News aggregators and copyright - from litigation to agreement?

An example of Google News

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Thesis submitted for assessment with a view to obtaining the degree of Master in Comparative, European and International Laws (LL.M.)
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THESIS SUMMARY

At the moment, no copyright statute refers to news aggregation. It is not surprising then that news aggregators present a challenge for any court having to deal with any aspect of their activity. Indeed, with any particular form of aggregation there are a number of competing interests at play: the copyright holder, the aggregator, the reader and the public at large.

So far, there were only two suits against Google Inc. based on copyright infringement concerns from Google News, one in the US and one in Europe, but they revealed a lot of problems that existing copyright law may have with news aggregators. The first claim (brought in 2005 in the United States) where the claimant Agence France Press claimed that Google Inc. was reproducing and publicly displaying AFP's photographs, headlines, and story leads on Google's news aggregation website without AFP's permission, resulted in a settlement (after 2 years in court). But the case brought against Google in Europe in 2006 by Copiepresse (the collective management organization for Belgian newspaper publishers in French and German languages) found that Google had infringed copyright law.

Interestingly, after the court door was broken down, a new practice regarding Google News appeared: in Germany, France and Belgium leading newspaper publishers had called on their governments to adopt a law to force internet search engines like Google to pay for displaying their content on services such as Google News. Consequently, agreements with Belgian and French governments were concluded by Google. In Germany, a new law passed granting news publishers a new neighbouring right pushing Google to pay a licensing fee even for the snippets of content used to display search results (in force as of 1st of August 2013).

The main issue both courts and legislators have to address when dealing with Google News is the question whether short fragments of news works along with their headlines and titles (so-called 'snippets') are protected by copyright or not. This touches one of the basic concepts of copyright law, i.e. copyright originality, not understood identically within copyright jurisdictions over the world, and challenged additionally, at least in the EU, with recent decision of the ECJ in *Infopaq* where the court found that a fragment of news article consisting of 11 words may be protected as an independent work. The impact of the *Infopaq* ruling should not be underestimated: even in the UK, where short forms of creative activity like titles or headlines, have not been traditionally protected under copyright, a recent ruling in *NLA v. Meltwater* concluded that news headlines may be copyrighted.

Assuming that Google News is involved in acts of exploitation of copyrighted works, the other important question arises that is whether any limitation / exception provided by copyright law is applicable to this service. What can come into play in this regard are (1) the exception of quotation, (2) the exception for report on news events, and (3) the fair use defences.

INTRODUCTION

I. News industry and online news aggregation

The Internet can be viewed as a huge library of interconnecting databases. However, although the library is constructed using a common language (HTML[1]), there is no electronic library catalogue within it to facilitate searching for the information. Visiting many separate websites to find out the content sought for can take a long time.

The best tool that users can rely on in this situation is a search engine, a software program that automatically accesses thousands of websites (collections of webpages) and indexes them within an index database, allowing users to track down what they are looking for[2]. Internet users have at their disposal not only general but also specialized search engines, in particular news aggregators. Aggregation technology allows to consolidate many websites into one page that can show the new or updated information from many sources. Aggregators reduce the time and effort needed to regularly check websites for updates, creating a unique information space.

[1] Hyper Text Markup Language, the main markup language for creating web pages and other information that can be displayed in a web browser.
[2] *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d 701, 720 (9th Cir. 2007).

A news aggregator can be defined as a website that takes content such as news headlines, blogs, photographs, podcasts, and video blogs (vlogs) from multiple sources and displays it in a single place for easy viewing[3].

Existing online news aggregators take many forms. Usually they are grouped into four categories: feed aggregators, specialty aggregators, user-curated aggregators, and blog aggregators[4]. *Feed aggregators* display contents from a number of different websites organized into various 'feeds' and typically arranged by topic, source or story. The best known examples of news aggregators such as Google News[5] or Yahoo! News[6] fall under this category. *Specialty aggregators* collect information from a number of sources but only on a particular topic or location. *User-curated aggregators* are websites that feature user-submitted links and portions of text taken from other sources. *Blog aggregators* are websites that use third-party content to create a blog about a given topic, sometimes offering also a commentary on it, and thus, involving to some extent the creation of new content. The most popular blog aggregator is the Huffington Post[7].

News aggregation websites started with sites where content was entered by humans. Most of news aggregation sites nowadays, on the other hand, are based on algorithms filling the content from a range of either automatically selected or manually added sources.

No matter what model of operation they employ, news aggregators always have at least one thing in common – they use third-party pre-existing contents such as newspaper articles, news headlines, blogs, podcasts, photographs or audiovisual recordings, that may be protected by copyright.

At the same time, along with their growing popularity, the social and economic significance of news aggregators comes into prominence. It is a truism to say that during the past few years the Internet has become probably the most important news source for people all over the world. Accordingly, the traditional media seem to be in

[3] Isbell K. (2010) *The Rise of the News Aggregator: Legal Implications and Best Practices*. Available at: http://cyber.law.harvard.edu/publications, last accessed 30 December 2013, 2.
[4] Isbell K. (2010), 1-5.
[5] https://news.google.com/.
[6] http://news.yahoo.com/.
[7] http://www.huffingtonpost.com/.

retreat. The Internet is harming the media business – the increased reliance on the Internet as a source of news has caused a negative trend in revenue of traditional news business. Aggregation sites are identified as the main reason for this: news aggregators by – as they are being accused of – free-riding on factual information gathered by traditional media organizations get profits from them and contribute to the industry's decline. Rupert Murdoch put it bluntly: *Producing journalism is expensive. We invest tremendous resources in our project from technology to our salaries. To aggregate stories is not fair use. To be impolite, it is theft. Without us, the aggregators would have blank slides. Right now content producers have all the costs, and the aggregators enjoy [the benefits]. But the principle is clear. To paraphrase a great economist, [there is] no such thing as a free news story.*[8]

The paradox, however, is that – although news aggregators are products quite emblematic of our times where the Internet and digital technologies have shaken the traditional ways of news production and distribution – the traditional news formats still provide the vast majority of content used by news aggregators. What is more, without the (pre-existing) content of news publishers, news agencies and broadcasters, news aggregators would make no sense at all.

At the same time, social impact of news aggregators cannot be underestimated. It sounds like another paradox but too much information kills information. By choosing and sorting information for Internet users news aggregators impose themselves as main players in the information society. Using news aggregators affords Internet users not only to save time needed otherwise to visit multiple news sites to get the searched information but it does much more for them: it allows users to obtain *all* the published news on a specific topic. In this way news aggregators enable people to get the overall picture of the situation related to a specific news and give them access to broad, diverse and comprehensive information. Moreover, news aggregators bring news to more people as information accessed through them reach a new public beyond the one that would be reached under the ordinary distribution. It is because thanks to news aggregators an article published in a local newspaper or in a minority

[8] Bunz M., *Rupert Murdoch: 'There's no such thing as a free news story'*, The Guardian, 1 December 2009, available at: http://www.theguardian.com/media/2009/dec/01/rupert-murdoch-no-free-news, last accessed 30 December 2013.

language can be easily accessed by foreigners, especially that Google offers automatic translation of all search results[9].

Indeed, with any particular form of aggregation there are a number of competing interests at play: the copyright holder, the aggregator, the reader and the public at large. Nevertheless, no copyright statute refers to news aggregation at the moment. For all the attention that news aggregators have received so far, no clear statement about their status has been made yet. Views differ considerably among academics and professional practitioners. Some of them claim that the activities of news aggregators are not legal at all. Others are in a position to accept them but they are of the opinion that the appearance of news aggregators may require a re-assessment and adjustment of the copyright statutes. All, without exception, agree that the advent of news aggregators present a great challenge for current copyright laws worldwide.

II. Scope and aim of this contribution

The best example of news aggregators is Google News, a free news aggregator provided and operated by Google Inc. Meanwhile, Google News definitely represents one of the most interesting copyright-related series of cases over the last few years.

It is because Google News – as closest to the traditional conception of a news aggregator – has become the leader (if not to say the monopolist) on the market in this regard. As a result Google has been involved in a set of court cases, as well it has become the crucial player for governments in a task of reshaping the balance between copyright protection and public interest in accessing and spreading the news. In the meantime, almost all aspects of its activity has been examined, in different jurisdictions, on different grounds, and with different outcomes.

Consequently, further analysis of news aggregators in this dissertation will be limited to Google News service, and other examples of news aggregators will be analyzed only where their activity caused specific problem to law, not dealt with (or dealt with differently) on the occasion of Google News.

[9] Xalabarder R. (2012) *Google News and Copyright*, in: Lopez-Tarruella A. (ed.) *Google and the Law. Empirical Approaches to Legal Aspects of Knowledge-Economy Business Models*, T.M.C. Asser Press, The Hague, The Netherlands, 116-117.

The first chapter depicts the Google News service itself. It aims at showing what is a technical reality of the service, under what business model it is employed and why its operation has caused so many controversies. The second chapter is devoted to describing two main court cases that involved Google News, that is *Agence France Press v. Google Inc.*[10] and *Copiepresse SCRL v. Google Inc.*[11]. The third chapter describes the agreements reached over Google News between Google and Belgian newspapers, and between Google and French government. It analyses also a legislative measures that has been adopted (in Germany) and are being considered (in Italy) in response to Google News activity. Next two chapters discuss the problem of how current copyright law responds to news aggregators or, which is probably better formulation, what problems news aggregators have caused to the existing copyright law. Specifically, the fourth chapter addresses the problem of copyright in news works and the fifth chapter analyses possible copyright exceptions and limitations to be applied to news aggregators. Accordingly, first the copyright concept of originality and possible changes to it after the rulings of the Court of Justice of the European Union in *Infopaq* case[12] and of the UK courts in *Meltwater* case[13] are presented shortly. In light of this, the discussion of the problem of originality in news articles, extracts of news articles (so-called snippets) and news titles and headlines follows. Then, assuming that news aggregators are involved by means of their activity in reproduction and communication to the public of copyrighted works, it is considered whether these acts of exploitation may be exempted under a statutory limitation or as a fair use. In particular the exception of quotation, the exception for report on news events, the fair use defences and implied license concept are discussed. Finally, some conclusions and possible further developments follow.

[10] *Agence France Press v. Google Inc.*, No. 1:05-cv-00546-GK D.C.C. 17 March 2005, No. 1:05-cv-00546-GK D.C.C. 29 April 2005, No. 1:05-cv-00546-GK D.C.C. 19 May 2005, No. 1:05-cv-00546-GK D.C.C. 8 June 2005, No. 1:05-cv-00546-GK D.C.C. 12 October 2005, No. 1:05-cv-00546-GK D.C.C. 6 April 2007.
[11] *Copiepresse SCRL v. Google Inc.*, no. 06/10.928/C, The Court of First Instance in Brussels, 13 February 2007, No. 2007/AR/1730, The Court of Appeal of Brussels, 5 May 2011.
[12] *Infopaq International A/S v. Danske Dagblades Forening*, (C-5/08) [2009] E.C.D.R. 16.
[13] *Newspaper Licensing Agency Ltd and Others v. Meltwater Holding BV and Others* [2010] EWHC 3099 (Ch), [2011] EWCA Civ 890. *Public Relations Consultants Association Limited (Appellant) v. The Newspaper Licensing Agency Limited and others (Respondents)*, [2013] UKSC 18.

CHAPTER I

GOOGLE NEWS – HOW IT WORKS AND WHY SO CONTROVERSIAL?

I. Advent of Google News service

Google News[1] is a free news aggregator provided and operated by Google Inc.[2], selecting most up-to-date information from thousands of publications by an automatic aggregation algorithm[3].

Launched in September 2002, Google News was intended as a specific application of Google's general search engine, an English-language 'news service' to complement company's offer to Internet users. The introduction of Google News service was a part of American company's strategy to attract as much as possible of Internet traffic to websites of its own services and applications. Accordingly, Google News was introduced along with other improvements or specific applications of Google's general search engine – Google Images, Google Patents, Google Scholar. Additionally, other web-applications such as Gmail, Google Docs, Google Reader, Google Music, Google Calendar, a social network Google + and other combinations of services and content like Google Books, Google Maps, Google Earth, Google

[1] https://news.google.com/.
[2] An American multinational corporation specializing in Internet-related services and products, headquartered in Mountain View, California, founded on 4 September 1998.
[3] *Wikipedia, the free encyclopedia* on Google News, last accessed 30 December 2013.

Street View, Blogger, Google Sites and You Tube were introduced[4]. For the same purpose of attracting Internet traffic the Chrome web browser, the Chrome operating system and the Android operating system for smartphones and tablets are provided by Google. What is worth stressing, all of the aforementioned services are free of charge.

What is the reason then for implementing such a business policy? Google's reasoning is simple. The more Internet traffic is attracted to Google's websites, the more information about its users is collected by Google. This information is essential for Google as it is used to personalize advertising – giving away personal data necessary to subscribe and to use Google's services is the price that is paid by users for enjoying Google services for free. Then, the more services provided by Google, the more websites there are to place sponsored links. The more sponsored links are clicked, the more revenues for Google[5].

The idea of providing services for free and to generate income indirectly through advertising is not new but Google perfected it notably. What made Google's strategy particularly successful was the central idea underlying Google's business model that in today's knowledge economy information should be treated as a commodity[6]. And what is especially valuable is to structure and organize that information.

In Google's own words: *Google's business and mission is to organize the world's information and make it universally accessible and useful*. *Pursuant to its mission, Google offers a variety of information location tools that search the Internet for certain kinds of information, index or catalog such information, and permit users to find information of interest*[7].

Google News was introduced exactly as one of the tools serving the purpose of implementing Google's business model as pictured above. Today different versions of the aggregator are available for more than 60 regions in 28 languages, with continuing development ongoing. As of January 2013, service is offered in the

[4] A complete list of Google services and products is available at: http://en.wikipedia.org/wiki/List_of_Google_products, last accessed 30 December 2013.
[5] Lopez-Tarruella A. (2012) *Introduction: Google Pushing the Boundaries of Law*, in: Lopez-Tarruella A. (ed.) *Google and the Law. Empirical Approaches to Legal Aspects of Knowledge-Economy Business Models*, T.M.C. Asser Press, The Hague, The Netherlands, 5.
[6] Lopez-Tarruella A. (2012), 2.
[7] http://www.google.com/intl/en/about/company/, last accessed 30 December 2013.

following languages: Arabic, Cantonese, Chinese, Czech, Dutch, English, French, German, Greek, Hebrew, Hindi, Hungarian, Italian, Japanese, Korean, Malayalam, Norwegian, Polish, Portuguese, Russian, Spanish, Swedish, Tamil, Telugu, Thai, Turkish, Ukrainian, and Vietnamese[8].

As already mentioned, the Google News facility is a service free of charge. However, unlikely to other Google's products Google News does not contain any advertising, although ads do appear after a user searches for content within Google News. Yet, it must be remembered that this free service can only be provided thanks to the significant revenue Google generates as a result of the attractiveness of all its services and the horizontal sliding of revenue which this interactivity facilitates. In addition, the service re-enforces partnerships formed through Google's AdSense program[9].

II. Google News – how it works?

Google News aggregates news from news sources worldwide, groups similar stories together and displays them according to each reader's personalized interests, providing the readers with an array of stories from the day. The news are classified under several categories such as top stories, world, domestic news, business, technology, entertainment, sports, science and health. Users also have the ability to conduct key-word searches within Google News, personalizing the content most relevant to their interests. Google does not edit the content aggregated.

However, news are aggregated not in the form of full articles, but instead in the form of a headline from news sources worldwide, the leading line from the original story and a link to where the full article can be viewed. Thus, Google News does not tell the story, but it only tells people how to find the story.

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[8] *Wikipedia, the free encyclopedia*, last accessed 30 December 2013.

[9] *Google AdSense is a fast and easy way for website publishers of all sizes to display relevant Google ads on their website's content pages and earn money. Because the ads are related to what your visitors are looking for on your site – or matched to the characteristics and interests of the visitors your content attracts – you'll finally have a way to both monetize and enhance your content pages.* Google Ads (AdSense), available at: http://www.google.com/adsense/start/, last accessed 30 December 2013.

In Google's own words: *Traditionally, news readers first pick a publication and then look for headlines that interest them. We do things a little differently, with the goal of offering our readers more personalized options and a wider variety of perspectives from which to choose. On Google News we offer links to several articles on every story, so you can first decide what subject interests you and then select which publishers' accounts of each story you'd like to read. Click on the headline that interests you and you'll go directly to the site which published that story.*[10]

The service covers news articles appearing within the past 30 days on various news websites. In total, Google News aggregates content from more than 25,000 publishers. For the English language, it covers about 4,500 sites. The actual list of sources is not known outside of Google[11].

Stories to show from the online news sources are chosen by Google's own software. Articles are selected and ranked by computers that evaluate, among other things, how often and on what sites a story appears online. Google's 'web crawlers' (called 'googleboots') are employed to constantly and automatically search the Internet for new and relevant news stories, automatically create links to the stories, and automatically organize them on Google News site. Other criteria are freshness, location, relevance and diversity. As a result, stories are sorted without regard to political viewpoint or ideology and reader can choose from a wide variety of perspectives on any given story[12]. Internet users can consult the index by means of keywords entered in the search bar, the search engine then displays the reference lists of pages available including the keywords searched and proceeds to an automated classification.

The home page for Google News does not look like the home page for the usual Google search engines. The typical Google search engine home page starts with a blank form with a 'Search' button, in which the service's functions are initiated by a user input. Until the search is undertaken there is no information provided. In contrast the Google News home page looks more like a traditional newspaper with a multiple column layout, news headlines, news photos, story leads for the various news stories found on the page. However, a keyword search functionality that permits users to

[10] http://news.google.com/intl/en_us/about_google_news.html, last accessed 30 December 2013.
[11] *Wikipedia, the free encyclopedia*, last accessed 30 December 2013.
[12] http://news.google.com/intl/en_us/about_google_news.html, last accessed 30 December 2013.

search for news stories on a given subject, similar to the well-known search tool at www.google.com, is also available on Google News website (at the top of the page).

The stories featured on the Google News page contain a headline in bold and large letters. Below this is the name of the news website that published the story and a record of how many hours or days old the story is. Below this information is the story lead, being roughly the first 200 characters of the article. Below the story lead are two more headlines accompanied by the name of the news publication from which they came. Below these headlines are the names of other news web sites containing a similar story. To the left of this block of information is the section's most dominate feature, a photograph illustrating the news event being reported[13].

A user of Google News cannot read any news story, or meaningfully view any photograph, on Google News, but can do so by following the corresponding link displayed on Google News to the site hosting the story or photograph. Following the link, the user leaves the Google News website and is taken to the third-party website where the respective story or photograph is hosted and displayed. In short, a Google News user need only click on a headline link or thumbnail image link to be directed to the third party website hosting and displaying the news story or photograph of interest, respectively[14].

Google News, like other Google tools, follows widely publicized and known Internet standards, including standards allowing third party websites to 'opt out' of Google News. When site owners wish to give instructions to web robots they place a text file called robots.txt in the root of the web site hierarchy. It functions as a 'do not crawl' command. If this file does not exist, web robots assume that the web owner wishes to provide no specific instructions, and crawl the entire site. Google's website includes detailed instructions as to these standards[15]. Website operators therefore may exclude their websites and the content thereon from Google, either to various degrees or entirely, e.g., by preventing Google's 'web crawlers' from accessing the website and identifying the content thereon.

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[13] *Agence France Press v. Google Inc.*, No. 1:05-cv-00546-GK D.C.C. 17 March 2005, 27, No. 1:05-cv-00546-GK D.C.C. 29 April 2005, 27.
[14] Agence France Press v. Google Inc., No. 1:05-cv-00546-GK D.C.C. 19 May 2005, 19.
[15] https://developers.google.com/webmasters/control-crawl-index/docs/faq?hl=it&csw=1, last accessed 30 December 2013.

III. Google News – why so controversial?

Google News service concentrates so many aspects that almost all vital problems of current copyright law are in its orbit. From copyright point of view there are three elements in Google News that need to be distinguished:

(1) the Google News search engine
(2) the Google News website
(3) the Google Cache service[16].

What is interesting, but also telling us something about the current status of copyright law, all of these three aspects of Google News service caused many problems in practice. Google News search engine returns a series of results, ranked according to pre-defined algorithms. Typically, this series of results contains hyperlinks to the webpages on which the indexed content appears, a title, headline and short extract of text usually along with a thumbnail image from the subject webpage, and a link to the cached copy of the webpage. Google News website displays a pre-set compilation of links to the news stories available online. Google News copy cache service offers a link to a copy of the website based on the HTML code of that page at the time it was last indexed. At the top of the cached page will usually be a date and time stamp indicating when the cached copy was created and a disclaimer warning the user that the page may not be current. Through this service the user is able to access a newspaper article once it is no longer available on the original website.

By operating Google News service Google reproduces and communicates to the public titles, headlines and portions of news articles that arises to the claims that Google uses copyrighted works without authorization. This in turn poses questions about the notion of copyrighted work and its originality nowadays, as well as about what currently constitutes copyright infringement and which copyright exceptions and limitations might be applied to justify news aggregators' activity. In particular, the question originates whether reproduction of copyrighted material by Google News

[16] Xalabarder R. (2012) *Google News and Copyright*, in: Lopez-Tarruella A. (ed.) *Google and the Law. Empirical Approaches to Legal Aspects of Knowledge-Economy Business Models*, T.M.C. Asser Press, The Hague, The Netherlands, 114.

may be exempted under temporary copying as envisaged in Article 5(1) of the Infosoc Directive[17].

Next, displaying by Google links to the news stories leads to the controversy of legality of hyperlinking as it is not clear in existing copyright *status quo* whether hyperlinking may be considered tantamount to making available or communication to the public[18]. Given the different views on the actual legal nature of hyperlinking, guidance from the CJEU is keenly awaited – and probably it will deliver its opinion quite soon since there is a case pending before the CJEU regarding hyperlinking problem[19]. This judgment has a potential to turn out to be of fundamental nature for Google as a whole, not only Google News, as its business is built upon the hyperlinking architecture.

Then, Google Cache service also presents different issues. Mainly, it poses questions about the legal character of cached, meaning reproduced and stored, copies as they can hardly be deemed temporary, transient or incidental[20]. On the other hand, cache copying raises another, maybe even more important problem – there is ongoing discussion in Europe and elsewhere about the right to be forgotten, and Google Cache service is a clear, perfect example of a service which can be in conflict with this principle. It is easy to imagine a situation when an article in a newspaper infringed someone's personal rights, a newspaper required by the court to delete the article from its online edition complied with the court order, but – as Google displayed the infringing article on Google News – there is a cached copy of this article in the Internet still. What could be a solution to this problem then?

The complexity of Google News case is the result of the fact that it reflects many interests involved in this activity, and of very different nature. It seems to, at first sight, that this service is beneficial mainly to Internet users: showing snippets of text and linking users to the websites where the information resides is what makes search engines so useful. But, after all it is not just users that benefit from these links but

[17] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal L 167, 22/06/2001 P. 0010 – 0019.
[18] A hyperlink is a technical link between one webpage and another. Hyperlinks can link webpages on the same website or they can link webpages from different websites. In essence, a hyperlink is simply a set of directions for a web browser – when a user clicks on one, he says 'I want to go here now'.
[19] Case C-466/12 *Svensson*.
[20] To be exempted under Article 5(1) of the Infosoc Directive.

publishers do too – because Google drive huge amounts of web traffic to their sites. Obviously, also the other side of the coin exists. Firstly, it can be claimed that if the search engine and data aggregation providers are benefiting financially by way of earning advertising revenue from user interest in the rightholder's content, the rightholder should, as a matter of principle, share that benefit. Secondly, there is the fear that the rightholders will potentially suffer damage because users will be diverted from their webpages to other webpages on seeing advertisements and links sponsored by competitors. Thirdly, there is a fear that advertisers will be willing to pay less to advertise on the rightholder's webpage if users are going to data aggregation sites before arriving there. Finally, and maybe most importantly, there is a right of copyright holder to control how and where his content is used and accessed. Search engines and data aggregation providers necessarily weaken that control[21].

[21] Allgrove B., Ganley P. (2007) *Search engines, data aggregators and UK copyright law: a proposal*, European Intellectual Property Review 29(6), 229.

CHAPTER II

GOOGLE NEWS IN A COURTROOM

I. Introduction

Lacking clear answers in existing copyright laws, news aggregators present a challenge for any court having to deal with any aspect of their activity. Indeed, several lawsuits have been brought against news aggregators in different countries. The outcomes of them differ, unsurprisingly. Some of them were settled out of the court, before a final decision on the merits.

So far, there were only two suits against Google Inc. operating the biggest news aggregator – Google News, based on copyright infringement concerns, one in the United States and one in Europe, but they revealed a lot of problems that existing copyright law may have with news aggregators. For the purposes of further analysis both cases will be referred in details here.

II. *Agence France Press v. Google Inc*. (USA)[1]

The first case was held in the United States and it was brought by Agence France Press ('AFP') in 2005[2]. Agence France Press, the world's oldest established news

[1] *Agence France Press v. Google Inc.*, No. 1:05-cv-00546-GK D.C.C. 17 March 2005, No. 1:05-cv-00546-GK D.C.C. 29 April 2005, No. 1:05-cv-00546-GK D.C.C. 19 May 2005, No. 1:05-cv-00546-GK D.C.C. 8 June 2005, No. 1:05-cv-00546-GK D.C.C. 12 October 2005, No. 1:05-cv-00546-GK D.C.C. 6 April 2007.

agency that maintains a worldwide operation, sued Google Inc. for copyright infringement and misappropriation of hot news.

AFP is one of the world's foremost and largest wire services. AFP's 200 bureaus cover 150 countries across the world, with 80 nationalities represented among its 2,260 collaborators. The Agency operates regional hubs in five geographical zones, reaching thousands of subscribers from its main headquarters in Paris and regional offices in Washington, Hong Kong, Nicosia and Montevideo[3]. AFP supplies news stories, headlines, photographs and graphics to newspapers, radio, television, websites, news aggregators, wire services, governments, corporations, national and international agencies, and data services around the world. It transmits news in French, English, Arabic, Spanish, German, and Portuguese. The news is provided on a real time basis.

Wire services like the AFP generally do not distribute news freely on their own websites but they license their content to other news providers. AFP is not exceptional in this regard, it does not give away its content for free but has instead set up a worldwide marketing apparatus through which it licenses its material to customers, directly or through agents. It provides services either as a subscription, whereby AFP's wires are made available to its customers, or on an *a la carte* basis, whereby customers may purchase single news or photographs[4].

According to AFP, then, as AFP's headlines, story leads, and photographs were licensed content and Google did not pay any licensing fee, their reproducing and publicly displaying on Google News site (and so using the material in the exact same manner that AFP's subscribers) without AFP's permission or any form of license constituted copyright infringement.

AFP stated that its works were original copyrightable works and that it complied in all respects with 17 U.S.C. § 101, et. seq.[5] and had registered its copyrights in the works with the US Library of Congress's Copyright Office in accordance with its rules and regulations. Additionally, when put on the wire and properly published, AFP's works were accompanied by copyright management information ('CMI') – a credit line to

[2] http://www.afp.com/en/, last accessed 30 December 2013.
[3] http://www.afp.com/en/agency/afp-in-world/, last accessed 30 December 2013.
[4] *Agence France Press v. Google Inc.*, No. 1:05-cv-00546-GK D.C.C. 17 March 2005, 3.
[5] The Code of Laws of the United States of America (U.S. Code), Title 17 – Copyrights.

AFP and/or a copyright notice. 'AFP' as a watermark was also embedded in the bottom right hand corner of AFP's photographs[6].

AFP claimed that Google was simply copying its news stories with their headlines and photographs and replicating this material on Google News, and so – stealing AFP's product. In the opinion of AFP the manner and fashion of display on Google News was such that the vast majority of readers had no need to go any further then Google News to learn about a news story or view the news photograph depicting the news event. Moreover, when AFP's works were reproduced and displayed by Google, the AFP's copyright management information found at the original source and AFP watermark were removed each time[7].

AFP stated that Google was reproducing and publicly displaying AFP's protected content on its Google News pages continuously and willfully, and it had done so since the September 2002 launch of Google News. AFP declared that it had informed Google that it was not authorized to use AFP's copyrighted material and had asked it to cease and desist from infringing its copyrights in its works, but Google had ignored these requests and continued to violate AFP's copyrights[8]. In AFP's opinion Google had violated its copyright thousands of times, and since Google's infringements were ongoing and continuous, all new AFP's works were potentially infringed every minute of every day. However, as for an accurate count of infringements AFP said it could be determined only after discovery and review of all the stories and photos which had appeared on Google News[9].

AFP declared that Google's behavior unfairly competed with and injured AFP as using its protected works by Google was in direct competition with AFP and its paid subscribers and licenses.

Accordingly, AFP asked for an order enjoining Google from reproducing and/or publicly displaying AFP's photographs, headlines and story leads and requiring it to delete all copyrighted images and text owned by AFP from its computers or web servers. Since AFP got to know that Google had planned to license its news service

[6] *Agence France Press v. Google Inc.*, No. 1:05-cv-00546-GK D.C.C. 17 March 2005, 15.
[7] *Agence France Press v. Google Inc.*, No. 1:05-cv-00546-GK D.C.C. 17 March 2005, 15.
[8] *Agence France Press v. Google Inc.*, No. 1:05-cv-00546-GK D.C.C. 17 March 2005, 10.
[9] *Agence France Press v. Google Inc.*, No. 1:05-cv-00546-GK D.C.C. 17 March 2005, 11.

to third parties, it was seeking also for an order preventing Google from doing it. Additionally, AFP asked for $17 500 000 in damages[10].

In addition, by the amendment of the complaint filed to the Court on the 29th of April 2005, AFP claimed a tort of 'hot news' misappropriation[11]. AFP stated that it had generated and / or collected newsworthy information at a significant expense, that the collected news had great economic worth and the value of AFP's news was that they were highly time-sensitive. Thus, the AFP news photographs, headlines and lead sentences that Google had taken to display on its main Google News page were 'hot news' and usually less than 24 hours old. Consequently, Google's use of AFP's works constituted free-riding on AFP's costly efforts to generate or collect information.

Google disagreed and asserted counterclaims[12].

Google declared that Google News was a tool to help users identify and locate web pages containing news stories on a given subject. Google stated: *when users visit Google News at news.google.com, they view an index of hyperlinks ('links') to news stories, organized by topic to allow users to find quickly a variety of different sources for any given news topic. In order to identify the materials linked to, the links on Google News include (a) headlines along with, in some cases, a portion of the story lead, typically consisting of the first sentence of the story or less, but in any event fewer than 300 characters (including spaces) (the 'lead fragment'), and / or (b) very low resolution thumbnail images, fewer than 100 pixels by 100 pixels, that are small summaries of photographs associated with stories (the 'thumbnail links').*[13]

Google undermined that users could not read a news story or view a full photograph on Google News, but could only do so by clicking on the link provided, thereby leaving Google News and going to the independent web site on which the story or photograph was posted[14]. Furthermore, Google did not profit from inclusion of any particular headline, lead fragment, or thumbnail link in Google News.

[10] *Agence France Press v. Google Inc.*, No. 1:05-cv-00546-GK D.C.C. 17 March 2005, 16-17.
[11] *Agence France Press v. Google Inc.*, No. 1:05-cv-00546-GK D.C.C. 29 April 2005, 16-17.
[12] *Agence France Press v. Google Inc.*, No. 1:05-cv-00546-GK D.C.C. 19 May 2005.
[13] *Agence France Press v. Google Inc.*, No. 1:05-cv-00546-GK D.C.C. 19 May 2005, 1-2.
[14] *Agence France Press v. Google Inc.*, No. 1:05-cv-00546-GK D.C.C. 19 May 2005, 2.

Google averted that any use it had made of portions of works in which AFP allegedly owned copyright, if any, was entirely lawful. It denied that it had reproduced and publicly displayed anything that can fairly be said to be AFP's claimed photographs. Google further denied that headlines and story leads in AFP news stories contain copyrightable text. As for the 'hot news' misappropriation claim Google stated that its ranking algorithms ranked a story more highly if more independent news sources on the Internet were reporting on the subject of the news story, and that Google News published links to multiple sources of that news[15].

Furthermore, Google claimed that its use of AFP's works, that had allegedly infringed AFP's copyrights, was fair use[16].

Google further stated that, although it considered AFP's complaint to be without merit, since the filling of the AFP's complaint, it had endeavoured to exclude links to stories and photographs containing any information suggesting that AFP asserted an interest in the stories or photographs.

Finally, Google declared that it followed widely publicized and known Internet standards for permitting website operators to exclude, at any time, their websites and the content thereon from Google News and Google's other indexing and searching products[17]. Moreover, AFP had authorized or licensed the uses of its works, or exhausted the rights asserted therein, through AFP's agreements with its subscribers, allowing widespread Internet copying, distribution, and display of works and 'hot news' allegedly owned by AFP, including access by Internet indexing tools such as Google News. In Google's opinion AFP and its subscribers and licensees were aware that they had the ability to exclude their respective websites (and the content thereon) from being accessed or linked to by Google, in Google News. According to Google's information AFP subscribers, licensees and AFP itself did not employ 'opt out' tools or other standard files or protocols to preclude Google News from searching and indexing the content on websites allegedly including AFP copyrighted works, and thereby allowed Google News to create links to such sites. Thus, when website operators placed content, including AFP news stories, on their websites not requiring any password or otherwise restricting access, they were

[15] *Agence France Press v. Google Inc.*, No. 1:05-cv-00546-GK D.C.C. 19 May 2005, 14.
[16] *Agence France Press v. Google Inc.*, No. 1:05-cv-00546-GK D.C.C. 19 May 2005, 15.
[17] *Agence France Press v. Google Inc.*, No. 1:05-cv-00546-GK D.C.C. 19 May 2005, 9.

intentionally making that content available to be viewed by any of the millions of users with a computer and Internet connection[18].

On these grounds Google lodged to the Court the following counterclaims against AFP: (1) that AFP's headlines and parts of story leads or other text it alleged were infringed, were not copyrightable subject matter, (2) that Google's use of AFP's allegedly copyrighted works, if any, constituted fair use and otherwise was lawful, and (3) that Google's use of AFP's works was licensed or authorized by AFP. Consequently, Google prayed for judgment to be entered dismissing AFP's complaint and declaring that AFP owned no copyright in the headlines and portions of news stories, that Google had not infringed any AFP copyrights, and that Google's use of AFP's alleged works and 'hot news' was authorized or licensed by AFP and otherwise was lawful[19].

AFP responded with motion to dismiss Google's counterclaims. It stated that (1) Google was not linking to infringing material, on the contrary, it was directly infringing AFP's material by siphoning it off AFP subscribers' web sites and reproducing and displaying the material on Google News without authorization; (2) headlines and story leads, which were the most creative and important part of a news story, were not precluded from copyright protection by statute, regulation or case law; (3) by claiming that Google's use of AFP's works was authorized or licensed by AFP, and therefore lawful, Google essentially asked the Court to impose a new set of requirements on copyright owners that would alter and limit their fundamental rights under copyright law, namely that in order to maintain copyright on material posted on the Internet right holders must install electronic protective shields around their content or forfeit their rights[20].

Subsequently, Google filled to the court two separate motions to dismiss: the first, based on AFP's failure to identify with particularity all of the works it alleged Google to have infringed, and the second, a partial motion to dismiss AFP's claim for copyright infringement of AFP's headlines, on the grounds that the headlines constituted uncopyrightable subject matter. Furthermore, Google argued that AFP and its licensees could have easily opted out (by using robots.txt and metatags to

[18] *Agence France Press v. Google Inc.*, No. 1:05-cv-00546-GK D.C.C. 19 May 2005, 20.
[19] *Agence France Press v. Google Inc.*, No. 1:05-cv-00546-GK D.C.C. 19 May 2005, 29.
[20] *Agence France Press v. Google Inc.*, No. 1:05-cv-00546-GK D.C.C. 8 June 2005, 1-2.

prevent automatic indexation by Google's search engines). Google also insisted that its service increased traffic to the linked websites[21].

Surprisingly enough, after nearly two years of litigation and extensive discovery[22], AFP and Google settled the case[23]. The parties entered into licensing agreement that allowed Google to post AFP contents in full text (so not only snippets of articles but articles as a whole), including news stories and photographs, on its Google News aggregator as well as on other Google services. No further details or financial terms of the agreement were disclosed by either party, except that with the deal AFP had agreed to drop the lawsuit. Consequently, it was not clear whether the deal involved a flat fee or paying AFP according to traffic statistics. The agreement was said to be effective immediately[24].

It is worth noting here that in August 2006 Google forged a similar agreement with the Associated Press[25], an American multinational non-profit news agency headquartered in New York City[26]. The AP had not sued Google over news usage, but it had made noises that it would do so. Google had learnt the lesson from AFP's lawsuit and – probably to avoid another one from AP – the parties entered into negotiations that were under way for several months. Consequently, Google agreed to pay the Associated Press for use of its news stories and pictures. However, financial terms of the agreement were not disclosed[27]. Next, on 24 December 2009 Google stopped hosting AP news content on the Google News website due to

[21] *Agence France Press v. Google Inc.*, No. 1:05-cv-00546-GK D.C.C. 12 October 2005.

[22] As Google claimed that AFP failed to identify the allegedly infringed copied items, as well as the time of the copying, the parties agreed that they would select some dates, at random, within agreed period of time between 2003 and 2005, and Google would produce to AFP the contents of the Google News home page in English and in French for each day and hour of this period of time, and then AFP would identify each copyrighted headline, story lead and photograph owned by AFP that it contended to be infringed by display on Google News site. Both parties experienced some troubles with fulfilling the task, and the deadline for presenting the results of the discovery was postponed by the court several times. For the details of the case see the history of the case at: http://dockets.justia.com/docket/district-of-columbia/dcdce/1:2005cv00546/113951/, last accessed 30 December 2013.

[23] *Agence France Press v. Google Inc.*, No. 1:05-cv-00546-GK D.C.C. 6 April 2007.

[24] McCarthy C., *Agence France-Presse, Google settle copyright dispute*, CNET News, 6 April 2007, available at: http://news.cnet.com/2100-1030_3-6174008.html?part=rss&tag=2547-1_3-0-20&subj=news, last accessed 30 December 2013.

[25] http://www.ap.org/.

[26] McCarthy C., *Google Reveals payment deal with AP*, CNET News, 3 August 2006, available at: http://news.cnet.com/Google-reveals-payment-deal-with-AP/2100-1030_3-6102109.html, last accessed 30 December 2013.

[27] Similar agreement was entered into by Associated Press with Yahoo. For details visit: Krazit T., *AP, Yahoo strike content deal; AP, Google still talking*, CNET News, 1 February 2010, available at: http://news.cnet.com/8301-30684_3-10445322-265.html, last accessed 30 December 2013.

dispute over the licensing agreement[28]. On 30 August 2010 Google announced that the existing license agreement was extended, so new content from Associated Press is added to the Google News site again[29].

III. *Copiepresse SCRL v. Google Inc.* (Belgium)[30]

Copiepresse[31] is the collective management organization of rights of Belgian newspaper publishers in French and German languages authorized by the Ministerial decrees to exercise its activities on the territory of Belgium. Its aim is to defend the copyright of its members (rights of publishers and acquired rights from journalists) and to supervise the use by third parties of the protected work of its members. Copiepresse represents, among others, titles such as *La Libre Belgique*, *La Dernière Heure* and *Le Soir*. In 2006 Copiepresse sued Google for copyright infringement, arguing that the Belgian French Google News site (Google News Belgique), launched in 2003[32], breached copyrights and *sui generis* database rights of newspapers associated in Copiepresse[33].

By letter of 13 July 2006 Copiepresse notified Google immediately to remove the newspaper articles of the Belgian press which are present in Google News and the Google Cache. Google did not respond to this letter.

Consequently, by summons of 3 August 2006 Copiepresse stated that the activities of Google News and the use of the Google 'cache' notably violated the laws relating to copyright and related rights (1994)[34] and on the database (1998)[35]. Copiepresse

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[28] Pepitone J., *Google News stops hosting AP stories*, CNN Money, 11 January 2010, available at: http://money.cnn.com/2010/01/11/news/companies/google_associated_press/, last accessed 30 December 2013.
[29] Krazit T., *Google, AP reach deal for Google News content*, CNET News, 30 August 2010, available at: http://news.cnet.com/8301-30684_3-20015053-265.html, last accessed 30 December 2013.
[30] *Copiepresse SCRL v. Google Inc.*, no. 06/10.928/C, The Court of First Instance in Brussels, 13 February 2007, No. 2007/AR/1730, The Court of Appeal of Brussels, 5 May 2011.
[31] http://www.copiepresse.be/.
[32] http://news.google.be/.
[33] *Copiepresse SCRL v. Google Inc.*, no. 06/10.928/C, The Court of First Instance in Brussels, 13 February 2007, No. 2007/AR/1730, The Court of Appeal of Brussels, 5 May 2011.
[34] *Loi du 30 juin 1994 relative au droit d'auteur et aux droits voisins*. Moniteur belge, of July 27, 1994, pp. 19297 et seq.

asked for an order requiring Google to remove from all its sites all the articles, photographs and graphic representation of the Belgian daily press, French and German speaking represented by Copiepresse, dated from the notification of the order under penalty of a fine of €2 000 000 per day of delay, and additionally an order requiring Google to publish on the 'google.be' and 'news.google.be' home page the entirety of the judgment to be pronounced for an uninterrupted duration of 20 days from the date of the notification of the ruling under penalty of a fine of €2 000 000 per day of delay[36].

To evaluate the appropriateness of this complaint, the President of the Court of First Instance of Brussels had submitted to a preliminary expert the problem of Google indexing Copiepresse's articles on Google News pages. From his testimony, the court had determined that the way in which Google News operates causes the publishers of the daily press to lose control of their websites and their contents. The expert's report concluded that the service 'circumvents the advertising of the publishers who get a considerable amount of their revenue from these advertisements, and the use of Google News short-circuits many other elements such as reference to the publisher, reference to protection of copyright, and reference to the authorization or not of the use of the data'. Moreover, the Google 'cached' option equals to stocking the entire article with a view to redistribution and enabled by-passing of registrations (and the related payments) requested by the publisher for access to archived news[37].

Google Inc. failed to appear at the hearing of 29 August 2006, and so the order of the President of the Court was handed down solely taking into account Copiepresse's point of view and documents produced, including the unilateral expert report mentioned above.

On the basis of its findings, by ruling of 5 September 2006 (*'Prohibitory Injunction Order'*) the court found the Copiepresse claim admissible and withheld the expert's

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[35] Act of 31 August 1998 implementing in Belgian law the Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, M.B. 14 November 1998.

[36] *Copiepresse SCRL v. Google Inc.*, no. 06/10.928/C, The Court of First Instance in Brussels, 13 February 2007, 4.

[37] *Prohibitory Injunction Order* of 5 September 2006, to be found at: http://cdn.arstechnica.net/5133.pdf, last accessed 30 December 2013.

conclusion that Google News was an information platform: it concluded that the scheduling of information was left to Google's discretion as Google was the holder of the technology and the algorithm which permitted the automation and systematization of the reproduction of articles available on the Internet. The President of the Court noticed that the information was extracted from the press web servers without permission, and held that Google could not exercise any exception provided in the laws relating to copyright and neighbouring rights and in the law on database rights. It therefore found Google to be in breach of the newspapers' rights and ordered Google to remove publishers' content from all its sites (Google News and 'cache' Google under whatever denomination) within 10 days from the notification of the ruling under penalty of a fine of €1 000 000 per day of delay, and to publish clearly and without comment on its part the entirety of the judgment to be pronounced for an uninterrupted duration of 5 days within 10 days from the date of the notification of the ruling under penalty of a fine of €500 000 per day of delay on the 'google.be' and 'news.google.be' home page.

Google complied with the order within the time specified[38].

However, Google opposed the order, which entailed the review of the case by the same jurisdiction. Google asked the court to reconsider its decision and requested that the requirement to post the ruling on its home pages be suspended. The court on 22 September 2006 agreed to reconsider its ruling, but maintained the requirement that Google must post the initial judgment on its home pages for 5 days or face a fine of €500 000 a day[39].

Although the President of the Court reached a different conclusion previously, in the opposition procedure he agreed to Google's claim that Copiepresse was not entitled to act on behalf of its members with regard to database rights, as the Database Act of 1998 did not provide for such representation (contrary to the Copyright Act of 1994). Consequently, the President concluded that the case was not admissible as far as database rights were concerned, and that it would focus solely on copyright issues.

[38] Google Official Blog, available at: http://googleblog.blogspot.com/2006/09/about-google-news-case-in-belgium.html, last accessed 30 December 2013.
[39] *Copiepresse SCRL v. Google Inc.*, no. 06/10.928/C, The Court of First Instance in Brussels, 13 February 2007, 5.

By petitions in voluntary third party intervention submitted to the court in October and November 2006 the claimant Copiepresse was joined by the collective management organizations SCRL Société Multimédia des Auteurs des Arts Visuels (SOFAM)[40], Société de droit d'auteur des journalists (SAJ)[41], Société civile des Auteurs Multimédias (SCAM)[42], Assucopie[43] and the company Pressbanking SA[44]. However, at a later stage SOFAM and SCAM declared withdrawal from their proceedings, and Pressbanking's claim was separated to another court proceedings[45].

The submissions and pleadings were made at the public hearing of 24 November 2006.

On 13 February 2007 the Court of First Instance of Brussels ruled in favour of Copiepresse, and so confirmed the precedent ruling being opposed by Google, although with two minor amendments: (1) the case was rejected as far as database rights were concerned, and (2) the fines imposed in case of non-compliance were reduced to €25 000 per day[46]. As regards the claims of the two other claimants, i.e. SAJ and Assucopie, the court obliged Google to withdraw the infringing material from its sites (Google News and the visible cached web pages of Google web search engine). The court also set up a 'notice and take down' procedure, in order to enable the involved collecting societies to notify to Google which works were covered by copyright belonging to their members. Google was granted 24 hours as from notification of an infringement to delete the copies, under penalty of a fine of €1 000 per day in the event of non-deletion[47].

[40] Belgian collective management organization in the field of visual arts, http://www.sofam.be/.
[41] Belgian collective management organization representing journalists of the written press and of the audiovisual medias, http://www.saj.be/index.html.
[42] The company under French law representing directors, authors of interviews and commentaries, writers, translators, journalists, video makers, photographers and illustrators from audiovisual, radio and new media sectors, http://www.scam.fr/fr/Accueil.aspx.
[43] Belgian collective management organization representing academic, scientific and university authors for the management of their reprography rights, http://www.assucopie.be/.
[44] 'Press clipping' company disseminating electronically to its customers press articles from Belgian daily and periodic press in French, Dutch, German and English, according to customers' requests http://www.pressbanking.com/main/home.
[45] *Copiepresse SCRL v. Google Inc.*, no. 06/10.928/C, The Court of First Instance in Brussels, 13 February 2007, 10.
[46] *Copiepresse SCRL v. Google Inc.*, no. 06/10.928/C, The Court of First Instance in Brussels, 13 February 2007, 30-31.
[47] Laurent P. (2011) *Copiepresse SCRL & alii v. Google Inc. – In its Decision of 5 May 2011, the Brussels Court of Appeal Confirms the Prohibitory Injunction Order Banning Google News and*

The Court analyzed Google's 'cache' system separately from the Google News service and found that both of them infringed the copyrights in the press articles.

As far as Google Cache was considered, the Court stated that this practice was equal to copying the content of the publishers' webpages to Google's servers and allowing the search engine's users to access the copies of works. In court's opinion these acts amounted to reproduction and communication to the public of Copiepresse's authors works. By doing this without the consent of copyright owners, Google was found to be infringing authors' rights.

Turning to the Google News practice, the court first noted that one of the main points of disagreement between Google and Copiepresse was the qualification of the Google News service. Google was contending that its service works as a specialized search engine and is based on an automatic indexation of press articles available throughout the Internet. Moreover, Google was of the opinion that the elements that were automatically extracted from the press websites were not protected by copyright. From Copiepresse's point of view Google News was far more than a search engine but consisted of a real information portal that was fed by unauthorized copy-pastes from the journal's websites[48].

Surprisingly enough, the court was not analyzing the qualification of the service but rather focused on the content extracted from the press websites in order to assess whether it might be protected by copyright. The court indicated that the length of articles' extracts did not matter in terms of copyright and that a title might be protected as long as it was original. The court also stressed that the reproduction of snippets of protected works without having the authorization of copyright owners might constitute copyright infringement as long as the copy encompassed elements that made the work original. The court concluded that by reproducing titles and short abstracts of articles Google reproduced and / or communicated copyrighted works to the public. Moreover, the court found that not only economic but also moral rights of

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Google's 'in cache' function, Computer Law & Security Review 27, 543, available at: http://www.crid.be/pdf/public/6845.pdf, last accessed 30 December 2013.

[48] Laurent P. (2007) *Brussels High Court confirms Google News' ban – Copiepresse SCRL v. Google Inc. – Prohibitory injunction/stop order of the President of the High Court of Brussels, 13 February 2007 [opposition procedure against the first default stop order by the same President]*, Computer Law & Security Report 23, 291, available at: http://www.crid.be/pdf/public/5512.pdf, last accessed 30 December 2013.

attribution and integrity of copyright holders were being infringed by Google's activities, as the names of the authors were not mentioned on Google News and reproduced parts of articles constituted modifications that were brought to the works without respecting the authors' opinion.

Google's defense line was based on several copyright exceptions, in particular exception for quotations and exception for report on news events. However, the court rejected both exceptions and stated that Google may not claim in this case any exception stipulated in copyright law.

First of all, the court undermined that any exception to copyright must be interpreted narrowly and by reference to the three-step test provided for in Article 5(5) of the Infosoc Directive[49].

As for the exception of citation, the court assessed whether Google News activity could be covered by article 21 § 1 of the Belgian Copyright Act (implementing INFOSOC Directive into Belgian law with regard to the exception for quotations). According to this article, a citation must aim at certain specific purpose (criticism, polemic, education or review) or be made in scientific works, and it must respect fair practices of the profession and be justified by the pursued goal. Google was of the opinion that exception of citation should apply to its service because it was a press review activity. The court stated that in order to rely on this exception press articles would have to be quoted in the frame of coherent comments and serve as illustrations of a review encompassing also other elements while Google News consisted of mere random juxtaposition of article fragments. The court stressed that citations should be used to illustrate or defend an opinion and concluded that Google News could not be considered as a press review. In its opinion a press review would imply a 'methodical analysis of a group elements' and 'a comparative overview of various press articles on the same topic'. The goal of a review is not to just collect elements to give a general overview on a topic but to comment upon some works. The court noticed that Google News activity consisted only of selecting and classifying articles from different sources but Google did not offer any analysis of the articles or draw any comparison between them. Neither did it express criticism or

[49] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal L 167, 22/06/2001 P. 0010 – 0019.

comment concerning these articles. Therefore, Google News could not benefit from the exception of quotation.

Considering the exception for report on news events the court referred to the article 22 § 1 of the Belgian Copyright Act. This article states that once a work has been lawfully published, its author may not prohibit reproduction and communication to the public, for the purposes of information, of short fragments of works or of works of fine art as a whole in connection with reports on current events. However, the court said that this exception, as the exception of quotation, applies only when copyrighted works are accessory to the news report and are not the very object of it. Moreover, it stressed that the justification for this exception was the necessity to enable media to react quickly to events and to comment upon them by using some copyrighted material even it is not possible to obtain prior permission of the copyright holder given the urgency to disseminate the information. In court's opinion Google's activity was contrary to this – Google News did not comment upon the news and, as it extracted systematically and automatically articles from the press websites, it was possible to contact the press publishers and ask for their permission. Given this, Google could not rely on the exception for report on news events in this case.

Furthermore, Google insisted that press publishers had, at least implicitly, consented to the indexation by search engines. Google deemed that press publishers always disposed of technical means to prevent indexation and that this way of proceeding had become a standard throughout the Internet. Therefore, by not using these parameters, press publishers associated with Copiepresse allowed Google to include their websites in the indexation process. The court disagreed and stated that standard copyright rules provided for the necessity to obtain a prior consent from copyright holders and that they did not have to take positive measures to prevent infringements.

Additionally, Google referred to Article 10 of the European Convention on Human Rights (ECHR)[50] and claimed that Google News activity fell within freedom of

[50] European Convention on Human Rights (Convention for the Protection of Human Rights and Fundamental Freedoms, ECHR), as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13. Text of the Convention available on the Council of Europe's website at: http://www.echr.coe.int/Documents/Convention_ENG.pdf, last accessed 30 December 2013.

expression principle. Also this argument was rejected by the court though. In response the court invoked Article 10 § 2 of the Convention (which provides for the possibility to limit the freedom of expression when necessary to protect other essential values, such as the protection of third parties' rights).

Although there was widespread speculation at the time that there would be some sort of agreement between the parties, that agreement never came true and on 22 June 2007 Google lodged an appeal against the judgment of the Court of First Instance, asking the court of appeal to rescind it[51].

Google reiterated most of the arguments raised in the Court of First Instance. However, Google employed also a new defence based on the Article 5(2) of the Berne Convention[52] which states that the applicable law is the law of the country where the infringing acts take place, and not where the damage occurs. Accordingly, Google claimed that US, not Belgian law should be applicable in the case, given that the insertion of the copyrighted material happened on Google's servers in the United States.

The Court asserted that in the case in question rather Article 5(3) of the Berne Convention instead of Article 5(2) was the correct provision to apply, since the infringement act is committed when protected works are transmitted in Belgium via the 'google.be' website, and copyright protection in Belgium is governed by Belgian law. The Court invoked also Article 4(1) of the 'Rome II' Regulation[53] which provides that 'unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort / delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur'. The Court explained that even if the preparatory

[51] Sterling G., *Google Appeal Fails: Belgian Newspaper Copyright Case Upheld*, Search Engine Land, 9 May 2011, available at: http://searchengineland.com/google-appeal-fails-belgian-newspaper-copyright-case-upheld-76248, last accessed 30 December 2013.

[52] Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, completed at Paris on 4 May 1896, revised at Berlin on 13 November 1908, completed at Berne on 20 March 1914, revised at Rome on 2 June 1928, at Brussels on 26 June 1948, at Stockholm on 14 July 1967, and at Paris on 24 July 1971, and amended on 28 September 1979. Text of the Convention available at World Intellectual Property Organisation's website at: http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P144_26032, last accessed 30 December 2013.

[53] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, p. 40–49.

acts of the infringement had to be taken into account to determine the applicable law, the delict should then be analysed as an ensemble of complex acts located in different countries (upload in the USA, diffusion in Belgium). In the light of Article 4(3) of the 'Rome II' Regulation, Belgium would in that case be the country which the damaging act was more closely connected with. In addition, the Court pointed out that whereas a '.be' can be accessed all over the world, it is supposed to only interest Belgians residing abroad or foreigners keen on keeping themselves informed on what is happening in Belgium, and these categories of users are far less numerous than internet users residing in Belgium. In the Court's opinion the connection with the Belgian territory was therefore sufficiently established[54].

As a consequence, the ruling of the Court of First Instance was confirmed and partially amended by the Court of Appeal of Brussels, 9th Chamber, on 5 May 2011[55]. The amendments consisted of (1) restricting the ruling to the infringements committed within Belgian territory, and (2) excluding from the ruling the content of the periodical *L'Echo* which had expressly licensed Google.

The court rejected all the claims raised by Google.

As regards the 'cache' function the Court asserted that Google wrongfully claimed that it was the Internet user who copied the 'cached' articles since Google had only provided Internet users with the 'installation' which allowed them to make a copy. In court's opinion it was not the Internet users who were making the copies but it was Google who put at their disposal the copy it had made using a 'cache' service. Google's registration on its own servers of a page published by a publisher constituted a physical act of reproduction. The fact that Google allowed users to take cognizance of that copy by clicking on the 'cached' link amounted to public communication. The Court declared that a service which consists of taking cognizance of an archived page cannot be assimilated to 'the mere provision of installations aimed at or facilitating communication' as it has been referred to under Preamble 27 of the Infosoc Directive[56]. Consequently, the Court declared the 'cache'

[54] Laurent P. (2011), 543.
[55] *Copiepresse SCRL v. Google Inc.*, No. 2007/AR/1730, The Court of Appeal of Brussels, 5 May 2011.
[56] *The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive.*

service an infringement of the rights of reproduction and communication to the public as it cannot be allowed as a temporary copy exception under Article 21 § 3 of the Belgian Copyright Act (transposing Article 5(1) of the Infosoc Directive into Belgian law) and it cannot qualify as 'proxy caching' under the safe harbor in Article 13 of the e-commerce Directive[57]. The Court pointed out that Google failed to prove that the public communication of the cached webpage was at all necessary from a technical point of view. The Court also noted that the copies were not transitory as they were kept for a long time on Google's servers and remained freely accessible even when the article was no more openly available on the editor's websites.

When it comes to Google News service itself, the Court stated that whatever its intentions, Google reproduced *in extenso* the titles and excerpts of works owned by publishers represented by Copiepresse, without having obtained their prior consent. By doing so Google is in breach of copyright law as these works are copyright-protected contents, as under Belgian as under European law. In particular, as regards the sections of a work, the Court stated that there is nothing in the Infosoc Directive or in any other relevant directive to indicate that these sections should be treated any differently from the work as a whole. The Court, invoking the ECJ ruling in *Infopaq* case[58], said that excerpts of a work are protected by copyright since, as such, they contain elements which are the expression of the intellectual creation of the author of the work, which was the case in the case in question[59].

As a consequence, their reproduction and communication to the public without having obtained prior consent of the publishers was illegal. The Court stated that since the right to authorize or prohibit the reproduction and communication to the public is exclusive right of copyright holder, the exceptions and limitations to this right should be interpreted with reservation and should have been explicitly provided for. Moreover, neither the Belgian Copyright Act nor the Infosoc Directive contains any general exceptions as regards the right of communication 'for a legitimate purpose' on which Google based itself. The Court rejected Google's argument that

[57] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), Official Journal L 178 , 17/07/2000 P. 0001 – 0016.
[58] *Infopaq International A/S v. Danske Dagblades Forening*, (C-5/08) [2009] E.C.D.R. 16.
[59] *Copiepresse SCRL v. Google Inc.*, No. 2007/AR/1730, The Court of Appeal of Brussels, 5 May 2011, 26.

reproduction and communication to the public of the excerpts of works are done for purposes of indexation and reference but rather they amount to a *verbatim* and *in extenso* reproduction of a significant part of the linked articles which convey the essential information and, hence, substitute for the originals.

Furthermore, the Court found that Google News service was also an infringement of moral rights of integrity and of attribution. In Court's opinion as Internet users who check Google News are perfectly informed of the essentials published in the press, without having to check the articles themselves, the publishers, journalists and authors of scientific works are prejudiced within the framework of the normal exploitation of their work, to the extent that Internet users are not necessarily directed to the original page where the article was published. Moreover, the name of the author of the article is not mentioned at Google News page. The Court concluded that if it was possible, from a computer-engineering point of view, to copy a title of an article and the first lines of it – and sometimes changing them slightly – then it would possible for the 'robots.txt' also to record the signature which would either feature at the start or at the end of an article.

The Court concluded that Google wrongfully deduced that since it had the technical means to browse all the publishers' sites, it meant copyright holders had given Google the permission to reproduce their works. In Court's opinion no implied license derives from the mere fact that copyright owners have not implemented the technological measures that could have excluded indexation and caching by Google. On the contrary, copyright is about authors' explicit, unequivocal and prior permission, which is non-existent in the case in question[60].

As Google invoked Article 10 of the ECHR to justify the operation of Google News service, the Court was obliged to refer to the question whether Google News service falls within the scope of the right to freely disseminate information. In Court's opinion the fundamental right of access to information as described in Article 10 of the ECHR is not an excuse for not complying with copyright law[61]. Contrary to what Google claimed, its service was not being paralyzed by copyright as Google was free to

[60] *Copiepresse SCRL v. Google Inc.*, No. 2007/AR/1730, The Court of Appeal of Brussels, 5 May 2011, 37.
[61] *Copiepresse SCRL v. Google Inc.*, No. 2007/AR/1730, The Court of Appeal of Brussels, 5 May 2011, 41-43.

conclude general contracts with collective management companies, which would release it from having to seek the prior permission from individual publishers and ensure that the latter and the authors receive the reasonable remuneration they are entitled to.

Google even tried to argue that it was the victim of an abuse of law, to the extent that the publishers, journalists and authors of scientific publications were exercising their copyright purely for economic reasons. The Court rejected this argument and declared that the fact that copyright holders are seeking for financial compensation in return for the permission to reproduce cannot be qualified as an abuse of copyright because the law itself provided for the existence of transferable, assignable ownership rights.

Finally, Google maintained that the collective lawsuit by Copiepresse contravened Article 2 of the Belgian Competition Act[62] and Article 81 § 1 of the European Union Treaty (101 § 1 of the Treaty on the Functioning of the European Union, TFEU) and that it abuses its dominant position, which is in contravention of Article 3 of the Belgian Competition Act and Article 82 of the EU Treaty (102 of the TFEU) in that it pursues an anti-competitive objective. Google claimed that the lawsuit based on copyright is only a pretext to put the brakes on the activities of Google, which is seen as a competitor. The court stated that no single shred of factual evidence has been submitted about the fact the members of Copiepresse would have entered into an agreement or would have engaged in concerted practices to prevent, restrict or falsify the game of competition or would have abused their possible dominant position by trying to charge unfair fees or by trying to limit the markets or technological development to the detriment of consumers[63].

Accordingly, the appeal court confirmed globally the first instance decision and condemned Google for copyright infringement. The court ordered Google to delete from Google.be and Google.com sites all the articles, photographs and graphic representations from the Belgian publishers of the French and German-speaking daily newspapers, represented by Copiepresse, and from the authors in respect of

[62] *Loi sur la protection de la concurrence économique du 15 septembre 2006 (LPCE)*. Moniteur belge, of September 29, 2006, pp. 50613 et seq.
[63] *Copiepresse SCRL v. Google Inc.*, No. 2007/AR/1730, The Court of Appeal of Brussels, 5 May 2011, 47.

whom SAJ and Assucopie can prove to have been legally authorized, under penalty of a fine for non-performance of €25 000 per day of delay.

Additionally, as Copiepresse stated that the excerpts of works Google was displaying on its Google News website generated revenue for the search engines and so publishers should be paid for the content, there was a second suit pending before the Brussels court in which publishers associated with Copiepresse were seeking as much as €49 100 000 for the period in which their content was visible on Google News.

CHAPTER III

GOOGLE NEWS UNDER NEGOTIATIONS AND LEGISLATION

I. Introduction

Shortly after the emergence of various news aggregators, a heated debate on whether and how to display the third parties' content over aggregators and search engines has started. The issue at stake is, in fact, whether news aggregators should have to pay at all content providers to host its content.

This contributes highly to the overall discussion on the condition of online news industry nowadays. At the moment it seems to that possible solutions are twofold. The first possibility might be that big players who run aggregation services, such as Google, enter into negotiations with local newspaper publishers in order to reach an agreement governing the use of snippets of newspaper articles by news aggregators. Another solution would be to adapt a bill that would require payment of a fee for displaying links to and snippets of articles, with the goal of recouping some of the revenues traditional news publishers have lost to the web.

Both models has been tried so far in different jurisdictions in Europe. In Belgium and France the agreements between interested parties have been concluded, although following different patterns. In Germany a bill has been introduced that extended press publishers' copyright by providing them with an ancillary right over news contents. Passing a similar piece of legislation is being considered at the moment in Italy.

A more detailed description of aforementioned solutions will follow in the next sections of this chapter.

II. Belgium

During the whole time the *Copiepresse* case was pending in the court, Google had pulled the Copiepresse content from Google News Belgique, but at the same time it stopped showing it on Google Search. Google said the court order required it to remove mentions of Copiepresse not only form Google News but also from its main search site. At the same time, Google declared it would be willing to re-introduce it into its search engine as soon as it had official permission of Copiepresse to do so[1].

Surprisingly enough, Copiepresse denied this was the case, and said Google only removed its content from Google Search in retaliation for its Google News lawsuit. Several publishers represented by Copiepresse viewed it as a 'boycott' as they felt they were being punished for suing the company by having their sites removed from all Google's search indexes. It was rather odd but these newspapers which fought to restrain Google first, were opting then for re-inclusion in its search indexes (but not on Google News). *'Attitude brutal de Google'*, '*It was not necessary to unlink so brutally'* – these titles from Belgian newspapers of that time spoke for themselves.

Subsequently, Google seemed to have received in July 2011 (so only two months after the appeal court gave its judgment) the necessary permissions from Copiepresse as its publications were back in Google's indexation pages as of 19 July 2011. As Jeannie Hornung, Google Communications Manager explained: *We are delighted that Copiepresse has given us assurances that we can re-include their sites in our Google search index without court-ordered penalties*. *We never wanted to take their sites out of our index, but we needed to respect a court order until Copiepresse*

[1] Young Rob D., *Google vs Copiepresse Copyright Tension Settled*, Search Engine Watch, 20 July 2011, available at: http://searchenginewatch.com/article/2095603/Google-vs-Copiepresse-Copyright-Tension-Settled, last accessed 30 December 2013.

acted. We remain open to working in collaboration with Copiepresse members in the future.[2]

A six year-long running litigation ended finally in December 2012 as long-awaited agreement was concluded on 12 December 2012 between Google and Belgian French-language newspaper publishers[3]. The agreement said that Google and Belgian French-language publishers would partner on a broad range of business initiatives, in order to: (1) promote both the publishers' and Google's services – Google would advertise its services on the publishers' media, while the publishers will optimise their use of Google's advertising solutions, in particular AdWords to attract new readers; (2) increase publishers' revenue – by collaborating on making money with content, both via premium models (paywalls, subscriptions), and via advertising solutions such as the AdSense platform and the AdExchange marketplace; (3) increase reader engagement – by implementing Google+ social tools on news sites, and launching official YouTube channels; (4) increase the accessibility of the publishers' content – by collaborating on the distribution of the publishers original content on mobile platforms, in particular smartphones and tablets.

The agreement is opt-in – Belgian newspapers can decide whether to re-join Google News.

Financial details of the settlement weren't disclosed[4]. Although Google said that it is not paying the newspapers to appear on its news service, the Huffington Post (quoting from *Le Monde)* reported that Google has accepted to pay a sum comprised between 2-3% (around €5 000 000) of the total turnover of Belgian French-language newspapers[5].

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[2] Lasar M., *Google v. Belgium "link war" ends after years of conflict*, Ars Technica, 19 July 2011, available at: http://arstechnica.com/tech-policy/2011/07/google-versus-belgium-who-is-winning-nobody/, last accessed 30 December 2013.

[3] *Partnering with Belgian news publishers*, Google Europe Blog, 12 December 2012, available at: http://googlepolicyeurope.blogspot.it/2012/12/partnering-with-belgian-news-publishers.html, last accessed 30 December 2013.

[4] Schechner S., *Google Settles with Belgian Newspapers*, The Wall Street Journal, 13 December 2012, available at: http://online.wsj.com/news/articles/SB10001424127887323981504578177323295632586, last accessed 30 December 2013.

[5] *Belgique: Google dément l'indemnisation de la presse en ligne*, Le Huffington Post, 13 December 2012, available at: http://www.huffingtonpost.fr/2012/12/13/belgique-google-presse-en-ligne-lex_n_2290284.html, last accessed 30 December 2013.

III. France

In fact, the agreement in Belgium came in the middle of fights faced by Google everywhere in Europe. Starting in 2009 press publishers had caused an uproar on the continent as they felt especially exploited by search engines. In their opinion search engines and other aggregators by placing advertisements next to parts of the digital press releases are earning money with them. European governments started considering laws that would give publishers the right to prevent Google from displaying headlines and snippets of articles unless it pays royalties. The most active in this regard were France, Italy and Germany. The initiative was quickly named 'Google Tax'.

In September 2012 leading French newspaper publishers had called on François Hollande's government to adopt such a law in France. In response Google sent a dramatic letter to several French ministerial offices, threatening to exclude French media sites from search results if France goes ahead with plans to make search engines pay for content[6].

In the meantime the ongoing Google versus publishers battle stopped in one of the world's fastest growing economies: Brazil. In October 2012 154 members of the Brazilian National Association of Newspapers (ANJ)[7] opted out of the Google News service[8]. However, this did not mean that Brazilian news sites were not available anymore on Google search. Ironically it is Google Search that Google makes money from as it contains adverts, and not Google News. Consequently, some opinions emerged that if Brazilian newspapers were serious and really wanted to opt out of Google's services, they would have taken their sites off all Google's sites, especially from Google Search, rather than limiting themselves to Google News.

Coming back to France, in November 2012 French Minister of Culture Aurèlie Filippetti said that if by the end of 2012 French, Italian and German publishers had not achieved an agreement with Google, in January 2013 France would have

[6] Rosati E., *France to make Google pay for its News service?*, The 1709 Blog, 18 October 2012, available at: http://the1709blog.blogspot.co.uk/2012/10/france-to-make-google-pay-for-its-news.html, last accessed 30 December 2013.
[7] http://www.anj.org.br/about-us.
[8] Silverman I., *Brazilian newspapers opt out of Google News*, The 1709 Blog, 22 October 2012, available at: http://the1709blog.blogspot.it/2012/10/brazilian-newspapers-opt-out-of-google.html, last accessed 30 December 2013.

adopted a law which would require Google to pay royalties on the contents displayed on its news service[9].

The agreement between Google and French Government was achieved on 1 February 2013. According to its terms, Google promised to help French news organizations increase their online advertising revenue by giving them access to advertising platforms on the Internet search leader and using Google advertising technology at a reduced cost. Additionally, Google agreed to set up a 60 million euro fund to finance digital publishing innovation. The Digital Publishing Innovation Fund is aimed at helping the transformation to digital publishing by supporting work on new projects to help publishers go digital. Google clarified that the agreement means it does not have to pay for snippets of news content that appear on a Google search page – the compromise allows Google to avoid paying an ongoing licensing fee.[10]

'France is proud to have reached this agreement with Google, the first of its kind in the world', the French president's office said on Twitter. Indeed, many breathed a sigh of relief and hoped that Google had opened the door to other countries' newspapers to make a similar deal and that French agreement would be a precedent to be followed in other (European) countries. A European publishers members' group and lobby organization European Publishers Council[11] called for Google to make payments to all European publishers for linking to snippets of their content[12].

However, shortly after conclusion of the French deal, Google itself made it clear that there is no intention to replicate initiatives like the creation of the French fund support model elsewhere in Europe. At the same time Google did not comment on what makes the French market different to other European markets[13].

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[9] Rosati E., *French minister of culture speaks of Google, Amazon and Loi Hadopi*, The 1709 Blog, 24 November 2012, available at: http://the1709blog.blogspot.co.uk/2012/11/french-minister-of-culture-speaks-of.html, last accessed 30 December 2013.

[10] *Google and France reach landmark agreement*, France24, 2 February 2013, available at: http://www.france24.com/en/20130201-google-france-reach-landmark-agreement, last accessed 30 December 2013.

[11] http://epceurope.eu/.

[12] Lomas N., *After Google's $80M French Publishers' Fund, Press Lobby Group Chief Calls For Search Giant To Pay Media In Every European Country*, TechCrunch, 8 February 2013, available at: http://techcrunch.com/2013/02/08/after-googles-80m-french-publishers-fund-press-lobby-group-calls-for-search-giant-to-pay-media-in-every-european-country/, last accessed 30 December 2013.

[13] Lomas N., *Google Says $80M French Publishers' Fund Won't Be Replicated Elsewhere In Europe*, TechCrunch, 11 February 2013, available at: http://techcrunch.com/2013/02/11/google-french-publishers-fund/, last accessed 30 December 2013.

On the other hand, also Google was given to understand by French Government that despite reaching an agreement with French publishers, taxing times might not be over for Google. Minister Filippetti denied there would be any link between the agreement and Google's tax bill: *'As long as publishers are satisfied, that's a good deal',* she said in a TV interview. *'But it doesn't release Google from its other duties and I'm thinking notably of its tax duties…. It may not all end there.'*[14]

IV. Germany

Leistungsschutzrecht für Presseverlege (LSR): legislative background

Indeed, in the meantime in Germany politicians were still, and more and more seriously, considering a bill to extend copyright protection to excerpts of newspaper articles appearing in search engines' results, thus enabling publishers to collect payment for them. A similar debate started in Italy. Also Austrian and Swiss publishers were thinking along identical lines.

An internal draft of appropriate legislation was published in Germany already in May 2010. It was designed by the powerful publisher's associations BDZV (*Bundesverband Deutscher Zeitungsverleger*) and VDZ (*Verband Deutscher Zeitschriftenverleger*) and – behind closed doors – negotiated with two unions of the German journalists (*DJV – Deutscher Journalisten-Verband* and DJU – *Deutsche Journalistinnen- und Journalisten-Union*)[15]. It was clear from the outset that the new law would be targeted primarily at Google. According to its draft, the publishers were aiming at an unprecedented new intellectual property right – in fact, German publishers claimed an exclusive right on simple formulations ('the snippet right') and an unprecedented right to read copyrighted articles ('the reception right'). So it sounded that German publishers wanted to (1) introduce a protection of single formulations, sentences or headlines and (2) require anybody to get licenses for merely reading the articles. The publishers' proposal was opposed – more or less

[14] Marchive V., *Google's settled the 'link tax' in France - but its €1bn tax bill won't go away so easily*, ZDNet, 14 February 2013, available at: http://www.zdnet.com/googles-settled-the-link-tax-in-france-but-its-1bn-tax-bill-wont-go-away-so-easily-7000011324/, last accessed 30 December 2013.
[15] Kreutzer T. (2011) *German copyright policy 2011: Introduction of a new neighbouring right for press publishers?*, Computer Law & Security Review (CLSR), 27, 214-216.

unanimously – by scholars, the German industry, the civil society, web community, freelance journalists and many other interest groups. The opponents claimed that such proposal would result in unjustified extension of copyright law and would mean introduction of protection of information or even the language itself.

In June 2012 the German Government published draft legislation which, if passed, would introduce an ancillary right for press publishers. It would require news aggregation sites and media monitoring firms to pay royalties on the snippets and headlines that they publish within a year of when the stories are first published. The royalties would be paid to a new collecting society which would distribute them to the publishers.

To go into details: a new section to the German Copyright Act was intended that would provide the 'producer of news materials' the general 'exclusive right to make said materials publicly available, in whole or in part, for commercial purposes'. Others would be permitted to provide 'public access' to the publishers' material unless those providing that access are 'commercial operators of search engines or commercial providers of services that aggregate this content in a respective fashion'. News publishers' right to control the commercial exploitation of their work in this regard would extend for a year after publication. Authors of the work would be entitled to be 'provided with a reasonable share of the remunerations issuing from the author's work'[16].

The bill was agreed by the Cabinet at the end of August 2012 and submitted to parliament on 14 November 2012. In response to the Government's proposal Google launched *'Defend Your Net'* campaign in Germany to protest against planned copyright restrictions[17]. American giant warned that if the proposed law passes its German users may find it difficult to find the information they seek. At the same time Google set up a new portal designed to educate and mobilise its users to help protect the information it collects. Google suggested such a law could damage the German

[16] *German news aggregators face publisher levy under planned changes to copyright laws*, Out-law.com, 8 November 2012, available at: http://www.out-law.com/en/articles/2012/november/german-news-aggregators-face-publisher-levy-under-planned-changes-to-copyright-laws/, last accessed 30 December 2013.

[17] Brian M., *Google launches 'Defend Your Net' campaign in Germany to protest against planned copyright restrictions*, TheNextWeb Europe, 27 November 2012, available at: http://thenextweb.com/google/2012/11/27/google-launches-defend-your-network-campaign-in-germany-to-protest-planned-copyright-laws/, last accessed 30 December 2013.

economy, threaten the diversity of information, result in massive legal uncertainty, set back innovative media and copyright and cause a 'market economy paradox'. The search giant argued that publishers already have the tools at their disposal to opt out of Google's search results and it does not profit from such news as its Google News service is completely free of advertising. In its opinion this 'bad law', as Google called the German proposal, would break the 'founding principle' of the Web's hyperlink-based architecture.

Notwithstanding Google's protests the bill was passed by the Bundestag on 1 March 2013 (by 293 to 243), following substantial changes in the week before the vote. It passed in the Bundesrat on 22 March 2013, was published in the Bundesgesetzblatt on 14 May 2013, and entered into force on 1 August 2013[18].

Leistungsschutzrecht für Presseverleger (LSR): the content of the new law

The new publisher's right has been put into effect as a neighbouring right and is governed by the newly created Chapter 7 (Articles 87f-87h) of the *Urheberrechtsgesetz*[19].

Article 87f introduces an exclusive, transferable[20] right for a producer of a press publication (press publisher) to make the press publication or parts of it available to the public for commercial purposes, unless the parts concerned are merely individual words or smallest excerpts (snippets). If the press publication has been produced by a corporate entity, the owner of such legal entity is deemed the owner of the right.

The term 'press publication' is defined in Article 87f(2). It encompasses the editorial and technical fixation of journalistic contributions, provided that these contributions are published under an existing journal or newspaper title that is published periodically. The definition further requires that the contribution was made typically in the context of publishing. For this, an overall assessment is required, excluding publications serving advertising purposes. Journalistic contributions are described as

[18] *Wikipedia, the free encyclopedia* on Ancillary copyright for press publishers, available at: http://en.wikipedia.org/wiki/Ancillary_copyright, last accessed 30 December 2013.
[19] *Leistungsschutzrecht für Presseverleger.*
[20] Article 87g(1).

articles and images serving the purposes of information distribution, formation of opinion or entertainment.

The new right expires one year after the first publication of the press publication[21] and cannot be exercised against authors or owners of related rights whose works form part of the press publication[22]. According to the Article 87h an author shall receive a fair share of any remuneration.

Article 87g(4) introduces specific limitations to the right – making available of press publications or parts thereof is permitted as far as it is not performed by commercial search engine or through providers of services that, on a commercial basis, prepare or otherwise enhance such content. The limitation in Article 87g(4) is interpreted by the German Ministry of Justice in the explanatory statement as follows: *'Thus, the press publisher is protected against the systematic use of his editorial activity by commercial providers of search engines and commercial services that process content accordingly whose business model centers on such use. Other users, e.g., bloggers, other privately owned companies, associations, law firms or persons working for private purposes or on a complimentary basis are not covered. Their rights and interests therefore remain unaffected by the proposed neighbouring right for publishers.*[23]

Leistungsschutzrecht für Presseverleger (LSR): a comment

The newly introduced right is tailored practically to search engine operators only, and even more visibly to the Google News service, and it has raised many critical concerns.

Most of them are of a robust, constitutional nature. Apart from the rudimentary concern of prohibition of law making for individual cases, the new publishers' right creates doubts as to whether it is not in conflict with a range of fundamental rights,

[21] Article 87g(2).
[22] Article 87g(3).
[23] Elteste U., *Neighbouring Right for Newspaper Publishers in Germany Passed*, at personal webpage http://www.ulixmann.de, 27 March 2013, available at: http://www.ulixmann.de/2013/03/27/neighbouring-right-for-newspaper-publishers-in-germany-passed/, last accessed 30 December 2013.

such as the right of search operators to the free exercise of their profession, the right to freely impart and communicate information, and the personality rights of journalists. It also poses a question of which policy rationale, other than a broad moralistic attempt to allow publishers some monetary participation from the advertising income made by search engine operators, should underpin that right[24].

Equally, the right raises concerns with regard to the overall copyright system, and in particular with regard to the copyright subject matter of it. What was described by many as a draconian 'Lex Google' was softened just one week before voting in Bundestag as lawmakers in Germany reached a compromise to water-down the language of a proposed law. Under this compromise Google (and other search engines and monitoring media firms) would still be permitted to use freely single words or short-text snippets of content from publishers' web sites in its search results. It would however require a license for use of any content beyond snippet length. This means that the German Parliament finally passed a much weaker version of the bill than first proposed. However, what the bill does not stipulate, is the precise definition of the length permitted. So maybe Google and other news aggregators have one reason less to fear the future but on the other hand uncertainty over what a snippet is, can easily result again in litigation before the courts.

Moreover, as it has been pointed out by one of the commentators, new German law might clash with the database maker right, as most online press services qualify as databases[25]. That conclusion arises out of a comparison between the publisher's right under a new Article 87f and the database maker right under Article 87b(3), which in turn implements Article 7(5) of the Database Directive with regard to infringements where information is taken on a 'little but often' basis[26]. According to Article 7(1) of the Directive a maker of a database shall enjoy a *sui generis* right provided that there has been qualitatively and / or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents, to prevent extraction and / or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database. Article

[24] Westkamp G. (2013) *The new German publisher's right – a violation of European Law? A comment*, Queen Mary Journal of Intellectual Property 3 (No. 3), 241.
[25] Westkamp G. (2013), 242.
[26] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, Official Journal L 077 , 27/03/1996 P. 0020 – 0028.

7(5) of the Directive states that the repeated and systematic extraction and/or re-utilization of insubstantial parts of the contents of the database implying acts which conflict with a normal exploitation of that database or which unreasonably prejudice the legitimate interests of the maker of the database shall not be permitted.

It follows from above cited provisions that where the source of the information is a database, publishers may rely on both rights: the publisher's right under a new Article 87f and the database maker right under Article 87b(3). It is therefore predictable that these two sets of rights might cover the same activity. However, the subject matter and scope of protection will differ significantly under these regimes as the Database Directive already provides a ceiling, rather than an identical scope of protection, that requires the claimant to show a substantial investment as well as the taking of a substantial part of the database contents. Clearly, the database maker right is narrower and the scale of protection of the two rights differ without any clear rationale.

On the other hand, the database maker right under the Database Directive protects information as such and is shaped rather broadly, since it describes the subject matter category as any collection of information that fulfills certain basic requirements of organization. Hence, the question arises whether operators of search engines can rely on freedoms that are guaranteed under the database maker right. Consequently, it is argued that the new publisher's right as introduced in Germany might violate rights of free access to information enjoyed by search engine operators under the database right[27].

Finally, the introduction of a new ancillary right for press publishers in Germany has to be seen in light of a hyperlinking problem, although the new law (in compliance with earlier case law[28]) does not expressly prohibit mere linking. However, the model in which news aggregators operate assume that a news aggregation service would first reproduce (temporarily) the information and subsequently create a hyperlink allowing the user access to the original news article. Accessing the original news article results in a further reproduction made by the user whereas placing the hyperlink might raise the question of whether such an act constitutes an act of

[27] Westkamp G. (2013), 243.
[28] *Paperboy*, I ZR 259/00, BGH [2003] GRUR 958; *Session-ID*, I ZR 39/08, BGH [2010] GRUR 56.

making contents available. This is likely to have important implications considering that the Court of Justice of the European Union has been asked to clarify, inter alia, whether a clickable link might constitute a communication to the public as per Article 3(1) of the Infosoc Directive[29] (case C-466/12 *Svensson*, a reference from the Svea hovrätt, one of the six appellate courts in the Swedish legal system). In particular, the Court has been asked whether it is possible for a Member State to give broader protection to authors' exclusive rights by enabling 'communication to the public' to cover a greater range of acts than provided for in Article 3(1) of the Infosoc Directive. Should the answer of the Court be in the affirmative, the introduction of a new ancillary right for press publishers in Germany would appear a halfway solution, if compared to the possibility for Member States to provide press publishers with actual copyright protection against use of their contents by news aggregators and alike[30].

To sum up, it appears that new German right for press publishers looks rather to be aimed at safeguarding established (outdated) models than promoting new services and business models.

What is a remarkable sign of it, is a story that happened in Germany after the new law has been introduced. Namely, in June 2013 Google announced the changes to the way Google News works in Germany[31]. According to the new rules, as of 1 August 2013 (the date when new sections 87f-h enter into force) German publishers can or have to opt in to their product being indexed by Google News. This is the other way round as the previous system was based on assuming that if the material was on the Internet and not protected by 'robots.txt', then it would be included. In all other countries, however, Google has maintained in force the previous policy: if a publisher makes its content available on the net, it is included in Google News. If publishers do not wish to be included in Google News, they can use a variety of technical options (robots.txt, meta tags) use to prevent indexing by Google – or simply tell Google that their content will not be recorded.

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[29] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal L 167, 22/06/2001 P. 0010 – 0019.

[30] Rosati E. (2013) *The German 'Google Tax' law: groovy or greedy?*, Journal of Intellectual Property Law & Practice 8 (No. 7), 497.

[31] Worstall T., *Google News Goes Opt In In Germany*, Forbes, 22 June 2013, available at: http://www.forbes.com/sites/timworstall/2013/06/22/google-news-goes-opt-in-in-germany/, last accessed 30 December 2013.

However, as many rightly guessed, a lot of German publishers have opted in, indeed, in order to be featured in Google News. The loss of traffic from not being in the Google News index seems to be sufficient scare for them[32]. This seems to tell a lot about the relationship between lobbying, law and the market.

V. Italy

Following what has happened in Belgium, France and Germany in relation to news aggregation services, the Italian Federation of Newspaper Publishers (FIEG) in February 2013 wrote an open letter accusing Italian decision makers that, while publishers have been adopting innovative models to remain competitive, there have been no actual political initiatives in Italy to protect content producers and safeguard all the economic, political and technical resources which are indispensable to produce quality contents[33].

In June 2013 a daily newspaper *'Corriere della sera'* published an interview with Giovanni Legnini (under-secretary to the Presidency of the Council of Ministers in charge of publishing and implementation of Government's agenda), in which the ministry spoke about possible measures in favour of Italian press publishers[34].

On 13 December 2013 Italian Government adopted its plan called *'Destinazione Italia'*, a law decree aimed to attract foreign investment and improve the competitiveness of Italian firms[35]. The*'Destinazione Italia'* consists of 50 measures whose goal is to reform a broad range of sectors, from tax to employment and civil justice to research to enhance and build upon Italian assets and to develop investment-focused policies to promote Italy at the international level. The Government is committed to translating these measures into provisions and laws and

[32] Lardinois F., *Google Makes Google News In Germany Opt-In Only To Avoid Paying Fees Under New Copyright Law*, TechCrunch, 21 June 2013, available at: http://techcrunch.com/2013/06/21/google-makes-google-news-in-germany-opt-in-only-to-avoid-paying-fees-under-new-copyright-law/, last accessed 30 December 2013.

[33] Natale R., *Editori al governo che verrà, 'Rafforzare la tutela del diritto d'autore contro i parassiti d'internet'*, Key4biz, 13 February 2013, available at: http://www.key4biz.it/News/2013/02/13/Policy/Editori_internet_stampa_fieg_contenuti_multimediali_informazione_215659.html, last accessed 30 December 2013.

[34] http://www.corriere.it/tecnologia/economia-digitale/13_giugno_02/l-editoria-e-le-sfide-della-rete-contributi-dai-motori-di-ricerca-paolo-conti_015e4914-cb3e-11e2-8266-15b8d315b976.shtml.

[35] http://destinazioneitalia.gov.it/.

to begin monitoring their implementation. Among other things the *'Destinazione Italia'* bill contains copyright-related measures aimed at sorting disputes relating to the usage of news contents by search engines and news aggregators[36].

It follows from the Government's explanation that Italian Government is trying to identify some sort of contribution to be paid to online magazines and newspapers for the mere indexing of their news. The main goal of the bill, as clarified by the Government, is to find the right balance between the need to preserve the free flow of information over digital platforms and the protection of copyrights.

The text of the relevant provision has been brought up by the financial newspaper 'Il Sole 24 ore'[37]. It reads as follows: 'Where rights are expressly reserved, reproduction, communication to the public and, in any case, use, including partial (use), in any way or medium, including indexing or aggregation in any way - whether (analogue or) digital - of press content, including medium and editorial context, which is published in print, online, TV- or radio-broadcast or made available to the public by other means, is allowed only following agreement between the relevant rights holder(s), or relevant representatives of rightsholders authorised to do so, and the user(s), or relevant representatives of users authorised to do so. Lacking agreement over terms of use, including economic use, such terms are defined by AGCOM upon request of interested parties.' [38]

As correctly observed by commentators, the language of this provision is very broad and rather vague so it might imply the need for seeking and obtaining permission for any aggregation activity, even beyond 'pure' news aggregation services. In any case, it will be interesting to see how this provision will be transposed into Italian copyright

[36] Coraggio G., *Copyright Measures Against Google's Indexing of Online News?*, at personal blog Gaming Tech Law, 17 December 2013, available at: http://www.gamingtechlaw.com/2013/12/copyright-measures-against-googles.html, last accessed 30 December 2013.

[37] Longo A., *News e motori di ricerca, in arrivo la norma più severa d'Europa*, Il Sole 24 ore, 15 December 2013, available at: http://www.ilsole24ore.com/art/notizie/2013-12-15/web-tax-italia--legge-piu-severa-d-europa-ecco-novita-e-ricadute-utenti-161759.shtml?uuid=ABu4tDk, last accessed 30 December 2013.

[38] Translation by E. Rosati at: Rosati E., *Italy to introduce new (neighbouring) right over news content?*, The IPKat, 22 December 2013, available at: http://ipkitten.blogspot.com/2013/12/italy-to-introduce-new-neighbouring.html, last accessed 30 December 2013.

law and what will be its relationship with copyright exceptions provided by the Copyright Act[39] (*libere utilizzazioni*)[40].

[39] Legge 22 aprile 1941 n. 633 Protezione del diritto d'autore e di altri diritti connessi al suo esercizio (G.U. n.166 del 16 luglio 1941).
[40] Rosati E. (2013).

CHAPTER IV

GOOGLE NEWS AND COPYRIGHT IN NEWS: WHERE DO WE STAND?

I. Introduction

'What is news? The statement of facts, the history of current events. Can anyone create or invent a fact or event? If he cannot create or invent a fact or event, how can he copyright it?'[1]

This thought was articulated in the US in 1884 when the discussion about ensuring legal protection for news started. Until the 1880s the news industry remained in a pre-copyright era and played no role in copyright discourse. Most newspapers were partisan organs that sought financial support at least as much from political sponsors as from sales or advertising. Newspaper editors followed a widespread custom of freely copying text from other newspapers.

In the middle decades of 1800s, however, social and technological changes radically modified the structure of the news industry. Political subsidies for newspaper shrank, and newspapers became more heavily dependent on sales and advertising. The introduction of the telegraph provided newspapers with an opportunity to invest in more timely news. This, along with improvements in typesetting, printing, and transportation technology, exposed newspapers to competition from which they had previously been geographically isolated. At the same time, the new communications

[1] The Evening Observer, Dunkirk, NY, 3 April 1884, 2.

technologies led to the emergence of companies and large associations that dominated the markets, such as Associated Press and Western Union[2].

It were these organizations that began to press for legal protection of news reports, in both legislative and judicial arenas. On the legislative front, the Associated Press made an effort in 1884 to push the US Congress to amend the US Copyright Act to provide protection for news items. The bill proposed sought to grant newspapers and newspaper associations (so not the author of the contents) the sole right to print, issue and sell for the term of eight hours, dating from the hour of going to press, the contents of the newspaper, or the collected news of said newspaper association, exceeding one hundred words[3]. After a strong opposition to the bill, it failed in the Congress. The Associated Press and others turned to courts then in order to seek for a copyright protection of news articles.

But the opposition to the 1884's bill led to the first prominent articulations of the notion that facts are not created by authors, and therefore not copyrightable subject matter. How the courts and legislators responded to the problem over the decades and what is the current situation of legal protection for news items will be a subject of next pages of this contribution.

II. Originality in a nutshell

The contention that news are not copyrightable because a news is the statement of facts, and facts are not created by authors, depends upon a creativity-based view of originality. The concept of originality in copyright law has been evolving over time according to technological, market and social changes. And this is especially true in the case of news and press works.

Copyright protects original creations. However, how this notion should be understand differs significantly among different jurisdictions, especially between the copyright and the author's right systems. As a general rule, national laws do not define

[2] Brauneis R. (2009) *The Transformation of Originality in the Progressive-Era Debate over Copyright in News*, The George Washington University Law School Public Law and Legal Theory Working Paper No. 463, Legal Studies Research Paper No. 463, 1-2.
[3] The Saturday Evening Observer, Dunkirk, NY, 15 March 1884, 1.

originality or creativity and the meaning of these terms has been, in the main, left to judicial interpretation.

The civil law countries regard originality as involving creativity – to be protected a work must 'bear the stamp of the author's personality', or result from 'the author's own intellectual creation'. Mere investment of skill and labour is not enough, there must be some 'creativity'.

The classic French theory is that, as the *Cour de Cassation* has expressed it, the work, when original, 'bears the mark of the personality of its author and confers on the created object a specific aspect', courts have also referred to 'imprint of the personality of the author', 'personal imprint', 'reflection of the personality of the author', 'imprint of creative personal talent', 'seal of the personality of the author', etc.[4]. French doctrine recognizes also the 'small change' (*petit monnaie*) concept, that originality may subsist in works in technical language or utilitarian compilations, in which the mark of the personality of the author is not evident.

Article 1 of the 1965's German Copyright Act states that the authors of works of literary, scientific and artistic works enjoy protection for their works in accordance with the Act. Article 2(2) declares that only personal intellectual creations (*persönliche geistige Schöpfungen*) are works in the sense of the Act. This provision enshrines the 'creation principle' (*Schöfungsprinzip*), the basic tenet of German author's right. German jurisprudence has also developed the concept of the 'small change' (*kleine Münze*) of author's right, that is to say, author's right protection has been granted to material such as catalogues, forms, etc. where there is a minimal degree of creative input[5].

In Italy the law requires some 'creative character' (Article 1), in Spain the work must be an 'original creation' (Article 10.1), the Dutch copyright act refers to 'creation in the literary, scientific or artistic areas' (Article 10), Polish Copyright Act states that the protection is given to 'any manifestation of the creative activity of individual nature' (Article 1).

[4] Sterling J.A.L. (2008) *World Copyright Law. Third Edition*, Sweet & Maxwell, London, 338-339.
[5] Sterling J.A.L. (2008), 344-345.

The traditional United Kingdom approach has been that the work must not be merely a copy of a previous work, and secondly that the work is the result of the investment of individual 'skill, judgment or labour'. It is submitted that skill and judgment on the one hand, and mere labour on the other, imply different qualities of contribution, and should be distinguished. Skill and judgment imply the application of personal choice, of some intellectual contribution. Mere labour does not carry this implication. While skill and judgment may involve an intellectual contribution akin to creativity, mere labour does not. Next, the degree of skill, judgment or labour which is required is a matter that can only be decided from case to case[6].

The present law of the United Kingdom with regard to the test for originality may be said to be in a state of evolution, mainly under the influence of the law of the European Union. Hence, the test of 'skill, judgment or labour' as described above applies to all categories of literary, dramatic, musical and artistic works. For databases, photographs and computer programs, however, because of the requirement to reflect the EC Directives, the criterion of originality is fulfilled only where these works result from 'the author's own intellectual creation'.

In the United States section 102(a) of the US Copyright Act provides that copyright protection subsists in original works of authorship, fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device[7]. There are plenty of cases in which the US courts have had to consider whether to uphold the plaintiff's claim of the originality of the work in suit. Undoubtedly, the most important case in this regard is the *Feist* case (1991)[8]. Before this US Supreme Court's decision courts tended to apply tests of invested labour ('sweat of the brow')[9] or creativity in order to assess fulfillment of the originality criterion. The 'sweat of the brow' doctrine gave copyright to anyone who invested

[6] Sterling J.A.L. (2008), 352-355.
[7] 17 USC § 102(a).
[8] *Feist Publications Inc. v. Rural Telephone Service Co. Inc.* 499 U.S. 340; 18 U.S.P.Q. 2d 1275 (1991).
[9] The phrase 'sweat of his own brow' first appeared in conjunction with copyright in *Amsterdam v. Triangle Publications*, 93 F. Supp. 79 (D. Pa. 1950). It was used to express the view that the mere combination of features from other maps cannot result in copyright in the compiled map so generated, as copyright in maps could only arise when the mapmaker had himself made observations of the world. However, it was not until 1984 that a court used the phrase in its now well-recognized sense as referring to a theory of originality that does not require creativity. Brauneis R. (2009), 6.

significant amount of time and energy into his work. In *Feist*, however, the 'sweat of the brow' criterion was rejected, the Court holding that labour alone could not constitute originality, and that the investment of a 'modicum of creativity' was necessary. The Court established that information alone without a minimum of original creativity cannot be protected by copyright.

In *Feist*, the plaintiff published a telephone directory, containing data (names, addresses, etc.) copied from Rural's telephone listings to include in its own, after Rural had refused to license the information. Rural sued for copyright infringement. At trial and appeal level the courts followed the 'sweat of the brow' doctrine, siding with Rural. However, the Supreme Court ruled that information contained in Rural's phone directory was not copyrightable and that therefore no infringement existed. The Court found that the plaintiff's selection, co-ordination and arrangement of its listings did not satisfy the minimum Constitutional requirements for copyright protection, lacking 'the modicum of creativity necessary to transform mere selection into copyrightable expression'[10].

The Court stated: *'Since facts do not owe their origin to an act of authorship, they are not original, and thus are not copyrightable. Although a compilation of facts may possess the requisite originality because the author typically chooses which facts to include, in what order to place them, and how to arrange the data so that readers may use them effectively, copyright protection extends only to those components of the work that are original to the author, not to the facts themselves. A compilation is not copyrightable per se, but is copyrightable only if its facts have been 'selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship'.*

There is an undeniable tension between these two propositions. Many compilations consist of nothing but raw data. Common sense tells us that 100 uncopyrightable facts do not magically change their status when gathered together in one place. The key to resolving the tension lies in understanding why facts are not copyrightable. The sine qua non *of copyright is originality. To qualify for copyright protection, a work must be original to the author. Original, as the term is used in copyright, means only*

[10] *Feist Publications Inc. v. Rural Telephone Service Co. Inc.* 499 U.S. 340; 18 U.S.P.Q. 2d 1275 (1991), 362.

that the work was independently created by the author (as opposed to copied from other works), and that it possesses at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. 'Sweat of the brow' courts thereby eschewed the most fundamental axiom of copyright law – that no one may copyright facts or ideas.'[11]

It would, therefore, seem that the test of originality under the US Act approximates to the civil law concept of originality, as being constituted by creativity. The US approach also appears to approximate to that evinced in the respective EC Directives, namely that of the 'author's own intellectual creation'.

Overall, the creativity test is accepted in the United States and in the civil law jurisdictions. EC Directives adopt the creativity test for computer programs, photographs and databases. One could think the United Kingdom remained isolated on the copyright arena with its devotion to the 'skill, judgment or labour' test for originality. But not after the CJEU's *Infopaq* decision as this ruling hits like a bomb in the UK copyright landscape[12].

III. *Infopaq*[13] ruling – Europe's *Feist*?

The process of EU harmonization in the field of copyright has brought about several changes in the domestic legal systems of the Member States. However, originality has been harmonized to a very limited extent – it occurred, as mentioned above, in relation to computer programs, databases and photographs, where originality has been interpreted as the author's own intellectual creation[14]. Meanwhile, it seems to that originality, being at the basis of copyright protection, cannot be left outside the harmonization discourse. The decision of the European Court of Justice of 16 July

[11] *Feist Publications Inc. v. Rural Telephone Service Co. Inc.* 499 U.S. 340; 18 U.S.P.Q. 2d 1275 (1991), 345-346.
[12] Derclaye E. (2010) *Infopaq International A/S v. Danske Dagblades Forening (C-5/08): wonderful or worrisome? The impact of the ECJ ruling in Infopaq on UK copyright law*, European Intellectual Property Review 32(5), 247.
[13] *Infopaq International A/S v. Danske Dagblades Forening*, (C-5/08) [2009] E.C.D.R. 16.
[14] Rosati E. (2012) *Judge-Made EU Copyright Harmonisation. The Case of Originality*, European University Institute, PhD theses, 57.

2009 in the case C-5/08 *Infopaq* confirms that a narrow approach to EU copyright is no longer adequate.

Infopaq International A/S (Infopaq) operates a media monitoring and analysis business which consists primarily in drawing up summaries of selected articles from Danish daily newspapers and other periodicals. The selection of articles is based on certain subject criteria agreed with customers and it is made by means of a 'data capture process'. The summaries are sent to customers by email. To produce summaries, Infopaq proceeds as follows. First, the relevant publications are registered manually by Infopaq employees in an electronic registration database. Secondly, the publications are scanned and an image file is created for each page of the publication (TIFF – 'Tagged Image File Format'). When scanning is completed, the TIFF file is transferred to an OCR ('Optical Character Recognition') server. Thirdly, the OCR server translates the TIFF file into data that can be processed digitally. These data are saved as a text file which can be understood by any text processing program. The OCR process is completed by deleting the TIFF file. Fourthly, the text file is processed to find predefined search words. Each time a match for a search word is found, data is generated giving the publication, section and page number on which the match was found, together with a value expressed as a percentage between 0 and 100 indicating how far into the text it is to be found, in order to make it easier to read the article. Also in order to make it easier to find the search word when reading the article, the five words which come before and after the search word are captured ('extract of 11 words'). At the end of the process the text file is deleted. Fifthly, a document is printed out for each page of the publication in which the search word appears, which contains the extract of eleven words.

Danske Dagblades Forening (DDF), a professional association of Danish daily newspaper publishers which helps, among other, its members with copyright issues, became aware of Infopaq's activities and informed the company that it required authorization from the copyright owners in order to carry out its activities. Litigation ensued. The parties disagreed on two points: (1) whether Infopaq's activity amounted to reproduction as envisaged in Article 2 of the Infosoc Directive[15], and (2) whether, if

[15] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal L 167, 22/06/2001 P. 0010 – 0019.

there is reproduction, the acts in question, taken as a whole, are covered by the exemption from the right of reproduction provided for in Article 5(1) of that directive. As the Danish Supreme Court (*Højesteret*) was unsure about the answers to these problems, it decided to stay the proceedings and ask several questions[16] to the Court of Justice of the European Union.

For the purposes of this contribution, the analysis will be limited to the first question only, which concerned whether the concept of 'reproduction in part' as meant by the Infosoc Directive, was to be interpreted as encompassing the storing and subsequent printing out on paper of a text extract from an article in a daily newspaper, consisting of a search word and the five preceding and five subsequent words. In this respect, the CJEU held that such an act occurring during a data capture process, was such as to constitute reproduction in part within the meaning of Article 2 of the Infosoc Directive, if that extract contains an element of the work which, as such, expresses the author's own intellectual creation. By saying this, the CJEU has triggered quite a big revolution in European copyright law, as through the back door it harmonized the originality criterion at the EU level.

The CJEU explained that Infosoc Directive does not define the concept of either 'reproduction' or 'reproduction in part' and that those concepts must be determined having regard to the wording and context of Article 2 of the Infosoc Directive, where the reference to them is to be found and in the light of both the overall objectives of that directive and international law.

The CJEU held that as Article 2(a) of the Infosoc Directive provides that authors have the exclusive right to authorise or prohibit reproduction, in whole or in part, of their works, protection of the author's right to authorise or prohibit reproduction is intended to cover 'work'. Consequently, the Court made an attempt to define what is to be

[16] 13 in total. The CJEU tackled question 1 first (*Can the storing and subsequent printing out of a text extract from an article in a daily newspaper, consisting of a search word and the five preceding and five subsequent words, be regarded as acts of reproduction which are protected (see Article 2 of [Directive 2001/29]?*) and the remaining 12 questions together as a whole (summed up by the CJEU as follows: the referring court asks, essentially, whether acts of reproduction occurring during a data capture process, such as that at issue in the main proceedings, satisfy the conditions laid down in Article 5(1) of Directive 2001/29 and, therefore, whether that process may be carried out without the consent of the relevant rightholders, since it is used to draw up summaries of newspaper articles and consists of scanning those articles in their entirety to produce a digital file, storing an extract of 11 words and then printing out that extract).

meant by 'work' and what should be the standard protection threshold for works in EU law.

Addressing the problem, the Court began with the observation that it follows from the general scheme of the Berne Convention[17], in particular Article 2(5)[18] and (8)[19], that the protection of certain subject-matters as artistic or literary works presupposes that they are intellectual creations[20].

Similarly, under Articles 1(3) of Directive 91/250[21], 3(1) of Directive 96/9[22] and 6 of Directive 2006/116[23], works such as computer programs, databases or photographs are protected by copyright only if they are original in the sense that they are their author's own intellectual creation. From this, the CJEU deduced that, in establishing a harmonised legal framework for copyright, the InfoSoc Directive was based on the same principles as these directives. Thus, the Court concluded that *copyright within the meaning of Article 2(a) of Directive 2001/29 is liable to apply only in relation to a subject-matter which is original in the sense that it is its author's own intellectual creation. As regards the parts of a work, it should be borne in mind that there is nothing in Directive 2001/29 or any other relevant directive indicating that those parts are to be treated any differently from the work as a whole. It follows that they are protected by copyright since, as such, they share the originality of the whole work.*

[17] Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886, completed at Paris on 4 May 1896, revised at Berlin on 13 November 1908, completed at Berne on 20 March 1914, revised at Rome on 2 June 1928, at Brussels on 26 June 1948, at Stockholm on 14 July 1967, and at Paris on 24 July 1971, and amended on 28 September 1979. Text of the Convention available at World Intellectual Property Organisation's website at: http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P144_26032, last accessed 30 December 2013.

[18] *Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections.*

[19] *Authors of literary and artistic works protected by this Convention shall enjoy the exclusive right of making and of authorizing the translation of their works throughout the term of protection of their rights in the original works.*

[20] Although the Berne Convention sets only minimum standards of protection. It follows, therefore, that even if the Berne Convention introduces a standard of originality that amounts to intellectual creation (that is not uncontroversial anyway), contracting states can extend protection to works which may not be considered original. See: Alexander I. (2009) *The concept of reproduction and the 'temporary and transient' exception*, Cambridge Law Journal 68 (3), 522.

[21] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, Official Journal L 122 , 17/05/1991 P. 0042 – 0046.

[22] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996, p. 20–28.

[23] Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version), OJ L 372, 27.12.2006, p. 12–18.

The various parts of a work thus enjoy protection under Article 2(a) of Directive 2001/29, provided that they contain elements which are the expression of the intellectual creation of the author of the work.[24]

Said this, the *Infopaq* ruling seems to be Europe's (or at least UK's) *Feist*. The CJEU decided that a copyright work, as an 'own intellectual creation of the author', should be stamped by author's personal touch. In other words, it held that creativity is the criterion of originality. Thus, the uniform interpretation throughout the EU of the term copyright work means that products of 'labour, skills or effort' not reflecting the author's personality will no longer receive copyright protection within the EU.

Although the *Infopaq* case only concerned the scanning and indexing of newspapers for online services, the CJEU applied its reasoning to all types of works covered by the Infosoc Directive[25]. However, as noted by one of the commentators, a less disruptive reading of the ruling would apply the standard of originality to newspapers articles only (which constituted the factual basis for the *Infopaq* case) instead of extending it to all kind of works – as paragraph 37 of the CJEU ruling seems to imply[26].

As the Infosoc Directive has been implemented by all EU Member States, the interpretation of the originality requirement given by the CJEU is to be followed by national courts, with all the consequences. It follows from the observations in the sections above, that the meaning of the originality as interpreted by the CJEU in *Infopaq* is in line with that of continental Member States' legislations[27]. Therefore, the effects of this decision in those legal systems are likely to be quite insubstantial, although it is not clear whether national courts will use the *Infopaq* standard of originality when dealing with all types of works. However, it does not hold true for the

[24] *Infopaq International A/S v. Danske Dagblades Forening*, (C-5/08) [2009] E.C.D.R. 16, 37-39.
[25] Hoppner T. (2011) *Reproduction in part of online articles in the aftermath of Infopaq (C-5/08): Newspaper Licensing Agency Ltd v. Meltwater Holding BV*, European Intellectual Property Review 33 (5), 331.
[26] Xalabarder R., (2012) *Google News and Copyright*, in: Lopez-Tarruella A. (ed.) *Google and the Law. Empirical Approaches to Legal Aspects of Knowledge-Economy Business Models*, T.M.C. Asser Press, The Hague, The Netherlands, 123.
[27] As it was interestingly pointed out by Stephen Vousden, a critical analysis of the reasoning used by the ECJ reveals that it does not gain inspiration from international copyright law, or EU law, but it looks like it would come from books on German copyright law. See: Vousden S. (2010) Infopaq *and the Europeanisation of Copyright Law*, The World Intellectual Property Organization Journal 1 (2), 197.

United Kingdom – it is this legal tradition where the *Infopaq* ruling is going to affect (and has affected already) the scope of copyright protection.

IV. *Infopaq*'s aftermath: UK's *Meltwater*[28] case

The impact of the CJEU ruling in *Infopaq* on the copyright law of the Member States was considered for the first time in the United Kingdom, in the decision of the England and Wales High Court of Justice in *Newspaper Licensing Agency Ltd and Others v. Meltwater Holding BV and Others* in 2010, revised by the Court of Appeal and decided by the Supreme Court on 17 April 2013.

The High Court considered claims against the aggregator Meltwater[29]. However, this case differs from *Infopaq* and *Copiepresse* addressing the issues of copyright infringement by news aggregators because its questions focus on whether it is the reader (end user), rather than the aggregator, that infringes.

Meltwater is a Dutch multi-national group that provides a commercial media monitoring service called *Meltwater News* to business customers[30]. That service is provided online only. Customers select search words, in order to then receive reports of articles containing such terms. Each *Meltwater News*, subject to a 256-character limit, contains: (1) a hyperlink to each relevant article (citation of the headline, a click on the link takes the customer through to the article as it appears on the publisher's website), (2) the opening words of the article after the headline, (3) an extract from the article showing the context in which the selected search term appears in the article. In order to compile the reports, Meltwater uses 'spider' programs to 'scrape' or 'read' the content of a wide range of publishers' websites. Its programs then create an index which records the position of every word in every article on every such website. The index is then either emailed to the customer or the customer is given the facility to access it at Meltwater's website.

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[28] *Newspaper Licensing Agency Ltd and Others v. Meltwater Holding BV and Others* [2010] EWHC 3099 (Ch), [2011] EWCA Civ 890. *Public Relations Consultants Association Limited (Appellant) v. The Newspaper Licensing Agency Limited and others (Respondents)*, [2013] UKSC 18.

[29] http://www.meltwater.com/.

[30] The second defendant in the case was Meltwater's UK subsidiary, the third defendant – Public Relations Consultants Association Limited (PRCA).

The Newspaper Licensing Agency Limited ('NLA')[31], formed in 1995, is a company that manages the intellectual property rights of its members by licensing, and collecting the licensing fees for, making copies of newspaper content. The NLA is a licensing body within the meaning of Section 116(2) of the Copyright Designs and Patents Act 1988 ('CDPA')[32]. The other claimants in the case were publishers of national newspapers and shareholder members of NLA[33].

The issue before the High Court was not to decide whether Meltwater itself required a licence for its services since Meltwater had decided to enter voluntarily into licence agreements with publishers. The High Court was asked to declare whether end users – Public Relations Consultants Association Limited (PRCA)[34] and its members require a licence from the claimants in order to lawfully receive and use *Meltwater News*.

Due to the proliferation of online media monitoring services, the NLA promulgated recently two new licensing schemes for commercial users of these services. One, with an effective date of 1 September 2009, for licensing media monitoring organisations (MMOs), such as Meltwater, the use of its members' websites by the grant of a Web Database Licence (WDL). The other scheme, with an effective date of 1 January 2010, aimed at licensing the use of its members' websites by end users of the services of MMOs such as public relations consultants. Under the latter scheme the end user obtained a Web End User Licence (WEUL). The terms of a WDL require the clients of the MMO to hold a WEUL. Meltwater contended that it did not require a WDL in order lawfully to carry on its business as its activities do not infringe the publishers' copyright. In addition it maintained that the terms of the WDL were unreasonable and, on 16 December 2009, commenced a reference to the Copyright Tribunal under Section 119 CDPA[35]. On 28 January 2010 PRCA intervened therein

[31] http://www.nlamediaaccess.com/default.aspx?tabId=40.
[32] *In this Chapter a "licensing body" means a society or other organisation which has as its main object, or one of its main objects, the negotiation or granting, either as owner or prospective owner of copyright or as agent for him, of copyright licences, and whose objects include the granting of licences covering works of more than one author.*
[33] MGN Ltd, Associated Newspapers Ltd, Express Newspapers Ltd, Guardian News and Media Ltd, Telegraph Media Group Ltd and Independent Print Ltd.
[34] An incorporated professional association which represents the interests of its members who are UK public relations providers using the *Meltwater News* service.
[35] Under CDPA the Copyright Tribunal exercises control over licensing bodies in accordance with its jurisdiction set out in Section 149 CDPA. Under Sections 118 and 119 of CDPA, the terms of any new or existing licensing scheme can be referred to the Tribunal by a potential licensee (or under Section

on behalf of its members contending that its members do not require a WEUL in order lawfully to use *Meltwater News*. Thus both Meltwater and PRCA were claiming before the Tribunal that no infringement of copyright is committed by either Meltwater or an end user not holding a WDL or WEUL respectively. As the Tribunal has no jurisdiction to determine those questions, on 24 May 2010, NLA, along with newspaper publishers, decided to sue Meltwater, its UK subsidiary and PRCA for copyright infringement.

The High Court delivered its judgment on 26 November 2010, setting that end users, lacking a licence, infringed publishers' copyright.

The Court held that in light of *Infopaq* no distinction is to be made between a work and any part thereof, provided that the part contains 'elements which are the expression of the intellectual creation of the author'. Consequently, the Court stated that, in some cases, headlines can be considered as independent literary works. Communication of a copyrighted headline would be regarded as a reproduction of a work as a whole and hence a *prima facie* infringement of the publisher's copyright.

Those headlines that are not independent, form part of the articles to which they relate. In such a case the court considered whether the communication of the text extracts consisting of a headline, opening words and a hit extract constituted a reproduction of a 'substantial part' of the protected article pursuant to Section 16(3) CDPA[36]. According to the previous English case law, the relevant test in this respect was to look at the level of the author's skill and labour appropriated by the copier. However now, in line with *Infopaq* ruling, the new relevant test would be that of whether the reproduced part expresses the author's own intellectual creation. From *Infopaq* it followed that even a very small part of the original work may demonstrate the author's stamp of personality. The presiding judge, Proudman J., continued to point out that, unlike the CDPA 1988, Article 2 of the Infosoc Directive contains no reference to 'substantial part', *the ECJ makes it clear that originality rather than*

121 by a person who has been refused a licence) for adjudication on whether those terms are reasonable in the circumstances of the case.

[36] Which states that the doing of an act restricted by the copyright in a work, as defined in Section 16(2), may refer to the doing of it in relation to the work as a whole or any substantial part of it, either directly or indirectly.

substantiality is the test to be applied to the part extracted. As a matter of principle this is now the only real test.[37]

Finally, the Court found that the mere receipt of a news report by email and accessing a report on Meltwater's website constituted copyright infringements by the end user, because a copy of the newspaper extracts was made on the end user's computer without the permission of the publishers. The defences of temporary copying and fair dealing for the purpose of criticism, review or reporting current events were rejected by the court as not relevant to the copying in question.

The ruling of the High Court was upheld on 27 July 2011 by the Court of Appeal of England and Wales on all points contented, dismissing PRCA's appeal.

This constitutes (rather revolutionary) shift from a more quantitative (substantiality) to a qualitative (originality construed as creativity) test in English copyright law. The quantitative test is rooted in Article 16(3) CDPA referring to the 'substantial part' of the work, as well as the practical test for the finding of copyright infringement, which envisages that the part taken by the alleged infringer must be measured against the whole work of the claimant, not simply the work minus the portions which have not been copied (so what is relevant is the level of the author's skill and labour appropriated by the copier[38]). Interestingly enough, the High Court and also the Court of Appeal pointed out in *Meltwater* that the test for what constitutes copyright-protectable subject-matter under UK law has not been affected by *Infopaq*, since *the word 'original' does not connote novelty but that it originated with the author*[39] and that *it is well established that the test of substantiality is one of quality not quantity*[40]. Nevertheless, if we take into account previous practice of UK courts, it seems to that the influence of *Infopaq* and *Meltwater* in the United Kingdom can be profound, by causing the abandonment of traditional refrains such as 'what is worth copying is *prima facie* worth protecting' and by establishing a higher threshold to protection. Paradoxically, the test laid down in *Infopaq* on the other hand might facilitate the

[37] *Newspaper Licensing Agency Ltd and Others v. Meltwater Holding BV and Others* [2010] EWHC 3099 (Ch), 69.
[38] *Ladbroke Football Ltd v William Hill Football Ltd* [1964] 1 WLR 273; *Newspaper Licensing Agency Limited v. Marks & Spencer plc* [2001] UKHL 38, [2003] 1 AC 551.
[39] *Newspaper Licensing Agency Ltd and Others v. Meltwater Holding BV and Others* [2011] EWCA Civ 890, 19.
[40] *Newspaper Licensing Agency Ltd and Others v. Meltwater Holding BV and Others* [2011] EWCA Civ 890, 24.

finding of copyright infringement, in that the taking of any part of a work of a third party can be sufficient to this end, if that part can be considered as its author's own intellectual creation[41].

On a side note, it is worth noting that the UK Supreme Court granted permission to PRCA to appeal against the decision of the Court of Appeal. On 17 April 2013 the Supreme Court gave its awaited decision[42] that astonished the public again, as copyright fans have got used to recently regarding cases on that matter. The Court sided with arguments of Meltwater and PRCA when it dealt with the problem of browsing. The Court held that readers (end users) who open articles via a website link are not breaking the law. However, the Court, while expressing its own view of the matter, decided to refer the matter to the CJEU for a preliminary ruling. The question which the Court refers is (in substance) whether the requirements of Article 5(1) of the Infosoc Directive that acts of reproduction should be (i) temporary (ii) transient or incidental and (iii) an integral and essential part of the technological process are satisfied in case the service as provided by Meltwater, having regard in particular to the fact that a copy of protected material may in the ordinary course of Internet usage remain in the cache after the browsing session which has generated that copy is completed until it is overlaid by other material, and a screen copy will remain on screen until the browsing session is terminated by the user.

V. Originality in news articles

A general rule that facts and ideas are not protected by copyright, but only the specific expression of these facts and ideas may deserve protection, is a common principle accepted by all current copyright laws. Yet, the distinction between non-copyrightable facts and copyrightable factual expression did not (and does not) come easy, and it has changed over decades. This holds true especially for news works.

[41] Rosati E. (2012) *Judge-Made EU Copyright Harmonisation. The Case of Originality*, European University Institute, PhD theses, 121.
[42] *Public Relations Consultants Association Limited (Appellant) v. The Newspaper Licensing Agency Limited and others (Respondents)*, [2013] UKSC 18.

It is enough to say that Article 7 of the original act of the Berne Convention (1886) expressly stated that newspaper and magazine articles published in any Berne Union country could be reproduced, in the original language or in translation, unless the authors or editors had expressly reserved so. The current Berne Convention's catalogue of works makes no reference to newspapers but it states in Article 2(8) that the protection of the Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information. It follows from this that while news *per se* (facts and mere information) is not protected, news articles may gain protection to the extent that they constitute literary or artistic works. It could be said that news works are now fully acknowledged as protected copyright subject matter in all jurisdictions, provided that they constitute original creations. And this holds true for news reports and articles as well as for any photographs and audiovisual recordings that may be used in news aggregation.

The copyright status of newspaper articles was confirmed also by the CJEU in *Infopaq*: *As regards newspaper articles, their author's own intellectual creation, referred to in paragraph 37 of this judgment, is evidenced clearly from the form, the manner in which the subject is presented and the linguistic expression. In the main proceedings, moreover, it is common ground that newspaper articles, as such, are literary works covered by Directive 2001/29*[43].

VI. Originality and titles and headlines

Much more problematic is to find a common playground for the protection of titles and headlines used by news aggregators.

Traditionally, in the US and the UK the protection of titles and short phrases has been denied. Under US law titles, names, short phrases, and slogans are not eligible for copyright protection. A headline in the US would likely be considered a 'short phrase or title' and hence not be copyrightable[44]. The UK courts in general refuse copyright to titles and slogans, as being too short to justify protection in themselves. In some of

[43] *Infopaq International A/S v. Danske Dagblades Forening*, (C-5/08) [2009] E.C.D.R. 16, 44.
[44] U.S. Copyright Office, Copyright Basics, p. 3, available at: http://www.copyright.gov/circs/circ01.pdf, last accessed 30 December 2013.

the cases analysed, copyright protection was denied to titles on the ground of lack of originality. For example, *Splendid Misery* for a book title in Dick v. Yates[45] or the *Lawyer's Diary* in Rose v. Information Services Limited[46]. *A fortiori*, the courts will not protect single words, even though a great deal of skill has gone into their composition (and it seems that there was sufficient originality in a heading). Thus copyright protection was refused to the word EXXON, which had been produced as a result of extensive research into a suitable name for a commercial enterprise. However, the word was not a 'literary' work because it was not intended to afford information and instruction or pleasure in the form of literary enjoyment[47]. Other examples include *Opportunity Knocks*, *Dr Martens*, and, notably, *The Man Who Broke the Bank at Monte Carlo*[48]. Cases in which headings were, to the contrary, given the status of literary work are distinguishable. For example, in *Lamb v. Evans*[49] the 'headings' in which copyright was held to subsist were deemed more than mere headlines. They included three translations and catch-words. Consequently, that decision does not necessitate a finding of copyright in newspaper headlines generally.

Under Article L.112-4 of the French Code, however, the title of a work of the mind is protected in the same way as the work itself where it presents an original character. Furthermore, even if the work is no longer protected, no one can use the title to identify a work of the same genre in conditions susceptible to provoke confusion. French courts have granted protection to single word titles in some cases (*Clochemerle*[50]) and denied it in others (*La gagne*[51]) but no clear line as to what is

[45] *Dick v. Yates* (1881) 18 Ch D 76.
[46] *Rose v. Information Services Limited* [1978] FSR 254.
[47] *Exxon Corp. v. Exxon Insurance Consultants International Ltd* [1982] Ch. 119.
[48] *Francis, Day & Hunter Ltd. v. Twentieth Century Fox Corp.* [1939] UKPC 68. The facts of the case were as follows: in 1892, Francis, Day and Hunter had released a song titled *The man who broke the bank at Monte Carlo*, which was written and composed by Fred Gilbert. It acquired copyright protection under the Copyright Act 1842, but failed to acquire the parallel performing right under the Copyright (Musical Compositions) Act 1882 because the published copies lacked a notice of reservation of such right. Gilbert died intestate in 1903, at which time British copyright law stated that copyright in his works would lapse in 1934. However, the Copyright Act 1911 extended it until the end of 1953. In 1935, 20th Century Fox released the film *The Man Who Broke the Bank at Monte Carlo*, which (other than the title) had no other connection to the song. As it was exhibited in various theatres in Canada, Francis sued in the Supreme Court of Ontario for infringement of copyright by performance in public, infringement of the literary copyright, and for passing off. The claim of literary infringement failed, because the only copying was in the use of the title, and that was too insubstantial in the facts of the case to constitute infringement. As stated by the Court, 'a name alone cannot possess copyright unless it is sufficiently original and distinctive. 'To break the bank' is a hackneyed expression, and Monte Carlo is or was the most obvious place at which that achievement or accident might take place'.
[49] *Lamb v. Evans* [1893] 1Ch 218.
[50] Lyon, 1 Ch., 5 July 1979, (1979) 102 R.I.D.A. 147.

original in titles is apparent. Possibly a distinction can be made between one- or two-word titles, where originality is hard to show, and longer titles, where originality may be more apparent[52].

Titles may be granted protection also in other European countries such as Spain and Poland, where titles of works are protected – if original – as parts of these works. However, Spanish courts are reluctant to grant independent protection to titles (general words) which are not related to works[53]. Polish courts take slightly different view and may grant protection to the title if the title, even separated from the whole work, represents sufficient degree of creativity and individuality. This happens, however, only occasionally, and anyway the judgment on the copyright infringement is made when the infringing title is exploited along with the work to which it relates[54].

As regards the protection of headlines, it was in 1996 when the court (a Scottish court in *Shetland Times v. Wills*[55]) for a first time suggested that copyright could embrace a headline to the extent the headline was original. The case related to a news aggregating site that provided headlines as hyperlinks to the original news source. A former editor of a local newspaper, *The Shetland Times*, left and set up a news website, which he called *The Shetland News*. *The Shetland Times* also set up a website. In October 1996, *The Shetland News* began including headlines taken from *The Shetland Times* site among its own headlines, setting them up as hyperlinks to the relevant news story on *The Shetland Times* website. There was no suggestion that *The Shetland News* was reproducing the stories themselves. *The Shetland Times* sued Mr. Wills for copyright infringement. The newspaper claimed that the headlines are literary works and that the copying of the headlines to *The Shetland News* website is an infringement of copyright in those works. Additionally, the claimant raised a question of whether someone making materials available on a website could be said to be making the material available to the public. The case lacked precedential authority since the parties settled out of the court. Mr. Wills agreed to include on its website the notice *A Shetland Times Story* and the name of the newspaper, in addition to a headline, as pointers to the linked articles. However,

[51] CA Paris, 6 May 1987, (1987) 134 R.I.D.A. 213.
[52] Sterling J.A.L. (2008), 340.
[53] Xalabarder R., (2012), 124.
[54] Barta J., Markiewicz R. (2010) *Prawo autorskie*, Wolters Kluwer, Warszawa, 48-49.
[55] *The Shetland Times v. Dr. Jonathan Wills* 1997 S.C. 316 CS (OH).

The Shetland Times with Lord Hamilton's opinion that headlines might in some circumstances be literary works under UK copyright law, set the stage for more recent decisions granting copyright protection to headlines.

After *The Shetland Times*, in the early 2000s, decisions in this regard varied widely across and even within jurisdictions[56]. In 2002 in the Netherlands, a news aggregation site was found not to infringe copyright laws[57], whereas in Denmark, the same year, a news subscription service was held to have violated copyright laws. The Danish Newspaper Publishers Association (DNPA) brought up a proceedings against Newsbooster, a news search service providing users with relevant headlines with links to articles. DNPA stated that by linking to newspaper articles on Danish newspapers' websites Newsbooster's service was 'tantamount to theft'. The court ruled in favor of the DNPA and enjoined Newsbooster's service, but not because of the mere act of linking, rather because Newsbooster used the links to gain commercial advantage over the DNPA, which was unlawful under the Danish Marketing Act[58]. However, Denmark courts later changed its stance on hyperlinks and search engines, ruling that search engines are allowed to link to other sites because of their important role to the functioning of the Internet. One of the courts said: *Search engines are desirable, as well as necessary to the function of the Internet; that it is usual that search engines provide deep links; and that businesses that offer their services on the Internet must expect that deep links will be provided to their websites*[59].

Similarly, in Germany courts in *Paperboy*[60] and *Session-ID*[61] cases, both dealing with linking and providing information through snippets, found that a hyperlink does not infringe copyright law in the context of a news aggregation site. The courts concluded that a copyright holder providing information on the Internet implicitly declares his consent to the usual usage of his works by search engines. *A sensible use of the immense wealth of information offered by the world wide web is practically impossible*

[56] Stanganelli M. (2012) *Spreading the news online: a fine balance of copyright and freedom of expression in news aggregation*, European Intellectual Property Review 34 (11), 747.
[57] *Algemeen Dagblad B.V & Others v Eureka Internetdiensten*, Case Number 1399609/KG ZA 00-846, 2002, District Court of Rotterdam.
[58] *Danish Newspaper Publishers' Association v Newsbooster.com Aps*, City Court Copenhagen, (2002) 16 W.I.P.R. 7.
[59] *home A/S v. Ofir A-S*, 2005.
[60] *Paperboy*, I ZR 259/00, BGH [2003] GRUR 958.
[61] *Session-ID*, I ZR 39/08, BGH [2010] GRUR 56.

without drawing on the search engines and their hyperlink services (especially deep links), the German court said.

In line with the foregoing decisions, Google as in the AFP, as in the *Copiepresse* cases consequently claimed that that headlines in AFP / Copiepresse news stories does not contain copyrightable text, simply because they encapsulate in a few words the factual content of the story, facts being not copyrightable at all. AFP and Copiepresse argued the opposite, stating that headlines, as sometimes the most creative parts of a news story, are able to gain copyright protection. As we remember, the court in AFP case had no chance to speak, but the Court of First Instance in Brussels concluded already in 2007 that headlines were not precluded from copyright protection by statute, regulation or case law. This was confirmed by the Court of Appeal of Brussels in 2011.

As pointed out by NLA in *Meltwater* case, headlines deserve copyright protection because: (1) they are often striking and substantial, both in terms of content and in terms of length, (2) they are not usually written by the journalists who write the underlying articles but by editorial staff whose specific functions include the composition of headlines, (3) the ability to compose a headline is a valuable and discrete skill and courses exist to teach it, (4) headlines require skill in order to fulfill the objective of capturing the reader's attention and inducing them to read the article. Thus a headline frequently has some emotional or sentimental 'hook', it may contain a pun, it may summarise the content of the article to which it relates, (5) the process of final selection of a headline is separate from the selection of the article. Often a number of options will be proposed and the decision will be taken by a senior editor. Occasionally the article will be tailored to fit the headline[62].

The *Meltwater* court accepted the NLA's point of view and held that in light of *Infopaq*, and arguably contrary to previous common law, headlines are capable of being independent literary works, as they involve considerable skill in devising and they are specifically designed to entice by informing the reader of the content of the article in an entertaining manner. Those headlines that are not independent, on the other hand, form part of the articles to which they relate.

[62] *Newspaper Licensing Agency Ltd and Others v. Meltwater Holding BV and Others* [2010] EWHC 3099 (Ch), 11.

Mindful of *Infopaq* and *Meltwater* decisions, one might wonder whether that case-law will be followed accordingly, and so whether there will be a well-established judicial practice to grant legal protection to headlines of newspaper articles in the future. It seems, however, that nothing could be more wrong. In its recent ruling Federal Court of Australia denied copyright protection to newspaper headlines[63].

Fairfax is the publisher of the national Australian newspaper *The Australian Financial Review* (AFR). The AFR is published on each day of the week, except from Sunday, both in paper and digital form, to subscribers in Australia and elsewhere. Reed provides a service known as 'ABIX' which involves the provision to subscribers of abstracts of articles published in various newspapers and magazines, including articles in the AFR. Each ABIX's abstract includes the headline of the article, typically without alteration, the by-line of the journalist who wrote the article, and a short summary of the article written by an employee of Reed. Fairfax argued that the Reed database reproduced the arrangement of the articles and headlines in the AFR and that Reed, by providing abstracts as part of the ABIX service, had infringed AFR's copyright in a number of different works comprised in each edition of this newspaper.

The court stated that a headline is, generally, no more than a combination of common English words and it does not involve literary composition. *Being this, it does not have the requisite degree of judgment, effort and skill to make it an original literary work in which copyright may subsist for the purposes of the Copyright Act. It may be that evidence directed to a particular headline, or a title of so extensive and of such a significant character, could be sufficient to warrant a finding of copyright protection but that is not the case here. Affording published headlines, as a class, copyright protection as literary works would tip the balance too far against the interest of the public in the freedom to refer or be referred to articles by their headlines*[64].

[63] *Fairfax Media Publications Pty Ltd v. Reed International Books Australia Pty Ltd* [2010] FCA 984.
[64] *Fairfax Media Publications Pty Ltd v. Reed International Books Australia Pty Ltd* [2010] FCA 984, 45.

VII. Originality and extracts of works: a mystery of snippets

Does courts' rulings in *Copiepresse* and *Meltwater* cases with regard to protection of headlines reinvent the wheel? It is easy to imagine what impact the protection of titles and headlines *per se* could have on the making of general reference listings and indexation activities where titles and sources must be necessarily indicated in order to convey any information at all[65]. This was exactly one of the Google's defence arguments in *Copiepresse* but it was rejected by the court. However, the court dismissed this argument because Google, apart from conveying the title / headline of the newspaper article was providing the reader also with a short extract (a snippet) which – according to the court – was giving the reader the essential information that the publisher intended to communicate, thus making it unnecessary to access the full newspaper article[66].

A snippet is defined as a small piece of something. In case of newspaper articles – a piece, part of the article, its extract. This part of the definition is not problematic. The hook is in what does it mean 'small' portion. Can the 11-words extract from the newspaper article be regarded as a small? And the other question – can this small, say 11-words long, part of a newspaper article be copyrightable? The CJEU in the *Infopaq* case answered positively to both questions. The Court said: *Regarding the elements of newspapers articles covered by the protection, it should be observed that they consist of words which, considered in isolation, are not as such an intellectual creation of the author who employs them. 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 possibility may not be ruled out that certain isolated sentences, or even certain parts of sentences, may be suitable for conveying to the reader the originality of a publication such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article. Such sentences or parts of sentences are, therefore, liable to come within the scope of the protection provided for in Article 2(a) of the directive 2001/29. In the light of those considerations, the reproduction of an extract of a protected work which, like those at*

[65] Xalabarder R., (2012) *Google News and Copyright*…, *op. cit.*, 125.
[66] Copiepresse SCRL v. Google Inc., No. 2007/AR/1730, The Court of Appeal of Brussels, 5 May 2011, 28.

issue in the main proceedings, comprises 11 consecutive words thereof, is such as to constitute reproduction in part within the meaning of Article 2 of Directive 2001/29, if that extract contains an element of the work which, as such, expresses the author's own intellectual creation; it is for the national court to make this determination[67].

Also the Court in *Meltwater* found that text extracts can constitute a substantial part of the articles provided that they are tantamount to being original. The Court said: *In many (though not all) cases the text extracts, even leaving aside the headline, do contain elements which are the expression of the intellectual creation of the author of the article as a whole. In most cases the text extracts (and in particular the headline and the opening text) are not merely isolated words or clauses which in themselves convey no meaning. They provide the tone of the article and generally have the special function of drawing the reader in to the work as a whole*[68]*.*

The *Copiepresse* court was of the same opinion, even in its judgment in the first instance in 2007, so before the CJEU ruling in *Infopaq*. The Court indicated that the length of articles' extracts did not matter in terms of copyright and that a title might be protected as long as it was original. The Court also stressed that the reproduction of snippets of protected works without having the authorization of copyright owners might constitute copyright infringement as long as the copy encompassed elements that made the work original.

Does it mean that after *Infopaq*, *Meltwater* and *Copiepresse* rulings courts will be giving strong copyright protection to titles, headlines and excerpts of newspaper articles? And not only, since it easy to imagine the same situation with music or films – can portions of these works be also copyrighted? It could seem, indeed that in the atmosphere when newspapers publishers are making so much noise fearing the competition from news aggregators, courts are taking care of their rights. However, it must be remembered that what courts in *Infopaq*, *Meltwater* and *Copiepresse* said was that titles, headlines, and snippets may be copyrightable only when they contain elements which are the expression of the intellectual creation of the author of the article as a whole. The aforementioned rulings should be then read as to that the key issue to decide infringement is not so much the copying (and independent protection)

[67] *Infopaq International A/S v. Danske Dagblades Forening*, (C-5/08) [2009] E.C.D.R. 16, 45-48.
[68] *Newspaper Licensing Agency Ltd and Others v. Meltwater Holding BV and Others* [2010] EWHC 3099 (Ch), 85.

of headlines, snippets and titles *per se*, but rather the specific purposes and the amount of copying of extracts (rather than headlines and titles) and whether it substitutes for the original works[69].

[69] Xalabarder (2012), 126.

CHAPTER V

COPYRIGHT EXCEPTIONS AND LIMITATIONS: WHERE GOOGLE NEWS STANDS?

I. Introduction

Copyright is the exclusive right of the author of a work, which means that author is the only one to authorise or prohibit reproduction, communication to the public and distribution of his works. However, in order to maintain an appropriate balance between the interests of rightholders and users of protected works, copyright laws allow certain limitations on economic rights, that is, cases in which protected works may be used without the authorization of the rightholder and with or without payment of compensation.

The *Copiepresse* court stated that Google through its Google News service reproduces and communicates to the public newspapers' copyrighted works. In fact, within the Google News reproduction and communication to the public may be examined on three different grounds: (1) copying of headlines and snippets of articles, (2) cache copying, and (3) linking to newspaper articles[1].

As regards copying of titles / headlines and excerpts of works, the Court of Appeal of Brussels, following the judgment of the Court of First Instance in Brussels, stated that

[1] Xalabarder R. (2012) *Google News and Copyright*, in: Lopez-Tarruella A. (ed.) *Google and the Law. Empirical Approaches to Legal Aspects of Knowledge-Economy Business Models*, T.M.C. Asser Press, The Hague, The Netherlands, 126.

by displaying titles and short abstracts of newspaper articles Google reproduced and / or communicated copyrighted works to the public. By doing so without having obtained the prior consent of publishers represented by Copiepresse, Google was deemed to be in breach of copyright law.

As far as Google Cache was considered, the Court asserted that this practice was equal to copying the content of the publishers' webpages to Google's servers and allowing the search engine's users to access the copies of works. In Court's opinion Google wrongfully claimed that it was the internet user who copied the 'cached' articles since Google had only provided internet users with the 'installation' which allowed them to make a copy. The Court assessed that it was not the internet users who were making the copies but it was Google who put at their disposal the copy it had made using a 'cache' service. Google's registration on its own servers of a page published by a publisher constituted a physical act of reproduction. The fact that Google allowed users to take cognizance of that copy by clicking on the 'cached' link amounted to public communication.

With respect to linking, there is no simple answer to the question whether linking qualifies as an act of reproduction or making available of a work at the moment. The problem has been discussed frequently by courts but no single position on the matter has been adopted so far. Last decisions, as that of *Paperboy*[2] in Germany, suggest that search engines are allowed to link to other sites because of their important role to the functioning of the Internet and that a hyperlink does not infringe copyright law in the context of a news aggregation site. However, two recent rulings handed down in Spain have reached opposite conclusions on the question of whether or not linking to copyright infringing content amounts to an act of communication to the public, and thus can be characterized as a primary infringement[3]. The problem is by no means just a domestic debate of any European country. Some references for a preliminary ruling which address directly this question are pending before the CJEU – this being

[2]Paperboy, I ZR 259/00, BGH [2003] GRUR 958.
[3] Peguera M., *Website operator sentenced to 18 months of prison for linking to P2P*, ISP Liability. Spanish Case Law & More, 17 November 2013, available at: https://ispliability.wordpress.com/2013/11/17/website-operator-sentenced-to-18-months-of-prison-for-linking-to-p2p/, last accessed 30 December 2013.

the Case C-466/12 *Svensson*[4]. The CJEU's decision will be delivered in the coming months.

Assuming that, by reproducing and communicating to the public of news articles or parts thereof, Google News is involved in exploitation of copyrighted works, it must be considered whether these acts of exploitation may be exempted under a statutory limitation or as a fair use. What can come into play in this regard are (1) the exception of quotation, (2) the exception for report on news events, and (3) the fair use defences. The Berne Convention for the Protection of Literary and Artistic Works, the Infosoc Directive and most national laws shape these exceptions in a slightly different way. In addition, arguments from Article 10 of the ECHR regarding the freedom of expression can be taken into account. Failed to be allowed to rely on any of these exceptions, one may turn to the implied license concept.

II. Exception of quotation

Quotations are allowed by all national laws and international instruments.

Article 10(1) of the Berne Convention states that 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 press summaries.

This provision applies to all kinds of works, provided that they have been lawfully made available to the public. There is no pre-set condition as to the amount that may be quoted and the beneficiaries or the means of exploitation. The only requirement that is specified is that the quotation is done to the extent justified by the purpose and in the manner that is compatible with fair practice. Article 10(1) does not impose any remuneration for quoting copyrighted works but nothing prevents Berne Union countries from subjecting the quotation limitation to remuneration schemes.

[4] Rosati E., *Is a clickable link a communication to the public? New case referred to the CJEU*, The IPKat, 26 November 2012, available at: http://ipkitten.blogspot.co.uk/2012/11/is-clickable-link-communication-to.html, last accessed 30 December 2013.

The exception for citation in the EU *acquis communautaire* is drafted in a similar way. Article 5(3)(d) of the Infosoc Directive states that Member States may provide for exceptions or limitations to the rights of copyright holders in case of quotations for purposes such as criticism or review, provided that quotations relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose.

The scope of the citation limitation seems to be therefore, in principle, favourable to news aggregators, as they could be exempted under Article 10(1) of the Berne Convention and Article5(3)(d) of the Infosoc Directive, either as mere quotations or as quotations from newspaper articles and periodicals in the form of press summaries, provided that it is done to the extent justified by the purpose and in a manner that is compatible with fair practice, and provided that the mention of the source and the name of the author as it appears on the original is made (Article 10(3) of the Berne Convention and Article 5(3)(d) of the Infosoc Directive itself). In assessing the fairness of any particular quotation, the three-step test envisaged in Article 9(2) of the Berne Convention and Article 5(5) of the InfoSoc Directive should be applied.

At domestic level, however, solutions provided for the citation exception vary. Two patterns can be distinguished: (1) quotations limitations that are not restricted to specific purposes (Germany[5]) or which refer to informatory purposes in general (France[6] and Luxembourg[7]), and (2) quotations limitations that are restricted to specific purposes such as criticism, review, research, teaching and alike (Belgium[8] and Poland[9]) or when making press summaries is expressly permitted either under a specific limitation (Portugal[10]) or as quotations (Spain[11] and the Netherlands[12]). Some of the jurisdictions require that quotation is made in works constituting an

[5] Article 51.
[6] Article L122-5(3)a.
[7] Article 10.1.
[8] Article 21.
[9] Article 29.
[10] Article 75.2g.
[11] Article 32.1.
[12] Article 15a.

independent whole (so no quotations *per se*) and that it should be somehow analyzed in it. Moreover, citation has to be done in a manner that is compatible with fair practice and the three-step test.

This suggests that news aggregators can have a problem with fulfilling quotation requirements – although it can be argued that results showed on Google News page constitute a new work, being an independent whole, it will be hard to prove that what is taken (quoted) from newspapers is then analyzed in Google News.

It also seems, at first sight, that it would be easier for news aggregator to fall within quotation exception in countries where this limitation makes express reference to informatory purposes in general, such as France. Indeed, this was confirmed in *Microfor* case, decided in 1983 and 1987 by the French *Cour de Cassation*[13]. The facts of the case were as follows: Microfor created a database (*France actualités*) that indexed the titles of news articles published in the printed editions of major French newspapers (among others, *Le Monde* and *Le Monde diplomatique*). In addition to titles and headlines a small portion of the indexed articles were also shown. *Le Monde* sued for copyright infringement. Lower courts sided with the claimant. However, the *Cour de Cassation* concluded that indexation for information purposes does not require any authorization from the copyright owner of the referenced work since it is a short quotation allowed by the law – as long as it does not substitute for the original work. According to the court, the limitation for quotations in Article L122-5-3a of the *Code de la propriété intellectuelle* allows the making of indexing listings of an 'informatory nature' which consist of short quotations from preexisting works, and does not require that the quoted parts be analyzed or commented in a new work.

However, this ruling of the *Cour de Cassation* was strongly criticized, on the grounds that the concept of work 'of informatory nature' is very imprecise, which seems to be a sufficient obstacle for any news aggregator to rely on the citation limitation in order to justify its activity. But even in countries where the quotation exception is not limited to any specific purpose, such as Germany, the situation is not more favourable for news aggregators. Nevertheless the wording of Article 51 of the German

[13] *Microfor v. Le Monde*, Cour de Cassation, Ass. Plén., 30 October 1987: JCP G 1988, II, 20932.

Urheberrechtsgesetz, the Federal Supreme Court in 2010 in *Vorschaubilder*[14] denied it could cover displaying of thumbnails of online posted images by the Google search engine because it lacked the legitimate purpose of quotation – that is to analyse or somehow elaborate on the quoted work, and because the quotation requires that there is an internal connection between the work used (or parts of it) and a new work. So the German court basically required news aggregators in Germany to fulfill similar conditions as it is in countries with citation exception restricted to specific purposes, in order to be allowed to rely on this limitation. This means that justifying news aggregation on the basis of the quotation and press summaries limitation may prove to be very difficult in national laws.

Indeed, an example of unsuccessful try of applying exception of citation to news aggregators may be found in *Copiepresse* case where the Belgian court assessed whether Google News activity could be covered by article 21 § 1 of the Belgian Copyright Act (implementing Infosoc Directive into Belgian law with regard to the exception for quotations). According to this article, a citation must aim at certain specific purpose (criticism, polemic, education or review) or be made in scientific works, and it must respect fair practices of the profession and be justified by the pursued goal. Google was of the opinion that exception of citation should apply to its service because it was a press review activity. The court stated that in order to rely on this exception press articles would have to be quoted in the frame of coherent comments and serve as illustrations of a review encompassing also other elements while Google News consisted of mere random juxtaposition of article fragments. The court stressed that citations should be used to illustrate or defend an opinion and concluded that Google News could not be considered as a press review. In its opinion a press review would imply a 'methodical analysis of a group elements' and 'a comparative overview of various press articles on the same topic'. The goal of a review is not to just collect elements to give a general overview on a topic but to comment upon some works. The court noticed that Google News activity consisted only of selecting and classifying articles from different sources but Google did not offer any analysis of the articles or draw any comparison between them. Neither did it express criticism or comment concerning these articles. Therefore, Google News could not benefit from the exception of quotation.

[14] *Vorschaubilder*, BGH I ZR 69/08, 29 April 2010.

The same result was reached by the court in *Meltwater* when analyzing whether this service falls within the quotation exception as envisaged in Section 30(1) CDPA[15]. The court adopted a narrow interpretation of this provision and found a lack of critical analysis necessary to partake in criticism or review. The court focused on the most narrow use by readers, that of searching, rather than a broader possibility that readers may access articles for the purpose of criticism. Neither Meltwater's method of 'scraping' the information, nor the reader's intention in viewing the parts of the 'scraped' articles was seen to be for the purpose of criticizing or reviewing that work. *No one is criticising the parts of the article which Meltwater has 'scraped'. Nor is any one reviewing those parts of the article. Nor, generally, do they seek to criticise or review the article from which the parts are taken*[16].

III. Exception for report on news events

According to the Article 10bis(1) of the Berne Convention, it shall be a matter for legislation in the countries of the Union to permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where protection is claimed.

It follows from this provision that at first sight news aggregators may be exempted under the limitation for report on news events as laid down in Article 10bis(1) of the Berne Convention. It would even seem that it is quite easy for news aggregators to rely on this exception, especially that – as against quotation limitation – there is no requirement to indicate the name of the author, it is enough that the source will be

[15] *Fair dealing with a work for the purpose of criticism or review, of that or another work or of a performance of a work, does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement and provided that the work has been made available to the public.*
[16] *Newspaper Licensing Agency Ltd and Others v. Meltwater Holding BV and Others* [2011] EWCA Civ 890, 37.

clearly mentioned. However, following closer examination of Article 10bis(1), some doubts emerge. First of all, this exception is not mandatory for Berne Union countries (although most of them introduced it). Secondly, and more importantly, the exception only applies if a copyright holder has not expressly reserved it. Thirdly, and even more importantly, articles published in newspapers or periodicals to be used under the limitation must be 'on current economic, political or religious topics'. This amounts to very serious obstacle for news aggregators since the exception does not encompass non-current topics as well as it does not cover topics on other subjects (art, sports, health, technical matters) which are very likely to be aggregated[17].

The exceptions for report on news events is provided also in Article 5(3)(c) of the Infosoc Directive. The article says that Member States may provide for exceptions or limitations to the rights of copyright holders in case of reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible.

Unlike Article 10bis(1) of the Berne Convention, the EU limitation covers all kind of works and other subject-matter (not only articles and broadcasts), and the author's name must be indicated along with the source. However, despite the wide scope, the exemption of news aggregation under the corresponding national limitations would find many obstacles since most national laws require that the reproduction of news articles be done 'by the press' or by other media similar to the original source, and news aggregators hardly qualify as 'press'[18].

This was exactly the case in *Copiepresse*. A try of applying this exception to news aggregators was given by Google before the Belgian court. The court referred to the article 22 § 1 of the Belgian Copyright Act. This article states that once a work has

[17] See Chapter I, II.
[18] Xalabarder R. (2012) *Google News and Copyright*, in: Lopez-Tarruella A. (ed.) *Google and the Law. Empirical Approaches to Legal Aspects of Knowledge-Economy Business Models*, T.M.C. Asser Press, The Hague, The Netherlands, 145.

been lawfully published, its author may not prohibit reproduction and communication to the public, for the purposes of information, of short fragments of works or of works of fine art as a whole in connection with reports on current events. The court said that this exception, as the exception of quotation, applies only when copyrighted works are accessory to the news report and are not the very object of it. Moreover, it stressed that the justification for this exception was the necessity to enable media to react quickly to events and to comment upon them by using some copyrighted material even it is not possible to obtain prior permission of the copyright holder given the urgency to disseminate the information. In court's opinion Google's activity was contrary to this – Google News did not comment upon the news and, as it extracted systematically and automatically articles from the press websites, it was possible to contact the press publishers and ask for their permission. Given this, Google could not rely on the exception for report on news events in this case.

Similarly, the *Meltwater* court stated that Meltwater's users were not using the work for reporting current events for purposes of section 30(2) CDPA[19] because Meltwater's service was available only to paid subscribers, whereas the defence provided by section 30(2) is clearly intended to protect the role of the media in informing the public about matters of current concern to the public. *Meltwater News* is not intended for public consumption; it is tailored, and addressed exclusively, to particular end users for their clients' purposes[20].

IV. News aggregators and freedom of expression

In *Copiepresse* Google not only argued that it fit into relevant exceptions for citation and news reporting, but also launched a freedom of speech argument under Article 10 of the ECHR to justify the operation of Google News service. Google claimed that while the Article 10 right to freedom of expression can be limited in order to protect the rights of others, including where copyright applies, it was neither appropriate nor

[19] *Fair dealing with a work (other than a photograph) for the purpose of reporting current events does not infringe any copyright in the work provided that (subject to subsection (3)) it is accompanied by a sufficient acknowledgement.*
[20] *Newspaper Licensing Agency Ltd and Others v. Meltwater Holding BV and Others* [2011] EWCA Civ 890, 38.

proportionate to do so in that case. However, the court held that Google News does not fall within the scope of the right to freely disseminate information. In court's opinion the fundamental right of access to information as described in Article 10 of the ECHR is not an excuse for not complying with copyright law. The court stated that the freedom of expression may not hinder the protection of the originality showed by an author in the way he expresses his ideas and concepts. It further made the point that copyright law is grounded on the balance between acknowledgment of the author's legitimate interests, on one hand, and the interests of the public and the society, on the other. In that sense freedom of expression was taken into account by the law maker when the latter provided for exceptions to copyright, such as the quotation exception[21].

The question of whether the Human Rights Act 1998[22] has impacted on the protection afforded to owners of copyright by national laws, in this case CDPA 1988 was discussed in the UK *Ashdown v Telegraph Group Ltd.* case[23]. The facts of the case were as follows. The *Sunday Telegraph* had published verbatim extracts from a minute of a meeting between Lord Ashdown, the Prime Minister and other political figures on 21 October 1997. The meeting was attended by only five persons in total, and it was devoted to possible changes in coalition government of that time. Mr Ashdown, since he became leader of the Liberal Democrats in 1988, had kept detailed diaries and other records of his life and political career. He treated these as confidential and kept them secure. If he showed them to others it was on a confidential basis. His record of the meeting on 21 October 1997 was prepared on that basis. Lord Ashdown was intending to publish the diaries of which the minute formed part and it became known in 1999, when Mr Ashdown was standing down from the leadership of the Liberal Democrats. The *Sunday Telegraph* article was published nearly two weeks later after Mr Ashdown revealed his intention to publish diaries. Mr Ashdown commenced proceedings against Telegraph Group, the

[21] Copiepresse SCRL v. Google Inc., No. 2007/AR/1730, The Court of Appeal of Brussels, 5 May 2011, 41-43.
[22] An Act of Parliament of the United Kingdom which received Royal Assent on 9 November 1998, and mostly came into force on 2 October 2000. Its aim is to give further effect in UK law to the rights contained in the Convention for the Protection of Human Rights and Fundamental Freedoms, more commonly known as the European Convention on Human Rights. The Act makes available in UK courts a remedy for breach of a Convention right, without the need to go to the European Court of Human Rights in Strasbourg.
[23] *Ashdown v Telegraph Group Ltd.*, [2001] EWCA Civ 1142; [2001] 4 All ER 666; [2001] 3 WLR 1368.

proprietor of the Sunday Telegraph, making claims for breach of confidence and copyright infringement. The court assessed that the minute was a copyright work and that Mr Ashdown is the owner of the copyright, and that substantial parts of the minute had been copied in the *Sunday Telegraph*. Telegraph Group relied mainly on the defence of fair dealing under Section 30 of the CDPA and on provisions of the Human Rights Act including in particular ss.3(1), 6(1) and 12(3) taken together with Article 10 of the Convention. The court awarded Ashdown summary judgment, dismissing the Telegraph's defences but the judgment is important for establishing that Article 10 considerations might, in an appropriate case, require the court to grant a public interest defence beyond the protection offered under copyright.

The court assessed that copyright is essentially not a positive but a negative right, in the sense that it gives the owner of the copyright the right to prevent others from doing that which any copyright act recognises the owner alone has a right to do. Thus copyright is antithetical to freedom of expression. It prevents all, save the owner of the copyright, from expressing information in the form of the literary work protected by the copyright. The court stressed: *It is important to emphasise that it is only the form of the literary work that is protected by copyright. Copyright does not normally prevent the publication of the information conveyed by the literary work. Thus it is only the freedom to express information using the verbal formula devised by another that is prevented by copyright. This will not normally constitute a significant encroachment on the freedom of expression. The prime importance of freedom of expression is that it enables the citizen freely to express ideas and convey information. It is also important that the citizen should be free to express the ideas and convey the information in a form of words of his or her choice. It is stretching the concept of freedom of expression to postulate that it extends to the freedom to convey ideas and information using the form of words devised by someone else. Nonetheless there are circumstances where this freedom is important and will 'trump' copyright, giving a public interest defence to a copyright infringement claim*[24]*.*

The circumstances in which freedom of expression will prevail over copyright are rare. The public interest which newspapers serve in disclosing information such as the matters referred to in Ashdown's confidential record can normally be protected

[24] *Ashdown v Telegraph Group Ltd.*, *cit.*, 31.

without the newspaper copying the exact words. Occasionally, however, it is necessary for a newspaper to publish documents verbatim, for example to ensure credibility. The form of the document, on such occasions, is of equal importance to the content. Even then, a newspaper may still have a fair dealing defence under the Copyright Act itself. But what if there is no fair dealing defence? Can it still be right for a newspaper to publish substantial verbatim extracts from a document? The court decided that in the *Ashdown* case it would be sufficient for the *Sunday Telegraph* to publish only one or two short extracts to establish authenticity. The *Sunday Telegraph* had gone further than this: *the minute was deliberately filleted in order to extract colourful passages that were most likely to add flavour to the article and thus to appeal to the readership of the newspaper*[25]. This was furthering the Telegraph Group's commercial interests in a manner which was 'essentially journalistic'.

It follows that after the *Ashdown* case in situations where the publication of longer extracts is genuinely necessary in the public interest, newspapers could be able to rely on their right of freedom of expression. The problem with news aggregators, however, is that – as it was demonstrated above – these services have slightly different goal than newspapers itself and so they hardly fall within the exceptions for reporting on news events.

Additionally, Google claimed that its Google News service was paralyzed by copyright, contrary to rights granted to it by the freedom of expression as envisaged in the Article 10 of ECHR. The *Copiepresse* court disagreed and stated that copyright did not prevent it from providing its service at all, as Google was free to conclude general contracts with collective management companies, which would release it from having to seek the prior permission from individual publishers and ensure that the latter and the authors receive the reasonable remuneration they are entitled to.

V. *Fair use* defence

In countries where there are no limitations and exceptions in copyright statues, i.e. in common law jurisdictions, the doctrine of fair use is applied. It is a doctrine that

[25] *Ashdown v Telegraph Group Ltd.*, *cit.*, 82.

permits limited use of copyrighted material without acquiring permission from the rights holders. Unlike the statutory limitations, fair use is merely a defence against infringement and involves no possibility to remunerate the author. Of all defences to copyright infringement, others being a *de minimis* defence, which applies when a party copies an insignificant amount of a work, and an implied licensing defence, which applies when the original party gives implied consent, fair use is the most flexible. Thus, fair use permits courts to 'avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster'[26]. At the same time, however, a fair use analysis are always very difficult for courts as they have to balance interest of copyright holders and public policy considerations. The doctrine was even called 'the most troublesome in the whole law of copyright'[27]. The best example of fair use's complicacy is the case of Google Book Library Project[28]. In this litigation between the Authors Guild and Google pending before the US Second Circuit Court of Appeals the decisions over fair use doctrine have astonished the public, to say the least. In May 2012 Judge Denny Chin let the Authors Guild sue Google on behalf of all authors whose books were scanned without permission, although Google was arguing that the Google Library Project is fair use[29]. In July 2012 the Second Circuit delivered its decision, substantially agreeing with Google and holding Judge Chin's class certification as 'premature in the absence of a determination by the District Court of the merits of Google's 'fair use' defense'[30]. The Second Circuit decided to remand the cause to the District Court for consideration of the fair use issues. On 14 November 2013 Judge Chin accepted Google's argument that that its scanning of more than 20 million books for an electronic database, and making 'snippets' of text available for online searches, constituted fair use, provided that *Google Books provide significant public benefits*[31].

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[26] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994).
[27] *Dellar v. Samuel Goldwyn, Inc.*, 104 F.2d 661, 662 (2nd Cir. 1939).
[28] http://www.google.com/googlebooks/library/index.html.
[29] *The Authors Guild et al. v. Google Inc.*, United States District Court Sothern District of New York, Opinion 05 Civ. 8136 (DC) 10 Civ. 2977 (DC) dated 31 May 2012, available at: http://thepublicindex.org/docs/cases/authorsguild/2012-05-31-opinion.pdf, last accessed 30 December 2013.
[30] Available at: http://james.grimmelmann.net/files/legal/authors-guild-appeal/opinion.pdf, last accessed 30 December 2013.
[31] *The Authors Guild Inc., and Betty Miles Joseph Goulden, and Jim Bouton, on behalf of themselves and all others similarly situated v. Google Inc.*, United States District Court Sothern District of New York, Opinion 05

In light of the foregoing, the question arises whether Google News service's benefits to public policy are significant enough to justify this activity under fair use doctrine. The courts have still to address whether Google News is protected under fair use, as they have had no opportunity to do so until now – as we remember, the only case regarding Google News service in the United States, *Agence France Press (AFP) v. Google, Inc.*[32], was settled out of the court[33].

Although Congress enacted the first copyright legislation in 1790, fair use in the United States was a judge-made rule of reason for almost two centuries until Congress incorporated the doctrine into the Copyright Act of 1976. The Act sets forth four nonexclusive factors for courts to consider when determining whether a use qualifies as a fair use (17 U.S.C. § 107). These factors include: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. No single factor will determine whether the use is fair or not, and all must be taken into account together in light of the particular circumstances of each case.

As regards the first factor, the purpose and character of the use, a court's analysis is two-fold: first, it must evaluate the commercial nature of the use, and second, it must determine whether and to what extent the new work is transformative. A work is transformative when the new work does not 'merely supersede the objects of the original creation' but rather 'adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message'. Conversely, if the new work supersedes the use of the original, the use is likely not a fair use[34]. Additionally, courts have found transformative works that provide a social benefit or

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Civ. 8136 (DC) dated 14 November 2013, available at: http://pl.scribd.com/doc/184172215/Summary-judgment-order-in-Authors-Guild-v-Google-Google-Books, last accessed 30 December 2013.

[32] *Agence France Press v. Google Inc.*, No. 1:05-cv-00546-GK D.C.C. 17 March 2005, No. 1:05-cv-00546-GK D.C.C. 29 April 2005, No. 1:05-cv-00546-GK D.C.C. 19 May 2005, No. 1:05-cv-00546-GK D.C.C. 8 June 2005, No. 1:05-cv-00546-GK D.C.C. 12 October 2005, No. 1:05-cv-00546-GK D.C.C. 6 April 2007.

[33] *Agence France Press v. Google Inc.*, No. 1:05-cv-00546-GK D.C.C. 6 April 2007.

[34] *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 583 (1994).

improve access to information[35]. It is even suggested that if a work is not found transformative, the analysis should end right then and there, as this factor is 'the soul of fair use'. Finally, courts have found that the more transformative a work, the less important its commercial nature[36].

Two cases are of special importance here. In *Kelly v. Arriba Soft Corp.*[37], that focused on the use by a search engine of thumbnails of photographs, the court ruled that this use was a fair use rather than replacing the original work, since it improved access to the claimants' photographs and thus benefited to the public. Such use was deemed transformative.

Similar fair use claim was successfully made in *Perfect 10, Inc. v. Amazon.com, Inc.*[38]. Perfect 10 markets and sells copyrighted images of nude models. Among other enterprises, it operates a subscription website on the Internet. Subscribers pay a monthly fee to view Perfect 10 images in a members' area of the site. Subscribers must use a password to log into the members' area. Google does not include these password-protected images from the members' area in Google's index. Perfect 10 has also licensed Fonestarz Media Limited to sell and distribute Perfect 10's reduced-size copyrighted images for download and use on cell phones. Some website publishers republish Perfect 10's images on the Internet without authorization. Once this occurs, Google's search engine may automatically index the webpages containing these images and provide thumbnail versions of images in response to user inquiries. When a user clicks on the thumbnail image returned by Google's search engine, the user's browser accesses the third-party webpage and in-line links to the full-sized infringing image stored on the website publisher's computer. This image appears, in its original context, on the lower portion of the window on the user's computer screen framed by information from Google's webpage. Perfect 10 claimed that Google infringed its copyrights by displaying thumbnail versions of its photographs. The district court held that, despite the 'enormous public benefit' that Google's search engine provided, the display of Perfect 10's thumbnails was not justified under fair use. However, the appellate court reversed that finding stating that

[35] *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d, 701, 721 (9th Cir. 2007)
[36] Reynolds R.F. (2010-2011) *Google News and public policy's influence on fair use in online infringement controversies*, Journal of Civil Rights & Economic Development 25(4), 984.
[37] Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003).
[38] *Perfect 10, Inc. v. Amazon.com, Inc.*, 487 F.3d, 701, 720 (9th Cir. 2007).

Google's display of thumbnails was 'highly transformative' and that Google search engine was providing a significant public benefit by incorporating the preexisting works into a new one (an electronic reference tool).

In considering the second factor, that is the nature of the copyrighted work, courts generally look at whether the work is creative or factual, whether it has been published or not, and whether the work is still commercially available.

Under a third factor, the amount and substantiality of the use, a court must explore whether the use of the copied material is reasonable compared to the original work, 'reasonable compared' understood in a way that only what is necessary to satisfy the specific purpose is taken. As general rule, the smaller the portion used, the more likely it is to be fair. Yet the importance of this factor will depend upon the type of work as well as on the purpose and character of the use (first factor).

The fourth factor, the effect of the use upon the potential market for the work, turns to be the most important element of fair use analysis. It depends upon the opportunities for sale or license of the work itself and its derivative works, the availability of licences for that use, or the denial of license, the number of recipients, the character (commercial or non-for profit) of the institution using the work, and whether the use usurps the intended audience of the work (whether it substitutes for the purchase of a copy). This fourth factor aims at protecting the commercial market of the work, and as it happens with the three-step test as well, heavily depends on evidence and takes into account aspects of unfair competition law[39].

In the light of all above-mentioned factors, it seems to unfeasible to forecast a univocal solution to the problem whether news aggregators could be deemed as a fair use. Results will heavily depend on the facts and evidence presented in each case. Yet, what should be taken into account in assessing this issue is, first of all, the commercial or non-commercial character of the use. A news aggregator which include advertising is less likely to be deemed fair than the one without advertising. Then, the smaller excerpt of copyrighted work is used, the more likely a news aggregator is to be fair. The importance of this factor will also depend on the type of work as well as the purpose and character of the use. It will be also very important

[39] Xalabarder (2012), 153.

what are the opportunities for sale or license of the work, the potential number of licensees, the type of the institution using the work and whether accessing the work through news aggregator substitutes for users for the purchase of the copy.

In the case of Google News, at first sight, the Google company's commercial nature and economic impact of its news aggregation activity (although Google News itself is not commercial), may weigh strongly against protection of the service under the fair use doctrine. Especially that fair use excludes any compensation which makes the activity building upon the use of pre-existing works.

However, in light of the *Kelly v. Arriba* and *Perfect 10* cases, as well as the very recent decision of Judge D. Chin in *Google Book Library Project*[40], it can be claimed that the US court would rule in favour of Google, finding the Google News service of transformative nature. It is because Google News may have a different purpose than print media as it meets the public's demand for more information, more quickly, whenever it wants, and offers users the power to decide what stories are most important to them. Hence, it may be asserted that Google News' transformative value overshadows its commercial nature.

On the other hand, however, it must be underlined that in some cases Google News does appear to supersede the original source of the news content as a result of its aggregation. This suggests that maybe the answer of the US court would not be so straightforward then. And that solutions maybe should be searched somewhere else.

VI. *Hot news* misappropriation

In addition, another US theory of liability can be asserted against news aggregators, namely hot news misappropriation. The hot news misappropriation is a law doctrine that has its origins in a 1918 Supreme Court decision, *International News Service v. Associated Press*[41]. The court stated there that a competitor cannot free ride on

[40] That will be appealed be the Authors Guild. See Kerr D., *Authors Guild appeals decision in Google Books copyright suit*, CNET News, 30 December 2013, available at: http://news.cnet.com/8301-1023_3-57616380-93/authors-guild-appeals-decision-in-google-books-copyright-suit/, last accessed 30 December 2013.
[41] *International News Service v. Associated Press*, 248 U.S. 215 (1918).

another competitor's work when the latter is expecting to benefit from it and enjoined the defendant from taking facts from the plaintiff's news articles until the commercial value of the facts as news had elapsed. As explained in *National Basketball Association v. Motorola Inc.*[42] the hot news doctrine may be applied if (1) the plaintiff can show that it generated information at a cost, (2) that the information is time-sensitive, (3) that the defendant is free-riding on the plaintiff's work by passing it off as its own, (4) that plaintiff and defendant are in direct competition, and (5) that the free-riding threatens the quality or existence of the plaintiff's product.

Yet, in 2011 the U.S. Court of Appeals in New York City (2nd Cir.) in *Barclays Capital Inc. v. TheFlyOnTheWall.com, Inc.*[43], that considered the application of the hot news doctrine (and its preemption by copyright) on the Internet, held that news aggregator is not liable for hot news misappropriation. At the same time, the court undermined that dismissing the misappropriation claims does not mean that TheFlyOnTheWall.com could not still be found liable for copyright infringement, it merely means that it cannot face both copyright and misappropriation claims.

TheFlyOnTheWall.com runs a financial news service that gathered and reported on stock recommendations from investment banking firms like Merrill Lynch, Morgan Stanley, and Lehman Brothers and reported them on its website. The firms claimed that the information was 'hot news' and that Fly was free-riding on the firms' work in creating the recommendations, as it was impairing their traditional business model based on controlling the dissemination of their research reports. A federal court agreed, and ordered Fly to delay reporting of the information for two hours after the reports are released. However, the ruling was reversed by the appellate court. The court found that the 'hot news' tort survives only in the 'narrow' circumstance where a party is truly 'free-riding'. Otherwise it is preempted by the Copyright Act, which forbids ownership claims in facts, or news of the day. The court stressed that Fly was not free-riding but it was reporting on the fact of the claimants' recommendations, not attempting to pass those recommendations off as its own.

This ruling seems to be a good news for Google News and a bad news for newspapers publishers. First of all, the court excluded that publishers could turn to

[42] *National Basketball Association v. Motorola Inc.*, 105 F.3d 841 (2d Cir. 1997).
[43] *Barclays Capital Inc. v. TheFlyOnTheWall.com, Inc.*, 650 F.3d 876 (2d Cir. 2011).

the ‘hot news’ tort as an alternative to seek when lawfully denied protection under copyright law. For instance, if the unauthorized use of copyrighted material by Google News would be regarded as fair use. Moreover, even if the publishers’ claim is not preempted by copyright law, the publishers should then prove that Google is free-riding on their investment by presenting the information as if it was its own. None of these facts is true in case of Google News. The court’s words tell us a lot: *The adoption of a new technology that injures or destroys present business models is commonplace. Whether fair or not, that cannot, without more, be prevented by application of the misappropriation tort*[44].

VII. Implied licence

Denied relying on any limitation / exception provided by law or on fair use defence, news aggregators might seek an authorization of their activities under implied license after all. This doctrine simply permits a party (implied licensee) to do something that would normally require the express permission of another party (licensor). Implied licenses may be inferred from a fact-specific inquiry into the surrounding circumstances of the case, or they may arise by operation of law.

This actually has been one of the strongest and mostly repeated arguments of Google that obsessively highlights that it follows widely publicized and known Internet standards as to allow third party websites to ‘opt out’ of its services, Google News included. Google explains that when site owners wish to give instructions to web robots, they place a text file called robots.txt in the root of the web site hierarchy. If this file does not exist, web robots assume that the web owner wishes to provide no specific instructions, and crawl the entire site. Google’s website includes detailed instructions as to these standards. Website operators therefore may exclude their websites and the content thereon from Google, either to various degrees or entirely, e.g., by preventing Google’s “web crawlers” from accessing the website and identifying the content thereon.

[44] Xalabarder (2012), 155.

Accordingly, Google argued in the *AFP* case that as AFP subscribers, licensees and AFP itself had not employed 'opt out' tools or other standard files or protocols to preclude Google News from searching and indexing the content on websites allegedly including AFP copyrighted works, they thereby allowed Google News to create links to such sites. Thus, when website operators placed content, including AFP news stories, on their websites not requiring any password or otherwise restricting access, they were intentionally making that content available to be viewed by any of the millions of users with a computer and Internet connection.

Similarly, in *Copiepresse* Google insisted that press publishers had, at least implicitly, consented to the indexation by search engines. Google deemed that press publishers always disposed of technical means to prevent indexation and that this way of proceeding had become a standard throughout the Internet. Therefore, by not using these parameters, press publishers associated with Copiepresse allowed Google to include their websites in the indexation process. The court disagreed and stated that standard copyright rules provided for the necessity to obtain a prior consent from copyright holders and that they did not have to take positive measures to prevent infringements. The appeal court added that Google wrongfully deduced that since it had the technical means to browse all the publishers' sites, it meant copyright holders had given Google the permission to reproduce their works. In court's opinion no implied license derives from the mere fact that copyright owners have not implemented the technological measures that could have excluded indexation and caching by Google. On the contrary, copyright is about authors' explicit, unequivocal and prior permission, which is non-existent in the case in question[45].

It is certainly true what the *Copiepresse* case tells us about the very nature of copyright as such, but on the other hand it must be pointed out that 'opt out' doctrines are not unknown in copyright law, as it may seem at first sight. Moreover, they are as old in that area as the oldest convention to regulate on copyright matter. As already noted, Article 7 of the Berne Convention in its original wording stated that articles from newspapers or periodicals published in any of the countries of the Union may be reproduced in original or in translation in the other countries of the Union, unless the

[45] Copiepresse SCRL v. Google Inc., No. 2007/AR/1730, The Court of Appeal of Brussels, 5 May 2011, 37.

authors or publishers have expressly forbidden it. This prohibition could not in any case apply to articles of political discussion, or to the reproduction of news of the day or miscellaneous information. As correctly pointed out by one of the commentators[46], it is rather a matter of legal interpretation whether this reservation is considered equivalent to opting out from a previously granted license. This leads to the question which may be a proper summary of this chapter: should the law establish a statutory license (with or without an opt out scheme) for news aggregators?[47]

[46] Xalabarder (2012), 157.
[47] Xalabarder (2012), 157.

CONCLUSIONS

The discussion about news aggregators comes at an important moment, in the midst of the debate on how best the newspaper industry should adopt to the new digital age. Yet, the content creator versus technology innovation battle has played out many times before and it is not the first time in history when informatory purposes and law, in particular copyright law, must come to an agreement.

Both copyright and right to access to information are strong public interests. The very existing of news aggregators resets the issue of a delicate balance that needs to be drawn between the unquestionably beneficial informatory function that news aggregators provide to the Internet-using public and the potential impact those services have on right holders in the content to which those services eventually lead.

Nonetheless, as the discussion in this dissertation shows, currently there is good bit of legal uncertainty surrounding news aggregation activities. A body of case law addressing the ability of websites to aggregate news articles is emerging, though clear guidance for various types of news aggregators is still wanted. Several basic questions (not necessarily easy) still need to be answered to assess whether news aggregation is lawful or not, and – hence – whether and how to make their operation legal.

In particular, there is no single answer to the question whether news aggregators displaying titles, headlines, and snippets of newspapers articles are infringing copyright law. At the moment, news aggregators do not benefit from any specific statutory limitation. At the same time, they can hardly fit into existing exceptions and

limitations such as exception for citation or exception in favour of communication media. What some court decisions (such as *Copiepresse*[1] and *Megakini*[2]) show is that the statutory limitations existing in most national laws are insufficient to adjust to a rapidly evolving technological landscape, and that any exhaustive list of limitations is doomed to fail. Additionally, rather narrow interpretation of existing limitations by the courts risks making them ineffective and impossible to apply to new technologies.

Fair use / fair dealing doctrines seem to grant news aggregators more chance of succeeding but they are highly fact specific and depend very much on the circumstances of the concrete case. In addition, the non-compensated nature of fair use makes it hardly difficult to conclude that a news aggregator could be regarded a fair practice.

Finally, implied license doctrines that are often a last resort when other limitations or defences to justify news aggregators operation fail, are also imperfect, as it is hard to accept the idea that newspapers publishers do not use any techniques to prevent their sites from being crawled by the so-called 'googleboots' just because they want their content to be displayed without any compensation on Google News site. This, as pointed out correctly by the *Copiepresse* court, contradicts clearly with the very idea of copyright which is about authors' explicit, unequivocal and prior permission[3]. So implied license may be eventually held true in case of general search engines but not in case news aggregation sites.

Lacking clear, harmonized rules courts sometimes try to challenge the existent situation in order to decide about the copyright infringement by news aggregators on the basis of substantiality / *de minimis* test as regards copying of copyrighted works. It means that some of the courts are likely to find that no copyright infringement results from making a list of links to news articles as this does not imply a *substantial* taking from the original webpage and, moreover, is of a temporary, incidental and

[1] *Copiepresse SCRL v. Google Inc.*, no. 06/10.928/C, The Court of First Instance in Brussels, 13 February 2007, No. 2007/AR/1730, The Court of Appeal of Brussels, 5 May 2011.
[2] *Pedragosa v. Google Spain, S.L*., WESTLAW AC 2008/1773. In this case the owner of the website www.megakini.es sued Google for copyright infringement by means of unauthorized displaying (and thus reproducing and / or making available) by Google its contents through Google's search engine. The court decided that Google's reproduction of the webpages html codes and contents was in order for the search engine to operate and was exempted under the temporary copies limitation.
[3] This actually invokes a simple comparison: if I leave my car open, with keys inside, do I say '*I want to have it stolen*'? If newspapers put some content online, without using 'robots.txt' do they say '*We want to have the articles stolen (taken) by Google*'?

minimal character, thus lacking infringing nature. However, this reasoning is likely to fail when a news aggregator provides not only links but also significant fragments of news works (so conveying essential information). Accordingly, the *Copiepresse* court seemed to suggest that Google News site could avoid liability for copyright infringement by merely reproducing titles and headlines, or – even better – merely linking titles and headlines from original websites, but not snippets of articles[4].

In light of all this, it is submitted that copyright law – failed to keep up with technological and social change – should be revised and adopted to current digital reality. Although the debate on how best copyright laws should answer to news aggregators' activities seems to be far from its end, the underlying idea of the discussion is that those who profit from the distribution of contents must also contribute economically to their creation. Indeed, if we look closer on the cases involving news aggregators we will see that what matters is not so much the copyright infringement but rather the conveyance of the information contained in the copyrighted works, and recovery of the investment made in its production[5]. Indeed, news aggregators are the typical and emblematic product of its times that is the *information society*.

At the moment, the possible models for regulating news aggregators activities in Europe appear to be the German (Italian?) legislative approach and the conclusion of private agreements between interested parties. Although Google's spokespersons were very enthusiastic about the agreements in Belgium and France, saying that 'these agreements show that through business and technology partnerships we can help stimulate digital innovation for the benefit of consumers, our partners and the wider web', it does not seem the proper path to follow. As the European Publishers Council (EPC) pointed out the type of deal arranged between Google and a group of publishers does not address the continuing problem of unauthorised reuse and monetisation of content, and so does not provide the online press with the financial certainty or mechanisms for legal redress which it needs to build sustainable business models and ensure its continued investment in high-quality content'.

[4] On this occasion, it is suggested that either the scope of Article 2 of the Infosoc Directive should be restricted by allowing non-substantial copies or the scope of Article 5(1) of this directive should be interpreted more widely.

[5] Xalabarder R. (2012) Google News and Copyright, in: Lopez-Tarruella A. (ed.) Google and the Law. Empirical Approaches to Legal Aspects of Knowledge-Economy Business Models, T.M.C. Asser Press, The Hague, The Netherlands, 165.

Rather, what is needed in longer term are solutions based on the law. Whether it can be done by means of attentively balanced statutory limitations (including remunerated compulsory licensing) or left for voluntary (collective?) licensing, has to be carefully considered, and not only from the copyright but also competition law standpoint. However, in drafting any solution it must be remembered that legislation may turn out to be disadvantageous for users and the web. If snippets and headlines require licence fees, the ability to locate, and – consequently – to find, information may be curtailed as search engines could (and likely will) simply remove the publishers from their index – an approach that Google has already taken in Belgium. If this happens, locating the news becomes more difficult. Imposition of licence fees in this context may also reduce competition by making it more difficult for new entrants who cannot pay such fees, and unintentionally favouring well-funded players who can pay.

Anyway, one thing is certain – failing to provide any solution, we may risk survival of news aggregation, an activity that – although some its features are criticized – provides value-added service that satisfy fundamental need in the information society. It was even suggested that by leaving the problem of news aggregators unresolved (or left to a 'theoretical voluntary licensing') we may be giving up some of the richest potentials of the Internet in exchange for a 'pyrrhic victory' for newspapers[6] and the maintenance of the copyright *status quo* (which has always been evolving with technology and markets)[7].

Technological development is always conflicting with, or at least poses difficult questions, to the existing legal *status quo.* However, technological changes may be seen not only as a threats but also challenges and opportunities to create new business models. Google News for sure is challenging nowadays.

Battles over Google News are expression of the ongoing deadlock between nations seeking to control cyberspace within their national borders and huge Internet companies like Google that want to standardize the rules of digital engagement globally. As Jan Malinowski, a media expert at the Council of Europe, says trying to get Google to pay for articles 'is like trying to ban Gutenberg's printing press in order

[6] Turner M, Callaghan D. (2008) *You can look but don't touch! The impact of the* Google v. Copiepresse *decision on the future of the Internet*, European Intellectual Property Review 1, 34.
[7] Xalabarder (2012), 165.

to protect the scribes'. One thing is certain about news aggregation sites: newspapers can't live with them and can't live without them.

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