Opinion

The "Link Tax" under the EU Copyright Directive: Seeking a Balance of Interests in the Digital Age

Maryna Manteghi[1]

Email: marinamanteghi@gmail.com

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In 2019 the EU adopted a new Directive on Copyright in the Digital Single Market (the DSM Directive), which introduces the new publishers' right under Article 15 (a so-called "link tax"). This Opinion considers the implications of this provision, referred as the most controversial one and its impact upon the digital publishing world.

What is Article 15?

Under the new provision of the DSM Directive,[2] European publishers are allowed to charge information society service providers (e.g., news aggregators, fact checking services and media monitoring services) for the use of their press publications on the web.[3] The internet companies, therefore, are obliged to obtain an authorization, like a licensing agreement from the press publishers to prevent copyright infringement. The provision grants publishers the exclusive rights of reproduction, communication and making available to the public. This new publishers' right will expire two years after publication calculated from 1 January of the year following the date on which that press publication is published. This provision does not apply to "private or non-commercial uses of press publications by individual users", "acts of hyperlinking", and the use of "individual words or very short extracts" of a press publication.[4]

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[1] LLM in international and comparative law, University of Turku, Finland.
[2] The EU Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130, 17.5.2019, p. 92–125.
[3] See Article 15 of the DSM Directive.
[4] See Article 15 of the DSM Directive.

Conflict of Interests

The DSM Directive aims to ensure better access to online data and services, thus stimulating the growth of the European digital economy.[5] The provision under consideration expresses the EU Commission's intention to protect the European publishing industry and ensure that the content creators receive the profit they are due. This provision would certainly benefit European publishers, but it may also have significant economic impacts on large news providers such as Google, Twitter and Facebook, and small businesses, that use snippets to link to news articles as a part of their business strategy. The implementation of the new publishers' right could affect the free flow of information and freedom of expression in the online environment. Restricting access to digital content will likely raise a conflict of interests between publishers and online platforms. Regarding the implementation of EU directives, the CJEU has underlined that "Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights."[6] Accordingly, it is important for Member States to strike a balance between the implementation of the publishers' right and the freedoms mandated by the EU's Charter of Fundamental Rights,[7] in particular, the freedom of expression and the right to information,[8]which are crucial for the online environment.[9]

The vague language of the provision

As stated above, the provision does not apply in respect of hyperlinks and the use of individual words or very short extracts of a press publication. However, the internet platforms usually involve the snippets of the linked content as part of links, which are used as previews to assist online users in finding relevant content. Technologically, linking is usually accompanied by snippets of the relevant content. Hence, limiting the use of snippets may be viewed as a

[5] E. Rosati, "Neighbouring rights for publishers: are national and (possible) EU initiatives lawful?", the International Review of Intellectual Property and Competition Law, vol. 47, 2016, p.17.
[6] Case C-275/06, Productores de Musica de Espafia (Promusicae) v Telef6nica de Espafia SAU, 2008 E.L.R. 1-00271.
[7] Charter of Fundamental Rights of the European Union, OJ C 326, 26.10.2012, p. 391–407.
[8] Article 10 of the EU Charter of Fundamental Rights
[9]M. van Eechoud, "A Publisher's Intellectual Property Right.Implications for Freedom of Expression, Authors and Open Content Policies", available at http://www.openforumeurope.org/wp-content/uploads/2017/01/OFE-Academic-Paper-Implications-of-publishers-right_FINAL.pdf 2017,p. 20.

limitation on linking, which has already been viewed as non-infringing.[10] Although the publication of the "individual words or very short extracts" of content is allowed the length of these short snippets has not been specified yet. It is unclear how many words or sentences could be displayed by online platforms to avoid infringement of the publishers' right. Moreover, the provision does not clarify the definition of "private and noncommercial use." Although personal social media accounts or blogs can be viewed as private and noncommercial, if they include ads they may be considered commercial.[11]

Without a clear definition of relevant concepts, the provision will probably create uncertainty. The possible inconsistency in the interpretation of Article 15 is likely to lead to a fragmentation in the application of this provision and disagreement between publishers and users. The language of this provision could be narrowly interpreted by the EU Member States allowing the link accompanied by the most minimal description of the publishers' content. This may limit the linking function of a "reference tool", meaning that users are less possible to click on it if they cannot understand to what content it leads. Moreover, publishers may adhere to the strictest national law to receive more compensation. Otherwise, online platforms will probably follow the more "convenient" Member States' rules to decrease the complexity of compliance with the new law.[12]

Excluding the "mere hyperlinking": what about other types of linking?

Article 15 merely provides exception on acts of hyperlinking, thus other types of linking such as inline, deep links or framing would require a license. The key difference between these four fundamental types of linking is that simple hyperlinks and deep links enable users to "transfer" from one website to another, but framed and in-line links operate oppositely, retrieving content from the server of another website, while the user stays on the same website (inline links) or while the linking website is still visible (framing).[13] Generally, linking technologies constitute an

[10] See C-466/12, Svensson, and Others v. Retriever Sverige AB, Judgment of 13 February 2014, OJ C 93 and C-348/13, BestWater International GmbH v. Michael Mebes and Stefan Potsch, Judgment of 21 October 2014 and C-279/13, C More Entertainment AB v Linus Sandberg, Judgment of 26 March 2015.

[11] A. Tyner , "The EU Copyright Directive: "Fit For The Digital Age" or Finishing It?", Journal of Intellectual Property Law, Vol. 26, Issue 2, 2020, p.9.

[12] S. Sater, "Killing It with Close Inspection: Regulators Using Copyright Law to Control the Open Internet", 2018, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3292259 , p.5.

[13] Tsoutsanis, Alexander, "Why Copyright and Linking can Tango", in Journal of Intellectual Property law & Practice, vol. 9, No 6, 2014, p.497.

important part of the Internet enabling easy and convenient dissemination of information.[14] Allegedly prohibiting the publication of the snippets of the publishers' content by the mean of various types of linking which assist users, similarly to hyperlinking, in finding relevant information within a vast capacity of data, posted online, in easy and convenient way, may undermine the real value of the Internet.[15] Accordingly, it is doubtful whether the exception should only be limited to "hyperlinks" or whether other types of linking referred to a lawful content available online, without a profit-making purpose, should be allowed.[16]

Negative consequences of the "link tax"

The restrictions imposed by this provision may lead to several problematic issues. Since a licensing process can be too time-consuming and costly, there is a risk that businesses will provide snippets in the course of links to a low-quality content, which would probably be freely available for sharing. Therefore, this provision will probably stimulate the circulation of fake news, consequently increasing the level of disinformation in the online environment. Moreover, the "link tax" will be extremely costly for online platforms if they have to pay for every linked news article. This may affect SMEs and startups strengthening only the positions of tech giant such as Google and Facebook, which possess resources to obtain the licenses.[17] Furthermore, the restriction on access to published content may even lead to a shutdown of online news services, that would affect not only news-related online businesses but also publishers who rely on the linking from those services.[18]

For instance, in Spain, the law that is similar to the publishers' right[19] had negative consequences since Google stopped its Google News service, resulting in a significant loss of traffic. Further, in Germany, publishers allowed the free publication of their content by online platforms after

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[14] European Copyright Society, "Opinion on the Reference to the CJEU in Case C-466/12 Svensson", 2013, p 1.
[15] Strowel, A. and N. Ide, " Liability with Regard to Hyperlinks", in Columbia - VLA Journal of Law & the Arts, vol. 24, Issue 4, 2000-2001, p.71.
[16] For more discussion on a profit-making purpose of linking see C-160/15, GS Media BV v Sanoma Media Netherlands BV and Others, 2016.
[17] P. Radosavljev, "For whom the copyright scale tips: has the CJEU established a proper balance of rights with its GS Media case judgment?", European Journal of Law and Technology Vol 8, No 3, 2017, p.7.
[18] A. Tyner , "The EU Copyright Directive: "Fit For The Digital Age" or Finishing It?", Journal of Intellectual Property Law, Vol. 26, Issue 2, 2020, p.8; A. Talke, "The „Ancillary Right" for Press Publishers: The Present German and Spanish legislation and the EU Proposal", 2017, available at http://library.ifla.org/1849/1/119%20talke%20en.pdf , p.6.
[19] In 2014 the Spanish Parliament adopted a law (Ley de Propiedad Intelectual available at https://www.aeepp.com/pdf/InformeNera.pdf) , which has *inter alia* introduced a right to "equitable remuneration" under Article 32.

realizing that an enormous loss of traffic will lead to profit reduction.[20] Nevertheless, it should also be noted that recently France has been the first EU Member State where publishers have succeeded in their efforts to obtain a revenue from Google for the use of their works.[21] Although the decision is of key importance, it is only an interim measure, thus the conflict of interests will likely arise again.[22]

Conclusion

Article 15 of the DSM Directive is likely to create uncertainty about its coverage and scope that may undermine the fundamental freedoms like freedom of expression and the right to information vital to a democratic society. The new publishers' right may be viewed as merely a "replication" of an already failed system in Spain and Germany, which resulted in decreasing the traffic, but only in an EU level. However, it is a common hope that the new provision, with all its side effects, will achieve the goals established by the European Commission through a fruitful collaboration between the EU Member States focused on the harmonization and striking the "fair balance" of competing interests. Therefore, it remains to be seen how the new "link tax" provision will be implemented across the EU and how national courts and the CJEU will interpret Article 15 of the DSM Directive.

[20] In 2013 the German Bundesrat approved new provisions of the Urheberrechtsgesetz (German Copyright Act) available at https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html, that provides press publishers with an sui generis right over their news content.

[21] See Decision 20-MC-01 of 9 April 2020 on requests for interim measures by the Syndicat des éditeurs de la presse magazine, the Alliance de la presse d'information générale and others and Agence France-Presse against t Google LLC, Google Ireland Limited and Google France, available at https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2020-06/20-mc-01_en.pdf

[22] T. Shapiro & S. Hansson, "The DSM Copyright Directive: EU Copyright Will Indeed Never Be the Same", European Intellectual Property Review, Vol.41, Issue 7, p.11.