Why Article 15 of the Directive on Copyright in the Single Digital Market is a bad idea.

Abstract
This opinion looks at Article 15 of the Directive on Copyright in the Single Digital Market (CDSM Directive), the press publishers' right. Article 15 creates a right ancillary to copyright that benefits some publishers. It is triggered when some agents perform some online acts in respect of some specific content: in brief, online reproduction and making available news content produced by news publishers by commercial internet concerns. The opinion argues that Article 15 is deficient. Amongst other criticisms that can be made of the provision, the one made here is that the rationales for its passing contained the recitals of the Directive are unconvincing given the nature of the right, and consequently it unduly benefits commercial news publishers. Moreover, the way Article 15 was passed reflects poorly on the European legislature.

This work is drawn from the author's blog post on the Kluwer Copyright Blog and ultimately from his work as research associate on the AHRC-funded Copyright and News project at CIPIL, University of Cambridge.

Why?
In 2006, (which in terms of the internet is equivalent to the times when dinosaurs stalked the Earth), the young search engine company Google negotiated a deal with the hundred-year-old American news wire service, Associated Press. The parties agreed, in the words of a contemporary Reuters report, that Google should 'pay AP for use of its news'. A few months afterwards Google also struck a similar deal with the French news wire service AFP. Spin forward three years to the summer of 2010, (about the time that – to continue the metaphor – in internet time mammals began to come down from the trees) and Google re-negotiated the deal with AP. No one at the time would explain the terms of the deal. Google said it didn't *need* to licence AP's product as it was covered by Fair Use, but Google's anticipated defence in respect of European exceptions and limitations was not clear. What *is* known is that Google did a deal to compensate some of the entities that produce news for presenting material derived from them on the Google's users' screens.

This seemed to be the route the law was travelling. Google was under pressure to pay for its online use of news by a string of court decisions in various jurisdictions – for example, Belgium, in part in the UK,[1] the CJEU,[2] and the USA.[3] There were also laws to similar effect mooted in Italy and France. That said, the traffic wasn't all one-way, globally, and a case against this principle was bolstered by decisions Australia,[4] and also in the USA.[5] But the general trend seemed to be that Google was licencing news from some publishers and risked being forced to in others. A principle seemed to be emerging that online information providers should pay for using news online.

[1] *NLA v Meltwater* [2011] EWCA Civ 890
[2] *Infopaq v Danske Dagblades Forening* Case C-5/08, [2009] EUECJ C-5/08 (16 July 2009)
[3] *AP v Meltwater*, 12 Civ 1087 (DLC) (SDNY 20 March 2013)
[4] *Fairfax Media Publications Pty Ltd v Reed International Books Australia Pty Ltd* [2010] FCA 984
[5] *Barclays Capital Inc v Theflyonthewall.com* 700 F Supp 2d 310 (NDNY 18 March 2010)

These facts are as good as any as a background to understand case for Article 15 of the Directive on Copyright in the Single Digital Market (CDSM Directive), passed in 2019. The 2006 and 2010 licencing agreements demonstrate that Google was prepared to licence news from AP and AFP, and the burgeoning case law supported the idea that they were obliged to. Developments, in other words, seemed to establish the principle of 'use news, pay for news'. The principle, in other words, behind what became Article 15.

Why not?

It is an almost comic understatement to say that not everyone agrees that Article 15 is a good idea. Drafts of the provision prompted extensive criticism. To explain one reason why it was controversial, consider the recitals to the Directive. These provide an account of the rationale behind the passing of the provision. Recital 54 talks about news being a valuable commodity in a democracy, and that commercial publishers of news are facing revenue difficulties in an online world. Recital 55 deduces from this the need to provide EU-harmonised legal protection for news publishers, targeted at the online uses of news by information society service providers. One criticism is that these recitals show that the directive is being used to impede the valuable creative destruction of the market. It is standing in the way of moribund business models being swept away. This criticism is not entirely convincing, but considering it leads to a more cogent case against Article 15.

The creative destruction argument goes like this. The commercial news industry has been a robust way of generating profit since at least the early 18th century, when commercial news publishers started to establish themselves. Their business model is that of a two-ended market. They sell information to interested parties – their readers; and the attention of those interested parties to advertisers. In the words of an 18th century pamphlet *The Case of the Coffee-Men of London and Westminster*[6]

> They are paid on both Hands; paid by the *Advertisers* for taking in *Advertisements*; and paid by the Coffee-Men for delivering them out: Which (to make use of a homely Comparison) is to have a good Dinner every Day, and to be paid for Eating it. *Here's Luck, My Lads!* Never was there so fortunate a Business.

This 18th century cry of pain came from an industry that the commercial news industry was out-competing: coffee houses. But today, the cry of pain today comes from the commercial news industry itself, as today they are not out-competing, they are being out-competed. The arguments found in recitals 54 and 55 can be seen as prefigured in that 18th century pamphlet. The anonymous author of *The Case of the Coffee-Men of London and Westminster*, were he alive today, might well see a palpable irony in news publishers' arguments for Article 15.

The commercial news industry is being outcompeted because many giant internet companies are much more efficient than commercial news publishers in the market for attention. They offer more interesting and relevant information to the public than news publishers, and thereby gather attention in larger numbers and in more exquisite detail to sell to advertisers than can purveyors of news. The new players are so effective that they no

[6] *The Case of the Coffee-men of London and Westminster*, Anon, Printed for G Smith, 1728

longer need to charge customers for the information itself. The 18th century two-ended market has come to an end, and is sustainable as a single-ended market. This, say critics, is a classic case of creative destruction.[7] That observation, coupled with the view that such an evolution of business should not be impeded, and Article 15 is an impediment, leads to the conclusion that Article 15 is a bad idea. The mammals, after all, out-evolved the dinosaurs.

Why, again?

And yet, is that true? Publishers counter – and they have a point – that it's all very well to be in favour of creative destruction, but only if there's a realistic expectation that the destruction is indeed creative. In the present case, the evidence that the destruction of the business model of the commercial news industry will create something of equal or greater benefit to society is mixed, to say the least. It will be creative for the giant internet platforms and their shareholders, but their interest isn't the same as that of society.

And they haven't covered themselves in glory in recent times, in terms of putting the public interest in the free flow of democratically salient information above their desire for profit. Far from it. Most significantly, they do not actively investigate, collect, assess and curate information, which are the key tasks of a news publisher. Rather, they scrape what they can find, after others have done these expensive tasks. Given that, isn't Article 15 a worthwhile addition to the EU's statute book?

No…

Yes and no. Yes, it's true, there is a point about being sceptical of the motivations of the giant internet information companies. They haven't designed their algorithms to serve the public good, and they are not primarily motivated by the public interest. They emphasise those occasions where their interests and the public interests are aligned, in what amounts to a 'tail-coating' argument, but these are contingent and passing. Their business model depends on selling aggregated attention, and shock and horror garners attention much more effectively than nuance and negotiation. The criticism is that they – on balance, frequently – err on the side of pimping scandal.

But that sounds like a somewhat familiar tactic: have news publishers not employed a similar technique on occasion? And themselves used – and arguably are now also using – tail-coating arguments to seek advantage? For these reasons and others, it is difficult to see this argument by itself as sufficient to pass a copyright-related law to support commercial news.

…unless…

Unless, of course, it's part of a bigger package. The concerns laid out in recitals 54 and 55 are valid. The problem is that Article 15 is not an appropriate response to them. From the perspective of society more generally – not the tail-coating arguments of the internet giants and commercial news publishers - an appropriate response to concerns they articulate should be a fuller set of regulations. These should include – and here's the key point – imposing responsibilities on the press as well as affording them privileges. At the least, the benefits afforded by Article 15 should be confined in scope to cover only the type of

[7] For example, *How to Fix Copyright*, William Patry, Oxford University Press, 2011, chapter 5.

information that serves the purposes identified in the recitals.

This linking of benefits and responsibilities on news publishers would cross no Rubicon. Indeed, the EU already imposes responsibilities on traditional broadcast institutional journalism in the Audiovisual Media Services Directive (AVMSD). Any European intervention could balance the benefits afforded to the Press by interventions like Article 15 by imposing new obligations aimed at serving the public interest identified in recital 54. Indeed, these might go beyond the scope of the CDSM Directive. They might amount to content-based regulations of the sort commonly imposed on broadcast journalism in many countries – such as, for example, enforceable rights of reply for those reported on – and business-related ones, such as strengthened media consolidation rules.

These aren't moot, academic points. The passing of Article 15 has invigorated arguments for similar laws and rules elsewhere. It provided a precedent for the recent Australian News Media Bargaining Code. And while the UK is not implementing the CDSM Directive, there is talk of legal interventions of similar effect afoot in that country. Similar discussions are ongoing in the USA.[8] If something like a press publishers' rights is passed in these jurisdictions, it should avoid the flaw in the European example. Commercial news publishers should not be dealt a free copyright hand.

Play the ball, not the player.

Beyond this, there is one other important point to bear in mind in these further debates. It relates to the conduct of the commercial news publishers in lobbying for Article 15. They frequently countered the arguments against what became Article 15 by playing the player not the ball. Academics, NGOs, and independent observers who argued against Article 15 were undermined as being Google stooges. Independent non-commercial viewpoints were marginalised. The powerful interests of news publishers invoked the powerful interests of big tech companies as a way of pursuing their own powerful interests. The Corporate Europe Observatory, who studied the lobbying by news publishers in the passing of Article 15, concluded that:

> Lumping in big industry players like Google with every other critical voice, such as NGOs and activists, and then tarnishing them both, was a successful strategy in this debate. Using this approach, all criticism, regardless of where it came from or what it focused on, could simply be dismissed.

Whatever one's view of the merits of Article 15, this was, to say the least, unwelcome. It should be avoided in any further debates about press publishers' rights.

[8] See also https://blogs.microsoft.com/on-the-issues/2021/03/12/technology-and-the-free-press-the-need-for-healthy-journalism-in-a-healthy-democracy/ and https://blog.google/products/news/google-commitment-supporting-journalism/, accessed 27 July 2021.