

Copyright and News Reporting: Towards New Business Models and Legal Regulations?

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Journalism and Digital Documentation
Research Unit

*Copyright and News Reporting:
Towards New Business Models
and Legal Regulations?*

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Preliminary Section

Serie Editorial DigiDoc. This series reports the direct findings of a number of research projects. Indirect findings are typically published in refereed journal articles, but given their length, there is usually insufficient room for direct findings. After several years these results might appear in monograph form or simply lie forgotten in a drawer. Current trends in academic policy favour an open-access approach, whereby researchers are encouraged to make their results as widely available as possible, for example under Creative Commons licences, and where appropriate in institutional repositories or in the research group's own repository. In keeping with this philosophy, we present this *Serie Editorial* and other forms of open-access dissemination that our group has adopted as part of its strategy.

Active Audiences deliverable papers. The Active Audiences Project is concerned with the analysis of various aspects of the cyber media. The different activities that make up this project – “Active audiences and journalism. Interactivity, web integration and findability of journalistic information”, funded by the National R&D+i Plan, have generated results that have been published in indexed journals and presented at various conferences. However, they have also generated direct results. The dissemination of these direct results, in all cases related closely to our research objectives, is achieved via this collection of *Deliverables*, in keeping with open-access recommendations and guidelines regarding the need to make direct research results available too. This present deliverable corresponds to one of our secondary research lines, namely our focus on **Communication and Law**.

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INTRODUCTION

IN NOVEMBER 14, 2014, A WORKSHOP - expert panel was organized at the Department of Communication of the Pompeu Fabra University (Barcelona), and it was intended to be a report on intellectual property and copyright trends in Europe related to news reporting activity on the Internet. The panel of specialists is intended to arrive at some conclusions and to agreement, to a consensus, we try to produce a piece of useful information. Professor Raquel Xalabarder could not attend the meeting, but she produced a forty pages long report on the topic, entitled *The remunerated statutory limitation for news aggregation and search engines proposed by the Spanish government; its compliance with international and EU law*.¹ The five specialists chose a topic related to the question, and sent an abstract of the proposal to be developed in that session.

This reports does not intend to be a complete transcription of the interventions, instead it aims to reflect the main topics and considerations exposed by the participants of the seminar, identifying the issues discussed in it.

¹ <http://journals.uoc.edu/index.php/in3-working-paper-series/article/view/2379/n14-xalabarder>

LEGAL FRAMEWORKS FOR SUSTAINABLE AND ETHICAL BUSINESS MODELS: *DROIT MORAL* AND CONTRACT

Mike Holderness

Abstract:

Developing models for sustainable journalism (as well as other creative expression) requires it to be possible for *independent* journalists to make a living from journalism, rather than from sponsorship or patronage, for example – to be *professionals*. This in turn requires legal frameworks that allow professional journalists to achieve equitable remuneration despite, typically, negotiating with monopolistic or oligopsonistic publishers and broadcasters; and to defend the identification and integrity of their works. Further, as a wider consideration of public policy, these same requirements apply, *mutatis mutandis*, to the world of “user-generated content”. Every citizen requires the protection of *droit moral* in their original works that they “share” and protection from oppressive and opaque contracts imposed by the services they use to do so.

THE QUESTION OF THE IMPORTANCE OF MORAL RIGHTS (*droit moral*) for professional journalists was one of the first questions. Mike Holderness defended that ‘sustainable journalism requires it to be possible for *independent* journalists to make a living from journalism, rather than from sponsorship or patronage, for example – to be *professionals*’, thus the ‘legal frameworks that allow journalists to achieve equitable remuneration – despite, typically, negotiating with ogliopsonistic publishers/broadcasters and to defend the identification (which include metadata) and integrity of their works,’ and take responsibility for it. The necessity of ensuring integrity and attribution of the work, the two main moral rights, is ‘a matter of public policy particularly with journalism’, since ‘these considerations go beyond the requirements of journalism, these same requirements apply, *mutatis mutandis*, because user generated content’, so that ‘every citizen requires the protection of the moral rights on the works that they “share” and, in a slightly different sense, every citizen requires protection from unfair contracts, and also protection from oppressive and opaque contracts imposed by the services they use to do so’. Mike Holderness linked the importance of moral rights to personal reputation, ‘hence to contribute to the economy and our cultures,’ and they are important to democracy too.

The nature and originality, a requirement for a work to be protected under copyright law, is another important issue. The nature of a newspaper as a collective work has concealed to some extent the original nature of the individual work by journalists, to whom responsibility is required, when ‘my experience of doing journalism is that you do your very best to collect the facts and then the way you express those facts so that people can take them in is a deeply creative act, there should be no argument that the journalism and the work of the individual journalist is one of the fields covered by author’s rights’. The right to be identified as the

author of a work is also a guarantee of responsibility from journalism to society. In this sense, ‘moral rights are a consumer protection’, since ‘moral rights mean not only asserting authorship, but also *taking responsibility* and *guaranteeing provenance and integrity*.’ ‘Especially in the age of the interwebs, it seems sensible to strengthen the relationship between the human author and the human user – not the intermediaries’, insisted Holderness.

The (absence of) recognition of journalists’ moral rights is a problem in Common Law countries. It is known that in the United States there are no moral rights (except in works of visual arts in editions of 200 copies or fewer) [USC 17 § 102], and in the European Union there is a country (the United Kingdom), in which moral rights are not recognized for journalists, since they are specifically excluded from works reporting news and current affairs *and* work for newspapers and magazines [*Copyright, Designs and Patents Act 1988 § 79 ff*] and the House of Lords rejected the possibility of regulating moral rights, ‘because it would be unfair to the publishers to penalize them’. In Britain ‘you are forced to assign the right to make the publisher the author’. This has been a motive for concern for European journalists and, more concretely, for the International Federation of Journalists, because in the English-speaking countries the journalists’ moral rights are not recognized or they can be waived, ‘so where the possibility of waiving moral rights exists, it will be used and the rights will be effectively null – except perhaps for authors who have money to burn in court’. In Holderness’ opinion, the full recognition of moral rights would help to enhance ethics, since ‘journalistic works with rights of attribution and integrity should be more ethical than those of, for example, *News of the World* writers who knew that their words would always be rewritten to follow the company line’. There are some exceptions, for instance ‘only on British broadcasting is the actual journalist being credited’, although even broadcast programs are considered, as Richard Danbury said, ‘a collective activity’ rather than a joint

work of different people. Moral rights, on the other hand, ‘are completely compatible with a journalistic freedom’. Mike Holderness defended a contractual approach based on personal links of the author to his or her work, more than on copyright as a commodity.

The question with moral right is, as Richard Danbury asked, whether ‘there are different variables that play in evaluating the easy identification of moral rights attribution, for different times and genders’. Of course, there are some cases in which the journalist would prefer to remain anonymous, for instance in dangerous situations, but in the case of the audio-visual works, Mike Holderness was in favour of identifying the author of every segment, ‘there is a role for the credits at the end, and I think there is no reason why it shouldn’t be more identification of individual inputs’.

The nature of the contracts signed by journalists was another significant topic, exposed by Mike Holderness. The existence of a legal framework ‘that grants rights to those who create works, including works of journalism’ is important, but ‘there must also be some means of making sure that there is fair negotiation.’ ‘The European Federation of Journalist is working on the idea that contracts should be regulated, just as consumer contracts are regulated’, insisted Holderness. Negotiation is not conducted in equal terms, it is fictional that a great company and a journalist could negotiate in equal conditions, so the situation is that the journalist is forced to negotiate ‘with dominant players in highly specialised markets’, as Holderness defined it. ‘In some cases we face a *monopsony*: there is effectively only one customer for a type of work, and that customer can dictate price, terms and conditions’, but rather, Holderness defined the situation as an *ogliopsony*, ‘where there is very restricted number of buyers and they can therefore set the terms’.

Some questions were posed at the end of Mike Holderness’ speech. One of them was the tension between the rights of the

companies as producers of the collective work and of the journalists as authors. One question, related to the protection of journalists through moral rights, which is difficult in Europe due to the legal fragmentation of the member states, is how to protect the aforementioned right to identification. Javier Díaz Noci suggested to which extent could metadata help in this respect.

Another question was the importance of collective bargaining, managed by newspaper publishers or by journalists.

One concrete question was how to deal with the fact that in everyday work a news item needs to be completed by someone else. Mike Holderness that American newspaper have a formula that covers this situation: 'Additional reported by...', which covers joint responsibility for a news item written by someone and finished by someone else.

APPRAISING LEGAL RESPONSES TO THREATS TO THE PRODUCTION OF NEWS IN THE DIGITAL ENVIRONMENT: COPYRIGHT AND REVENUE. AN INTERNATIONAL STUDY

Richard Danbury

Abstract:

It is well known that the news industry has faced significant challenges over the past two decades. Argument rages as to the cause of these difficulties, and indeed these are likely to differ in different countries, but a significant common element can be identified in the rise of digital technologies in general, and the internet in particular. This has resulted in, amongst other things, increased competition for attention, the decline in subscription revenues due to free distribution of news, and the decline in the revenue newspapers have traditionally drawn from printed display and classified advertisements.

Copyright concerns, therefore, are not necessarily central to the financial problems facing these institutions, but they have been proposed as part of a solution. That, at least, has been the view of news producers – those institutions who seek to make revenue from news – in many countries. To that end, there have been recent copyright and copyright-related interventions, both in legislation and litigation, proposed or adopted, in (amongst other countries) the UK, Germany, Spain, Italy, Denmark, Belgium, France, Finland, Australia, and the USA. Indeed some of these have prompted a series of cases to be referred to the CJEU.

Some comparative study of these interventions has already been undertaken, but more is likely to be worthwhile. This is partly because of a lack of such an approach in the literature considering the ‘newspaper crisis’,¹ and also because of the apparent lack of international comparison that has been undertaken in the formation of these interventions. Moreover, such study is likely to be valuable given the common challenges that copyright raises to those who seek to derive revenue from the production of news, whether in the form of traditional newspapers or not.

Hence as a preparatory work to a wider study that appraises legal responses to threats to news in the digital environment, the current study compares some contemporary, contrasting copyright-related legal responses to the financial threats to the production of news. The difficulties that copyright poses to those who seek to derive revenue from news will be summarized, and then copyright responses to these difficulties from three different countries will be described, and compared. Each has approached the question in a different way: in Denmark, the current position was arrived at by litigation, in Germany by legislation, and in France by negotiation.

¹ Siles I.; Boczkowski P. J, (2012). Making Sense of the Newspaper Crisis: A Critical Assessment of Existing Research and an Agenda for Future Work’. 14 *New Media Society* 1375.

DR RICHARD DANBURY DEALT with the potential legal responses to threats to news in the digital era. To start with, he remarked three tension poles. First, the importance of considering freedom of speech and copyright, since the conception of news as a property could affect freedom of expression. Second, there is a difference, on the other hand, between the publisher's and the journalists' interests. And third, there is a tension between Civil Law and Common Law. Here we find a number of different backgrounds in which we can framework legal intervention,

The problem is, in Dr Danbury's opinion, that commercial journalism businesses in the European Union and the United States are troubled, in some aspects: there is a decline in readership, a decline in income (advertising revenue and sales) and a decline in profitability. Causes may include the general economic crash started in 2008, the debt and over-expansion of the newspaper industry in the 1990s and 2000s, and the digital technology. Of course, there are notable differences in the national level, not to mention the situation in countries outside the EU and the US, like China or India. Worldwide, the business models are very different too: whilst in America they traditionally have a very large advertising base and business compared, in some European countries like Germany and Denmark there is largely a subscription base, and in Japan as well, their business is based on a subscription more than an advertising model.

Most British newspapers, said Danbury, have had declines in readership from 2000 onwards. As a result of this journalism crisis, nearly 15,000 newspaper jobs were lost in 2009 alone. The number of people employed in American newsrooms fell by 30% between 2000 and 2012. . The UK *Press Gazette* reports that between 2005 and 2011, 242 local newspapers closed, and only 70 new titles opened in the United Kingdom. 'A significant reason for that,' said Dr Danbury, 'is the undermining of the business

model of advertising because advertising is now available on the internet, so classic advertising is migrated to the internet.

‘Why does digital technology caused a problem? There a number of different ways to short-circuit them, one is that in the early years of the Internet boom news publishers gave them for free online. And since then news publishers have been competing with free news, which they found very difficult. The other reason is that digital technology allows perfect and instant copies to be generated so therefore newspapers in the past which managed to make money through being first to market no longer can be first to market’, explained Richard Danbury.

Some ways have been tried to face this situation. One is paywalls, to increase revenue. The other is to reduce costs. One significant cost for the newspapers is the cost of their staff, the cost of employed people. The other great cost is data, so media are trying to reduce the cost of news which they get from other people. ‘So, the issue of copyright is a two headed thing in relation to the newspapers. They actually want to maximize the amount they can get from copyrighting their product. They also want minimize the amount they have to pay for taking others people copyright product’, explained Dr Danbury. ‘There are lots of different interventions which have been tried around the world. Competition law is one, that’s honestly a big think in the European Union at the moment. Contract law, there are different contract law intervention which have been tried, and tort law, mostly in America, specially the hot news doctrine’ to face ‘free-riding’.

The research project Richard Danbury was involved at the moment was a two-years one, whose principal investigator is Prof Lionel Bently (Cambridge University), collaborating with Prof Ian Hargreaves (Cardiff University), started in April 2014, funded by the British Arts and Humanities Research Council (AHRC), to ‘examine shifting business models in order to appraise how the news industry is adapting to the digital environment, consider the methods of assessing these changes, not just

on the economy, but also on society, and consider what role, if any, policy makers should play in this field in ameliorating the problems facing news institutions’.

Dr Richard Danbury agreed with Mr Mike Holderness that ‘a free, impartial and well funded press is necessary in democracy’. Copyright can be a good tool for this. Starting with copyright, Dr Danbury began remembering one of the main differences within the member states of the European Union: even the European publishers’ industry is aware that ‘one thing that European legislation doesn’t have that British does is the idea of work for hire. This is a major problem for publishers in their relationships with their employee journalists and freelance journalists, and relates to how they acquire rights to do what they need to do’. Moreover, when examining the legal interventions with more detail it seems to be more complicated than that. For instance, related to the subject matter, ‘is news information copyright? Can you protect the news idea as well as the expression? According to the Berne Convention, news of the day is inappropriate to be copyrighted. Is headline a copyright work? That’s a particular problem, now in some jurisdictions in France for example, there are some judgements that say that headlines can be protected by copyright. In other jurisdictions, in Australia, in England, originally in Germany and in Denmark, headline was not considered sufficiently appropriate to be a subject matter of copyright.

‘Originality is a particularly key word which has been pragmatically treated in Europe, is a snippet of text original, and therefore protected by copyright?’, continued Richard Danbury. Since snippets are used by news aggregators, it is a very crucial question to determine the criteria for protection of news. ‘It’s difficult for a publisher to argue that it has been sufficiently original to deserve copyright protection’. Then, it is the taking of a small snippet of text an infringement? Some other problems appeared when dealing with copyright and the news: authorship and first ownership, for instance: Can a publisher establish they have the

right to sue, based on an author's copyright? The nature of the rights is another important topic: Do hyperlinking, and making temporary cache copies count as infringing acts? As to defences, do press reviews and reporting current events protect those who take news. Dr Danbury mentioned the opt-in and opt-out debate: if publishers post material to the Web, can it be assumed that they consent to re-publication? Another two important questions appeared as well: that of related rights (should publishers have ancillary rights, and do database rights assist?) and that of moral rights (do these create costs for exploiting content in other formats?).

'Not surprisingly', continued Richard Danbury, 'there a number of different jurisdictions over a number of different countries, so that there have been a number of different attempts' to regulate those questions. One important decision at the European Union level is the *Svensson* case. The research group of Richard Danbury looked at a ten countries sample. There are some other cases at national level in various countries, as stated in the following table:

Country	Intervention
Australia	<i>Fairfax Media Publications Pty Ltd v Reed international Books Australia Pty Ltd</i> [2010] F.C.A. 984 (Federal Court of Australia)
Belgium	<i>Google v Copiepresse</i> Presented 11/5/2011, Cause List No: 2007/AR/1730 (Court of Appeal of Brussels, 9th Chamber)
Denmark	<i>Ilopaq v Danske Dagblades Forening I</i> C-5/08, [2009] EUECJ C-5/08; and <i>Infopaq II</i> C-302/10 (Order 17 Jan 2012) [2012] EUECJ C-302/10

Germany	"Paperboy" Judgment of 17 July 2003 (BGH I ZR 259/00), BGH [2001] GRUR 958 (German Federal Supreme Court)
Germany	Leistungsschutzrecht für Presseverleger (News Publishers' Ancillary Right)
Spain	Proposed art 32 Spanish Copyright Act
Sweden	<i>Svensson v Retriever Sverige AB</i> C-466/12, [2014] Bus LR 259, [2014] ECDR 9
UK	<i>Newspaper Licensing Agency Ltd and others v Public Relations Consultants Association Ltd</i> , ("Meltwater") [2013] UKSC 18 and CJEU C-360/13
USA	<i>Barclays v Theflyonthewall.com</i> 650 F.3d 876 (US Court of Appeals Second Circuit)
USA	<i>AP v Meltwater</i> 931 F.Supp.2d 537 (US District Court for NY)

Most of those cases are subject to the matter criteria of protection (originality), as it happens in *Fairfax*, *Copiepresses*, *Infopaq I* (Denmark), *Meltwater* (UK) and *AP v. Meltwater* (US). The intervention carried out in the rights of copyright, such as hyperlinks or temporary copying ('the most prominent area'), is present in *Copiepresse*, *Infopaq*, *Paperboy*, *Svensson* and *Meltwater*. The limits of exploitation (i.e., implied licenses) are found in *Copiepresse*, *Paperboy*, *AP v. Meltwater*. Defence is present in the reform of the article 32 of the Spanish *Copyright Act* and in *AP v. Meltwater*. And some related rights, which is the question treated by the German *Copyright Act*, reform, on publishers' ancillary rights. 'You can use robots to protect copyright, to prevent news items from being taken by aggregators, and in many countries ag-

gregators have argued that copyright for news have become an opt-in rather than an opt-out' [mainly sued by aggregators like Google through robots.txt and metatags, whilst opt-in is the way used by Google to face the German reform, for instance: through this system, publishers are asked whether they want to be indexed by Google or they prefer to remain out of the indexing system]¹.

Richard Danbury's research group has focused on the legal interventions in three countries: Denmark, Germany and Belgium. In Denmark, it has been done a successful use of litigation, they have preferred not to reform the legislation. In that country, Google News is not operating. According to the Reuter Institute's (Oxford University) *Digital News Report*, 'the Danish have the lowest rate of people who find news using aggregators'. The key case in Denmark was *Danske Dagblades Forening v. Newsbooster SHD*, February 19., 2003 (case V 110/02), in which the court found that the EU database right was infringed by aggregator's deep hyperlinks. Even if the case was examined by a lower court, it has been effectively used as a precedent.

On the other hand, in Germany the use of litigation has been unsuccessful (even though in Germany there was the precedent of the successful *Paperboy* case, 'which again established a number of interesting things about originality and use of snippets'), so the Germans have preferred to reform legislation. As a result, 'Google and others are at odds with publishers'. The third case is Belgium, in which publishers negotiated with Google after using litigation (the *Copiepresse* case) successfully and not reforming the existing legislation.

Probably the most important case is *Infopaq*: the Court of Justice of the European Union decided that short text snippets (11 words) can be original if they are 'the author's own intellectual

¹ <https://germany.googleblog.com/2013/06/google-news-bleibt-offene-plattform-fuer-verlage.html>

creation'. The decision clarified and applied the temporary copying exemption of the article 5(1) of the *Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society* (also called *InfoSoc Directive*).

The research in which Richard Danbury was working conducted several semi-structured interviews with academics and journalists. Litigation is seen, remarked Dr Danbury, as a success for publishers, 'but a lawyer for the other side said in on of those interviews that the case was a 'huge loss' for publishers, as it have opened the way for news companies to enter the market and make a business in the area'. His view, added Dr Danbury, 'is bolstered by the European Court judgment in *Newspaper Licensing Agency Ltd and others v Public Relations Consultants Association Ltd* (Case C-360/13): browsing copies and caches are not reproductions'.

In Germany, an ancillary right for publishers was enacted in 2014 (§ 87 f of the German *Copyright Act*), which establishes that a 'news producer has the exclusive right to make news available to the public for commercial purposes', though this 'does not apply to very small text snippets'. In this respect, the owner of the producing company shall be considered the producer. News publication is defined as 'editorially determined compendium of journalistic articles within the scope of a collection periodically published under a particular title that, considering the overall situation, must be deemed predominantly typical of a publishing house, and that is not issued primarily in service of self-promotion'. The interviewees of the aforementioned semi-structured interviews 'agreed the provision is poorly drafted', one of them said 'is a bit of a mess'. According to this reform, aggregators and search engines are obliged to pay a tariff to a publishers' collecting society, VG Media, that was formed as a result. However, the tariff has been challenged by Google, and Google said that 'it would be de-list from Google News publishers who

did not waive the right', so many publishers waived that right. That ancillary right has been 'deeply controversial in a number of different ways'. 'Unsurprisingly, this reform is resulting in litigation, since many people in Germany is assuming that this is going for long before it works out'. The reform, explained Dr Danbury, 'has had unexpected consequences'.

Finally, in Belgium 'there is an interesting facet, the link between Google News and Google search' engine, which is one of the topics in the *Copiepresse* litigation (2006-2011), which was a 'resounding win for the publishers' association on almost every element of copyright'. Even when the Belgian publishers won the case, there was 'a significant loss in traffic in publishers' websites when de-listed from Google, from 15% to 26% according to some contemporaneous reports', and, even if 'traffic doesn't necessarily correlate directly with revenue', in 2012 'the publishers negotiated a result with Google', publishers re-entried into Google News and Google, in exchanged, helped publishers to 'optimise monetization'.

Dr Richard Danbury exposed some possible conclusions about copyright interventions. First, he explained that 'the quickness with which digital technology changes makes copyright interventions difficult, so technological change and business change in the context of the internet means that copyright is actually quite a rigid structure to use, it may not be the effective way'. Leaving aside the legitimate arguments based on competition law, legislation can lead to expensive and unforeseen results, as in the case of Germany. Publishers 'are seeking to create a valuable business, but they aren't necessarily interested in the moral rights or the natural rights issues'. Dr Danbury suggested to considered 'will there be creative destruction', meaning whether the Internet is more like writing a paper, the radio of television, or more like cable or interactive television, local community television, CB radio. The main question is 'what is worth protecting', the production of news as described by Jürgen Habermas' Public Sphere

passive reporting, or news institutions, according to Emile Zola's *J'accuse!* and the fourth state conception of the press as a more active institution.

Related to the German case, the situation of the Spanish *Copyright Act* was intensively mentioned by many participants. The case of France, in which Google accepted to donate 60 million euro (an amount much greater than the 6 million euro agreed with the Belgian press publishers after years of litigation), was referred, as it was the case of the Brazilian press publishers, who decided to abandon Google and the lose a lot of traffic. One question that arose as well was the possible collision of the doctrine of the *Svensson* case on hyperlinking activity and the reform of the German and Spanish copyright acts. The case of Italy was also mentioned, as in that country is was considered to perform a reform of the copyright act as well, after an active lobbying activity by the Italian newspaper publishers, but it received a lot of contrary publicity. Finally, the reform never happened. Just if the German and Spanish reforms are successful, then 'there will be a lot of copycat work at legislation level'. As a possible solution, it was mentioned that there are some provisions in the Italian and Finish acts that provide 'exclusive rights of the use of information of news for a limited period of time' which get back to the times in which this sort of provision were enacted in Australia to face the advance of the telegraph. The hot news doctrine was mentioned as well, as a possible remedy.

Another thing that was remarked in the subsequent discussion is the different advertising model of the printed press and Google, 'much more tailored', using R. Danbury's words. 'They are suing data and data analytics to sell advertising'. The question is whether the transfer of this model is attractive for newspaper publishers.

NEW ARTICLE 32 OF THE SPANISH COPYRIGHT ACT: PRESS CLIPPING AND THE SO-CALLED 'GOOGLE TAX'

Gemma Minero

Abstract:

Nowadays, many organizations employ a press clipping service to monitor the media, as part of its communication strategy. But newspapers articles are works protected by copyright. Therefore, these practices have to meet the copyright obligations. Many Copyright Acts regulate a limit or exception to copyright in this sense, which means that organizations are granted (a legal) permission to copy from newspapers articles and to distribute them (or part of them) to their clients. Press clipping is currently regulated in Article 32 of the Spanish Copyright Act. This Article has its origin in Law 23/2006, which incorporated the EU InfoSoc Directive (Directive 2001/29/EC, on the harmonisation of certain aspects of copyright and related rights in the information society) into the Spanish legal system, and it introduced into our Copyright Act a complex regulation of press clipping activities. According to previous Article 32, press clipping compilations were considered to be citations. However, according to the amended (and current) Article 32 "when articles from newspapers are compiled which basically consist of their mere copying and that activity is performed for commercial purposes, the author who has not expressly opposed to that activity shall have the right to receive adequate compensation. If the author expressly refused press clipping, this activity shall not be permitted by this limit".

On February 2014 the Spanish Government passed the bill to amend the Copyright Act, which is still pending on the Senate. This bill will introduce the so-called "Google Tax" under Article 32. The proposal maintains the press clipping limit or exception, but is also authorizes the aggregation of on-line contents in exchange for an equitable compensation, which is subject to collective management. On the other hand, this proposal authorizes search engines to link to theses contents, but this time as an uncompensated activity. In our discussion we will analyze the Spanish proposal and the consequences of the judgment of the Court of Justice of the European Union on the *Svensson* case (13 February 2014), dealing with linking activities.

DR GEMMA MINERO DEALT about *Some exceptions to the reproduction right: quotation, press clipping and online aggregation of contents*, sensitive topic sin the Spanish *Copyright Act*. In her opinion, there are two main perspective: the one held by journalists, photographers and newspaper publishers, and the other one, held by press clipping companies and news aggregation companies. From the first perspective, there is no doubt that ‘articles and reports are literary works that fulfil the originality requirement and are protected by copyright’, also headlines are, according to the *Infopaq* decision but it needs to be remembered that, accordingly to the article 8 of the *Berne Convention*, protection does not apply to news of the day or to miscellaneous facts having the character of mere items of press information. In Dr Minero’s opinion, ‘the journalist is the original right holder of that copyright, which, after the European harmonization of *Directive 93/98* -the *Term Directive*-, which was codified by *Directive 2006/116*. That copyright runs for the life of the author and 70 years after his death, irrespective of the date when the work was lawfully made available to the public. In the case of joint authorship of two or more journalists, that term shall be calculated from the death of the last surviving author.’ Dr Minero remembered the rules to be applied to anonymous and pseudonymous works ‘70 years after the work is lawfully made available to the public’ and, ‘when the pseudonym adopted by the author leaves no doubts as to his identity or in the case the author discloses his identity during this period (that is, the 70-years after the work was made available to the public), the term of protection applicable is that of the general rule, author’s lifetime and 70 years after his death’.

The answer is not so easy when dealing with photographs, since ‘photographs are not always protected by copyright.’ In her opinion, ‘the vast majority of photographs used in articles and

reports are not original enough to be considered copyrightable works'. The legal protection given to photographs is not harmonized in the European countries. In the case of pictures that do not fulfil the requirements of originality to be protected by copyright law, one way of giving them some protection is using neighbouring rights, 'with their own term of protection'. For instance, in the Spanish legislation 'non-original photographs are protected for 25 years, running from the date when the photograph was taken or when it was reproduced. Although the right holder of this related right has the same exploitation or economic rights of copyright, he has no moral rights, such as the right of integrity to go against unauthorized deformations or modifications of his work and the right of paternity, that is, the right to be identified as the creator of that photograph in any single use of it.'

The perspective of newspaper publishers, Dr Gemma Minero stated that 'the newspaper is the derivative right holder of the journalists and photographers exploitation or economic rights over their articles and photographs'. According to the article 51 of the Spanish *Copyright Act*, so 'the parties are free to negotiate the rights assigned to the employer and the exclusive or non-exclusive nature of that assignment. But when that issue is not dealt in the contract, Article 51(2) of the Copyright Act states [read]: "It shall be deemed that the exploitation rights of the author of such work are exclusively assigned to the employer, to the extent of his activity when the work was delivered to him". Therefore, unless otherwise was provided by contract, the newspaper shall become the derivative exclusive right holder of the rights of reproduction, distribution and communication to the public, but only to the extent of his specific activity on that date, and not for any other use. Consequently, the journalist or photographer shall have to ask this publisher for authorization to use the article or the photograph if that use is part of the newspaper's common activity'.

In the case of freelance journalists and photographers, we have to study the contract ‘in order to understand which specific right, or rights, were assigned to the publisher and whether that assignment has an exclusive or non-exclusive nature’. Moreover, as Dr Minero underlined, ‘in the case of exclusive assignment of any economic any exploitation right, the journalist or the photographer cannot make use of that right anymore, unless he asks the newspaper for that’. Needless to say, exclusive assignment is the usual agreement between journalists and companies.

This is an examination of the journalistic work from the individual point of view, but ‘the article and the report or the photograph are generally part of a whole, and that whole has its own nature and character and pieces, which have been decided by another person: the editor or the publisher’. In most cases, the whole is a collective work, a concept not harmonized at the European level. In Spain, the collective work is regulated under the article 8 of the act, where ‘there must be a natural or legal person has to drive the initiative to create the work and has to coordinate the people involved on it’, and, as a result, ‘the person that publishes that work shall be considered the author of it, and, in the case that that person is a company, a legal person, the term of protection shall be only 70 years after the disclosure of the work’. The journalist or ‘shall only be considered author of his individual creation’.

There is also another possibility: ‘The whole final product or compilation may also be non-original, but in the case the maker can show that there has been substantial qualitatively or quantitatively investment in either the obtaining, verification or presentation of the contents, that maker shall be granted with a related right for 15 years after the creation’. This falls under the *sui generis* right, harmonized by the European law, and it ‘consists in a right to prevent extraction and/or re-utilization of the whole or of a substantial part of the contents of that database’. This a

stronger solution than the American hot news doctrine, in Dr Minero's opinion.

The second perspective is 'the use of articles, photographs and reports and newspapers by third parties', such as press-clipping or news aggregation companies. The article 32(1) of the Spanish *Copyright Act* was modified in 2006, when the *Act 23/2006* incorporated the *InfoSoc Directive* into the Spanish legal system, to include a compensation to the publishers - and subsidiarily to the authors - to be paid by press-clipping companies. This was criticized, as Gemma Minero remembered, by many Spanish scholars, who considered that 'it surpassed the three-steps test conditions'. The modification of the article 32(1) was done on the basis of the quotation right, 'in practice, many press clipping companies made use of entire articles, reports and photographs, which is not the main common use of works according to the general limitation or exception for quotation'. Which is to be remarked in the article 32(1) are two features: 'It allows authors' opposition. In other words, the copyright owner can choose whether or not to oppose press clipping services, and obtain a remuneration, in exchange', which is a quite 'unusual possibility when we talk about limitations or exceptions to copyright', because 'in fact, the very concept of exception is generally based on the lack of authorisation of the author in order to use the work and, consequently, it is stated that the author is also incompetent to avoid that kind of use of his work or to deny that legal authorisation'. When we deal with the authors, it is important to underline that the Supreme Court of Spain, 'in its judgement of 4 April 2014 (n. 1623/2014), resolved that it is the editor of the newspaper, which is the right holder of the right of reproduction of the contents of the newspaper, and not the individual authors of the articles, reports and photographs, the person that has the competence to make that decision'.

The other important thing about the reform of the article 32(1) is that ‘it requires press clipping companies to remunerate authors’ a feature that ‘was not in the *InfoSoc Directive*’.

Finally, Dr Minero mentioned the reform of the article 32(2) of the Spanish *Copyright Act* (2014) ‘an specific limitation that authorises the aggregation of online contents in exchange for an equitable compensation (subject to collective management in any case)’ and which excludes specifically photographs ‘either protected by copyright or by related rights’. ‘On the other hand,’ remarked Dr Gemma Minero, ‘it only authorises uses of parts of works, so, *a contrario*, it can be stated that this new section rules out uses of entire works. Contrary, to article 32 (1)(2), where common press clipping and off-line press clipping is contain’.

Dr Minero stated that the reform was ‘a real surprise’, even more because the bill on the amendment of the aforementioned article 32(2) was published ‘on February 12, 2014, that is, one day after the judgment of the Court of Justice of the European Union in the *Svensson* case’ so ‘the Spanish legislator may have to analyse now whether the recent Spanish amendment of the copyright Act casts some doubts as to the legitimacy of this new limitation’. Gemma Minero predicted ‘many commercial problems’ once the reform is enacted and come into force on January 1, 2015: ‘The problem is that it has been regulated in a second exception, inside the article 32 of the Spanish *Copyright Act*, and the conditions are quite different, depending if it is in the off line content or in the on line content’, so probably, in the participants’ point of view, it would give more litigation. It was remembered that the amendment was highly controversial, even the Spanish National Commission for Markets and Competition [Comisión Nacional de los Mercados y la Competencia] or the State Council were against the reform, not to mention users’ associations. It was very controversial, as Dr Díaz Noci remembered, ‘the fact that the Popular Party, which has the majority in the Spanish Parliament and governs the country, is announcing a second reform the following

year [2015; it never happened, however]'. Another controversial issue is that a compensation or remuneration to authors and copyright holders for private copying was enacted, to be paid on behalf of the public budget [that was rejected by the Court of Justice of the European Union in 2016].

TRANSACTION-COST REDUCTION IN THE NEWSPAPER INDUSTRY: THE CASE OF AUDIENCE-SUBMITTED CONTENT

Antoni Rubí-Puig

Abstract:

As the news industry evolves, especially in online environments, transaction costs incurred in the acquisition of inputs and the arrangement of production remain yet a major concern.

For instance, the use of copyright-protected material submitted by readers and other active audiences, although it supplies media companies with content that is obtained almost for free, may exacerbate some forms of transaction costs such as future hold-up situations that may end up endangering business models that take audiences' participation as an essential input. Also, different governance structures used in the production and dissemination of news –working in teams, licensing of material for press-clipping and other aggregation services- may result in an increase in transaction costs that may demand legal intervention.

This article focuses in the elements that may support efficient – cost-minimizing- relationships between participants in alternative processes of news production and dissemination. Following normative theories in copyright law and economics that advocate transaction cost minimization, this article discusses some problems that licensing practices devised by media companies may face and suggests some policy recommendations from the standpoint of current Spanish copyright law, including interpretation of standard form contracts, unfairness assessment of licensing terms, and contracting around moral rights.

DR ANTONI RUBÍ PUIG'S INTERVENTION DEALT on the *Transaction-cost reduction in the Spanish newspaper industry*. Dr Rubí Puig dealt specially about transaction-cost reduction and the news industry, concretely about the case of audience-submitted content. As the news industry evolves, especially in the online environment, transaction-cost in the acquisition of inputs and in the arrangement of productions, transaction-costs are pervasive in the coordination of the sources for industry, and the news industry is not an exception. This graphic tries to address to describe the different relationships or transactions that news industry may engage to apply different inputs or to commercialize news and other related products and services, such as derivative works.

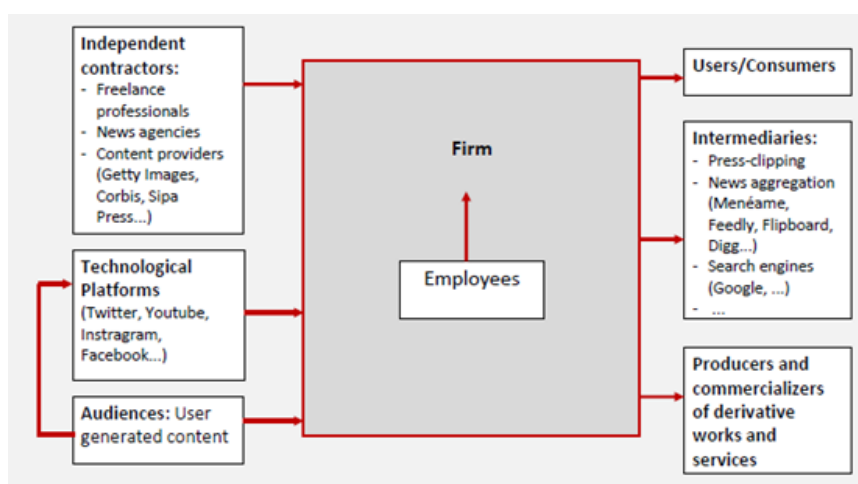


Figure 1: Transaction-cost in the newspaper industry.

Source: Author's own elaboration.

Transaction-costs may constraint social or economic cooperation. The picture is obviously an oversimplification, nonetheless Dr Rubí Puig thinks it is helpful to show how parties would need to incur in different costs in order to collect information, to bargain, to enter into formal agreements, in order to enforce rights and

remedies. Some of those transactions may to these agreement, and when those agreements are possible they may be the result in opportunistic behaviour by the parties, and in the production of socially products and services, as it has been highlighted before.

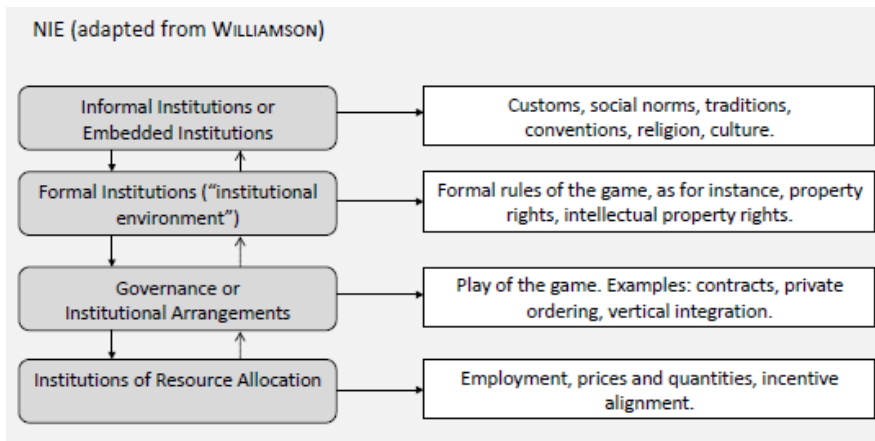


Figure 2: Transaction-cost from the point of view of New Institutional Economics.

Source: Author's own elaboration upon Williamson.

Many legal scholars advocate for the law reducing those transaction-costs, and the main arguments rests basically on two premises: the first, transaction-costs are waste dead ways, because waste should be avoided, and second, that transaction-cost reduce the ability of the parties to enter into a welfare-enhancing relationship, and this economic or social cooperation will be lost is those arrangement, those agreements were not facilitated. Law has to minimize transaction-costs, and related to IP and copyright law, reducing them would result in enhancing creation and innovation.

Dr Rubí Puig focused on three issues:

1) First, the concept of the transaction-costs. Dr Rubí Puig briefly analysed the arguments that support that transaction-cost should be minimized.

2) Second, he identified some sources of transaction-cost in the news industry and described legal solutions or legal intervention which can be understood as mechanisms that report to reduce or minimize transaction-cost.

3) Finally, he used audience submitted content as the case study of the transaction that it's affected by copyright law and described some of the problems are interesting right now.

The last decades have witnessed how the concept of transaction-cost entered to legal discourses some public law and private law and states an imaginary world in which zero transaction-cost, perfect competition, perfect information is conceived and used as a model to discuss all sources of legal issues, it is imaginary but nonetheless it has been really common in the legal academia for many years.

Despite its pervasiveness in legal discourses there is no single agreed definition of transaction-cost. Definitions vary different from one article to another but many of those articles mainly encompass impediments or obstacles to change to transactions, so we may define transactions-costs as the limits or the obstacles to a change. According to Cooter and Ulen's book on law and economics,¹ transaction-costs would include search and information costs, bargaining costs and finally enforcement costs. A standard starting point to discuss or to frame any discussion on transaction-cost is the Coase Theorem. The Coase Theorem was developed by Nobel prize Ronald Coase and his very influential article.² The *descriptive or positive version of the Coase Theorem* says that when transaction costs are zero, parties through private bargaining will end up assigning use or resources in an efficient way regardless of how law assigns property rights over those resources. According to the *normative version of the Coase Theo-*

¹ Cooter, R. and Ulen, T (2012). *Law and Economics*, 6 ed. New Jersey: Prentice Hall.

² Coase, R. H. (1993). Law and Economics at Chicago. *Journal of Law and Economics*. 36 (1): 239–54.

rem that have been endorsed by traditional or classical law and economics, lawmakers should structure the law, should interpret the law so as to remove the obstacles to private agreements and because of that lawmakers should promote a minimization of transaction-costs. In the field of intellectual property law, this notion of transaction-costs has also been used in order to explore different issues or different topics.

Perhaps the most influential or famous example in the literature is a professor Wendy Gordon's article on fair use,³ according to which transaction-costs are a source of market failure and because of this market failure we may need a legal intervention, so that fair use and copyright limitations may be understood just such as a legal intervention that is caused by the existence of the transaction-cost in the market.

Secondly, classical and traditional intellectual property law and economic or copyright law and economics has been concerned with intellectual property as a creation parcel of costs, social losses, deadweight losses. Among those losses transaction-cost there will be one which worried this group of authors. More recently, New Institutional Economics has also been used in the field of intellectual property law and copyright law to analyse transaction-costs. In the field of intellectual property law, one of the goals of the new institutional economics has been to identify institutional arrangements that give support to a productive change. In doing that, transaction-costs are analysed and different arrangements are compared, several layers and several levels of discourse are considered. We cannot only focus on copyright law, but other levels or descriptions have to be taken into account, such as contracts, tort law and also social norms and the culture of framework in which the creation of news, in our case, or the

³ Gordon, W. (1982). Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and its Predecessors. 82 *Colum. L. Review* 1600.

creation of other cultural products. The important thing that this New Institutional Economics literature highlights is that it identifies in some cases that transaction-costs are really needed in order to avoid other costs, in other terms social transaction-costs can be necessary to obtain some benefits, such as an exchange of information between the parties, such as correcting consequences of cognitive vices or even protecting values such as autonomy and dignity. At the end of the day what we should make is basically to balance different transaction-costs and all those levels of description.

Going back to this graphic, transaction-cost may be present in all those relationships and it may affect economic and social behaviour. Basically, the dispersion, the proliferation of rights may be resolved in hold-up agreements, bottom-next or anti-commons has been highlighted by Michael A. Heller.⁴ Basically, more right holders mean more people from home asking for a license or an authorisation before engaging in activities in which copyrights are involved. Consolidated copyright may be a good strategy to avoid those risks, those costs, so consolidating copyright ownership to enhance the limited pull of corporate owners could work as a way to minimize future transaction-costs, but this also comes with some additional cost.

In this point Dr Rubí Puig reminded which Mike Holderness explained before. The focus was to examine transaction-costs in the case of the audience submitted contents, the first example is production within the firm. So employed journalists without rights, and rules on collective works, rules on work-for-hire and the cases mentioned in the Spanish Copyright Act, articles 51 and 52, may be understood as a mechanism that helps to consolidate ownership to enhance of the corporation, the employer. This reduces transaction-costs but nonetheless it comes with lots addi-

⁴ Heller, M. A. (1998). The Tragedy of the Anticommons: Property in the Transition from Marx to Markets. *Harv. L. Rev.* 111(3): 621-88.

tional costs, basically, affecting dignity and autonomy, in Dr Rubí Puig's opinion. The second example is the aforementioned ancillary right for online aggregation of news, the new article 32.2 of the *Spanish Copyright Act*, a right that will be unwaivable and will be effective through the collective management organizations of intellectual property rights. This limits the lack of labour and the mandatory and collective management and also reduce transaction-cost. Future transaction-cost, basically, lays in the enforcement of rights, so CEDRO, which is the collecting society that will be responsible for the management of this right will incur in less cost when enforcing the rights. So, no need to prove title, no need to prove (standing) and this is the source of course that will be minimized.

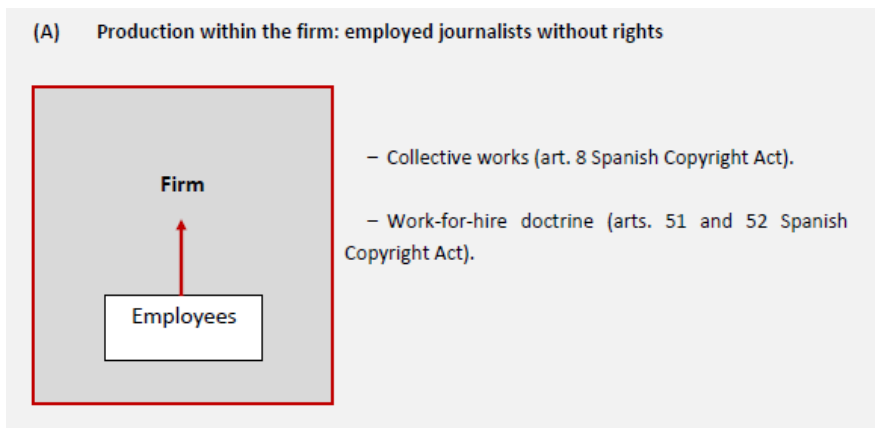


Figure 3: Production within the firm.

Source: Author's own elaboration.

Dr Rubí Puig underlined as the main point of his intervention the *transactional view of audience-submitted content*. Technological advances have empowered citizens with tools that democratize media and creative culture, smartphones with an Internet connexion fuels information and expression in ways that some decades ago were only available to well-funded corporate actors, so citizen journalism, collaborative journalism and social journalism

have become common labels to describe different ways in which content is generated by non-professional journalists and also user-generated contents. Those practices are conditioned both by technology and by a legal norm, and by social norms. One level of description affects how those practices are contracted or are subject to private ordering and other layer concerns how legal entitlements have been assigned to different actors, to different agents, in a situation in which the content is not produced in a centralized way, who owns what. From a general perspective, copyrights are automatically bespoke upon individual creators who retain those rights.

Dr Rubí Puig also mentioned the issues of derivative works doctrine and to which extent rules on composite works could apply to them, when a user uses a platform to provide user-generated content. When individual creators such as newspaper audiences claim, retain and manage their own copyrights, they contribute to this phenomenon that was described by professor Molly Van Houweling as *copyright atomism*.⁵ Basically, this copyright atomism phenomenon includes three variables or three problems which according to professor Van Houweling affect proliferation, so there can be many works that are subject to copyright ownership; distribution, that can be many people (owning) copyrights and finally fragmentation, so in some cases the copyright (bundle) is fragmented and different people own different rights in the bundle.

Solutions aimed at reducing copyrights atomism, basically, deal with the idea of consolidation of rights. But, as we have already discussed consolidation of rights poses some problems. I have summarized the problems with the following three ideas. So first, consolidation may suppress or restrict competition and is something that Mike Holderness has explained quite well. Se-

⁵ Van Houweling, M. S. (2010). *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549 (2010),

cond, it reduces authorial control of the works and because of that this may affect the autonomy and dignity of authors in our particularly case of active audiences. And because of this affection to autonomy and dignity maybe authors have less incentives to create new works, to develop new content. And finally, it may promote censorship and may curtail diversity of expressions. Because of that, taking to account the copyright atomism and the different cost that consolidation may involve we may discuss several solutions in the law.

So first of all, one possible solution would be to reduce the number of works protected by copyright law, for instance analysing the originality standards or the originality threshold. Another way to reduce the number of works is to reinforce formalities and this can go against the *Berne Convention*. Second, a possible solution would be to manage consolidation *versus* cost, creating legal rules or legal doctrines that assign rights or allocate rights in a manner that may be considered efficient, so the question is whether we need collective work rules. Work for hire implies licenses and this is something Richard Danbury already mentioned. Finally, there may be ways in which we can invest in rights' clearance mechanisms that would allow individuals and firms to transact more efficiently. In Dr Rubí Puig's opinion this is the solution that balances the costs and benefits of the authors' rights in a more respectful way, so we need to analyse what happens with private ordering or contract, and we need to improve information about copyright ownership, and this is basically done through notices, registers or metadata.

FINAL DISCUSSION

MIKE HOLDERNESS THEN HIGHLIGHTED how, in the first stage it would simply make it easy to discover who has the power to ground the license that someone seeks to use your work, who is a cost plural in many cases, in his opinion copyright is the answer, the authors rights are the answer, and he agreed that the way to do it, is by defining a structure for metadata. He affirmed that ‘down the road and much more controversially maybe I will have to offer canned licenses where somebody can search the ownership of the work’, and if they wish they can accept one-click licensing so that will reduce the second-party to definitely avoid the transaction-cost to bargaining. Dr Rubí Puig agreed that in the case of audience-submitted content by individual users of newspapers or online platforms or other social intermediaries, metadata is one of the best solutions we can propose. Another solution when someone discovers on the Internet ten, twenty years later that the particular content he or she is using is just a fragment of a whole project that is really valuable for society we should be able to modify remedies in that way, remuneration, get the payment and not destroy the whole project, but this is also problematic, since goes against the TRIPS agreement and other international obligation of the states.

Just the existence of exceptions creates problems in this respect, according to Dr Danbury’s opinion. Mike Holderness agreed since in his opinion ‘an exception does have a price’, to find out, for instance in the United Kingdom, what a journalism exception is about, and it means again transaction-costs. In general terms, it is not clear whether civil contracts or consumer contracts are clear enough to avoid litigation. E.g., when a user submits a content generated by him or her, to a platform or an online

newspaper, it is unclear to which extent he or she is assigning rights since he or she is a consumer, and not a professional producer of news. At that point, the question on whether the Canadian Copyright Act and its regulation of users' content could be a model to be considered in the European Union, since it could affect the commercialization of derivative works of economic value and to maximize the potential revenue from a product, and, from the point of view of companies, to avoid risks as well. A solution posed by Dr Rubí Puig are sharecropping contracts, quite usual in both the Spanish and the Catalan legal system, and assume that the content sent by a user to a platform could be split by the owners of it and by the user. Dr Danbury underlined that this kind of products are not material property but a product of democracy. 'Information wants to be free, it most to be free as the birds on the air but also needs to eat', underlined Mike Holderness. At this point, Dr Díaz Noci referred a news about a (possibly secret) agreement between the French government and the scholarly publishing house Elsevier, which meant that 'authors are paying twice for seeing published their work'¹.

At the same time, user-generated contents like the ones generated by users during the Arab spring and shared through Twitter and other social networks posed the problems of the engagement about contents, and the fact that they may engage some fundamental rights. So now every citizen is enforced to take care on the rights upon the material he or she delivers to a social network, which a massive phenomenon. This can lead to scepticism on the flow of information on social networks and the fact that possible those items are not adding any substantial value to intellectual property and journalism.

1

http://bo.rue89.nouvelobs.com/sites/news/files/assets/document/2014/11/marche_elsevier.pdf

The discussion moved to the lobbying activity of press industry to find a solution to the crisis of advertising in journalism. Whilst YouTube and video streaming increases advertising, online press is suffering from the advertisement model, which has led press industry in Europe, at least in Germany and Spain, to pressure the governments and parliaments to enact ancillary rights to make Google pay.

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