Some economic aspects of a proposed German ancillary copyright law

Stefan Lorenz, University of Jena (Stefan.Lorenz.2@uni-jena.de)

31 May 2012

(Unfinished working paper)

Abstract

This paper analyses the economic consequences of a new ancillary copyright law in Germany, which aims at enabling newspaper publishers to charge online aggregators (such as Google News) for displaying parts of their content. It will do so by extending protection to small excerpts of newspaper articles (i.e., "snippets"). Using a model originally developed by Dellarocas et al. (2011), we will demonstrate that the key component of this bill is not the extension of copyright, but the inherent mandatory collective administration, serving as a *de facto* antitrust exemption meant to enable publishers to joint pricing policies in their negotiations with online aggregators. Rather than closing a legal loophole, this law's purpose is merely to cut publishers in on web companies' profits. Even though this paper merely focuses on German legislature, results may be applied to international parallels, such as the *Copiepresse* decision in Belgium, the British *Meltwater* case, and the "hot news" debate in the United States.

Keywords: press publishers, copyright, aggregators, rent-seeking

JEL Classification: D72, K11, L82, O34

1 Introduction

Press publishers in Germany, as in other parts of the world, have suffered from declining revenues throughout the past decade. In Germany, newspaper and magazine circulation declined by almost 30% between 2003 and 2011.[1] Once profiting from local newspaper monopolies that enabled them to extract high surplusses from both readers (consumers) and advertisers, press publishers today only generate minuscle revenue online from advertising, while so-called pay walls (i.e. charging consumers for access to content) largely failed. Seeking for someone to blame, publishers identified online news aggregators as cause for their struggling online operations. While there are of course numerous minor aggregators and blogs collecting and republishing excerpts from press products, the main culprit in the eyes of publishers is none other than Google. Despite offering nearly all of its services free of charge, the company generates huge profits on the German market. Press publishers argue that Google is only able to do this on their expense (Hegemann and Heine, 2009).

Avoiding direct negotiations with Google (for reasons later to be explain in this paper), press publishers decided to explore non-market strategies. Claiming the current situation – their content being disseminated in parts by aggregators – to be the result of a legal loophole, they have lobbied for a new ancillary copyright law (*Leistungsschutzrecht für Presseverleger*) specificly tailored to protect their business. Purpose of this law to gather fees from internet companies "for the dissemination of a press product or parts of it". On 4 March 2012, Germany's governing coalition official announced its plans to introduce such legislation (Pfanner, 2012).

This paper aims to analyse the economic consequences ensuing from this legislative proposal. To our knowledge, only Stühmeier (2011) attempted a similar analysis at an earlier stage of the debate, when details of the proposed law were even less concrete than they are today. He also chose a different approach than this paper, comparing the effect of news aggregators to the economics of online music piracy, whereas this paper will use

[1] According to the press wholesaler Bundesverband Presse-Grosso, newspaper and magazine circulation declined from 3.441 billion in 2003 to 2.441 billion in 2011, while – due to increased copy prices – revenue declined less sharply, from €3.989 billion to €3.403 billion in that same period (Schröder, 2012).

a network economics model.

The first chapter of this paper will outline the known details of the new neighboring right. The second part will describe a model of link economy, comparing outcome before and after the proposed legislation. Finally, we will discuss the justification of such law from an economic and legal perspective.

2 German law proposal

Caveat: *Since no official draft of this bill has been released as of May 2012, this section may be considered preliminary and conjectural. For the lack of a better basis, the economic analysis in this paper will largely draw from more or less concrete statements by involved politicians. We will update this section as soon as the coalition draft is publicly available, although we do not expect any fundamental changes that would render the following arguments moot.*

In Germany, like in many other countries, newspaper publishers contend they are losing online revenue to news aggregators (Burda, 2009; Schweizer, 2010). These websites crawl the internet for newly published content, by newspapers in particular, and display parts of it – usually an article's headline and lede, accompanied by a deep link to the original source – on their own website. While this helps making content more discoverable (Picard, 2011), publishers complain snippets of their content on the aggregators' websites divert readers from accessing the full article (Sherrod, 2012), thereby thwarting the publishers ability to generate advertising revenue from these readers. Further, since aggregators do not expend resources gathering the news but merely collect written stories from various sources, publishers accused them of free-riding.[2] They argued it was unfair to allow aggregators to benefit from the work of enterprises that create news articles

[2]Burda (2009), owner of Hubert Burda Media, argued that aggregators were gaining more profit from newspaper articles than the newspapers' publishers themselves. Explicitly naming *Google News*, Hegemann (2009) complained that the service would "skim off" adventising revenue by distilling press products without pay. This parallels international debate, where, for example, News Corporation owner Rupert Murdoch went so far as to compare story aggregators to thieves (Weaver, 2012).

without having to pay any of the costs to obtain them (Beckerman-Rodau, 2011).

Publishers were pointing at the fact that prevailing law does not give them any legal options to prevent aggregators from 'scraping' their content. As of today, the publisher's legal position stems from derived usage rights obtained from the authors. These rights are bounded by the same legal barriers as the author's original right. Of course, German *Urheberrecht* entitles creators with the exclusive reproduction right of their works. But while this right also extends to parts of the original work, said parts have to meet certain requirements of creativity and uniqueness. Despite the recent *Infopaq* decision of the Court of Justice for the European Union,[3] short segments of texts, in particular of factual content, rarely pass this originality threshold.

In an effort of lobbying very similar to the ongoing one in the United States,[4] German publishers therefore urged politics to close what they consider a legal loophole. But unlike in the US, where publishers seek to tighten copyright boundaries by outlawing "search engine practice" as infringment instead of protecting it under the "fair use" doctrine (Sanford and Brown, 2009), German publishers are aiming for their own ancillary copyright. Already existing in the sound and film recording industry, ancillary copyrights, or neighboring rights (*verwandte Schutzrechte*), grant producers with the exclusive right to copy the recording, to distribute it, and to make it available to the public. These neighboring rights are provided without having to overcome any originality requirement, since they do not protect original, creative input, but financial, organizational, and technical effort. This is particularly relevant for small parts of a protected work. While copyright only protects elements of a work that demonstrate some minimal creativity, neighboring rights literally protect every bit of a work,[5] which in case of

[3] In *Infopaq International A/S v. Danske Dagblades Forening* the European Court of Justice held that the European Union Information Society Directive (2001/29/EC) can provide an exclusive right even to partial reproduction as short as eleven words if the fragment demonstrates particular unique creativity, but does not grant this right to all fragments of this length per se (Moran, 2011).

[4] One may trace the origins of this effort to two prominent op-eds in the national *Frankfurter Allgemeine Zeitung* by Hegemann (2009) and Burda (2009). Compare this to Sanford and Brown (2009), and Marburger and Marburger (2009), which triggered the "hot news" misappropriation debate at nearly the same time.

[5] In the *Kraftwerk* decision (know in Germany as *"Metall auf Metall"*) the German Federal Court of Justice (BGH) held that even the unauthorized two second sample infringes, in principle, the rights of phonogram producers (see Conley and Braegelmann, 2009; Reilly, 2012).

newspaper articles would be sentences and possibly even single words.[6] Therefore, with a neighboring right of their own, press publishers would overcome the onus of having to prove infringement in every single case of an aggregator's use of a snippet.

To this day, legal specifics of the proposed law remain unclear, which understandibly has caused rampant speculations among German legal scholars (e.g., Kreutzer, 2009; Frey, 2010; Nolte, 2010; Peifer, 2010; Schwarz, 2010; Wieduwilt, 2010; Ohly, 2012). Thanks to a few comments from politicians and high-level officials directly involved in the drawing of the bill, as well as the recent release of a protocol from the coalition committee meeting, we can at least draw a vague picture. For one thing, the purpose seems clear: news aggregators should no longer be allowed to display snippets for free.[7] Also, other than one might assume, the proposed law is not meant to protect all online texts – of which there are of course than just newspaper articles – from unlicensed search engine aggregation. In fact, the new neighboring right is planned to be narrowly tailored to protect only the newspaper industry.[8] It will do so by defining only producers of "press products" as beneficiaries of protection, thereby not only excluding amateur bloggers but also professional web-only publications. While it seems difficult to faultlessly distinct between websites of 'old' press publishers and new media companies in legal terms – which is why this idea has been met mostly with scepticism by German legal scholars (e.g., Frey, 2010; Nolte, 2010; Peifer, 2010; Ohly, 2012) – we will assume *arguendo* that

[6] German jurists (e.g., Frey, 2010; Kreutzer, 2010; Nolte, 2010) were quick to point out the potential ensuing ravages for free speech. There is no room to further discuss this admittedly important issue in this paper, though.

[7] The protocol of the 4 March 2012 meeting of the coalition committee, available at http://docs.dpaq.de/353-koalitionsrundenergebnisse.pdf, reads: commercial service provider on the internet, such as search engines and news aggregators, should pay fee to publishers for disseminating press products (*"Gewerbliche Anbieter im Netz, wie Suchmaschinenbetreiber und News-Aggregatoren, sollen künftig für die Verbreitung von Presseerzeugnissen (wie Zeitungsartikel) im Internet ein Entgelt an die Verlage zahlen."*). Earlier, Ansgar Heveling, member of Culture and Media Committee of the Bundestag, explained in an interview with Hintzen (2010) that the new right is basically aimed at *Google News*.

[8] This has been confirmed by Irene Pakuscher, head of copyright and publishing law at the German Ministy of Justice, who is directly in charge of drafting the bill. Only 'genuine press publishers' should benefit from the [proposed] neighboring right (*"Als Begünstigte des Leistungsschutzrechts sollten nur echte Presseverleger in Frage kommen"*) said Pakuscher at the *eco MMR congress* in Berlin on 24 March 2010, see congress report at available at http://www.eco.de/wp-content/blogs.dir/Bericht_eco_MMR_Kongress_2010.pdf.

lawmakers will succeed in doing so.[9]

On 4 March 2012, the German governing coalition officially announced the impending legislation, confirming the afformentioned assumptions (Pfanner, 2012). The proposed right is meant to protect "press products and small parts thereof".[10] It was also stated that the new right's term of protection would only span one year, contrary to the decades-long protection provided by existing neighboring rights for record and movie producers. More intriguing, however, is the fact that press publishers will not be able to exercise their right individually. Instead, fees would be gathered and distributed by a collecting society similar to those which gather royalties on music.[11] While collective administration of copyrights are common practice to overcome allocative inefficiency (Besen et al., 1992), one can hardly argue that transaction costs of direct negotiations between individual publishers and search engines are prohibitively high. We will particularly investigate the publishers' eagerness to include mandatory collective administration within the bill in chapter 3.2.[12]

3 Press economics and news aggregation

Before tackling the economic consequences of the proposed copyright law, we should first add a few brief words on the economics of newspapers. As is well known at least since Corden (1952), publishers serve multiple markets with their product, receiving income from readers on one hand, as well as advertisers on the other. These markets are, of course, mutually dependent and dynamically interwoven. Increased circulation leads to

[9] Additionally, legislators must also define "news aggregators" as the ones targeted by the law, unless bloggers and even off-line publications should also be obligated to make royalty payments before quoting (online) press products.

[10] The coalition meeting protocol, *supra* note 7, reads: *"Deshalb sollen Hersteller von Presseerzeugnissen ein eigenes Leistungsschutzrecht für die redaktionell-technische Festlegung* journalistischer Beiträge oder kleiner Teile hiervon *erhalten."* (accentuation by the author).

[11] The coalition meeting protocol, *supra* note 7, reads: *"Einzug und Verteilung der Entgelte soll über eine Verwertungsgesellschaft erfolgen."*

[12] It has to be noted that American publishers, too, recognized the opportunities of acting collaboratively, demanding an antitrust exemption for "collective pricing policies for their web sites" in addition to federalizing the "hot news" doctrine (Sanford and Brown, 2009).

rising demand for advertising space, and vice versa, which is refered to in literature as "two-sided network effect".[13] Without getting into further details, one of the significant consequences of this effect is that a (monopolistic) producer on a two-sided market will rationally decide to supply one side of the market at a price below (marginal) costs or even free of charge, if the resulting costs are outweighed by additional revenue gained on the other side of the market. As for press products, most publishers opted to not charge readers on the internet, contrary to what has been the custom in the industry off-line.[14] Instead, most of them decided to offer their content free of charge, not only because of the Bertrand competition ensuing from undifferentiated content (i.e., myriads of equally worded reports provided by news agencies, and published on each newspaper's website), which drove prices down to marginal costs (Varian, 2010), but also partly because it maximizes potential advertising revenue. This leads to the logical assumption, that publishers must be interested in the highest possible exposure of their content, which on the internet means traffic, measured in either page views or unique visitors. This traffic may consist of "anchor traffic" (i.e., consumers who use this website as their starting point to consume news) and "link traffic" (i.e., consumers who were directed to this website through a hyperlink from another website). Both numbers combine to the "total traffic", which ultimately determines the advertising revenue. Which is to say, link traffic usually increases a website's income, giving them every reason to encourage being linked to (Picard, 2011).

3.1 Model

To formalize this argument, let us outline a simple model of news websites and aggregators. This chapter draws heavily on Dellarocas et al. (2011) who were among the first to study strategic hyperlink formation in content networks, explaining (among other things) interaction between content producing (in this case press publishers' websites)

[13] In recent years, a whole new area of research evolved, devoted to the economics of these two-sided or multi-sided markets, starting with Rochet and Tirole (2003), as well as Caillaud and Jullien (2003).

[14] It has to be noted that there is an increasing number of free *print* newspapers, which can also be explained by two-sided market effects, in particulary the increase in the net advertising revenue per reader and a decrease in unit printing costs (see Gabszewicz et al., 2012).

and non-producing websites (i.e., aggregators).[15]

In the basic setting there are N content-producing websites on the internet, competing each other for user traffic. For simplicity, we assume there is only one topic and each website $i = 1, \ldots, N$ produces content of quality $c_i \geq 0$, for which in accordance to Dellarocas et al. (2011) the costs are $\frac{k_i}{2} c_i^2$ for each site i. The level of (content) quality determines the utility consumers derive from reading the content on these websites, which for simplicity may be $z_i = c_i$ for every consumer of site i. Consumers aim to maximize their utility by periodically switching their "anchor sites" in an exploration-exploitation process. Under several other assumptions by Dellarocas et al. (2011), there is a population of consumers, each at different stages of their exploration of the content ecosystem, which at steady state results in anchor traffic t_i^A for site i of:

$$t_i^A = \frac{z_i}{\sum_{j=1}^{N} z_j + \mu} \tag{1}$$

where μ represents the expected utility gained from the *outside* option (i.e., "off-line"). We assume websites do not charge users for access to their content,[16] meaning they monetize traffic by displaying advertisement next to their content. It is reasonable to assume the advertising revenue is proportional to the total time visitors spend on a particular website, while the length of stay may be proportional to the quality of content. In accordance to Dellarocas et al. (2011), we let marginal revenue m_i of site i therefore be $m_i = m_i(c_i) = c_i$, which results in total revenue of $R_i = t_i^A c_i$ for site i. This means in the simplest case of identical quality, both total traffic and total revenue of the ecosystem would evenly split between the incumbents. In case of heterogenous quality, the higher quality sites' fraction of total traffic is relatively larger, in accordance to equation (1).

We ignore the effects of two incumbents linking to one another (see Dellarocas et al., 2011, chapter 4), and will instead focus on what has been left out of the equation thus far: aggregators. As used in this discussion, a "news aggregator" may be a website that does not produce any own content. Instead, it gathers content from other (content

[15] There are of course also other models, by George and Hogendorn (2012), Hong (2011), and Rutt (2011), which are more complex than necessary for the argument presented in this paper.

[16] One could further assume that require payments before granting access to their content (automatically) exclude aggregators from their content, leaving them irrelevant for the argument in this paper.

producing) websites of the ecosystem and displays excerpts of it – generally the headline of a story, and sometimes the first few lines of the story's lede – with a link to where the rest of the content can be read on the original website.[17] Using complex algorithms, the aggregator may be able to determine content quality of each (content producing) website in the ecosystem with high precision, which is captured in the Dellarocas et al. (2011) model by parameter $s \geq 0$.[18] It then ranks the obtained results by quality, or only displays a single link to the website of highest quality.[19] In our model, consumers may derive utility $z_i = \delta c_j$ from visiting aggregator i, who displays content from site j, where $\delta \in [0, 1]$ captures the utility loss from not accessing site j directly, but via link.[20] Consumers following the link are summarized as "link traffic" t_j^L, which adds to site j's traffic and therefore increases its revenue to $R_j = (t_j^A + t_j^L)c_i$.

While the aggregators i's business model is to attract anchor traffic, monetizing it through advertising, but ultimately sending it to content producer j, a fraction of consumers may satisfy their needs by reading the excerpt of j's content on the aggregator's site, and therefore decide not to follow the link to consume the entire content on j's website. Dellarocas et al. (2011) capture this fraction of consumers with parameter $\rho \in [0, 1]$, which means only fraction $1 - \rho$ of aggregator i's visitors t_i^A decide to follow the link to consume the entire content at site j, leading to traffic $t_j = t_j^A + t_j^L = (t_j^A + [1 - \rho]t_i^A)c_i$. Besides μ,[21] it is the height of ρ (i.e., the share of consumers not clicking through to the original content) that determines whether an aggregator harms or benefits the incumbent content producers.[22]

[17] There are, of course, various types of aggregators (as outlined by Isbell 2010), but in this context we may narrow our scope on automatic aggregators operated by search engines.

[18] "When $s = 0$ the aggregator is unable to determine quality and randomly chooses between the two sites. When $s = 1$, the aggregator is only as good as consumers in finding the best sites. If $s \to \infty$ the aggregator can find the top site with perfect precision." (Dellarocas et al., 2011, p. 19). We assume *arguendo* that the aggregator can determine quality with high precision.

[19] For simplicity, let us assume that even if presented a ranked list of numerous content producers, rational consumers would *always* decide to consume the top link only, since it maximizes their utility.

[20] Dellarocas et al. (2011) explain δ as the "cognitive cost of clicking on a link and reorienting oneself to a different context, i.e., a new web page layout." (p. 6).

[21] The aggregators ability to detect the highest quality content increases the attractiveness of the content ecosystem relative to outside alternatives, thereby attract consumers into the ecosystem.

[22] Dellarocas et al. (2011) find that "(1) if sites 1 and 2 produce the same content and do not link to each other,

Publishers claim that aggregators are harming their business, because the click-through rate $1-\rho$ is deemed too low (Schweizer, 2010).[23] Also, they contend aggregators owe them a "fair share" (Burda, 2009; Schweizer, 2010) of their (advertising) revenue, which is to be determined in negotiations between content producers and search engines. These potential negotiations, they argue, require a property right in excerpts, which in essence would be a right to veto being linked to.[24] The effectiveness and consequences of such law are discussed in the following chapter.

3.2 Economic consequences

Ignoring the fact that already today Google and other search engines/aggregators voluntarily enable content producers to veto linking by inserting a simple meta tag,[25] and also ignoring the fact that producers could easily put their content behind pay walls, let us assume that only after the Bundestag passed the neighboring right proposal as a law, publishers will be able to negotiate with aggregators. Using the model by Dellarocas et al. (2011), we can now explore the decision-making process for content producers.

In the most simplistic setup, there are two competing content producers, one aggregator, and no outside option (i.e., $\mu = 0$).[26] We assume both content producers could veto being linked to if they choose so. If both allow being link targets, the aggregator

then they are better off in the presence of an aggregator iff $\rho < \frac{\mu}{2c_1+\mu}$" and "(2) if site 1 produces higher content and site 2 links to it then site 1 is better off in the presence on an aggregator iff $\rho < \frac{\mu}{c_1+\mu}$, whereas site 2 is always worse off." (Proposition 5, p. 18).

[23] This argument also has its parallels in the "hot news" debate in the US. "The problem with the link economy is that being linked to is far less lucrative than being the linker. Aggregators receive far more ad revenue, especially when they provide enough of a headline or summary that readers need not click through to the originating site." Park (2010, p. 379).

[24] While the proposed neighboring right is not meant to protect the link itself (i.e., the "raw" uniform resource locator), we assume that the aggregator would not want to display "raw" links (without any headline or excerpt), perceiving them as useless to the consumer. Therefore, press publishers will effectively be granted the right to refuse being linked to by aggregators.

[25] See "Using the robots meta tag" on Googles' Webmaster Central Blog, available at http://googlewebmastercentral.blogspot.de/2007/03/using-robots-meta-tag.html.

[26] The lack of an outside option also means that the aggregator cannot attract consumers from outside from outside the "online ecosystem", but only from the incumbents. If there was an outside option ($\mu \geq 0$), link refusal would be less likely.

attempts to select the higher quality page and creates a link to only that particular site. Should only one producer veto a link, the aggregator links to the other one. In case both content producers veto, the aggregator is left with no content to display, thus loses all its anchor trafic as it offers no utility to consumers.

If we assume both content producers simultaneously decide whether to allow or veto a link from the aggregator, their decision depends on their sites' content quality c_i and the aggregator's precision to identify the higher quality content (i.e., search parameter s). Under the listed assumptions, Dellarocas et al. (2011) identify an equilibrium in which neither content producer refuses a link from the aggregator, where content levels are $c_1^* = c_2^* = \frac{(3s+8)(1-\rho)+18}{36}$ iff $\rho < \frac{1}{2}$. But if ρ was higher, both sites would have an incentive to refuse the link from the aggregator. However, since content publishers cannot coordinate, this is where the prisoner's dilemma comes into effect. If only one site refuses the link, the aggregator links to the other, accumulating an anchor traffic of:

$$t_i^A = \frac{\rho z_i(\delta z_j)}{z_i + \sum_{j=1}^{N} z_j}. \tag{2}$$

The one content producer allowing the link will be "awarded" with additional (link) traffic of $t_j^L = (1-\rho)t_i^A$ and thus additional revenue, whereas the link-refusing content producers is left off with less revenue ensuing from decreased traffic. With an increasing number of content producers, this dilemma gets even worse (from the content producers' perspective), since the potential gain in traffic (and revenue) from defection is ever-increasing. This means if the purpose of the proposed legislation is to equip press publishers (content producers) with improved negotiating power to stand up to major search engines (aggregators), this attempt will fail. If all publishers were given the sought-after exclusive right in headlines and excerpts, in the end, even if they were facing a scenario that would incite refusal from the group (as a whole), publishers would undercut each other in license fee negotiations. At least one individual publisher would readily authorizing inclusion for no fee at all, in "exchange" for massively increased exposure through consumer traffic that would have otherwise been channeled to competitors' websites.

Either publishers or politicians must have foreseen this, since the proposed neigh-

boring right is not meant to be excercised individually. As has been mentioned at the end of chapter 2, a (yet to be founded) collecting society will not only gather potential license fees from search engines and news aggregators, but obviously also negotiate the size of the compensations and (implicitly) the publisher websites' inclusion in the first place. Now that the prisoner's dilemma which publishers were facing, if they acted individually, has been outlined, the publisher's motivation to demand mandatory collective adminstration is evident. Going back to the model (under the strict assumptions mentioned above), if both content producers could simultaneously decide to do refuse the link, both of their content levels would be lower, $c_1^* = c_2^* = \frac{3}{8}$, but their profits would be higher (since their costs fall disproportionately with decreasing content quality). All "anchor traffic" of the ecosystem would be shared among the content producers, whereas the aggregator would be defunct, having no content to link to, resulting in a utility of $z_i = 0$.[27] Facing the option of either to cease operations (resulting in profit $\pi_i = 0$) or to negotiate an inclusion license, the aggregator could be willing to pay license fees as high as just below his potential revenue, leaving it with profit just above zero.[28] Simply put, coordination would allow content producers to extract a sizeable share of the aggregators revenue compared to none in a competitive market with no coordination. It would also allow them to maximize profit while disseminating lower quality content than in the competitive market scenario.

It also has to be considered how a collecting society would alter competition among content producers. Under normal circumstances, an aggregator highly precise ($s \geq 1$) in determining the superior quality content producers would increasingly (over time) link to those websites. Producers of lower quality content would be forced to upend their content production, or (in case of inferior cost structures) leave the market. By that same dynamics, the number of publishers of undifferentiated content would reduce over time. In a regime of a collective adminstration, these effects are partly or entirely

[27] This, of course, only holds true under the strict assumptions of this model, in which press publishers are the *only* content producers in the ecosystem. While this is obviously not the case for the internet in its entirety, it probably is for news aggregators who only crawl online press content.

[28] For simplicity, it was assumed the aggregator operates at no costs. If permitted to link, its revenue and profit is $R_i = \pi_i = \delta z_j t_i^A$ (compare eq. 2).

offset, due to the collectives all-or-nothing license policy and its non-market-conform distribution of license fees (Katz, 2009).

Further, and beyond the presented model, one must take into consideration the disruptive effect of this law on platform competition. As previously stated, the new right will only be valid for (websites of) traditional newspaper publishers. However, on the internet there are of course countless other content providing platforms, whether it be websites of TV channels, or pure web publishers and blogs. These non-press publishers would be excluded from the superior negotiating position provided by the collecting society, and therefore have a comperatively worse ability to monetize their content. This would result in an inferior position in the platforms' competition for writers, as only a subset of platforms (i.e., press publishers) is entitled with a further reaching copyright protection. In other words, identical texts could much easier be monetized by press publisher websites than by non-press publisher websites, even if both would offer it free of charge and financed by advertising only.[29]

4 Discussion

The press publishers' demand for this neighboring right and for having it collectively administered seems solely motivated by the outlook of gaining more profit than they could in a functioning market. This has first been observed by Katz (2010) in the Belgian *Copiepresse* case, writing "collective action in this case seems more like an attempt to charge money to license a right which in a competitive market would have no or very low market value." This case (see Klein, 2008, for details) also demonstrated that is more plausible to assume that content producers currently benefit more than they lose from the presence of aggregators, meaning that the net effect of aggregators may actually be positive for content producers, partly because the click-through rate $1 - \rho$ may not be painfully low,[30] partly because of the aggregators ability to attract

[29] This argument could be expanded by using a different model than Dellarocas et al. (2011). At the current development stage of this paper, we were not able to include one.

[30] A January 2010 report estimates ρ at about .44 for the US online news market (Wauters, 2010) To our knowledge there is no empirical data for ρ on the German market.

consumers into the ecosystem may be substantial (thus outweighing the loss in t_j^A with gain in $t_j^L = (1-\rho)t_i^A$). When Google decided to eliminate all links to press content on its Belgian website on 15 July 2011 – following the courts decision in the final instance holding that Google infringed Belgian publishers' copyright (and would have to pay €25,000 per infringment) – publishers were quick to rescind their complains (Lüthi, 2011), since otherwise facing an immensely reduced exposure of their content.[31]

For the lack of empirical data, we cannot conclusively determine the net effect of aggregators. But regardless of whether it is positive or negative, it seems questionable whether publishers should obtain entitlement to a share of aggregators profits, even though aggregtors would not be able to amass any profit without content that others produced. "Competition is not unfair in a legal sense, merely because the profits gained are unearned, even if made at the expense of a rival." (Sherrod, 2012, citing Brandeis' dissent in the 1918 US Supreme Court decision *INS v. AP*). Further, it needs to recognized that publishers always had to deal with some degree of free-riding, i.e., readers who did not pay for the newspaper, but read someone else's copy (Picard, 2011). In fact, the share of readers that only consumes headlines and excerpts displayed by aggregators without clicking through, is probably no different from the people who satisfy their demand for news with a glimpse at the newspapers' front pages at the newsstand. Still, at least to out knowledge, newsstands have never been the focal point of a missappropiation debate.[32]

Setting aside whether it is advisable to create a right narrowly tailored to protect a single industry, there are significant questions whether this ancillary copyright law conforms to the principal purpose of copyright, which is to provide incentives and to further engage creation (Sherrod, 2012). While publishers claim the ability of preventing aggregators from free-riding to be a prerequisite to maintain "quality journalism" (Burda,

[31] Google re-added all of the publishers' websites only four days later, after publishers agreed not to claim any compensations. One would wish to have an empirical analysis of this shock effect, comparable to the study by Chiou and Tucker (2011) regarding the brief ban of *Associated Press* content by Google in January and February 2010.

[32] Lemley (2005) points at the erroneous assumption that intellectual property owners should be entitled to capture the full social surplus of their creation, which "runs counter to our economic intuitions in every other segment of the economy." (p. 1046).

2009; Schweizer, 2010), they seem to confuse journalism with newspapers. Instead of increasing incentives to maintain quality journalism, this law will likely only hinder news dissemination, while artifically extending the oversupply of homogenous content of mediocre quality.

5 Conclusion

Notwithstanding all legal difficulties this proposed ancillary copyright law faces – in terms of precisely defining the protected subject-matter, its beneficiaries and so on – there are economic consequences that have to be considered, too. Overall, it seems questionable whether copyright protection should be expanded selectively to protect a single industry, by cutting them in on profits of allegedly free-riding competitors, whose operations may actually produce a net profit not only for publishers, but society as a whole. As has been shown in this paper, it is mainly the proposed law's inherent mandatory collective administration that will cause disruption. It enables publishers to charge significantly higher license fees than they would be able to achieve individually on a competitive market.

In essence, the press publishers lobbying for narrowly tailored law to protect their industry may just be another case of "rent seeking". In the end, given the massive protest from other parts of the industry as well as independed legal scholars, this bill might never even get passed.[33]

[33] Peifer (2010) and Ohly (2012) draw comparisons to the 1932 "law for protection of press communication" (*"Gesetz zum Schutz des Pressenachrichtenwesens"*), conceived to protect publishers from free-riding newswires. This bill, too, was never passed.

Bibliography

Beckerman-Rodau, A. (2011). Ideas and the Public Domain: Revisiting *INS v. AP* in the Internet Age. *New York University Journal of Intellectual Property and Entertainment Law*, 1(1):1–32.

Besen, S. M., Kirby, S. N., and Salop, S. C. (1992). An Economic Analysis of Copyright Collectives. *Virginia Law Review*, 78(1):383–411.

Burda, H. (2009). Wir werden schleichend enteignet. *Frankfurter Allgemeine Zeitung*.

Caillaud, B. and Jullien, B. (2003). Chicken & Egg: Competition among Intermediation Service Providers. *The RAND Journal of Economics*, 34(2):309–328.

Chiou, L. and Tucker, C. E. (2011). Copyright, Digitization, and Aggregation. Working paper.

Conley, N. and Braegelmann, T. (2009). *Metall auf Metall*: The Importance of the *Kraftwerk* Decision for the Sampling of Music in Germany. *Journal of the Copyright Society of the USA*, 56(4):1017–1037.

Corden, W. M. (1952). The Maximisation of Profit by a Newspaper. *Review of Economic Studies*, 20(3):181–190.

Dellarocas, C., Katona, Z., and Rand, W. (2011). Media, Aggregators and the Link Economy: Strategic Hyperlink Formation in Content Networks. NET Institute Working Paper No. 10-13; Boston U. School of Management Research Paper No. 2010-30; Robert H. Smith School Research Paper No. RHS 06-131.

Frey, D. (2010). Leistungsschutzrecht für Presseverleger. *Multimedia & Recht*, pages 291–295.

Gabszewicz, J. J., Laussel, D., and Sonnac, N. (2012). Advertising and the Rise of Free Daily Newspapers. *Economica*, 79(313):137–151.

George, L. M. and Hogendorn, C. (2012). Aggregators, Search and the Economics of New Media Institutions. *Information Economics and Policy*, 24(1):40–51.

Hegemann, J. (2009). Schutzlos ausgeliefert im Internet. *Frankfurter Allgemeine Zeitung*.

Hegemann, J. and Heine, R. (2009). Für ein Leistungsschutzrecht der Presseverleger. *AfP: Zeitschrift für Medien- und Kommunikationsrecht*, (3):201–207.

Hintzen, H. (2010). Recht muss auch im Netz gelten. Rheinische Post, 6 June 2003.

Hong, S. (2011). A Simple Model of News Aggregators, Information Cascades, and Online Traffic.

Isbell, K. (2010). The Rise of the News Aggregator: Legal Implications and Best Practices. Research Publication 2010-10, Berkman Center for Internet & Society.

Katz, A. (2009). *Competition Policy and Intellectual Property*, chapter Commentary: Is Collective Administration of Copyrights Justified by the Economic Literature?, pages 449–468. Irwin Law, Toronto.

Katz, A. (2010). *Working Within the Boundaries of Intellectual Property*, chapter Copyright Collectives: Good Solution But For Which Problem? Oxford University Press, New York.

Klein, S. (2008). Search Engines and Copyright – An Analysis of the Belgian *Copiepresse* Decision in Consideration of British and German Copyright Law. *International Review of Intellectual Property and Competition Law*, 39(4):451–483.

Kreutzer, T. (2009). Faszination des Mystischen: Zum Leistungsschutzrecht für Presseverlage. *epd medien*, 76:7–11.

Kreutzer, T. (2010). Leistungsschutzrecht für Presseverlage: Mehr Schaden als Nutzen. *MedienWirtschaft*, 7(1):44–47.

Lemley, M. A. (2005). Property, Intellectual Property, and Free Riding. *Texa*, 83(4):1031–1076.

Lüthi, N. (2011). Die belgische Lektion. Medienwoche, 25 July 2011.

Marburger, D. and Marburger, D. (2009). The free ride that's killing the news business. Los Angeles Times, 2 August 2009.

Moran, C. (2011). How Much Is Too Much? Copyright Protection of Short Portions of Text in the United States and European Union After *Infopaq International A/S v. Danske Dagblades*. *Washington Journal of Law, Technology & Arts*, 6(3):247–258.

Nolte, G. (2010). Zur Forderung der Presseverleger nach Einführung eines speziellen Leistungsschutzrechtes. *Zeitschrift für geistiges Eigentum*, 2010(2):165–195.

Ohly, A. (2012). Ein Leistungsschutzrecht für Verleger? *Wettbewerb in Recht und Praxis*, 58(1):41–48.

Park, D. S. (2010). *The Associated Press v. All Headline News*: How Hot News Misappropriation Will Shape the Unsettled Customary Practices of Online Journalism. *Berkeley Technology Law Journal*, 25(1):369–394.

Peifer, K.-N. (2010). Digital und ohne Recht? – Zweck, Inhalt und Reichweite eines möglichen Leistungsschutzrechtes für Presseverleger. *Kölner Schriften zum Wirtschaftsrecht*, 2010(4):263–271.

Pfanner, E. (2012). Germany trying to cut publishers in on web profits. *New York Times*. March 11, 2012.

Picard, R. G. (2011). Tremors, Structural Damage and Some Casualties, but no Cataclysm: The News about News Provision. *Geopolitics, History, and International Relations*, 2(2):73–90.

Reilly, T. (2012). Good Fences Make Good Neighboring Rights: The German Federal Supreme Court Rules on the Digital Sampling of Sound Recordings in *Metall auf Metall*. *Minnesota Journal of Law, Science & Technology*, 13(1):153–209.

Rochet, J.-C. and Tirole, J. (2003). Platform Competition in Two-sided Markets. *Journal of the European Economic Association*, 1(4):990–1029.

Rutt, J. (2011). Aggregators and the News Industry: Charging for Access to Content. Working Paper 11-19, NET Institute.

Sanford, B. W. and Brown, B. D. (2009). Laws That Could Save Journalism. Washington Post, 16 May 2009.

Schröder, J. (2012). Kiosk-Krise: 1 Milliarde Printverkäufe weniger. Meedia, 30 May 2012.

Schwarz, M. (2010). Erster Entwurf eines Leistungsschutzrechts für Presseverleger in der Diskussion. *GRUR Prax*, 2(13):283–288.

Schweizer, R. (2010). Schutz der Leistungen von Presse und Journalisten. *Zeitschrift für Urheber- und Medienrecht*, 2010(1):7–16.

Sherrod, H. (2012). The 'Hot News' Doctrine: It's Not 1918 Anymore–Why the 'Hot News' Doctrine Shouldn't Be Used to Save the Newspapers. *Houston Law Review*, 48(5):1205–1240.

Stühmeier, T. (2011). Das Leistungsschutzrecht für Presseverleger: Eine ordnungspolitische Analyse. Technical report. DICE Ordnungspolitische Perspektiven 12.

Varian, H. (2010). Newspaper economics: Online and offline. Presentation held at an Federal Trade Commission workshop, 10 March 2010.

Wauters, R. (2010). Report: 44% Of Google News Visitors Scan Headlines, Don't Click Through. TechCrunch, 19 January 2010.

Weaver, A. B. (2012). Aggravated with Aggregators: Can International Copyright Law Help Save the News Room? Technical Report 2. Emory Legal Studies Research Paper (16 May 2012).

Wieduwilt, H. (2010). Das neue Leistungsschutzrecht für Presseverlage – eine Einführung. *Kommunikation & Recht*, 13(9):555–561.