

Press Publishers and Copyright

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Prof Javier Díaz Noci
Pompeu Fabra University (Barcelona, Spain)

Invited by Open Forum Europe to give a talk in a meeting hosted by MEP Catherine Stiehler, the author had the chance to explain some points of view on the new press publishers' right, included in the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, launched on September 14, 2016. These are some of the guidelines explained in that session, in a more developed version.

cc Javier Díaz Noci
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How Media Industry Faced the Digital World

Press publishers have actively lobbied and finally manage to get the so-called publishers' right included in the *Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, launched on September 14, 2016. This is configured as a related right explicitly designed to help press publishers 'obtaining a fair share of the value they generate [and] aiming at facilitating online licensing of their publications, the recoument of their investment and the enforcement of their rights', but it is unclear how the rights of the individual authors who contribute to the collective work, being those authors professional practitioners of journalism or amateur user-generators, would be guaranteed.

In a conference organized by the CIPIL, University of Cambridge, held in the IViR, University of Amsterdam, in April 2016, in which a similar state of the art was described, Dr Richard Danbury said:

There is talk of the 'death of the newspaper' and questions have been raised about the very future of journalism. While with music, books and films, the greatest threat to existing business models have been seen as the unauthorised and unremunerated home copying and peer-to-peer distribution, with commercial news journalism much of the challenge derives from the fact that advertising has not followed the shift of print-newspapers to the Internet. Such difficulties are compounded, from the point of view of news publishers, by the relatively free availability of news from other online sources. And they've been further compounded by the recent rise of social media, particularly Facebook, as a main route to the news. Given that more than half of newspaper revenue (in many countries, generally speaking) traditionally comes from advertising, newspaper profit margins have suffered badly, many jobs have been lost and titles closed. Consequently, news journalists, including photographers and associated freelance creators, have expressed dismay at their increasingly fragile economic and unsatisfactory position. This sort of crisis in other industries would lead to calls for intervention, including legal intervention [...]. But, if the central problem has not been copyright piracy, a big question is whether copyright-related business models, and indeed copyright itself, are part of the solution.

'For a brief window, it seemed like the Internet might destroy the media industry's business model of large, centralized distribution systems', said in 2012 Bill D. Herman, and he added: 'The future of music, movies, publishing, and news media seemed to hang in the balance'.

Some other authors, such as Newman *et al.*, have a similar opinion: ‘As publishers struggle to generate sufficient revenue through advertising, they come under even more pressure to convince consumers to pay for access to digital content [...]. The economic challenge for any legacy newspaper company is simply stated: it is to grow digital revenue far and fast enough to offset the inevitable declines in print revenue, and at sufficient margins to defend – or increase – profitability’ (Newman *et al.*, 2016: 103, 108). But the law, as Dr Till Kreutzer says, ‘cannot create a business model’ (Kreutzer, 2016: 4).

The question is that from the invention and popularization of the World Wide Web, in the mid-nineties, most media companies, especially newspapers, decided to offer their contents for free, since at that moment they were doing *shovelware* editions of their printed products. The consolidation of the WWW as a new dissemination model evolved towards a more developed digital strategy and the emancipation of the online edition, to the extent that many media, one of the first *The Guardian*, to decidedly embrace the so-called *digital first strategy*. Now, to a great extent, printed editions are a version of the online edition, since scoops, multimedia products, interactive and participative issues and ongoing reports are produced for the website first.

The European Union has showed its concern on this problem. In March 2016 it launched a public consultation¹ *On the role of publishers in the copyright value chain and on the ‘panorama exception*, that was open to the general comments until June 15, 2016, whose conclusions were to be published in July, 2016.

Many ‘major players’ of the information economy, for instance newspaper publishers, are tirelessly lobbying to receive compensation for the secondary exploitation of the works they have primarily published. This is related to the economy of attention, exemplified very well in the case of media industry when Alan Rusbridger, then the editor of *The Guardian*, said that ‘newspapers are increasingly about views rather than news’, and defined them as *viewpapers*. In a workshop-expert panel we organized at the Pompeu Fabra University in November 2014, it was recognized that ‘even if aggregators do not divert advertising revenue, they divert audience attention’.

In this point, we should consider the *Coase theorem*, whose normative version explains that ‘lawmakers should structure the law so as to remove the impediments to private agreement and hence lawmakers should promote minimization of transaction costs’. ‘In the language of economics’, explain Jeff Borland and Philip L. Williams, ‘the problem is that technological developments have raised the transactions costs of license agreements between journalists and the users of newspaper articles – where transaction costs include the cost of

¹ <https://ec.europa.eu/digital-single-market/en/news/public-consultation-role-publishers-copyright-value-chain-and-panorama-exception>

discovering the parties to the negotiation, the cost of conducting the negotiations, and the costs of enforcing the contract' (Borland and Williams, 1993: 352).

The problem, as many authors have posed, is not the gratuity of contents: Benhamou and Farchy, 2014: 69). According to these authors, the problem is not to give contents for free, but to ensure the transfer of profitability in the value chain. The proposed solutions are diverse: from licenses (a blanket license), a Creative Commons license, which covers also very general terms;² compensation through taxes, but this is a solution interdicted by the European Court of Justice, which in 2016 decided that only the final users of the private copies should pay a compensation to authors and copyright holders, and not all the citizens; see CJEU, Case C-470/14, concerning EGEDA *at al.*, June 9, 2016.

The Nature of the Work: Individual, Joint and Collective Works

There are many aspects to be considered when dealing with reforming and harmonizing copyright law regarding to news reporting. Originality is the first one of those aspects, and the most recent doctrine is explained in the *Infopaq* case held by the European Court of Justice. Originality can be found even in those short excerpts, saying that 'it is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation'. The European Court of Justice left the national legislators and courts to decide where such excerpts can constitute an original creation.

On the nature of the work, probably the most controversial question is the conflict between the individual, the collective and the joint work (or *oeuvre en collaboration*, following the denomination of the Civil Law tradition). The complex nature of both types of works, the collective and the joint work. In a collective work, for instance a printed or online newspaper or any other informative website, we can find many joint works, amalgams of individual works which could, or not, work individually.

A tension between the protection given to individual authors (journalists) and to media companies (juridical persons as, in some legislations, authors of the collective works) is to be seen in the whole conception of news reporting activity. The definition of the collective work is the one which is created under the initiative and coordination of someone (usually a corporate entity). The accent is put, in Civil Law countries, on the nature of the work. In some other countries, on the nature of the author, as Haveman and Kluttz pinpoint, 'by creating and

² On a wider theory of commons applied to intellectual property, see Mitchell, 2005.

enforcing laws, the state both enables and constraint markets' (Haveman and Kluttz, 2014: 1), and this is precisely which is happening, in our opinion – and this is one of our main arguments – when, by different ways, the states are enforcing the attribution of the corporate entities upon the works created, under its direction of course, by individual authors. Rather than being a natural right of authors, copyright 'may be conceived as a temporary monopoly conferred by the state that motivates authors to produce the creative works that, in turn, benefit the public'.

Are corporate entities to be considered authors of the collective work?

The question appeared in all its crudity when press publishers tried to manage the compensation rights for press-clipping activity creating a collecting society in Spain, Gedeprensa, in 2004, which was banned by the Competition Court, and then they successfully lobbied to reform the article 32(2) of the *Intellectual Property Act* to enact such rights, with due compensation, if not contrarily agreed, to the authors of the items reproduced by press-clippers.

The European newspaper publishers promoted in 2008 the creation of the Press Database and Licensing Network association 'to protect the interest of publishers in media monitoring (see [http:// http://www.pdln.info/](http://www.pdln.info/)). Press-clipping, publishers have insisted, is not covered by this exception. They were successful in Spain, where news media publishers managed in 2006 to modify the article 32.2 of the *Intellectual Property Act* 1/1996 to include compensation to the companies, and, if not contrarily agreed, with a fair remuneration to authors, in exchange of press-clipping activities – but failed in constituting a collecting society, Gedeprensa.

Right holders are not necessarily authors', as Michael Seadle reminds:

Corporate entities, to which authors had assigned rights in return for a modest, token or even non-existent payment, obviously added value and played a role in the ongoing distribution of these intellectual creations (Seadle, 2007: 431).

The emergence (and acceleration; Beer, Mogyoros and Stidwill, 2014: 83) of user-generated contents and some other factors linked to the power of digital online communication has posed, which is obvious, new problems to the regulation and protection of the intellectual work, and of its authors. Alongside with the importance of the individual, skilled author (who is the one theoretically to be protected under *droit d'auteur* system) the copyright system protects the

interests of corporate entities. The situation has been crudely and precisely defined by Pamela Samuelson:

Complaints have been legion that copyright industry groups and corporate copyright owners have sought and too often obtained extremely strong and overly long copyright protections that interfere with downstream creative endeavors and legitimate consumer expectations (Samuelson, 2013: 740).

Due to the rise of the works performed by users from existing work, the importance of derivative works is increasing, and has been a concern for rightholders, when considering that those works were created infringing copyright, or a hope.

The linking nature of the Internet

Reselling or packaging works originally produced for a company without the explicit authorization of the authors (i.e., *Tasini et al. v New York Times Co.*) was another controversial legal point, and from the late nineties legal doctrine and the industry began diverging on the nature of hyperlinks:

The digital edition of newspapers and printed media began to be not a simple receptacle where the paper version was shoveled, but different contents than those of the analogic or traditional version, and [these online editions] gave different choices for interaction with the reader or user [...]. This demands to consider it a new work (Rodríguez Tapia, 2013: 55).³

After the European *Directive 2001/29/CE* it seems clear that, at the European level at least, to link to a website is not a reproduction of the work. The question has been settled in the European Union's doctrine by the so-called *Svensson* case (European Court of Justice, C-466/12): 'It must be observed that making available the works concerned by means of a clickable link, such as that in the main proceedings, does not lead to the works in question being communicated to a new public'. Moreover, the Court observed that, actually, the clickable links do not create a new public, so the authorization of the copyright holders is not needed.

³ 'La edición digital de los periódicos y medios impresos de comunicación empezó a no resultar un mero receptáculo donde sólo se volcaba en lenguaje binario el periódico en papel, sino a tener contenidos distintos de la edición tradicional o analógica y además brindó posibilidades distintas de interacción con el lector o usuario de dicha edición digital [...]. Exige hablar de una obra nueva o distinta, la edición digital'.

We should also consider the doctrine held by the Supreme Court of the United Kingdom in 2013, in the *Meltwater* case,⁴ in which the judges ruled that when opening an article via a website link was not a copyright infringement. In the court's opinion, 'to the extent that the customer downloads the report from the website he is making a copy that will infringe the newspaper's copyright unless he is licensed. In a document of 2012, however, the ENPA emphasized that 'newspaper publishers oppose any attempt by third players to introduce a new 'fair use' exception.

This opinion has been recently modulated in *GS Media BV v. Sanoma et al.* in September 2016. The CJUE held in this case that

Certain aspects of copyright and related rights in the information society must be interpreted as meaning that it is to be determined whether those links are provided without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are provided for such a purpose, a situation in which that knowledge must be presumed.

⁴ *Newspaper Licensing Agency Ltd & Others v. Meltwater Holding BV & others*, EWCA Civ 890 [2011].

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A PRESS PUBLISHERS' RIGHT

The authors' v. the publishers' rights? A need for compensation

For the time being, basically we have two models which regulate the relationship between authors and companies: one, to assign copyright to the publisher, so the journalist receives a fixed monetary payment, a salary (and sometimes some general compensation for further reproductions of the work); the other one is to assign copyright to journalists, so their incomes consist of a combination of a fixed wage plus variable royalties. The authors, accordingly to the risk-sharing approach, are in favor of assigning copyright to the publisher to ensure copyright protections of the works in the market.

The tension between authors and companies – not to mention users – is well exemplified by the debate around the *Public consultation on the role of publishers in the copyright value chain and on the 'panorama exception'* launched by the European Commission in March 2016. The press publishers' right is an ancillary or neighboring right in whose favor the European newspaper publishers are fighting. European associations are split in two, since at the beginning of 2016 the publishers of eleven countries decided to (supposedly amicably) leave the European Newspaper Publishers' Association (ENPA) and create News Media Europe (NME). News Media Europe, the newly created newspaper association in the continent, has as its main goal is to create a concentration of powerful printed media to face the new challenges of digitization.

Anyway, since the enacting of the so-called *Loi Hadopi* in France, in 2009, similar solutions, even if based in different legal rationales, are in use in the Civil Law countries. According to that reform of the French *Intellectual Property Code*, the economic or exploitation rights on the collective work, namely on newspapers (and on their online editions)⁵ and on the individual works that

⁵ This is quite meaningful how some CEO of media companies make a distinction between the printed newspaper and the online edition of it, disregard the fact that both of them share contents and that a digital-first strategy is changing the symbiotic relation of both of them, instead of the shovelware strategy that was under the all-for-free editions of those newspapers on the World Wide Web until relatively recent times. Luis Enríquez, then CEO of the Spanish Vocento group and one of the promoters of the legal reform of the *Intellectual Property Act* of Spain in 2014 (more concretely, the so-called 'Google tax' or 'AEDE canon' we will explain in another part of this chapter) explained that difference in January 22, 2016: A newspaper is, in his opinion, 'a work that hierarchically compiles, contextualises and develops the information generated over the course of 24 hours' whilst the website is 'an outlet that satisfies people's need for information in real time' (see <http://www.esade.edu/web/eng/about-esade/today/news/viewelement/319507/1/luis->

compose it are considered to be assigned in origin to the corporate person through labor contract.

In both legal traditions, Common Law (identified with the so-called ‘copyright system’, considered to be more ‘entrepreneurial’) and Civil Law (identified with the ‘authors’ rights’ system and considered to be more inclined to protect individuals) this protection of the corporate entities is achieved through the qualification of some work as ‘collective’, for instance a newspaper or a webpage. This has led to some scholars, for instance Lionel Bently and B. Sherman distinguish between *authorial works* and *entrepreneurial works* (Bentley and Sherman, 2014: 32).

There is a clear movement towards the usual attribution of primary rights to the employer – which is not to be considered a full author, since this is a category reserved to ‘natural persons’ – in the Civil Law area. The clearest case is France, where the reform of 2009 has led to an automatic assignment of all the economic rights of exploitation – and secondary exploitation – of a news article to the employer in exclusive terms, globally for a news company (‘titre de presse’), which includes both printed and web versions (article 20 of the French *Intellectual Property Act*). The reform attributed to the employer the exclusive rights of exploitation of the works produced by an employee journalist, and allowed the reproduction of the work in other media for a period fixed by agreement between the parties or taking into account the timing of the original support. That is, a newspaper article may be reproduced for 24 hours on the website of the group and an article in a weekly newspaper for a week, and the journalist is not entitled to claim compensation other than his salary. It also provides for the possibility of individual or collective agreements, but, at the same time, a collective agreement makes possible to assign the exclusive right to a group (a ‘*même famille cohérente de presse*’).⁶ This could be a model for the announced press publishers's right; the other could be the model of the audiovisual work producers, which equally makes and attribution of exclusive exploitation rights to the produce of the joint work, but still, this right carefully

enriquez,-ceo-of-vocento,-at-esade:-new-readers-consumption-of-information-is-a-problem-not-only-for-publishers-but-also-for-society).

⁶ The Syndicat des Journalistes Françaises, not surprisingly, did not received the reform well: ‘L’éditeur peut obliger le journaliste à produire, en plus de ses articles, des photos et des reportages audiovisuels (vidéo et radio). Cette nouvelle organisation du travail n’a fait l’objet d’aucune négociation entre éditeurs et syndicats’. Moreover, ‘les journalistes ne sont pas opposés à la convergence des médias, qui doit être une formidable opportunité pour produire de véritables reportages de qualité, mêlant texte, image et son, apportant de la valeur ajoutée sur chacun des supports, une nouvelle dimension et une nouvelle profondeur à l’information, and they appose to the reform arguing that ‘les éditeurs n’ont vu que l’opportunité [...] de vendre la même information plusieurs fois sur tous les supports et donc de multiplier leurs profits’.

protects those of the individual authors, and not just the moral ones, which are equally important as well (especially, paternity and integrity rights; these rights are waivable in the case of hired journalists in the Common Law European countries), but most especially the exploitation rights on the individual contributions to the joint work. Authors - the director of the film, the script writer and the music composer - are distinguished as full authors, the producer is not.

The most relevant doctrine on this aspect is to be found in the *Luksan case* (*Martin Luksan v. Petrus van der Let*, CJUE C-277/10) of February 9, 2012, in which the Court of Justice of the European Union held that the director of the audiovisual work, in this case Martin Luksan's documentary *Fotos von der Front* (Luksan was also the script writer), could not be denied to reserve for himself the exploitation rights on the online dissemination of the work. In some way, this is a similar case to those regarding journalists' secondary exploitation of their work on CR-ROM or online during the 1990s: a producer is not entitled, according to this relevant case, to enjoy all the exclusive exploitation rights on the work produced under his or her supervision, even less when, as in the agreement signed by Martin Luksan and producer Petrus van der Let, the online exploitation of the work was explicitly reserved for the author.

These days, this seems to be the maximum affordable, at least in Civil Law tradition, without modifying and forcing the essence of *droit d'auteur*. Are we, instead, when accepting to enact a press publishers' right, moving towards an attribution of full authorship recognition for corporate entities?

The movements behind these insistent claim on having exclusive control on their contents ('an exclusive right for publishers', Kala, 2016 [on behalf of the European Newspaper Publishers' Association]: 3).

On the contrary, the main journalists' association, the International Federation of Journalist, keeps a campaign alive in favor of their authors' rights, and, for instance, in a contract model launched to avoid abusive contractual terms, freelancers are encouraged to negotiate a clause:

All author's rights in the work shall remain with author who will retain their exclusive rights. The licence granted to publish or broadcast will be limited to the first publication/broadcast only. Unless there is express written agreement to the contrary, the licence shall expire 3 months after the delivery date referred to in clause 2 and once the license has expired publisher/broadcasting company shall destroy all copies of the work. Any modification of the work shall be subject to prior authorisation by author.

The strategy has not been, so far, much successful for journalists. the European Commission to Parliament: : 'Fair compensation of authors and

performers [is a] mechanism [which] includes the regulation of Certain contractual practices, unwaivable remuneration right, collective bargaining and collective management of rights’ [COM (2015) 626 Final].

Another issue can be concerned as well, the so-called *collection right*, recognized in Spain and in Greece ‘with respect to the ownership of photographs published in a newspaper or periodical, that these cannot be lent or published in a book or album by the employer without the employee’s consent’. The French *Intellectual Property Code*, article L. 121-8, as reformed in March 30, 2009, is also an important milestone:

Pour toutes les oeuvres publiées dans un titre de presse au sens de l’article L. 132-35, l’auteur conserve, sauf stipulation contraire, le droit de faire reproduire et d’exploiter ses oeuvres sous quelque forme que ce soit, sous réserve des droits cédés dans les conditions prévues à la section 6 du chapitre II du livre Ier. Dans tous les cas, l’exercice par l’auteur de son droit suppose que cette reproduction ou cette exploitation ne soit pas de nature à faire concurrence à ce titre de presse.⁷

Even in the Common Law tradition, anthologies are an important source of incomes, so authors’ societies recommend to be extremely careful when negotiating a publishing contract.

⁷ *Titre de presse* is understood in a wide sense: ‘Art. L. 132-35. – On entend par titre de presse, au sens de la présente section, l’organe de presse à l’élaboration duquel le journaliste professionnel a contribué, ainsi que l’ensemble des déclinaisons du titre, quels qu’en soient le support, les modes de diffusion et de consultation. Sont exclus les services de communication audiovisuelle au sens de l’article 2 de la loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication. Est assimilée à la publication dans le titre de presse la diffusion de tout ou partie de son contenu par un service de communication au public en ligne ou par tout autre service, édité par un tiers, dès lors que cette diffusion est faite sous le contrôle éditorial du directeur de la publication dont le contenu diffusé est issu ou dès lors qu’elle figure dans un espace dédié au titre de presse dont le contenu diffusé est extrait. Est également assimilée à la publication dans le titre de presse la diffusion de tout ou partie de son contenu par un service de communication au public en ligne édité par l’entreprise de presse ou par le groupe auquel elle appartient ou édité sous leur responsabilité, la mention dudit titre de presse devant impérativement figure’.

3

AS A WAY OF CONCLUSION:
WHICH IS THE FUTURE OF COPYRIGHT FOR NEWS REPORTING?

The historical evolution and current trends in the legal movements of reforms during the first two decades of the twenty-first century showed us that, to a great extent, there is a tension amongst creators (authors) and investors (producers), with some particularities in the case of the news: investors can even be considered authors, in the case of the Common Law tradition, or semi-authors when applying to them the category of juridical persons in the Civil law tradition. The question of status of legal entities is one of the first set of categories that becomes evident, applying the techniques of grounded theory: authorship is not so easy to define.

We have insisting in this report in one of the most sensitive topics when dealing on copyright on news reporting: how to share rights between the producer of the collective work (a corporate or legal entity) and the individual author of each work published in the collective work. We fully agree with M. Krestchmer and F. Kawhol, that ‘the creator has little to gain from exclusivity [...] little to gain from transferability [...] and a lot to gain from the so-called *droit moral*’ since ‘investors want exclusive and transferable property rights to extract maximum returns from their investments, exclusive rights [which] come at a cost to society’.

The position of the most important European scholars is, in this respect, categorical:

Copyright law is linked to the freedom of the authors to create and should remunerate the creative authors in first instance. Therefore copyright law should not grant rights *ab initio* to persons other than the individual creators. This principle (the *author principle*) applies to the exclusive rights within the copyright bundle [...]. We believe copyright is not the correct instrument by which to confer rights on legal entities to protect their investments (European Copyright Society, 2015: 2).

The most relevant European scholars on intellectual property have posed how newspaper publishers are adding a ‘highly problematic extra layer of rights’, as a study conducted by Martin Kretschmer, Séverine Dusollier, Christophe Geiger and P. Bernt Hugenholtz in 2016 states (European Copyright Society, 2016: 6). In their opinion, this way is difficult to effectively apply since it could cause an increase of transaction costs and more confusion for users. Users are in no-man’s land. As it was evident in the preamble of the reform of the German Law on Intellectual Property 2014, any legal reform that is made ‘should not be

understood as a legislative form of protection of old and outdated business models'.⁸

The International Federation of Journalists is of the same opinion, since in a press note dated in 2015 affirmed that 'the principle of freedom of contracts in this case will allow the stronger party such as media conglomerates to exploit the weaker party during the negotiation process, and the reality is that journalists are often forced to sign away all their authors' rights to their employer with no hope for further remuneration when their work is reused on different formats or in different titles.'

Even when the user-generated (or derived) content is protected, as it has been enacted in Canada in 2012, it is guaranteeing that the economic interest of the original author or copyright holder of the original work upon which the derivative, user-generated one is created is preserved.

Some reform directions have been suggested for copyright law: such an integral reform seems to be impossible or incomplete. William Patry proposes shorter copyright terms. Compensation (for instance, through compulsory licenses or collective licensing), instead of exclusivity, is another recommendation by William Patry. A more flexible use of fair use has been proposed as well (opposed to the Civil Law doctrine, adopted by the European Union, of a closed list of exceptions). Contractual and technical measures to prevent unlawful uses of works on the public domain, which makes more difficult the creation of commercial derivative works, are another way.

In these days, the question is whether intellectual property is still a good legal solution to a full-digital market. At a seminar on the subject that we held at the University Pompeu Fabra in November 2014, one of the conclusions reached by the participants was precisely that legislation can lead to expensive unforeseen results and that it would be preferable to the legislator to structure the law as to remove impediments to reach private agreements, and would therefore be better to promote minimization of transaction costs. Béatrice Dumont and Peter Holmes proposed some alternatives to intellectual property, based on the *public knowledge commons*. This is an idea perfectly feasible for news as a cultural heritage (see Vaver, 1988: 289), and the massive digitization projects launched by many public libraries meet the obstacle of authors' rights of works produced by journalists decades. The attribution of subsidiary or ancillary rights to the companies block the possibility for the users of producing derivative works. proceed.

⁸ In 2014, Richard Foster, Senior Faculty Fellow of the School of Management of Yale University stated that 'the Internet and all that it has wrought – from immediacy to interconnectivity – have wreaked havoc on the revenue models of news organizations and rendered their cost structures antiquated and obsolete' (Foster, 2014: 1).

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