



Spanish IP Proposal Targets U.S. Internet Firms (March 2014)

On February 14, 2014, the Spanish Council of Ministers approved a partial reform of Spanish intellectual property law and sent the document for consideration by the Parliament. A troubling provision – reportedly added in a procedurally unconventional manner at the eleventh hour – targets U.S. search engines and other news aggregators for discriminatory treatment. The provision, which subjects normal Internet search “snippets” to a special tax, is nearly without precedent internationally. As CCIA has argued in previous Special 301 submissions, established international copyright rules prohibit nations from restricting the right to quote. Thus, the Spanish IP revision would not only undermine market access for U.S. companies and distort established copyright law, but also violate the EU and Spain’s treaty and WTO commitments.

Q. Why is the proposed law problematic?

A. The bill would restrict the ability of Internet search engines in Spain to provide basic news aggregation and search functionality in the same manner as elsewhere in the world. It appears to require that each time a website provides even a small snippet of a newspaper article, and links to the publisher’s site, the search engine must provide compensation. It also subjects the reuse of any photo to permission from the news publisher, *whether protected by copyright or not*, after the photo is posted to any “periodically updated” website.

This upends how the Internet – and copyright law – ordinarily operates. In the United States and nearly all other jurisdictions, such showing of a snippet is considered to be permissible either under an exception to copyright law – *e.g.*, because it is considered a fair practice, fair use, or fair dealing of the copyrighted work – or because the copyright owner is considered to have granted its implied consent to showing such snippets (because it has made its work available on the Internet and is not blocking its work from being indexed by search engines). Online publishers may at any time opt-out of the display of text or images on search tools, with the “Robot Exclusion Protocol” commonly employed by websites. The bill would deviate from this international consensus. It would instead mandate that the search engine or other sites showing news snippets pay royalties – presumably through collecting societies.

Q. What does the proposed law actually say?

A. The full text of the proposal is (informal translation):

“The making available to the public by electronic service providers of non-significant fragments of aggregated content which are disclosed in periodic publications, or on websites which are regularly updated, for the purposes of information, the creation of public opinion or entertainment, shall not require authorization, without prejudice to the editor’s right, or if appropriate, other right holders,

to receive fair compensation. In all cases, the making available to the public by third parties of any images, photographic works or mere photographs disclosed in periodic publications or on websites that are regularly updated, is subject to authorization.”

“Notwithstanding the provisions of the preceding paragraph, the making available to the public by service providers that provide instruments to search for isolated words included in the content indicated in the preceding paragraph is not subject to authorization or fair compensation provided that such making available to the public is not for commercial purposes and is strictly limited to what is essential to offer search results in reply to queries made by a user on a search engine and provided that the making available to the public includes a link to the website from which the content originated.” (all emphasis supplied).¹

Although this language is hardly a model of clarity (in Spanish or English), the *first paragraph* appears to create a compulsory license governing all text content, notwithstanding the right to quote, and would presumably be followed by the designation of a European collecting society empowered to demand royalties from Internet companies. The *second sentence* of the *first paragraph* appears to prohibit any search indexing of images. Conspicuously, this paragraph is not limited to copyright-protected content, and at least on its face also seems to regulate public domain content. The *second paragraph* appears to carve out non-commercial search engines, which would presumably not apply to any U.S. businesses.

Q. What is the process and timing?

A. The next step for such a bill to advance is normally a discussion in the Spanish Parliament. The Spanish Government has reportedly sought to use procedures to expedite parliamentary consideration of the bill, and given the current Spanish Government’s parliamentary majority and the support of large local newspapers, this proposal could be approved before elections later this year. The Spanish Government’s reported objective is to get the proposal approved before the summer.

Q. How is this inconsistent with Spain (and the EU)’s treaty and trade commitments?

A. Contrary to established international law, the bill creates a new “neighboring right” that empowers a specific set of copyright-holders to tax search engines and news aggregators for content that long-standing copyright policy has explicitly excluded from protection.

- **Berne Convention/TRIPS:** Copyright protects *original* works. This bill, however, protects *any* content posted by a news publisher (or a blogger), regardless of its originality, quality, or creativity. The Berne Convention specifically limits authors’ rights to “*their* literary and artistic works”. (art. 1) At the same time, quotations have been one of the few *mandatory* limitations on copyright. Since its inception in 1886, the Berne Convention has encouraged free quotation. Today, Article 10(1) of Berne provides: “It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of

¹ See Proyecto de Ley por la que se modifica el Texto Refundido de la Ley de Propiedad Intelectual, art. 32 (original Spanish at: http://www.congreso.es/public_oficiales/L10/CONG/BOCG/A/BOCG-10-A-81-1.PDF#page=1).

press summaries.”² As CCIA has previously argued in Special 301 proceedings,³ restrictions on the quotation right violate international obligations. This provision of Berne is incorporated in TRIPS.⁴ Thus, TRIPS imposes a mandatory, affirmative obligation on WTO Members to permit anyone to quote from a work that is already lawfully publicly available. The Spanish snippet tax would abrogate this right.

- **EU Principles:** The bill even appears to contravene EU legal principles safeguarding the right to impart and discover information – a function at the heart of the Internet. Last year, the European Court of Justice held in *Sky Österreich*⁵ that the right to show television excerpts in the course of news reporting for public information trumped property interests in the program content being excerpted.
- **Discriminatory, Protectionist Intent:** The bill discriminates between quotation offline and online, highlighting that the intent is to target Internet companies to benefit local publishers. Indeed, it is widely referred to as the “Google tax”, and follows on a similar effort by German legislators last in 2012.⁶

Recent Media Coverage of the Issue:

- Spain’s cabinet OKs ‘Google tax’ on Internet content, *ANSamed*, http://www.ansamed.info/ansamed/en/news/sections/politics/2014/02/14/Spain-cabinet-OKs-Google-tax-Internet-content_10077998.html
- Spain’s Launches ‘Google Tax,’ Attacks Piracy Linking Sites, [sic in original], *Variety* (blog), <http://variety.com/2014/digital/news/spains-launches-google-tax-attacks-piracy-linking-sites-1201105933/>
- Spain approves content tax for search engines, *Advanced Television*, <http://advanced-television.com/2014/02/17/spain-approves-content-tax-for-search-engines/>
- Spain to force search engines to pay to display some content, *Reuters UK*, <http://uk.reuters.com/article/2014/02/14/uk-spain-intellectualproperty-idUKBREA1D1NS20140214>
- Spain Greenlights Measure for Newspapers to Charge Search Engines..., *Hollywood Reporter*, <http://www.hollywoodreporter.com/news/spain-greenlights-measure-newspapers-charge-680584>

² Berne Convention for the Protection of Literary and Artistic Works, art. 10(1), amended Oct. 2, 1979.

³ See, e.g., Comments of CCIA, Dkt. No. USTR-2010-003, filed Feb. 16, 2010, at 5, available at <http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/00000000321/CCIA-2010-Spec301-cmts.pdf>; (if a Berne Contracting Party “were to prohibit the making of quotations from newspaper articles, for example, this would constitute denial of ‘adequate and effective protection’ under § 2242(a)(1), possibly necessitating identification as ‘acts, policies, or practices’ having actual or potential impact on relevant United States products.”); see also Comments of CCIA, Dkt. No. USTR-2012-0022, filed Feb. 8, 2013, at 11-12, available at <http://www.ccianet.org/wp-content/uploads/library/CCIA%20Comments%20on%20Special%20301%20%5b2013%5d.pdf> (“By virtue of Berne’s incorporation in TRIPS, Article 10(1) imposes a mandatory, affirmative obligation on WTO Members to permit anyone to quote from a work that is already lawfully publicly available”).

⁴ TRIPS Agreement, art. 9 (“Members shall comply with Articles 1 through 21 of the Berne Convention (1971)”).

⁵ C-283/11, 22 Jan. 2013, para. 35 to 40, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=132681&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=83010>

⁶ For further discussion of the German proposal, see Matt Schruers, *Germany Looks to Prop Up News Publishers With Snippet Subsidy, but is a Quotation Tax Legal?*, Nov. 14, 2012, <http://www.project-disco.org/intellectual-property/111412-germany-looks-to-prop-up-news-publishers-with-snippet-subsidy-but-is-a-quotation-tax-legal/>