



‘Google tax’ and online content wars

Shoosmiths’ **Laurence Kaye** explores the new laws in Spain and Germany and what it means for content producers and news aggregators

The newspaper industry’s conflict with online news aggregators like Google, Microsoft and Yahoo! has been ongoing for several years.¹

The core of the industry’s complaint is about ‘free riding’ by aggregators on press producers’ investment in gathering and producing professional news and content. The aggregators counter by pointing to the value of the traffic they deliver to newspapers sites.

The European newspaper industry recently scored two very different, but notable legal wins in this long running battle. In 2014, press publishers won a new right under Spanish Intellectual Property Law in its ‘canon AEDE’,² which introduced a statutory limitation to copyright, allowing the aggregation of news and other copyright content subject to an unwaivable remuneration right. This has been called ‘the Google tax’, not to be confused with George Osborne’s event call for Google to pay more corporation tax!³

It follows in the footsteps of the ancillary copyright (‘Leistungsschutzrecht für Presseverleger’, also known as ‘Lex Google’) which German press publishers gained in August 2013.

While, the newspaper industry has welcomed these changes, Google has already taken steps to neutralise ‘Lex Google’ in Germany, by eliminating the display of snippets and has said it is “disappointed” with Spain’s new law. So the battle is far from over. News aggregation and search are closely related and these new laws seek to distinguish one from the other. But they also reflect the debate which started soon after the web first appeared in the early 1990’s. Driven by technology, search and social media, where is the online boundary in copyright law between the public and private domains? On the one side are exclusive rights and licensable activities; on the other, are exemptions, limitations and exceptions.

In this article, we explore the background to this struggle, who are the winners and

losers, what these legal developments mean for the protagonists and what it means for producers, intermediaries and users of news content and online content more broadly.

Mind the traffic

Even though some newspapers have grown revenues from paid subscription services, the majority remain dependent on advertising to secure a return on their investment in producing and gathering news and other content. In the online world, advertising revenue is directly related to page impressions and traffic. Although news snippets reproduced on news aggregators’ sites have links to the ‘source’ newspaper sites, the essence of the newspaper industry’s complaint is that news aggregator services significantly reduce traffic to their sites, without any form of prior authorisation or compensation. They say that visitors from aggregator sites spend much less time on the newspaper sites and, having found more content about the story they first saw on the aggregators’ site, simply hit the ‘back’ button or leave the newspaper site.

Google rejects this. As reported in the *Guardian* recently, Google said, “We believe that services like Google News help publishers bring traffic to their sites. As far as the future is concerned, we will continue working with the Spanish publishers to help increase their revenues while we evaluate our options within the framework of the new legislation.”⁴

New ‘press snippets’ laws

Spain and Germany have taken two distinctly different legal approaches to press publishers’ rights and news aggregators’ activities. But both seek to draw a boundary between licensable re-publication of ‘press snippets’, on the one hand, versus what one might call ‘pure search’ on the other. As we will see, this boundary isn’t always easy to see.

Spain’s ‘canon AEDE’

In Spain, the ‘canon AEDE’ introduces in Article

32.2 of the Spanish Intellectual Property Law (TRLPI) a statutory limitation to the ‘making available’ right under the title “Quotations, reviews and illustrations for teaching and scientific research purposes”. It comes into effect in January 2015.

It is similar in approach to the private copying exception allowed under European copyright law, carrying with it an unwaivable right to ‘fair compensation’ to be administered through a collective management organisation

Article 32.2 expresses the limitation in this way: “The availability to the public by electronic content aggregate providers of non-significant content fragments, disclosed in periodical publications or on Websites that are regularly updated and intended for informative purposes, creating public opinion or entertaining, shall not require authorisation, without prejudice to the right of the publisher, or when applicable, of other rights holders to receive fair compensation.” However, “content fragments” do not include photographs, which are not covered and therefore require licensing.

Similar to the German right, it provides a carve out for ‘search’ for service providers that offer search tools to locate isolated words included in these contents, as long as “providing such availability to the public is not made for its own commercial benefit and is strictly limited to the required, to offer results in response to search queries previously made by a user on a search engine and providing that the availability to the public includes a link to the source page of the contents.” Exactly how that proviso will work remains to be seen.

Legal commentators have raised a number of questions about ‘canon AEDE’ and its conformity with EU and international law,⁵ including its consistency with the Court of Justice of the European Union’s decision in *Svensson*⁶ and its relationship with the exemption for intermediaries under the E-Commerce Regulation.⁷ So we can expect continuing legal debate in Spain on the subject.

Germany's 'Lex Google'

Germany took a different, and earlier, legal direction. In place of a statutory limitation, it introduced a new, quasi copyright neighbouring right in 2013. The new provision in the German Copyright Act gives the producer of a 'press product', the press publisher, the exclusive right to make the "press product" (or parts) available to the public for commercial purposes. A news aggregator therefore now needs a licence from the German publishers collecting society, VG Media.

There is a fairly extensive definition of "press product" which covers "journalistic contributions in the context of a collection published periodically on any media under a single title, which...can be regarded as predominantly typical for the publishing house and the overwhelming majority of which does not serve self-advertising purposes." On the face of it, it could therefore include 'citizen contributed journalism' where that forms part of the overall press product.

This new right is circumscribed in several important ways: (a) it expires one year after publication of the press product; (b) makes distinction between news aggregation and 'search' by exempting making press content available where this pertains to individual words or the smallest of text excerpts; and (c) it does allow press products to be made available to the public by anyone other than a "commercial providers of search engines or commercial providers of services which process the content".

Spain v Germany – is it a victory for the publishers?

Both laws, in their different ways, represent a legal advance for press publishers in their battle with online aggregators, although there are differences between them. The German law allow the licensed re-use of illustrations (presumably including photographs), whereas the limitation under Spanish copyright law does not.

But the battle lines are not that clearly drawn. A number of German press publishers did not welcome 'Lex Google'. Their ambivalence reflected a worry that the 'cure' may hurt the patient more than the illness. After the new law was introduced, the collecting society VG Media sued Google, Yahoo! and others over the display of snippets that contained content from their member publishers. But a number of press publishers in Germany decided to not exercise their right to ensure that they were listed in search results to benefit from the traffic they get from Google and other online services.

Also, recent events in Germany suggest further skirmishes on the business front. As

a result of this lawsuit, some German online services, like T-Online and GMX, decided to play the 'no index' card and throw VG Media content out of their search results completely.⁸ Google has decided to continue the display of hyperlinks to VG Media content but without snippets. This led VG media to claim this move amounts to an abuse of dominant position since it claims Google's aim is to extract a free use of snippets.

So the outcome remains unclear and illustrates the challenge in drawing the boundary between licensable news aggregation – effectively re-publication – and non-licensable search with a link. The aggregators are using the publishers' desire for the latter to neutralise the former. In Spain, we may well see similar developments.

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So what are the longer term implications of these new laws?

As the battle over online content is being fought on the legal and business fronts, we are already seeing responses on both fronts, whether as legal challenges to the new laws or in aggregators' excluding 'press snippets' from their services, or both.

But in the longer term, business solutions are needed. Press publishers and other online content providers need distributors in addition to their own platforms. By the same token, distributors such as news aggregators need third party content, including that produced by press publishers.

This brings us to licensing in the form of partnerships and voluntary licensing arrangements to permit uses which go beyond those allowed under copyright limitations and licensing. Licensing takes many forms, whether 'one to one' or via collecting societies.

And in the online world, it means 'machine to machine' licensing. This is where the work of the UK Copyright Hub comes in.⁹

And what should you be doing?

Those in the content or aggregation industries will be watching 'Lex Google' very carefully and using both legal and business tactics to avoid drawing the legal boundary, in way which may damage their respective industries and business models.

But in the longer term, devising and implementing 'win, win' partnerships between content producers and users will determine the real winners.

Footnotes

1. In *CopiePresse v Google* before the Belgian Courts in 2011, the court decided that the Google News service infringed the copyrights of the Belgian newspaper publishers. The latter succeeded before the Belgian Court of Appeal but the case was settled. For more detail see the English language version of the excellent article by Bart van Besien in *Revue du Droit Des Technologies de L'Information* – No 51/2013.
2. Named after the acronym for Spain's daily newspapers' association.
3. George Osborne to tech giants: 'We will make you pay your taxes'. *The Telegraph*. <http://bit.ly/1rHpv8o>
4. <http://bit.ly/1wlgcN8>
5. See the very comprehensive article by Professor Raquel Xalabarder – SSRN-1d2504596.pdf
6. Judgment of 13 February 2014, C-466/12 *Svensson*.
7. Directive 2000/31/EC on e-commerce.
8. See to <http://www.project-disco.org/competition/goethes-ghost-german-remedpublishers-angry-about-online-services-not-infringing-their-snippet-rights-061014>.
9. <http://www.copyrightthub.co.uk/about>

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