Evaluating legal responses to threats to news in a digital environment

London Workshop

On the 3rd November 2015, a workshop was held at the Institute of Advanced Legal Studies in London, to discuss potential legal responses to threats to the production of news in a digital environment. The workshop was an output of a two-year study funded by the AHRC, entitled 'Appraising Potential Legal Responses to Threats to the Production of News in a Digital Environment'. The co-Principal Investigators are Professors Lionel Bently of Cambridge University and Ian Hargreaves of Cardiff University. The Research Associate is Dr Richard Danbury.

Particular attention was paid to copyright. Present were academics, representatives of news publishers, and representatives of digital information businesses. This is an account of the discussion.

The discussion was divided into four parts – first, consideration was given to general questions such as whether there is a crisis in the commercial news industry, and whether this is sufficient reason to intervene to assist the industry. The source of commercial news publishers' difficulties was discussed, including those created by online news aggregators, ad blocking and content farms. The conversation also discussed the changing nature of online news distribution; from aggregation and search, to social media and mobile. Consideration was also given to the continued viability of subscription and sales as sources of revenue for commercial news publishers.

The second part of the discussion considered the legal difficulties in using copyright as a means to assist news publishers.

The third part of the discussion considered the experience in Spain, which has seen an amendment of the copyright law designed to benefit news publishers.

The fourth part of the discussion briefly considered the impact of freedom of speech law on any possible copyright interventions.

The text here is a summary of the discussion that took place, and does not necessarily reflect the views of the project researchers.

Introduction

The discussion started by delineating the research project,[1] describing how it seeks to evaluate potential legal responses to threats to journalism in the digital environment. Particular attention has been paid to copyright. This is because much has happened in copyright: there have been a number of copyright-related developments in a variety of different countries which have been justified with reference to the need to protect the position of news publishers.

A variety of questions were posed to start with. There has been lot of analysis and comment in this field, and so the questions posed were selective, rather than comprehensive. They included whether there are sufficient difficulties in the news industry to merit intervention; whether commercial journalism – as opposed to publicly funded, or subsidised journalism – is necessary; whether the commercial journalistic sector is viable, given the technological changes that have undermined its business models; and whether legal intervention by means of copyright and related rights would be effective in providing help to commercial journalism – if such help were needed and merited.

Part 1: General context

Is there a crisis in commercial news sufficient to merit intervention?

A majority felt that there were indeed significant difficulties in the commercial news industry. This is despite the fact that there is significant amount of money flowing into commercial news, for example to Buzzfeed and Vice News, and there have been significant mergers and acquisitions. It was argued that the existence of such investment does not necessarily rebut the idea that there is a crisis in the sector. This is because an influx of venture capitalist money, and the like, does not show that profits are being made. All it shows is that some investors think that profits may be made in the future.

It was also generally accepted that there was a need for commercial journalism in a democratic society. The fact that commercial journalism does not require subsidy helps protect the independence of its editorial line. It complements the subsidised journalism of the sort produced by the BBC – which is valuable, but not enough by itself for society's needs.

However, some argued that it would not be damaging to democracy if some popular products of the commercial news industry ended, such as lifestyle supplements. The democratic case for intervention should not be confused with the commercial interests of news publishers. Moreover, it was argued that the audience might consider it good that the news no longer makes the very high levels of profit it did in the 1990s.

[1] The project webpage is at: http://www.cipil.law.cam.ac.uk/research/appraising-potential-legal-responses-threats-production-news-digital-environment-ahrc

Against this, others said that it might indeed be bad for society if the commercial media were unable to use lifestyle content and the like to attract people's attention for other material of more salience to democracy. Similarly, it was argued that society may suffer in the long run if the news industry is unable commercially to produce content.

Reasons for the crisis

The origins and nature of the crisis were discussed. It was observed that there are empirical studies that establish these sorts of phenomena, and their effect on revenues. These changes are likely to be permanent.

One significant feature was said to be that technology can provide advertisers with a much more efficient means of delivering advertisements than that offered by the news industry.

Another source of difficulty was said to arise from the unbundling – facilitated by technology – of the package of information contained in a newspaper. Technology increases the ability of people to select what to read, without being exposed to different types of content bundled up with the material they choose. This prevents the cross subsidisation of less popular by more popular content.

Other difficulties identified included changing habits of reading news, and generational changes in attitudes to news consumption.

It was also observed that the barriers to entry to the news publication market are now low, as it is no longer necessary to purchase a newspaper printing plant and distribution network to compete with news publishers.

An argument was advanced that any revenue derivable from copyright was unlikely to be enough to resolve long-term, structural and fundamental problems such as these. This could be proved by empirical work to establish the level of the financial difficulty facing the commercial news industry, which could be contrasted with the amount of any potential revenue a copyright intervention may create.

On the other hand, others observed that even if copyright wouldn't provide enough revenue to resolve the difficulties facing the news industry, it would likely help. It should be seen as an 'and-and', not an 'either-or'. Newspapers are not looking, it was said, for a magic bullet, but for help in areas that are 'leaking revenue'.

Should one intervene to benefit the incumbents?

It was questioned whether there was sufficient reason for intervening in general to protect incumbents – the old news publishing industry – when this is likely to damage new entrants.

Against this, it was argued that the difficulties posed by the new environment are shared both by incumbents and new entrants. Intervention, it was argued, won't

disproportionately benefit established players, but will benefit both, given that they both face the same troubles. Ad blocking was mentioned as an example of this, as it was said to pose more of a threat to new entrants than it does to incumbents, who tend to have deeper pockets to weather the difficulties it creates.

It was also questioned whether any copyright intervention would comply with copyright law, given CJEU judgments such as *Svensson.*[2] This was discussed later, as described in part 2, below.

Ad blocking

There seemed to be consensus that part of the problem highlighted by the development of ad blocking was bad quality advertising – if readers liked advertisements, they wouldn't feel the need to block them.

Some thought the rise of ad blockers might be beneficial for the news industry. This is because it might cause prices to rise for good ads that get readers' attention. Others thought this unlikely.

Some held that ad blocking is a publisher problem, not a problem for advertisers. This is because there is no charge to advertisers if ads get blocked, so it is less of a financial burden on them. The financial cost is borne by publishers, who suffer a diminution in their revenue.

It was observed that as a business model, ad blocking is open to abuse – the blacklisting and whitelisting of adverts can amount to something akin to extortion.

Some suggested that technological countermeasures could be an answer, but others thought they didn't get to the kernel of the problem: unattractive adverts. Moreover, in the past in other areas, technological countermeasures haven't proved to be effective, so there is reason to be sceptical that they will be effective here.

This led to a proposal that a solution should be to make the total product of the publisher – both content and advertisements – more attractive to audiences.

Aggregation

It was suggested that a significant cause of difficulty for news publishers has been the development of aggregators. This was argued to be the case, because aggregators exploit the content of news content producers without incurring the costs of generating that content: the charge being that of free riding.

Some disagreed with this analysis. First, they observed that many 'free to air' aggregators do not make money from advertisements placed against news: more lucrative adverts are those placed against search and social media. If that is true, the argument went, it is not

[2] *Svensson v Retriever Sverige AB* C-466/12, [2014] Bus LR 259, [2014] ECDR 9

accurate to say that aggregators divert advertising funding from news publishers. If mere aggregation is not lucrative, the charge of free riding is not established.

This was countered by the argument that, even if aggregators do not divert advertising revenue, they divert audience attention. And this attention has a significant financial value to aggregators and news publishers.

Second, it was argued against the case of free riding, that some publishers actively seek out aggregation and the like as a means of disseminating their content. Not everyone sees aggregation as a zero sum game, where one group benefits, and others lose. Reference was made to the argument that aggregators drive traffic to news publishers' sites, as – it was argued – is evidenced by the Spanish experience. This was discussed in more detail later. But it was mentioned that when Google withdrew Google News Spain, the evidence seemed to show there was a significant decline in traffic to publishers' sites. Hardest hit were the smaller, less well-known news publishers.

Against this, it was observed that some empirical studies show there to be very low levels of traffic driven to news publishers, in comparison with the traffic drawn to news aggregators. Some studies were cited that showed it to be as low as 5%.

Moreover, brand loyalties seem to be less fixed than in the past, which exacerbates the problem, as people are less likely to seek out content published by a news brand they follow, but just rely on aggregated news.

Even if, which some present did not admit, the case of free riding is not cogent, it was observed that there were other problems with aggregators. One is that they facilitate the disaggregation of content. This makes is difficult to sell the bundle of content that comprises a traditional newspaper. Bundling of content is useful in economic terms, because the popular content subsidises the generation of the less popular but more worthy content. It is also useful socially, as it means people get exposed to material they might not seek out, but which is beneficial for society for them to know.

Some argued that this observation means that the most likely route to success for commercial news publishers is to reconnect popularity with success, and to deliver a popular bundle of content for which people are prepared to pay.

Content farms

Content farms, which copy content wholesale and reproduce it with new advertisements, were described as a significant concern. Some of these were abroad, notably in the Ukraine.

Even within the UK, there is evidence of widespread and extensive republication of content from news publishers' sites. But some doubted whether these activities, while to be deprecated, pose a systemic threat to the industry.

Moreover, it was argued that copyright as it already exists could be used to restrain this sort of action. The existence of content farms does not, by itself, suggest that copyright law should be altered. That said, it was observed that there were significant difficulties in bringing copyright actions, and enforcing them, against content farms.

Search

Some highlighted a problem for news publishers that arises from Internet search engines. The process of search frequently entails the complete copying of material on websites, as this is required for the preparation of the indices used by search engines.

This is not necessarily published, so some questioned whether this reading and copying by a machine caused harm to news publishers. Others observed that the mere coping of the material by itself presented problems, and also expressed concerns about how the copied material might be exploited in the future.

Social media and mobile

It was observed that aggregation is no longer the only, or even the most significant problem from the point of view of news producers. Social media is increasingly the means by which people find their news. Moreover, mobile viewing of news is more important than desk-top viewing. Publishers of news who, in the past, have attempted to grapple with making money from news in the open web, have been hamstrung by this move to the closed web. Their techniques for existing on the open web work less well where social media is an increasingly important portal for attention.

Subscription and sales as a source of revenue

Subscription and sales as a source of revenue were discussed. It was reiterated that one solution is to have an attractive bundle of content for which people would pay commercial rates. The link between popularity and financial success should be re-established.

Counter arguments were advanced. Some thought this only viable for specialised, and in particular financial news. Some that technology has facilitated the unbundling of news, and it is difficult to put that genie back in the bottle. Some, that it was difficult to establish what 'popular' is in this context – whether it's a broad but shallow engagement, or a narrow but deep engagement.

It was suggested that a fundamental problem could be that – as has been shown by empirical research – consumers are frequently not prepared to pay for news. The evidence also shows that while people read news out of interest, there is little evidence that they would pay if they could get it for free. This is particularly true of younger people. However, the methodologies of the studies that arrived at this conclusion were questioned.

The ready availability of news from other sources, such as the BBC, was identified as a problem for those who sought subscription revenue. It was noted that the BBC could offer material to local publishers, and this could help commercial news publishers. Others

felt this was a form of subsidy, and as such did not resolve the core problem of how to ensure the independent viability of commercial news.

Part 2: Copyright as a means of intervening

There was a short presentation analysing the legal problems with using copyright as a means of assisting news publishers.

Legal difficulties with copyright as a means of intervening

There are legal problems in on least three levels with using copyright as a means of assisting news producers. The first derives from EU law, the second from international copyright law, and the third from freedom of speech law.

Difficulties arising from EU law

In broad-brush terms, the EU-related problems derive from the partial harmonisation of copyright law undertaken by, amongst other things, the Information Society Directive 2001 (the InfoSoc Directive). This harmonises the right of reproduction, the right of distribution and communication to the public. This is generally so in relation to authorial works, phonograms, broadcasting organisations and fixations of films. The harmonisation of these rights by the InfoSoc Directive means that the EU imposes on member states also an upper limit of what can be protected, as well as a lower limit.

In respect of the reproduction right, art 2 of InfoSoc requires member states' copyright rules to restrict reproduction of any part of a work. 'Any part' means, after *Infopaq*, a part that is original – namely the author's own intellectual creation, namely in an expressive work, the part that reflects the creative choices of an author. In some cases, a broad brush copyright law to protect the news industry would protect more than these parts. It would, in other words, protect material that is not original in these terms. Evidence in support of this can be found in the UK's *Meltwater* case, which indicated that an aggregator would require a licence because some material might be original in these terms. But, therefore, some material would also not be original. A *per se* rule that protects all news material would therefore be contrary to EU law, as it would be protecting some material for which protection is not allowed at the EU.

In respect of the communication to the public right, there are also difficulties. The CJEU has said that communication to the public by hyperlink is infringing if the material to which the link is made is thereby communicated to a new public. So if material is legitimately on the public web, hyperlinking to it will not be an act that breaches copyright. Clearly it would be different if a link was made to material behind a firewall, as this material would not have been made available to the public. But, because of the upper limit of protection imposed by the InfoSoc directive, a *per se* rule that made all linking to news material potentially infringing would – as was the case in respect of reproduction – be contrary to EU law.

These are not insurmountable legal hurdles to a copyright law, as EU law might

be changed. But the way the law is currently does pose difficulties to laws like the Spanish and German laws.[3]

A further difficulty relates to the EU regime that regulates exceptions – actions that can be undertaken with respect to copyright protected work without incurring legal liability. These are contained in an exhaustive list in the directive – in article 5. One of these is a quotation exception. Quotation is permitted, according to this provision, as long as certain conditions are met: quotation must be proportionate, in accordance with fair practice, attributed, and to the purpose for which the quotation is made. Importantly, however, the provision does not mandate that compensation be provided. Now, if the provision in question – art 5(3) (d) – is seen as an all or nothing provision, then a law like the Spanish law which requires compensation, may well be outside what is permitted by the EU regime. There are quite a number of assumptions in that argument, however.

Difficulties arising from the Berne Convention

In respect of international copyright law, problems arise because of the provisions of the Berne Convention. Under the Convention, there is a mandatory exception to copyright – the quotation exception. It's obligatory for contracting parties to the Convention to have a quotation exception or limitation. Quotation, under such provisions, should be in accordance with fair practice, proportionate and attributed. The Convention says this includes press summaries, and this has been taken to mean that it must be possible, without infringing copyright, to publish newspaper stories alongside each other.

Given that the Berne Convention says that this exception must exist, acts that curtail it – such as a Spanish type law that mandates compensation be paid for quotation – may well be contrary to article 10. Unless, perhaps, compensation is restricted to situations where quotation is not pursuant to fair practice.

The three-step test may also apply. If it did, this might ease this difficulty. This test is in art 9 of the Convention, and provides that Members of the Union or Contracting Parties may permit reproduction in specific cases, where reproduction does not conflict with normal exploitation of the work, and does not unreasonably prejudice the legitimate interests of the holder. It is also in art 13 of TRIPS. But there is a question about how the three-step test relates to other provisions.

If the three-step test applies, it might provide a rationale for the imposition of a compensation element to quotation. This is because such a step would prevent the unremunerated use of quotation where that use conflicts with normal exploitation of a work.

[3] The Spanish law is described below. The German law referred to is the German Copyright Act (1965, as amended), art 87f (1).

However, whether the three-step test is of assistance here is not clear. It is likely to be of assistance if, as some argue, the three step test is supplementary to the requirements that quotation be in accordance with fair practice, proportionality and attribution. However, others argue that the three-step test is not supplementary to these conditions.

One way to argue this point is on the ground that TRIPS says that contracting parties must comply with art 1 to 21 of the Convention, and that obligation is prior to any subsequent article of TRIPS. Art 13 of TRIPS therefore appears to be subsequent to the obligation to comply with the Berne Convention. If this is so, article 13 can be argued not to add extra conditions to those found in the Convention, in so far as it is inconsistent with them. It should not, therefore, be seen as imposing a condition that quotation should be only permitted insofar as it does not conflict with the normal commercial exploitation of a work.

For completeness, there is a middle way: this is to suggest that the conditions of fair practice in art 10 of the Convention reflects the two relevant elements of the three step test.

Potential resolutions

Potential ways around these difficulties were discussed. It might be possible to create an ancillary right not within copyright. Such a right would not be subject to the Berne Convention, nor the restrictions contained in the InfoSoc Directive. It is clearly possible for such rights to exist, as manifest by the vitality of rights such as the UK's typographical arrangement right.

Some felt that re-visiting what constitutes 'fair practice' would be of assistance, as this threads through all the legislation. The law, it was argued, or at least accepted behaviour, has moved away from what is intuitively acceptable as 'fair'. Others considered that this would not be of immediate help to news publishers, as litigating this question would be expensive, and the result uncertain.

It was suggested that some other current copyright and related laws might avail news publishers. The laws regulating use of technological protection measures, for example, might help.

The database right

One law related to copyright that was discussed in a little depth was the database right. It was observed that news publishers had an investment to protect, and acted as quasi-authors in preparing a bundle of content. They are, in this way, similar to broadcasters and phonogram producers. This might lead to the possibility of using the *sui generis* database right as a cause of action.

It was argued that there were advantages in using this right. First, it would avoid the difficulties involved in using copyright, noted above. These do not apply the database right. Moreover, the database right went through a stage of being narrowly interpreted by

the CJEU, but is now being interpreted more expansively. Second, the database right appears to be a more appropriate tool, as it is a protection of investment, which is what publishers seek to protect. Third, it was also argued to be a more appropriate tool, as it protects the bundle of content that historically has been the essential nature of a newspaper. Fourth, it was argued that it would not inhibit new entrants to the market. Fifth, the basis of the database right is unfair extraction, and that seems to be the activity which is inappropriate here.

It was also observed that there are problems with using the database right. One is that it does not reflect the creative collective endeavour of putting together a newspaper (or the like). Second, is that it does not seek to reinforce the connection between popularity and financial success, which some felt was central to solving this problem – rather than seeking legal intervention. Third, that there are few exceptions to the database right, and this may mean it infringes unduly on free speech concerns. (Against this last point, some thought it arguable that there are exceptions to the database right.) Fourth, some publishers actively seek out aggregation and social media dissemination, and this might inhibit them.

General points about legal intervention

Some argued that law is a blunt and often inappropriate tool, but other attempts to resolve difficulties – such as using technology – had failed, and it was appropriate to try to use it. Others observed that it is appropriate to turn to the law, as publishers have tried but failed in their attempts to resolve the difficulties with other means.

It was argued that other means might also be used, such as technological measures. One that was discussed was the robots.txt convention, which prevents indexing of news material by search engines. This could be of assistance to publishers seeking to restrain re-publication of news via search.

However, others felt that conventions such as robots.txt were an insufficient remedy. Robots.txt was said to be on or off - either permitting or restricting indexing. There was a view that it would be more useful if a variegated control was developed, permitting some use for some purposes, but not others.

Some countered this assertion, by saying that technology does already provide some facility for doing this. Others observed that tobots.txt and the like were likely to be ineffective as a remedy, as experience shows that some web crawlers (who couldn't be identified, but were not Google's) ignored the protocol.

Competition law

Many felt that a problem for news publishers was the inequality of the powers of the parties involved in negotiations about the distribution of news content. Google and social media companies, it was said, hold disproportionate power, becuase they control access to the attention of the public. They are also perceived as providing a benefit to the public in indexing the content of the Internet. This, it was argued, is relevant to a competition law evaluation, but was felt to eclipse the interests of content producers.

Conversely, competition law weakens the negotiating position of news publishers, as it restricts news publishers from acting collectively to seek to withhold their content from search and social media organisations.

And even if this were not the case, the ready availability of 'free to air' news, from the BBC, foreign news organisations and the public, means withholding news is not a realistic prospect.

The discussion returned to the question of free riding. Some felt that Google and social media companies do provide benefits in return for their use of publishers' content, because they drive traffic to publishers' sites. Evidence for this was said to be the experience of the Spanish amendment. This resulted in Google withdrawing Google News Spain. When this happened, research by Nera[4] showed that traffic to publishers' sites declined. It fell off more for the smaller sites, than incumbents: larger players lost 2 to 5% of traffic, while smaller sites lost 25%.

[4] http://www.aeepp.com/pdf/InformeNera.pdf, accessed 6 Mary 2016, Spanish.

Part 3: Spain – a case example

There was a short presentation describing the context and nature of the Spanish law.

The context behind the Spanish law

The background to the Spanish law – an amendment of article 32 of the Spanish Copyright Act – can be found in similar copyright-related interventions in Europe and the wider world, designed to benefit the news industry. The *Copiepresse* litigation in Belgium provides one example, where Google were sued by a Belgian collecting society. They won in the courts, but decided in 2012 not to enforce their judgment. Another can be found in Brazil, where in 2011 the news publishers decided to withdraw their material from Google News. This resulted in Google removing relevant metadata, and publishers' traffic was reduced by 5%. A third example is that of France, where the government threatened to bring in a new law, but did not after negotiation resulted in Google providing publishers – through the auspices of a particular project – with various benefits.

The Spanish law was said to be the creation of a consortium of Spanish newspaper editors, Gedeprensa. This was a collective created in 2002 by the five most influential newspaper groups. Gedeprensa was created against a background of conflict with the Spanish competition authorities, and uncertainness about the legality of quotation of press articles.

Spain, being a civil law system, considers a newspaper as a promoter of a collective work. Copyright in articles and photos, and the like, is therefore held by individual authors, and is not held by news publishers. However, it may be that there is a move in some civil law jurisdictions to see authors of collective works – like newspaper publishers – as quasi-authors.

Reforming art 32 of the Spanish Copyright Act

In 2004, article 32 of the Spanish Copyright law was reformed to mandate compensation to publishers from press clipping activities, and also ancillary compensation to individual authors. The second reform of the law, in 2014, was targeted not at press clipping companies, but at Google. The reform means that it is permissible to quote 'non-significant fragments of content available to the public', where the source of the content is 'periodicals or regularly updated websites', and where the material in question 'has the purpose of informing, creating public opinion or entertainment'. But, while this permission will not need authorisation, it will entail the paying of compensation to editors and other rights holders. Furthermore, it is un-waivable.

The provision has been called the "Google Tax". It is aimed at deriving revenue from Google. It has been somewhat divisive. AEDA is an association of newspapers in Spain, but not the only one. An association of smaller newspaper publishers and editors have challenged it.

It's also plausible that the passing of the law was facilitated by the fact that the incumbent government – a populist right wing administration – needed the support of those big newspaper organisations who were lobbying for it.

Consequences of the Spanish law

What were the results of the law? In December 2014 Google pulled Google News out of Spain. Traffic has decreased to many newspaper sites – the smallest newspapers said their traffic has fallen by 10% to 15%. A big newspaper group indicated that they would not participate, even though the right is said to be unwaivable. When Google News disappeared, other aggregators were made to pay – but it is unclear who is subject to the law. Indeed, some newspaper publishers will have to both pay and be paid under the law. Smaller aggregators have also been caught by the law.

There are some legal problems with the law: first, the fact that it is unwaivable is curious, as this feature is normally reserved in Spanish law for moral, personal rights, not the economic right of a news publishing company. Second, there are difficulties in drafting, interpretation and application of the law, not least because 'aggregation' is not defined. The difficulties of applying the law are exacerbated, as the law was aimed at Google News, yet this is no longer in existence: it is unclear who should now be paying. Third, Spanish copyright law is focused on the rights of authors, yet these are not mentioned in art 32. Fourth, it should be asked whether it is appropriate to protect something as transient – and of such transient value as - news for the full duration of copyright. Fifth, it is not clear how derivative works utilising news should be treated. These have been recognised in Spain since 1847, and comprise – for example – the right of journalist authors to collect their material and publish it as a book. Sixth, the position of third parties is not clear.

Many are ranged against the law, including small publishers, the Competition Court, and opposition parties.

Google withdrew Google News from Spain, and indicated it would invest €150m in the Digital News Initiative. Nevertheless, the collecting society tasked with implementing the law is working.

Discussion

It was observed that many publishers in Spain were in favour of the Spanish law, as well as against it. And that given the difficulties in news publishing, it was necessary to think of a positive alternative. Some thought the term 'Google Tax' to be unhelpful.

The emphasis in Spain on the interests of authors was said to be misleading, if it failed to recognise that successful news publishers are of central importance to authors' employment. There is a mutual benefit here between authors and news publishing entrepreneurs, it was argued.

It was also said that news publishers do act as quasi-authors in preparing and organising an appropriate range of content within a newspaper, or the like. Moreover, industrial scale investment is required in journalism to – for example – investigate regularly and efficiently.

However, some felt it to be overly optimistic to expect the old model of news publishing to continue and that change is inevitable. It may be, they argued, that copyright changes could protect employment for journalists as authors, but this is insufficient grounds to support an extension of copyright or related law.

Part 4: freedom of speech

There was a short final discussion about the relationship between any copyright intervention, and freedom of speech law.

The relationship between copyright and free speech law

It was described how from some perspectives and in some jurisdictions, freedom of speech law has not been seen as a viable route by which copyright can be challenged. This is because of the view that certain provisions of copyright law sufficiently protect freedom of speech. These protections have been said to include the existence of doctrines such as the idea/expression dichotomy, and the application of copyright exceptions.

Application to the ECHR and CJEU

However, some recent case law in Europe challenges this view. Recent European Court of Human Rights cases have shown that the court will subject copyright to a free speech review. Furthermore, there appears to be an increasing possibility that at the CJEU, copyright law would be interpreted so as to comply with free speech concerns.

Hence it was argued that any extension of copyright, or application of it, to benefit press publishers in Europe should pay regard to freedom of speech law. However, it is not clear how the arguments would play out. Moreover, the way the free speech guarantee in the EU Charter will affect the decisions of the CJEU remains unclear, as it is relatively new law for that tribunal.

In broad brush terms, it was argued that the most important aspect of freedom of speech law engaged is likely to be the interests of the audience to receive information. From this perspective, copyright interventions may both be assailed and defended. On the one hand, it could be argued that the curtailment of the free flow of information that may be a result of a copyright related intervention would tend – all other things considered – potentially to infringe free speech. Consideration would then have to be given to the proportionality of such an act.

However, on the other hand, copyright interventions could also be defended on the grounds that they help ensure that commercial news publishers continue to be viable, and so in the end contribute to the free flowing of information in a democracy.

It is not clear how the courts would resolve this. Much will depend on the exact wording an application of any particular copyright intervention.

Dr Richard Danbury,
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