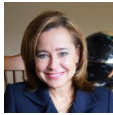


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# What Happens If Hyperlinks Get Copyright Protection In Europe?

Another storm appears to be brewing in Europe that will impact the ability of many U.S. businesses to freely operate there. According to a leaked draft European Commission Communication, “the Commission will examine whether action is needed on the definition of the rights of ‘communication to the public’ and of ‘making available’,”—direct references to EU case law governing hyperlinks. According to European Parliament member Julia Reda, this means that “[the European Commission is preparing a frontal attack on the hyperlink](#)”, the basic building block of the Internet as we know it.”



Image from Savethelink.org

What is being discussed, essentially, is ancillary copyright. Ancillary copyright includes the right of copyright owners to charge a fee for hyperlinking to and excerpting from their works. From a practical standpoint, this law would affect **any** news aggregator linking to and excerpting works from European content sources, not just EU based aggregators.

### Frontal attack on the hyperlink

Reda bases her warnings on a draft [Communication](#) from the European Commission to the European Parliament on copyright reform, allegedly leaked to [IPKat](#) and released by that outlet last week. Reda asserts based on her reading of this Communication that “the



Commission is considering putting the simple act of linking to content under copyright protection.” She asserts that if this happens, “[each web link would become a legal landmine](#)” and would allow press publishers to hold every single actor on the Internet liable.”

The Communication itself does not expressly reference hyperlinks; however it does indicate that, “[the Commission will examine whether action is needed](#)” on the definition of the rights of ‘communication to the public’ and of ‘making available’.” This is language that expressly references a European Court of Justice ruling, [Svensson](#), that held that hyperlinks do not constitute a “communication to the public”.

### Ancillary copyright explained

As detailed by the Computer and Communications Industry Association, CCIA, in a paper entitled, “Understanding ‘[Ancillary Copyright](#)’ in the Global Intellectual Property Environment,” ancillary copyright is essentially “a right to impose a special levy on search engines and other online platforms providing the public with short fragments of news text, including quotations.” CCIA details laws in Germany and Spain that have implemented ancillary copyright.

### The “Google tax” in Spain

Both Spain and Germany have implemented ancillary copyright, with Spain’s implementation causing Google to shutter its news operations there. Spain’s law, which came into effect in January 2015, created a *nonwaivable* right to compensation for linking and quoting, which became known as the “Google tax,” according to Hector Guzman, Director of Data Protection and Privacy at [BGBG Abogados](#). This does not just mean news snippets, he says, but also quotations and reviews. In the Spanish version of ancillary copyright, the title of article 32 of the copyright law is “Quotes and reviews and illustration for teaching for scientific research,” Guzman says.

*El Pais* reported at the time of implementation of Spain’s [ancillary copyright](#) law that “the so-called Google tax was imposed as a result of lobbying by the Association of Spanish Daily Publishers (AEDE).” The news outlet explained that the new law “requires online news aggregation services to pay a charge to publishers for indexing and using fragments of their stories,” and contains specific provisions, including the mandatory nature of the tax, applicable to news aggregators like Google.



## Tax in Germany, with Google exception

The German version of the law, *Leistungsschutzrecht*, “expressly holds search engines liable for making available to the public parts of ‘press products’ in search results, thereby creating direct liability for the automated indexing processes by which search results are generated,” according to CCIA.

The result in Germany was that Axel Springer, one of Germany’s biggest publishers and a major supporter of the new legislation, granted Google a royalty-free license, thus creating a bifurcated market that penalized smaller publishers, CCIA reported.

## The draft Commission Communication

It is not self-evident upon a cursory read of the leaked Communication that implementation of a hyperlinking law is in the offing. Nowhere in the Communication is link or hyperlink mentioned. However as mentioned above, the reference in the Communication to “rights of ‘communication to the public’” and of “making available” hark back to background case law that permits hyperlinking. It therefore certainly appears as if hyperlinking could be a target of new copyright legislation in Europe.

According to Ms. Reda, the Communication is expected to be officially released to the public on December 9. She is accordingly calling upon the public to begin expressing their opposition to any new EU law that would “break the Internet”. As the CCIA says, “in sum, German and Spanish [ancillary copyright] laws, and similar efforts under consideration, upend established international copyright law.”

The European Union has proven its ability to wreak havoc on businesses worldwide operating on the Internet there, such as in the EU’s implementation of the “right to be forgotten” and its personal data transfer regulations (“Safe Harbor”). Any potential new EU copyright law should therefore be closely watched.

Lisa Brownlee is author of [Intellectual Property Due Diligence in Corporate Transactions: Investment, Risk Assessment and Management](#), a cutting edge reference for conducting high tech deals.

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