Rights on news: expanding copyright on the internet

Urszula Furgał

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

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European University Institute
Department of Law

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I confirm that chapter V draws upon an earlier article I published in Journal of Intellectual Property Law & Practice (2018, Vol. 13, No. 9) Ancillary right for press publishers: an alternative answer to the linking conundrum

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This thesis has been corrected for linguistic and stylistic errors.

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Thesis summary

The internet and digital technologies have irreversibly changed the way we find and consume news. Legacy news organisations, publishers of newspapers, have moved to the internet. In the online news environment, however, they are no longer the exclusive suppliers of news. New digital intermediaries have emerged, search engines and news aggregators in particular. They select and display links and fragments of press publishers' content as a part of their services, without seeking the news organisations' prior consent. To shield themselves from exploitation by digital intermediaries, press publishers have begun to seek legal protection, and called for the introduction of a new right under the umbrella of copyright and related rights. Following these calls, the press publishers' right was introduced into the EU copyright framework by the Directive on Copyright in the Digital Single Market in 2019.

The purpose of this thesis is to explore how the extension of entitlements on news and press online influences the EU copyright framework. In essence, the thesis asks whether a new related right of producers of press publications is coherent with the EU copyright framework. It enquires into the motives behind the introduction of the new right, and whether copyright and related rights are a fitting tool to address the issue of compensation of press publishers for online uses of their content. The thesis examines the relationship between copyright and the press publishers' right in different regards. It compares the object of protection of the two rights, namely press publication and copyrightable works, on the one hand, and the scope of protection, the exclusive entitlements of copyright holders and press publishers' right holders, on the other. Finally, it explores whether the press publishers' right overcomes the uncertainties in the press publishers' legal standing, or rather creates additional uncertainty by introducing a new right which overlaps with copyright.

Acknowledgements

The story of this PhD begins in Ireland. When reading an article for a next-day class at the Trinity College Dublin, I came across the idea of copyright protecting news and information. It seemed quite impossible at the time. It does not seem like that anymore.

The first and foremost thank you goes to my supervisor, professor Giovanni Sartor. He gave me the freedom to pursue this topic in the way that I wanted, and created numerous opportunities for me to learn and to find my place in the academic world. Secondly, I would like to thank the members of my panel, professor Bently, professor Geiger and professor Parcu. I could not have imagined a better panel in front of which to defend this dissertation.

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A big thank you also goes to my rowing family, the EUI Rowing Club. What started as a fight with the fear of water, became the greatest adventure. A morning without a row on the Arno and a cappuccino with a view on Ponte Vecchio has always been a Florentine morning wasted. A special thank you goes to my lovely co-captains: Christy, Ihintza and Isea. A year of leading the team side-by-side these three strong women was an amazing challenge. Additionally, a big hug goes to 'the bad kids at the end of the boat', Louis and Andrea, my prosecco-on-the-Arno companions, Nico, Nikita and Vuk, and to Alassane for his omnipresent helping hand.

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A special acknowledgement goes to my godson, Leon, who was born just when I embarked on my PhD adventure. I was always joking that Leon is exactly as old as my thesis. Whereas this thesis is not getting any longer, I wish Leon continues to grow and learn, and that he goes out into the world and pursues his dreams, whatever they might be.

Krakow, 14 October 2019

Granting news publishers the legal means to assert their copyright in the digital age should surely not be a controversial step. But, somehow, the companies who have built their business models on the back of our and others' valuable content have made people believe that the internet itself will fail if news publishers are in a position to seek payment for their work.

Christian Van Thillo,
Chairman of the European Publishers Council
and CEO of de Persgroep
9 January 2019

People trust Google to help them find useful and authoritative information, from a diverse range of sources. To uphold that trust, search results must be determined by relevance—not by commercial partnerships. That's why we don't accept payment from anyone to be included in search results. We sell ads, not search results, and every ad on Google is clearly marked. That's also why we don't pay publishers when people click on their links in a search result.

Richard Gingras
Google VP for News
25 September 2019

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Germany

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List of abbreviations

AG	Advocate General
ALAI	The International Literary and Artistic Association
Berne	Berne Convention for the Protection of Literary and Artistic Works (Paris, 4 May 1896), 1161 UNTS 3, entered into force 5 December 1887, as revised at Paris on 24 July 1971, as amended on 28 September 1979
CDSM Directive	Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC OJ L 130 2019
Charter	Charter of Fundamental Rights of the European Union OJ C 326/391 2016
CJEU	Court of Justice of the European Union
CMO	collective management organisation
CoE	Council of Europe
CSO	civil society organisation
DSM	Digital Single Market
EC / Commission	European Commission
ECS	European Copyright Society
ECtHR	European Court of the Human Rights
EP / Parliament	European Parliament
EU	European Union
GDPR	Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119 2016
InfoSoc Directive	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 OJ L 167/10
IPR	intellectual property rights

IPRED	Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights OJ L 157
JRC	Joint Research Centre
Junker Commission	2014-2019 European Commission presided by Jean Claude Juncker
MEP	Member of the European Parliament
MS	Member State
NGO	non-governmental organisation
Proposal	Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market' COM(2016) 593 final
Public Consultation	Public Consultation on the Role of Publishers in the Copyright Value Chain and on the "Panorama Exception"
REP	robot exclusion protocol
TDM	text and data mining
TEU	Treaty on the European Union (consolidated version 2016) OJ C 202/13
TFEU	Treaty on the Functioning of the European Union (consolidated version 2016) OJ C 202/1
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights (adopted 15 April 1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994)
UGC	user-generated content
WCT	WIPO Copyright Treaty (adopted 20 December 1996, entered into force 6 March 2002) 36 ILM 65
WIPO	World Intellectual Property Organisation
WPPT	WIPO Performances and Phonograms Treaty (adopted 20 December 1996, entered into force 20 May 2002) 36 ILM 76 1996

Introduction

I. Online news environment: challenging new ground for press publishers

To say that internet and digital technology has changed the way we consume creative content, is a truism. We watch movies on Netflix, listen to music on Spotify, read books on Kindle, and discover new ideas on Pinterest. The manner in which we find and consume news, has also gone through a considerable change. Legacy news organisations, publishers of newspapers, have moved to the internet. They have their own websites and news applications and communicate with their readers via newsletters and mobile notifications. In the online news environment, however, they are no longer the exclusive suppliers of news. Thanks to the internet, new digital-born news organisations, and digital intermediaries have emerged. Some digital intermediaries, search engines and news aggregators in particular, use news organisations' content: they select and display links and fragments of news organisations' content as a part of their services. They do so without seeking the news organisations' prior consent. Readers have welcomed this new way of discovering news, since it offers a variety of news sources in one place.

The transition to the online news environment has been economically challenging for legacy news organisations. Traditional sources of revenue, such as circulation of paper press and newspaper advertising, are no longer sufficient for publishers to sustain their activities. The content which news organisations made available for free online, did not generate the expected advertising revenues, which would be able to offset analogue publications' losses. The newsrooms began to shrink, and press publishers started to lock their content behind paywalls. At the same time, digital intermediaries, especially big tech companies such as Google and Facebook, are financially booming, taking the lion's share of the online advertising revenue. They slowly became a gateway to news and information online. At the same time, they do not directly participate in news content production.

Legacy news organisations' attempts to license content to digital intermediaries were largely unsuccessful as intermediaries refused to enter licensing agreements. Since their services use only small parts of news content, and link to content which has already been made available on news organisations' websites, intermediaries saw their activities as not to fall under copyright, and consequently not requiring a license in the first place. News organisations were unconvinced. Digital intermediaries' services, and Google News, a news aggregator run by Google, particularly, came to be seen as parasites who build their business models around the use of content for the creation of which they did not pay. News organisations argued that

systematic use of small parts of news content, remains economically significant, and should be under press publishers' control. In response, Google pointed out that many new readers reach press publishers' websites thanks to inclusion of publishers' content in Google services. Considering technical solutions exist to limit search engines and news aggregators' use of their content, news organisations chose not to use them, recognising the benefits of being included in the tech giant's services.

To shield themselves from exploitation by Google and other digital intermediaries, press publishers began to seek legal protection. Copyright was their battleground of choice. However, press publishers had not been explicitly recognised as right holders in the Information Society Directive (InfoSoc Directive). The copyright in the news content they publish, is usually derived from journalists. Copyright failed to provide a clear answer whether the activities of news aggregators, search engines, and similar services would require a license. To confirm their legal standing, and the need to conclude licenses to use news content, press publishers began to call for an award of a new right. They saw it unjustified that the European Union (EU) copyright framework recognises other creative content producers as right holders, such as film and phonogram producers, but ignores news content producers.

The calls of press publishers were first heard at the national level. First Germany, and then Spain, adopted regulatory solutions to benefit press publishers: national press publishers' rights. However, these national solutions did not produce the expected results because they did not create additional income for press publishers. In consequence, press publishers decided to bring their claims to the European Union forum. The claims were well-timed. Junker Commission had announced plans for copyright modernisation in 2014, which gave press publishers a perfect opportunity to make their case for the new right. At that point, the press publishers' right was no longer only about protection against Google and other digital intermediaries, but also about the sustainability of the press sector, and its role in modern democratic societies.

The press publishers' right was introduced into the EU copyright framework by the Directive on Copyright in the Digital Single Market (CDSM Directive). The idea of copyright protection of press publications and press publishers' interests has been controversial from the outset. Copyright experts nearly unanimously opposed it. The press publishers' right was named a "link tax" and protested by public policy advocates and users themselves. This opposition did not discourage the EU legislator, who introduced a new related right for press publishers into

the EU copyright framework in 2019. Member States (MS) have until 2021 to implement the new right in their national legal orders.

II. Scope and aim of contribution

The purpose of this thesis is to explore how the extension of entitlements on news and press online influences the EU copyright framework. In essence, the thesis asks whether a new related right of producers of press publications is in line with the EU copyright framework. It enquires into the motives behind the introduction of the new right, and whether copyright and related rights are a fitting tool to address the issue of compensation of press publishers for online uses of their content. The thesis examines the relation between copyright and press publishers' right in different regards. It compares the object of protection of the two rights, namely press publication and copyrightable works, on the one hand, and the scope of protection, and the exclusive entitlements of copyright holders and press publishers' right holders on the other. It asks whether the press publishers' right overcomes the uncertainties in press publishers' legal standing, or rather creates additional uncertainty by constructing a new right which overlaps with copyright.

When the proposal for this thesis was drafted in January 2015, the introduction of the press publishers' right at the EU level was only an idea, unlikely to find a practical implication. National press publishers' rights had been quite recently introduced, and their consequences were largely unknown. Since then, a proposal for the EU-wide press publishers' right was tabled in September 2016, fiercely discussed for several years, and finally adopted in April 2019. In the meantime, the German press publishers' right was found invalid by the Court of Justice of the European Union (CJEU), and the Spanish solution did not bring any tangible benefits. In writing this thesis I faced the challenge of a dynamically changing subject. Thus, I tried to capture the evolution of the ongoing legislative process, while, at the same time, not to lose the sight of the main question: the expansion of entitlements on news and information and its effect on the EU copyright framework.

To rise to the challenge and provide a better understanding of the complexity of the news production process in the digital age, the thesis adopted a twofold approach. It does not limit itself to the legal analysis of the contents of the EU copyright framework, but it also presents the public discussion on the introduction of the press publishers' right, and sketches the online news environment. Firstly, the thesis provides a doctrinal analysis of the copyright and related rights' *acquis*. It engages with the directives making up the EU copyright framework and analyses the relevant case law of the Court of Justice of the European Union, particularly

concerning the copyright subject matter, right of reproduction and right of communication to the public. Secondly, the thesis provides a comparative analysis of definitions of press, news, press publisher and similar terms in national press and media regulations. The relevant laws were translated using DeepL,[1] an automated translation tool, and translations were later verified with help of native speaker colleagues at the EUI. The same translation method was used when national copyright laws were referred to, except situations where the WIPO Lex database,[2] or a relevant national authority, provided an English translation of a legislative act.

To reconstruct the legislative process of the CDSM Directive, the thesis engages with official documents issued by the European Commission (EC or Commission), the European Parliament (EP or Parliament) and the Council of the European Union (Council), as well as leaked working documents of these bodies. The public discussion accompanying the legislative process, has been reconstructed through the textual analysis of documents issued by stakeholders participating in the discussion, documents disclosed by MEPs following access to information request, and responses to the public consultation on the role of publishers in the copyright value chain. The answers to the public consultation were accessed through the DG CONNECT website. The relevant documents of stakeholders were identified on a rolling basis during the period of writing of this thesis, following reports in media and publications on the stakeholders' websites. To understand the online news environment, the chapter refers to the studies by the Reuters Institute for Study of Journalism (Reuters Institute) among others, data provided by Eurobarometer and Statista, information provided by actors of the online news environment themselves, and the author's own experience with accessing news online. Geographically, the scope of enquiry is limited to tools accessible and actors active in the EU Member States.

III. Chapters outline

Chapter I introduces the EU copyright framework to provide the setting for the other parts of this thesis. It explains how the EU copyright framework was created, what it consists of, and what the reasons were for the harmonisation of copyright and related rights. It provides an account of the copyright and related rights' harmonisation process, in the context of the EU competences and constraints to act in the copyright domain. The chapter also introduces the concept of Digital Single Market (DSM), and explores the reasons behind its creation. It outlines the EU agenda for the creation of DSM, and copyright's role in the DSM. It describes

[1] 'DeepL' ‹https://www.DeepL.com/home› accessed 27 September 2019.
[2] 'WIPOLex' ‹https://wipolex.wipo.int/en/main/legislation› accessed 12 September 2019.

the recent modernisation of copyright rules during the 2014-2019 Commission presided over by Jean Claude Juncker (Junker Commission), which brought the Directive on Copyright in the Digital Single Market, introducing the press publishers' right into the EU copyright framework.

Chapter II sketches the landscape of the online news environment. It lists actors involved in the creation, distribution, and consumption of news content online. It shows that legacy news organisations no longer have a monopoly on the provision of information, exploring their relationship with digital intermediaries, including news aggregators and social media. Furthermore, users' paths of news discovery are traced. Additionally, the chapter describes the basic toolkit of online news organisations, solutions which news organisations use to distribute and promote their content on the web, such as websites, mobile applications, newsletters, and RSS feeds. In the last part of the chapter, the economic state of online news publishing is considered. Funding models currently used by traditional and digital-born news organisations are described, taking account of the part of content which is made available to users for free.

Chapter III provides an account of the public discussion on the introduction of the press publishers' right into the EU copyright framework. First, it introduces the concept of a press publishers' right. It outlines the provisions on press publishers' right in the national copyright laws of Germany and Spain, and traces how the provision on the press publishers' right in the CDSM Directive has changed over time. Additionally, it outlines the goals which the new right was and is to achieve, according to the legislators. In its second part, the chapter provides insight into the discussion on the introduction of the press publishers' right to the EU copyright framework. It lists the discussion's participants, the documents issued, and the actions taken. Additionally, it considers the temporal relationship between the discussion and the CDSM Directive legislative process. Looking at the content of documents and actions of discussions' participants, the last part of the chapter reconstructs the main lines of argument used in the discussion: the narratives. These narratives provide useful insight into actors' reasoning in favour of, or against extension of the copyright into the news domain. The documents and answers to the Public Consultation on the role of publishers in the copyright value chain analysed in chapter III, are listed in Annexes 1 and 2.

Chapter IV explores what a press publication is, the subject-matter of the press publishers' right. The concept of a press publication, and not that of a press publisher, is key for determining the scope of the new right. Thus, understanding what a press publication is, and

how it relates to copyright-protected works and subject-matter of other related rights, is crucial to figure out the effect of the introduction of a press publishers' right into the EU copyright framework.

The chapter begins with an investigation of how copyright protection of the press and news has been addressed at the international level, and what, if any, special provisions are in force for press or news. Subsequently, it defines the subject-matter of copyright and related rights in the EU and considers their mutual relationship. The chapter then proceeds to the discussion of the different definitions of press and press publications in national media and press laws, and within the provision on press publishers' rights at the national level and in the CDSM Directive. In its final part, the chapter makes two claims. The first one is that it is difficult to distinguish between a press publication as the object of the press publishers' right and news items as works protected by copyright. The second one is that the protection of press publication under the umbrella of copyright and related rights, undermines legal certainty and the coherence of the EU copyright framework by granting special protection to a subcategory of literary works and by breaking with copyright egalitarianism.

Chapter V outlines what exclusive rights of copyright and related right holders are relevant for the online news environment, their scope and how the new exclusive right of press publishers fits into the EU copyright framework. It calls into question that the introduction of the press publishers' right will result in a higher level of legal certainty in the online news environment.

The chapter begins with a brief consideration of who the right holders are in the EU copyright framework, and which exclusive rights they enjoy. Since news aggregators and similar services are based on the use of links, two exclusive rights relevant to linking are discussed in detail: the right of communication to the public and the right of reproduction. The chapter thereby answers the question whether the copyright which press publishers, provides a legal basis for the conclusion of licensing agreements, or whether activities of news aggregators and similar services fall outside of copyright's scope. Subsequently, the chapter discusses the new exclusive rights of making available and communication, to the public which the new right confers on the publishers of press publications. It addresses the claim of double-layering of rights as well as the claim of circumvention of copyright provisions. It considers the role played by previews in the context of linking. In its final part, the chapter discusses the possible use of copyright exceptions and limitations in the online news environment and indicates the diverging catalogues of exceptions of the Member States.

Chapter I: Introducing the EU copyright framework

The EU copyright framework consists of acquis on copyright and related rights. At the outset, neither copyright, nor rights related to it, were a matter of interest to the EU. Over time, harmonisation of copyright and related rights progressed, through both legislative measures and jurisprudence of the Court of Justice of the European Union. The aim of this chapter is to explain how the EU copyright framework was created, what it consists of, and what were the reasons for the harmonisation of copyright and related rights. The chapter provides a background for further parts of this thesis, by explaining the context in which the Directive on Copyright in the Digital Single Market, which introduced the press publishers' right into the EU copyright framework, was enacted.

The chapter begins with an account of the copyright harmonisation process. It notes the internal and external competences and limitations of the EU's intervention into the copyright domain. After considering the actions of the European Commission, the European Parliament, and the CJEU, the section concludes that the level of harmonisation consistently rises, challenging the default role of national copyrights. In its second part, the chapter explains the concept of a Digital Single Market, and explores the reasons behind its creation. After briefly discussing the effects of digitalisation on copyright, the section outlines the EU agenda for the DSM's creation. It focuses on the recent modernisation of copyright rules during the 2014-2019 Commission presided over by Jean Claude Juncker, which brought the CDSM Directive.

I. Harmonising EU copyright and related rights

A. EU copyright policy: competences and goals

Originally, the European legislator did not concern itself with copyright. Primary norms of the European Community influenced copyright in a limited manner through the rules on freedom of movement of goods and services, as well as competition law. The EC Treaty establishing the European Community (the EC Treaty) allowed Member States to introduce prohibitions of, and restrictions to the free flow of goods and services, necessary for protection of the intellectual property rights, including copyright, into their national laws.[3] While it was unconcerned with the existence of national intellectual property rights, the EC Treaty applied to the exercise of these rights.[4] As the CJEU explained, the functioning of the single market is not impaired by the mere existence of the copyright provisions, but it could be through their

[3] Treaty establishing the European Community (Consolidated version 2006) OJ C 321E/37 art. 30.
[4] This is so called existence vs exercise doctrine. See Guy Tritton, 'Articles 30 and 36 and Intellectual Property: Is the Jurisprudence of the ECJ Now of an Ideal Standard?' (1994) 16 European Intellectual Property Review 422, 423.

exercise.[5] Accordingly, copyright was primarily seen as an obstacle to free movement of goods and services.[6] Prior to the copyright harmonisation, the CJEU jurisprudence on copyright's interference with the functioning of the internal market, was of the utmost importance.[7] The exercise of national intellectual property rights, which hampered the single market, was allowed only when necessary for the preservation of respective subject-matters. In van Eechoud's opinion, the CJEU's case law shows that any form of copyright exploitation satisfied this requirement.[8]

The EU needs competence to legislate within a particular area of law. This rule is referred to as the principle of attribution or principle of conferral.[9] Pursuant to art. 5 of the Treaty on the European Union (TEU),[10] the EU can only act should the TEU or the Treaty on the Functioning of the European Union (TFUE)[11] confer powers upon it to do so, and only to achieve the objectives set therein.[12] Originally, the Treaties did not contain a specific competence rule in the field of copyright, or intellectual property rights in general. Pursuant to the principle of conferral, the EU bodies are required to indicate a competence rule on the basis of which they act. As such, it is easy to identify what the basis was for regulatory intervention in the area of copyright and related rights. The legislative competence of the EU in the field of copyright was usually derived from art. 114 TFEU, former art. 95 of the EC Treaty. This article provides the European Parliament and the Council with grounds to adopt measures for the approximation of the Member States laws aimed at establishing and functioning of the internal market. As such, the harmonisation of copyright was not motivated by concerns over copyright itself, but the creation and functioning of the single market. A legislative measure based on art. 114 TFEU, which can be either a directive or a regulation, actually needs to harmonise the laws of Member States, and visibly improve the conditions for the establishment or functioning of the internal market.[13]

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[5] *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Großmärkte GmbH & Co KG* [1971] Court of Justice of the European Union C-78/70, EU:C:1971:59 [11–13].
[6] European Commission, 'Green Paper on Copyright and Challenge of Technology. Copyright Issues Requiring Immediate Action COM(88) 172 Final' (European Commission 1988) COM (88) 172 final 1.
[7] Giuseppe Mazziotti, *EU Digital Copyright Law and the End-User* (Springer 2008) 44.
[8] Mireille van Eechoud and others, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Kluwer Law International 2009) 4.
[9] ibid 12.
[10] Treaty on the European Union (consolidated version 2016) OJ C 202/13 art. 5.
[11] Treaty on the Functioning of the European Union (consolidated version 2016) OJ C 202/1.
[12] TEU and TFEU are jointly referred hereinafter to as the Treaties.
[13] *United Kingdom of Great Britain and Northern Ireland v European Parliament and Council of the European Union* [2006] Court of Justice of the European Union C-217/04, EU:C:2006:279 [42–43].

Legislation in the copyright area gained explicit legal basis in the Treaty of Lisbon. Current art. 118 of the TFUE states that the Council and the Parliament can establish 'measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union'.[14] This competence applies only in the context of establishing and functioning of the internal market. Consequently, the initial context of harmonisation, the reinforcement of a single market, was not set aside. Introduction of an explicit competence to legislate in the copyright area does not mean that the legislative instruments can no longer be based on art. 114 TFEU. Of central importance for this thesis, the Directive on Copyright in the Digital Single Market is based on art. 114 TFUE rather than art. 118 TFUE.[15] Introduction of intellectual property's specific competence to legislate, means that the EU is now able to introduce a single European copyright title, which could potentially substitute national copyright laws.

The idea of a single European copyright title, and the creation of a European Copyright Code, have been discussed for about 20 years. The Wittem Project, launched in 2002 by a group of leading European scholars, produced a draft European Copyright Code.[16] The draft, in a form of legislative instrument, was to serve as a model or reference for future harmonisation or unification of the European copyright.[17] It focused on the main elements of the copyright: authorship, moral and economic rights, as well as limitations and exceptions, and it was in line with the spirit of the European harmonisation and international agreements.[18] Unfortunately, it has not found a practical application to date. In 2009, the notion of a single European copyright title has been officially considered by the European Commission. In its 2009 Reflection Document, the EC considered introduction of the 'European Copyright Law' to aid online licensing.[19] The European Copyright was either to substitute national laws or to exist parallel to the national copyright titles. Later, in its 2011 communication on 'A Single Market for Intellectual Property Rights', the Commission indicated two possible solutions to aid in the creation of a copyright environment which would facilitate licensing and dissemination of works in the single digital market. Suggestion one was the creation of a European rights

[14] TFUE art. 118.
[15] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC OJ L 130 2019.
[16] 'European Copyright Code - Introduction' (*IViR*) ‹https://www.ivir.nl/copyrightcode/› accessed 22 May 2018.
[17] Bernt Hugenholtz, 'The Wittem Group's European Copyright Code', *Codification of European Copyright Law. Challenges and Perspectives* (Kluwer Law International 2012) 339.
[18] 'European Copyright Code (Text)' (*IViR*) ‹https://www.ivir.nl/copyrightcode/european-copyright-code/› accessed 6 September 2019.
[19] European Commission, 'Creative Content in a European Digital Single Market: Challenges for the Future. A Reflection Document of DG INFSO and DG MARKT' (2009) 18.

management regime providing for multi-territorial licensing.[20] The second suggestion was the creation of a European Copyright Code, which could consolidate the entitlements owned by right holders pursuant to the directives in force, and clarify the relationship between various exclusive rights and exceptions.[21] Additionally, the Commission promised further to examine the feasibility of the introduction of the unitary European copyright title pursuant to art. 118 TFEU, and its effect on the single market.[22]

Even though the idea of a single copyright code and a single copyright title was not explicitly rejected, their adoption has become a long-term goal. The Commission recognised the difficulties associated with copyright codification, and the substantial changes it would bring about in the functioning of the copyright, including the creation of a single copyright jurisdiction.[23] Copyright comes into existence through the mere fact of creation of work, making a distinction between the community and national systems difficult, if not impossible.[24] Thus, the European copyright title would need to be established by a regulation and replace Member States copyright laws.[25]

To act in the area of copyright law, the European legislator not only needs to have a legislative competence, but also has to observe the principles of subsidiarity and proportionality.[26] The principle of subsidiarity requires the EU to act only when the goals of intervention cannot be sufficiently achieved by the Member States themselves, and they can be better realised at the EU level.[27] Thus, for an intervention on copyright to take place, the EU action needs to have a clear advantage. The principle of proportionality requires that the legislative measures adopted fulfil three criteria: suitability to achieve the objective, necessity, and proportionality *sensu stricte* – benefits of a new legislative measure need to be balanced with the burdens it imposes.[28]

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[20] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Single Market for Intellectual Property Rights Boosting Creativity and Innovation to Provide Economic Growth, High Quality Jobs and First Class Products and Services in Europe COM(2011) 28 Final' (2011) 11.
[21] ibid.
[22] ibid.
[23] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Towards a Modern, More European Copyright Framework COM(2015) 626 Final' 12.
[24] Reto Hilty, 'Reflections on the European Copyright Codification', *Codification of European copyright law: challenges and perspectives*, vol 29 (Kluwer Law International 2012) 360–361.
[25] Maria Martin-Pratt, 'The Future of Copyright in Europe' (2014) 38 The Columbia journal of law & the arts 29, 46.
[26] TUE art. 5(1).
[27] Ibid art. 5(3).
[28] Ana Ramalho, *The Competence of the European Union in Copyright Lawmaking A Normative Perspective of EU Powers for Copyright Harmonization* (Springer International Publishing 2016) 112.

Therefore, the exercise of the European legislator's competence to act in the area of copyright needs to be justified separately in each case.

When acting in the area of copyright, the EU legislator needs to be considerate of international agreements on copyright and related rights of which the EU is a party. The same consideration should be given to international agreements binding Member States, as harmonisation of national laws cannot go against Member States' international obligations.[29] International treaties which both Member States and the EU are party to include the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS),[30] two WIPO Internet Treaties: WIPO Performances and Phonograms Treaty (WPPT)[31] and the WIPO Internet Treaty (WCT),[32] as well as the Beijing Treaty[33] and the Marrakesh Treaty.[34] International treaties which the EU is a party to, are an integral part of the EU legal order, and are binding to the EU institutions and the MS alike.[35] The European Union is not a party to the two oldest and most important international agreements on copyright and related rights: the Berne Convention (Berne)[36] and the Rome Convention.[37] However, both conventions have an indirect effect on the EU legal order. All of the Member States are a party to the Berne Convention,[38] and all but one (Malta) a party to the Rome Convention.[39] As a party to WCT, pursuant to art. 1(4) WCT, the EU is obliged to comply with articles 1 to 21 of the Berne Convention.[40] Art. 9 TRIPS includes a similar provision. Additionally, the EU is a signatory of the WPPT, which requires its parties not to stand in the way of obligations of the MS under the Rome Convention.[41]

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[29] *Società Consortile Fonografici (SCF) v Marco Del Corso* [2012] Court of Justice of the European Union C-135/10, EU:C:2012:140 [53].
[30] Agreement on Trade-Related Aspects of Intellectual Property Rights (15 April 1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994).
[31] WIPO Performances and Phonograms Treaty (adopted 20 December 1996, entered into force 20 May 2002) 36 ILM 76 1996.
[32] WIPO Copyright Treaty (adopted 20 December 1996, entered into force 6 March 2002) 36 ILM 65.
[33] Beijing Treaty on Audiovisual Performances (24 June 2012).
[34] Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (27 June 2013).
[35] *SCF* (n 29) paras 38–39.
[36] Berne Convention for the Protection of Literary and Artistic Works (Paris, 4 May 1896), 1161 UNTS 3, entered into force 5 December 1887, as revised at Paris on 24 July 1971, as amended on 28 September 1979.
[37] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome, 26 October 1961), 496 UNTS 43, entered into force 18 May 1964.
[38] 'WIPO-Administered Treaties Contracting Parties › Berne Convention › Paris Act (1971)' ‹https://www.wipo.int/treaties/en/ActResults.jsp?act_id=26› accessed 6 September 2019.
[39] 'WIPO-Administered Treaties Contracting Parties › Rome Convention' ‹https://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=17› accessed 19 March 2019.
[40] *DR and TV2 Danmark A/S v NCB – Nordisk Copyright Bureau* [2012] Court of Justice of the European Union C-510/10 [29]; *Football Association Premier League Ltd and Others v QC Leisure and Others (C-403/08) and Karen Murphy v Media Protection Services Ltd* [2011] Court of Justice of the European Union C-403/08 and C-429/08, EU:C:2011:631 [189].
[41] *SCF* (n 29) paras 42 and 51.

Although the basis of copyright harmonisation lies in the creation and facilitation of a single market, a look at the recitals of the directives and regulations making up the EU copyright framework shows that the goals which these acts set to achieve are more diverse. Ramalho distinguishes three categories of objectives for the EU legislative intervention into the copyright area: treaty-related objectives, protection of a specific interest, and compliance with the international framework.[42] As treaty-based objectives, which can be related to either the TEU or the TFUE, she singles out not only the creation of a single market, but also the support of culture.[43] Specific protected interests include interests of authors and performers, content industries, intermediaries and end users.[44] An example of legislative instruments aiming to adopt international obligations, are the InfoSoc Directive, transposing the provisions of the WIPO Internet Treaties,[45] and the Marrakesh Directive[46] together with the Marrakesh Regulation,[47] implementing the Marrakesh Treaty. The objective which seems to be lacking from Ramalho's account is the EU's ambition to grasp the potential of technological development. According to Hugenholtz, the inherent relationship of copyright and technology could be justified by the fact that the Commission saw technology as an easy target for harmonisation, without respective national laws already in place, and no deeply-rooted doctrines.[48] When commenting on the objectives which copyright acts aim to achieve, Peukert makes an important observation that all directives regard copyright protection in a positive manner, not considering that the expansion of copyright into new domains or over-protection could be detrimental.[49] This makes the overly increasing positive harmonisation of copyright a desirable outcome.

[42] Ramalho (n 28) 27.
[43] ibid 36.
[44] ibid 39.
[45] 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 OJ L 167/10 resital 15.
[46] Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 242/6.
[47] Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled OJ L 242/1.
[48] Bernt Hugenholtz, 'Is Harmonization a Good Thing? The Case of the Copyright Acquis', *The Europeanization of Intellectual Property Law: Towards a European Legal Methodology* (Oxford University Press 2013) 59.
[49] Alexander Peukert, 'Intellectual Property as an End in Itself?' (2011) 33 European Intellectual Property Review 67, 67.

B. *Harmonisation: the beginning*

At the beginning of the harmonisation process, the Commission had no ambition to create a European copyright framework. Its interventions were more incidental, focused on the issues which were seen as impairing the functioning of the single market. As a result, the harmonisation was not approached in a systematic manner.[50] The beginning of the harmonisation process is marked by the Commission's 'Green Paper on Copyright and Challenge of Technology' published in 1988 (1988 Green Paper).[51] The 1988 Green Paper's concerns revolved around the functioning of the single market, including limiting the effects of copyright on competition, as well as protection from unfair exploitation of works by entities outside the Community.[52] The Commission identified six areas requiring immediate action: 1) piracy; 2) audiovisual home copyright; 3) distribution right, exhaustion and rental right; 4) computer programs; 5) databases; 6) the role of the EU in external relations. The follow-up paper of 1991 (1991 Paper) added new issues, such as the terms of protection, moral rights, reprography and a resale right. In its annex, the 1991 Paper provided a list of actions, including legislative ones, which were to be taken. The Commission's goal was to tackle all aspects of copyright which might have implications for the single market.[53]

The 1988 Green Paper started, what Hugenholtz calls, 'a decade of directives',[54] a time during which the first copyright directives were enacted. The roadmap set by the 1988 Green Paper and the 1991 Paper was mostly realised in the course of the 1990s. The first to be adopted was the Software Directive,[55] setting a common standard of originality for the first time, applicable to computer programs as literary works. Its fast adoption was a consequence of the European legislator's desire to grasp the technical advancement's economic potential, and the rapid development of the personal computer sector. The directive to follow, was the Rental and Lending Directive, which created a horizontal framework for the protection of related (neighbouring) rights of performers, phonogram producers, broadcasting organisations, and

[50] Bernd Justin Jütte, *Reconstructing European Copyright Law for Digital Single Market : Between Old Paradigms and Digital Challenges* (Nomos 2017) 46.
[51] European Commission, 'Green Paper on Copyright and Challenge of Technology. Copyright Issues Requiring Immediate Action COM(88) 172 Final' (n 6).
[52] ibid 11–13.
[53] European Commission, 'Working Programme of the Commission in the Field of Copyright and Neighbouring Rights. Follow-up to the Green Paper' (1991) COM (90) 584 final 4.
[54] Hugenholtz, 'Is Harmonization a Good Thing? The Case of the Copyright Acquis' (n 48) 58.
[55] Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs OJ L 122/42 1991; The directive was later repealed and substituted with a codified version Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs OJ L 111/16.

film producers.[56] The standard of protection guaranteed to European producers and performers was higher than the one of the Rome Convention. Another noteworthy piece of legislation adopted in the decade of directives was the Database Directive.[57] It created a unique, two-tier system for protection of databases, providing a copyright protection for original databases, and the sui generis right for databases of which the creation required substantial investment.

The 1990s directive agenda was concluded by two acts. The first was the Term Directive, providing a common term of protection for copyright works (70 years) and related rights (50 years).[58] The second was the SatCab Directive, a further-reaching instrument searching to establish an internal market for transfrontier satellite services.[59] The remaining issues of the 1988 Green Paper roadmap were tackled later during the 2000s, with the Resale Rights Directive[60] and the Enforcement Directive (IPRED),[61] setting a common standard for the enforcement of copyright rules, among others.

While dealing with the issues outlined in the 1988 Green Paper, the Commission issued another Green Paper focusing on the implications of the technological development for copyright protection: Green Paper on Copyright and Related Rights in the Information Society (1995 Green Paper).[62] The 1995 Green Paper was quite ambitious, singling out nine priority areas requiring action at the EU level: applicable law; exhaustion of rights; reproduction right; communication to the public right; digital dissemination and transmission; digital broadcasting; moral rights; administration of rights; technical protection. Some of the identified issues extended beyond the digital sphere. Compared to the previous documents, the 1995 Green Paper tried to focus more on the right holders than on the industry and users.

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[56] Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property OJ L 346/61 1992; The directive was later repealed and substituted with a consolidated version Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.

[57] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases OJ L 77/20.

[58] Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights OJ L 290/9 1993; The directive was later repealed and substituted with a codified version 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 OJ L 372/12.

[59] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission OJ L 248/15.

[60] Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art OJ L 272/32.

[61] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights OJ L 157.

[62] European Commission, 'Green Paper on Copyright and Related Rights in the Information Society' (1995) COM (95) 382 final.

Exclusive rights of the copyright holders were explicitly singled out, as digital technologies were likely to give these rights new characteristics. The follow-up to the 1995 Green Paper, which came in 1996, limited the number of priority areas, focusing on the rights of reproduction and communication to the public, technical protection measures and right of distribution and exhaustion principle.[63] All of these issues were addressed by the InfoSoc Directive.

C. *InfoSoc Directive: core of European copyright*

The InfoSoc Directive is a key directive for the EU copyright framework. Unlike its predecessors, the InfoSoc Directive addresses copyright in a horizontal manner, abandoning the piecemeal approach which dominated the post-1988 Green Paper working agenda. The two main goals of the InfoSoc Directive were to grasp the technological development, and to adopt the provisions of the WIPO Internet Treaties. Initially, the InfoSoc Directive was criticised as already outdated at the moment of its enactment. While the WIPO Internet Treaties dated back to 1996, and the proposal for the InfoSoc Directive was tabled in 1997, the directive itself was only adopted in 2001, lightyears later in internet years. However, to date, the InfoSoc Directive addresses copyright in the most comprehensive manner, tackling not only its digital aspects, but also crossing over into the analogue world. A predominant part of the InfoSoc Directive is devoted to copyright exceptions. It contains an exhaustive list of twenty-one exceptions, including amongst others: private copy, quotation, parody and exceptions for the benefit of the press, libraries, educational establishments, museums, and archives. Only one of these exceptions, concerning temporary acts of reproduction, was made obligatory. As for the remaining exceptions, Member States have the freedom to choose which of those they want to transpose into their national copyrights. The MS are not allowed to adopt exceptions not included in the InfoSoc Directive's catalogue. Additionally, the InfoSoc Directive harmonised the exclusive rights of the copyright holder, making the right of communication to the public, as prescribed by the WCT, the core right in the context of digital uses of works.

The report on the implementation of the InfoSoc Directive was adopted by the European Parliament in July 2015 (EP Report).[64] In its draft version, prepared by a progressive MEP Julia Reda, the EP Report suggested a number of fundamental changes to the European copyright, including making all copyright exceptions mandatory and introduction of an 'open norm' to

[63] European Commission, 'Communication from the Commission Follow-up to the Green Paper on Copyright and Related Rights in the Information Society' (1996) COM (96) 586 final.
[64] European Parliament, 'Harmonisation of Certain Aspects of Copyright and Related Rights. European Parliament Resolution of 9 July 2015 on the Implementation of 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 (2014/2256(INI))' (2015) P8_TA(2015)0273.

inject flexibility into interpretation of exceptions.[65] The final version of the EP Report was not as far-reaching, yet it still gave a clear signal that the copyright rules of the InfoSoc Directive require an update. The EP Report listed a number of issues which are in need of revision, but it provided no clear indication on which direction these updates should go. Like the InfoSoc Directive itself, the predominant part of the EP Report concerns copyright exceptions. In the spirit of limiting disparities between their national implementations, the EP Report called for the establishment of a minimum standard for exceptions and limitations across the EU.[66] Moreover, considering the technological developments, the EP urged the InfoSoc Directive revision better to safeguard the balance in the digital environment, and to clarify the liability rules of intermediaries and service providers, while guaranteeing a fair remuneration for creators and right holders.[67]

D. Role of the Court of Justice of the European Union

Prior to copyright harmonisation, the CJEU jurisprudence was the only means for EU intervention in the domain of copyright and related rights. The Court clarified compatibility of exercise of national copyrights with the internal market freedoms, especially free movement of goods and services. Following the beginning of the harmonisation process, the role of the CJEU did not diminish in the area of copyright. On the contrary, the number of cases on copyright law is constantly growing, with the Court's judgements significantly contributing to the EU's copyright framework. Using a referral mechanism of art. 267 TFUE, Member States bring questions on the interpretation and validity of acts of the institutions, bodies, offices or agencies of the EU before the CJEU. This includes questions on interpretation of the EU directives, among which the InfoSoc Directive generates the most referrals in the copyright area. Thus, the referral mechanism is the primary means for achieving a uniform interpretation of the EU copyright law.[68]

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[65] European Parliament, 'Draft Report on the Implementation of 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' (2015) 2014/2256(INI).

[66] European Parliament, 'Harmonisation of Certain Aspects of Copyright and Related Rights. European Parliament Resolution of 9 July 2015 on the Implementation of 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 (2014/2256(INI))' (n 64) para 38.

[67] ibid 7, 35 and 45.

[68] Mireille van Eechoud, 'Along the Road to Uniformity - Diverse Readings of the Court of Justice Judgements on Copyright Work' (2012) 3 Journal of Intellectual Property, Information Technology and Electronic Commerce Law 60, 71.

The CJEU case law pursues 'harmonisation by interpretation',[69] also referred to as 'harmonisation by stealth'.[70] Through its judicial activism, the Court fills in the gaps left by the EU legislator, ensuring the interpretative consistency throughout the EU. However, the Court has been accused of an expansionism attitude which particularly manifested itself in the CJEU's choice of autonomous interpretation of the EU law as a default rule.[71] In its judgement in the *SGAE* case, the Court noted that a provision of a directive, which does not explicitly refer to the national laws of the Member States, should be considered an autonomous concept of EU law, and interpreted uniformly throughout the European Union.[72] This means that Member States cannot individually interpret undefined concepts included in the directives, even when the reference to the national law is implicit. To date, autonomous concepts of EU law defined by the CJEU include the concept of work,[73] public,[74] reproduction in part,[75] fair compensation,[76] and parody.[77]

Geiger notes that the CJEU goes further than the mere interpretation of the directive provisions, and acts as a creator of EU law.[78] A good example of the Court going beyond its law-interpreter role, is the judge-made concept of originality. The originality standard was explicitly defined by the EU legislator only to be in connection to particular types of works: computer programs, databases and photographs. Copyright *acquis* did not include a general standard of originality, valid for all works. While delivering its judgement in the *Infopaq* case, the Court took it upon itself to fill this legislative gap, finding that works are protected by copyright if they are the 'author's own intellectual creation'.[79] The general standard of originality understood as author's own intellectual creation was further developed in the subsequent CJEU judgements, which resulted in an effective harmonisation of the subject-

[69] Hugenholtz, 'Is Harmonization a Good Thing? The Case of the Copyright Acquis' (n 48) 62.
[70] Lionel Bently, 'Harmonization By Stealth: Copyright and the ECJ' presentation delivered during 20th Annual Fordham IP Conference, Fordham University School of Law, 12-13 April 2012.
[71] van Eechoud (n 68) 89.
[72] *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* [2006] Court of Justice of the European Union C-306/05, EU:C:2006:764 [31].
[73] *Levola Hengelo BV v Smilde Foods BV*, [2018] Court of Justice of the European Union C-310/17, EU:C:2018:899 [33].
[74] *SGAE* (n 72) para 31.
[75] *Infopaq International A/S v Danske Dagblades Forening* [2009] Court of Justice of the European Union (Fourth Chamber) C-5/08, EU:C:2009:465 [29].
[76] *Padawan SL v Sociedad General de Autores y Editores de España (SGAE)* [2010] Court of Justice of the European Union C-467/08, EU:C:2010:620 [33].
[77] *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others* [2014] Court of Justice of the European Union C-201/13, EU:C:2014:2132 [15].
[78] Christophe Geiger, 'The Role of the Court of Justice of the European Union: Creating and Sometimes Disrupting Copyright Law in the European Union' [2016] Centre for International Intellectual Property Studies Research Paper 2016-03 441.
[79] *Infopaq* (n 75) para 37.

matter of the copyright protection.[80] In Hugenholtz's opinion, the *Infopaq* judgement marks the beginning of the 'age of judicial activism', a distinctive phase in the copyright harmonisation, characterised by the replacement of the legislature with the Court as a harmonisation's centre.[81] An expression of judicial activism of the CJEU, was the introduction of the new public criterion, used in the context of the right of communication to the public. Even though the concept of the new public was mentioned in neither the InfoSoc Directive, nor WCT or Berne, in its unprecedented judgement in *Svensson*, the CJEU invoked the new public criterion to assess whether the provision of a link infringes the right of communication to the public.[82]

The case law on the right of communication to the public, especially that which followed *Svensson* judgement, draws attention to the third role of the CJEU, named a disruptive role by Geiger.[83] Instead of bringing clarity to the interpretation of the copyright provisions, the CJEU causes further confusion on occasion when its case law lacks consistency. When deciding on the application of the right of communication to the public, the Court has been gradually adding new criteria needed for the determination whether a particular act falls within the scope of the right of communication to the public or not. Currently, the application of the right of communication to the public requires the use of a complex test, applied in each case separately. This gave rise to calls for a regulatory clarification of the right.

While interpreting, creating or disrupting EU copyright law, the Court primarily focuses on the wording of provisions and the text of the relevant recitals. The legislative history of directives does not seem to play a role in the interpretation process. Additionally, the Court considers the international agreements in the area of copyright and related rights which the EU is a party to, and which form an integral part of the EU law. However, the way international sources are used in the interpretation process, has been criticised, especially in connection with the *Infopaq* case, and the use of the 1978 WIPO Guide to the Berne Convention, which was both outdated and non-binding.[84] Apart from sources strictly concerned with copyright, the CJEU often refers to the fundamental rights' reasoning behind copyright, particularly since the Charter of Fundamental Rights of the European Union (Charter) is a primary law of the EU.[85]

[80] The concept of originality is discussed in detail in chapter IV, section II.A.2.
[81] Hugenholtz, 'Is Harmonization a Good Thing? The Case of the Copyright Acquis' (n 48) 62.
[82] *Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB* [2014] Court of Justice of the European Union (Fourth Chamber) C-466/12, EU:C:2014:76 [24].
[83] Geiger (n 78) 443.
[84] Mihály Ficsor, 'Svensson: Honest Attempt at Establishing Due Balance Concerning the Use of Hyperlinks – Spoiled by the Erroneous "New Public" Theory' 4–12 ‹http://www.copyrightseesaw.net/en/papers› accessed 30 August 2017 See.
[85] Charter of Fundamental Rights of the European Union OJ C 326/391 2016.

II. Digital copyright and Digital Single Market

Development of digital technologies confronted the EU copyright framework with a number of challenges. Internet and its borderless nature inherently clash with the territorial character of copyright and related rights. Works are no longer confined to a tangible form, and their reproduction rarely involves physical duplication. Thanks to digital technology, everyone is able to make perfect copies of protected works, without any quality loss. Availability of easy-to-use creative tools caused the passive audience to transform into creators. As a result, the amount of available creative content grew dramatically. New stakeholders emerged, such as digital intermediaries of the likes of Google and Facebook, and established stakeholders have taken up new roles.[86] Consequently, balancing of interests in the copyright framework has become more complex.

Development of digital technologies has brought previously unknown forms of digital transmission and storage: linking, embedding, framing, streaming, and cloud computing, as well as new research and learning technologies, including text and data mining (TDM), and massive online courses (MOOC). Moreover, technological development has made it possible for new digital initiatives to emerge: Google Books, digitalisation of archives and libraries, and the creation of interactive museums. New types of services were created as well. Since users are no longer restricted to buying tangible copies of works, they welcomed the creation of streaming services, carrying all kinds of creative content: music, movies, TV, radio, and press.

The development of digital intermediaries, platforms and social media has radically changed the dynamics of creative markets. Creation of value no longer needs to be connected to production of content. Right holders and authors' control over dissemination of works was significantly weakened, endangering the position of traditional content distributors, such as publishers. The dominant position of digital intermediaries coupled with creators and right holders' dependence on their presence on platforms, became a major concern. At the same time, defining the role of platforms, and assigning them respective responsibilities and liabilities caused multiple problems. Online, the line was blurred between private and commercial use.

The EU copyright framework has become subject to fierce criticism of being outdated, and unsuitable to support creativity and development of new digital technologies. The challenges inherent to the development of digital technologies were addressed in the process of the

[86] Hugenholtz foresaw that traditional actors would take new roles in the digital environment as early as 1996. He referred to it as a 'convergence of roles'. See Bernt Hugenholtz, 'Adapting Copyright to the Information Superhighway', *The Future of Copyright in a Digital Environment* (Kluwer Law International 1996) 84.

creation of a Single Digital Market, an equivalent of the EU internal market on the borderless internet.

A. *Digital Strategy for Europe (2010-2014)*

The origins of the Digital Single Market can be traced back to the Europe 2020 Strategy, the goal of which was the recovery of the European economy following the economic and financial crisis.[87] One of the seven flagship initiatives outlined in the Strategy, was the Digital Agenda for Europe (Digital Agenda). The Digital Agenda's overall aim was the creation of a 'true single market for online content and services'.[88] Such a single market was to aid the smart growth of the EU economy, based on knowledge and innovation. Copyright did not play a significant role in the Europe 2020 Strategy, and it was not even mentioned in the context of the DSM's creation. The Europe 2020 Strategy only refers to copyright in the context of the Innovative Union initiative, in which the EC promises to improve framework conditions for businesses to innovate. Modernisation of copyright was one of the proposed improvements.[89] Nevertheless, copyright was mentioned in the 2010 Digital Agenda for Europe, a document providing a roadmap for the DSM.[90] In its account of the obstacles to the DSM's creation, the Commission noted that Europe lacked a unified market in the content sector. Hence, a promise was made to take actions to 'simplify the copyright clearance, management and cross-border licensing'.[91] The majority of the 2010 Digital Agenda still concerned the technical dimension of the DSM: network development, interoperability of standards, fast internet access, and digital literacy.

A more in-depth analysis of copyright in the context of the DSM was provided in the EC's communication on 'A Single Market for Intellectual Property Rights'.[92] The creation of a comprehensive framework for copyright was singled out as one of six key policy initiatives which needed tackling for the single market for intellectual property rights (IPRs) to subsist. The then existing barriers created by copyright, were to be removed, so that right holders and users could take advantage of technological development, and that right holders could secure the remuneration for new uses. The EC identified eight areas requiring its initiative, including,

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[87] European Commission, 'Communication from the Commission Europe 2020 A Strategy for Smart, Sustainable and Inclusive Growth' (2010) COM(2010) 2020 final.
[88] ibid 15.
[89] ibid 13.
[90] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions A Digital Agenda for Europe' (2010) COM(2010)245 final.
[91] ibid 11.
[92] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions A Single Market for Intellectual Property Rights Boosting Creativity and Innovation to Provide Economic Growth, High Quality Jobs and First Class Products and Services in Europe COM(2011) 28 Final' (n 20).

among others: copyright governance and management, management of databases, access to Europe's cultural heritage, and fostering media plurality. Interesting to note is that the Commission also considered further-reaching projects: a codification of the European copyright through the introduction of a European Copyright Code, and the introduction of a unitary copyright title on the basis of art. 118 TFUE. None of them came to be, and it seems that we are still far away from accepting a European Union-wide copyright title. Nonetheless, two of the areas singled out in the communication, were addressed through regulatory measures. The call for the creation of a European framework for collective licensing, and enabling multi-territorial and pan-European licenses, resulted in the adoption of the CRM Directive.[93] Additionally, acting to promote access to European cultural heritage, the Commission tackled the problem of identification by making orphan works available in the Orphan Works Directive.[94]

The Commission's enquiry into adopting a comprehensive copyright framework for the DSM was further developed along two parallel tracks of action: review of the existing copyright framework and a stakeholder dialogue. First, in its communication on 'The Digital Agenda for Europe - Driving European growth digitally', the Commission promised to finish the review of the EU copyright policies, based on empirical data provided by impact assessments and market studies.[95] The decision on possible legislative reform proposals was scheduled for 2014. The Commission vowed to address elements such as territoriality, harmonisation, limitations and exceptions, fragmentation of EU copyright market and enforcement, making the review quite comprehensive in its scope.

On the same day as publishing the communication making the pledge to continue the policy review, the Commission issued the communication 'On content in the Digital Single Market', which launched a stakeholder dialogue under the name 'Licenses for Europe'.[96] The Commission established four parallel stakeholders' groups, each responsible for different issues: 1) cross-border access and portability of services; 2) user-generated content and licensing for small-scale users of protected material; 3) the audiovisual sector and cultural

[93] Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market Text with EEA relevance OJ L 84/72.
[94] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works OJ L 299/5.
[95] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions The Digital Agenda for Europe - Driving European Growth Digitally' (2012) COM(2012) 784 final 6.
[96] European Commission, 'Communication from the Commission On Content in the Digital Single Market' (2012) COM(2012) 789 final.

heritage institutions; 4) text and data mining for scientific research purposes. The dialogue's aim was to deliver practical, industry-led solutions, which would explore the limits of innovative licensing. The success of the 'Licensing for Europe' project is questionable, with two groups having failed to reach a compromise. The 'Ten pledges to bring more content online', prepared by two other groups, were more declaratory in nature, did not put forward any concrete solutions.[97]

Delivering on its promise to continue the review of European copyright policies, the Commission launched the Public Consultation on the review of copyright rules in December 2013 (2013 Consultation). The 2013 Consultation addressed the challenges to the EU copyright framework in the digital environment, making an enquiry into the issues identified in the communication 'On Content in the Digital Single Market'. The 2013 Consultation was quite extensive and included a total of eighty questions. The majority of the questions concerned two issues. The first issue was the rights and functioning of the single market, including linking and browsing, and the related scope of rights associated with digital transmission and cross-border access to content. The second issue was limitations and exceptions as applied in the digital environment. The remaining part of the enquiry addressed such matters as private copying and reprography, fair remuneration of authors and performances, enforcement of rights, and a unitary copyright title. The 2013 Consultation attracted a significant number of responses, as the Commission received more than 9500 replies, with the majority having been submitted by end users and consumers. The replies were summarised in a report published in July 2014.[98]

The EC's initial take on the modernisation of copyright rules came in the White Paper 'A copyright policy for creativity and innovation'. The never-published, but prematurely-leaked document, did not contain any ground-breaking content. It was more of an outline of objectives and elements which were to be taken under consideration during the review process. What is worth noting, is that apart from the need for adoption of the copyright framework to the new technological reality, the document indicated two other reasons for copyright's modernisation: the outdated character of the InfoSoc Directive, and the complexities in the production value chain. It was the first time the EC singled out the InfoSoc Directive as a legislative tool inconsiderate of current digital reality. From then on, the need for re-evaluation of the value distribution became a permanent element of

[97] '"Licences for Europe" Stakeholder Dialogue' (*Digital Single Market - European Commission*, 22 December 2017) ‹https://ec.europa.eu/digital-single-market/en/news/licences-europe-stakeholder-dialogue› accessed 4 September 2019.
[98] European Commission, 'Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules' (2014).

the discussion on the modernisation of copyright rules. The White Paper pointed out a number of issues in need of the review, with three objectives: facilitating the access to content in the DSM; balance between copyright and other public policy areas; efficient market-place and value-chain for copyright works. The document remained an internal draft and was never officially published, only making a suggestion for the policy solutions to be followed during the next commission's term.

B. Digital Single Market Strategy (2014-2019)

A new wave of initiatives on creation of the Digital Single Market came during the 2014-2019 Commission under Jean Claude-Juncker presidency. In the Political Guidelines for the next European Commission, Juncker called 'A Connected Digital Single Market' his second Priority.[99] The goal was to take advantage of opportunities offered by the digital technologies and 'to break down national silos in telecoms regulation, in copyright and data protection regulation'.[100] Juncker promised to take ambitious legislative steps towards the creation of the DSM. One of the promised steps was the modernisation of copyright rules, so that they would take into account the digital revolution and the related changes in consumer behaviour.

The Commission's communication 'A Digital Single Market Strategy for Europe' provided a roadmap for the DSM's creation.[101] It followed from the earlier declarations of the Digital Strategy of capturing the benefits of the technological development for innovation, growth, jobs, and Europe's competitiveness. The Digital Single Market Strategy (DSM Strategy) was based on three pillars: 1) better access to online goods and services across Europe for consumers and business; 2) the creation of the right conditions for digital networks and services to flourish; 3) maximising the growth potential of the European Digital Economy.[102] The initial plans for copyright, addressed within the first pillar, were ambitious, with the proposals for modernisation of copyright framework scheduled for 2015.[103] Somewhat less ambitious was the approach adopted by the Commission, which opted for reducing the differences between national copyright regimes rather than overcoming the existing barriers.[104] Leaving the

[99] Jean-Claude Juncker, 'A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change. Political Guidelines for the next European Commission.'
[100] ibid 6.
[101] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Digital Single Market Strategy for Europe' (2015) COM(2015) 192 final.
[102] ibid 4.
[103] ibid 20 Annex: Roadmap for completing the Digital Single Market.
[104] ibid 8.

territorial character of copyright intact, the Commission declared to adopt solutions supporting content portability and addressing geo-blocking.[105]

An outline of targeted actions and proposals for copyright in the DSM was presented in the Commission's communication 'Towards a modern, more European copyright framework',[106] and followed by the communication 'Promoting a fair, efficient and competitive European copyright based economy in the DSM'.[107] The Commission considered it necessary to further harmonise the copyright rules to overcome fragmentation and conflicts within the functioning of the single market.[108] Four separate areas requiring its attention were identified. The first area concerned the need to ensure a wider access to content across the EU, which the EC decided to tackle by removing respective obstacles gradually without addressing the territorial nature of copyright directly. Two regulatory instruments were adopted in this area, the Portability Regulation[109] and the Geo-Blocking Regulation,[110] and the SatCab Directive was revised.[111]

In the second area, the Commission considered actions for the adaptation of exceptions to the digital and cross-border environments. The goal was to increase the level of harmonisation for exceptions, making some of them mandatory and applicable across all Member States. The Commission took a number of, not entirely concise, actions in this area. First, it adopted two regulatory instruments to implement the Marrakesh Treaty,[112] facilitating the access to works

[105] See Reto Hilty and Valentina Moscon, 'Modernisation of the EU Copyright Rules. Position Statement of the Max Planck Institute for Innovation and Competition' (Max Planck Institute for Innovation and Competition) Research Paper 17–12 14.
[106] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Towards a Modern, More European Copyright Framework COM(2015) 626 Final' (n 23).
[107] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Promoting a Fair, Efficient and Competitive European Copyright-Based Economy in the Digital Single Market' (2016) COM(2016) 592 final.
[108] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Towards a Modern, More European Copyright Framework COM(2015) 626 Final' (n 23) 3.
[109] Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market OJ L 168/1.
[110] Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC OJ L 60I/1 2018.
[111] Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC OJ L 130/82.
[112] Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (signed 27 June 2013) WIPO Doc VIP/DC/8 2013.

for disabled people, namely the Marrakesh Directive[113] and the Marrakesh Regulation.[114] Secondly, it carried out a public consultation on the panorama exception, which covers the taking and reproduction of pictures of works placed in public spaces.[115] The consultation resulted in a simple recommendation to the Member States to adopt such exception.[116] Thirdly, the CDSM Directive introduced three new mandatory exceptions, covering text and data mining by research organisations and cultural heritage institutions; use of works in digital and cross-border teaching activities; uses for preservation purposes by culture heritage institutions.[117] The fourth exception of the CDSM Directive, the general text and data mining one, is also obligatory, but it does not apply when the right holder made an express reservation to the contrary.[118]

The third area of action, achieving a well-functioning marketplace for copyright, bears the most significance for the purposes of this thesis. The Commission had pledged to consider whether there was a need for defining the right of making available, and the right of communication to the public, as well as to examine if a specific action was necessary with regard to the news aggregators.[119] The press publishers' right introduced by the CDSM Directive delivered exactly on that promise. Additionally, the Commission promised to examine whether the EU copyright framework guarantees a fair distribution of value generated by the new forms of online uses of content.[120] After concluding that there is a value gap in the content production process, the EC put forward a proposal for a special liability regime for online content-sharing providers, the most controversial provision of the CDSM Directive often referred to as a filtering obligation.[121] The Commission also pledged to consider the issue of fair remuneration of authors, which resulted in the introduction of a principle of appropriate and proportionate remuneration, and transparency obligations.[122] The scope of the right of

[113] Marrakesh Directive.
[114] Marrakesh Regulation.
[115] 'Public Consultation on the Role of Publishers in the Copyright Value Chain and on the "panorama Exception" - Digital Single Market - European Commission' (*Digital Single Market*) ‹https://ec.europa.eu/digital-single-market/en/news/public-consultation-role-publishers-copyright-value-chain-and-panorama-exception› accessed 9 May 2016.
[116] European Commission, 'Synopsis report on the results of the public consultation on the "panorama exception"' ‹https://ec.europa.eu/digital-single-market/en/news/synopsis-reports-and-contributions-public-consultation-role-publishers-copyright-value-chain› 4 September 2019.
[117] CDSM Directive art. 3, 5 and 6.
[118] ibid art. 4.
[119] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Towards a Modern, More European Copyright Framework COM(2015) 626 Final' (n 17) 8.
[120] ibid 9.
[121] CDSM Directive art. 17.
[122] ibid art. 18 and 19.

making available and communication to the public were not clarified, causing a major disappointment in the modernisation process. The fourth, and ultimate, area concerned the enforcement of intellectual property rights. Regardless of great expectations about the revision of the IPRED, only a guidance communication on the application of IPRED was published.[123]

Legislative proposals included in the DSM package followed the non-systematic path of copyright harmonisation. Certain aspects of copyright were addressed in various documents. The package included both directives and regulations, so the legislator was not even consistent in choosing a form of legislative response.[124] The Junker Commission's reform lacks conceptualisation.[125] Even though an evidence-based approach to the current modernisation of the copyright rules had been pronounced a goal, the proposals were often not backed by relevant empirical data.

C. *Copyright in the Digital Single Market: the CDSM Directive*

The most comprehensive legislative instrument on copyright adopted during the Junker Commission, is the Directive on Copyright in the Digital Single Market. The proposal for the CDSM Directive (Proposal) was tabled by the EC on 14 September 2016, accompanied by the Impact Assessment[126] and the communication on 'Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market'.[127] Additionally, two synopsis reports on the Public consultation on the role of publishers in the copyright value chain and on the 'panorama exception' (Public Consultation) were published the same day.[128] The Proposal came about a year later than expected, and it was consistently delayed during the legislative process in the EP and the Council and the trilogue negotiations. The CDSM Directive was finally adopted on 17 April 2019, and published on 17 May 2019. Member States

[123] European Commission, 'Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee Guidance on Certain Aspects of Directive 2004/48/EC of the European Parliament and of the Council on the Enforcement of Intellectual Property Rights' (2017) COM(2017) 708 final.
[124] Hilty and Moscon (n 105) 16.
[125] ibid 17.
[126] European Commission, 'Commission Staff Working Document Impact Assessment on the Modernisation of EU Copyright Rules. Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council Laying down Rules on the Exercise of Copyright and Related Rights Applicable to Certain Online Transmissions of Broadcasting Organisations and Retransmissions of Television and Radio Programmes' (European Commission 2016) SWD(2016) 301 final.
[127] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Promoting a Fair, Efficient and Competitive European Copyright-Based Economy in the Digital Single Market' (n 107).
[128] 'Synopsis Reports and Contributions to the Public Consultation on the Role of Publishers in the Copyright Value Chain and on the "Panorama Exception"' (*Digital Single Market - European Commission*, 14 September 2016) ‹https://ec.europa.eu/digital-single-market/en/news/synopsis-reports-and-contributions-public-consultation-role-publishers-copyright-value-chain› accessed 4 September 2019.

are required to implement the CDSM Directive's provisions by 7 June 2021, two years after it entered in force.[129]

The difficulties in reaching a compromise on the text of the CDSM Directive can be directly linked to its content. Since the Proposal, the CDSM Directive has been structured around three strands: 1) adaptation of exceptions and limitations to the digital and cross-border environment; 2) improvement of licensing practices and ensuring a wider access to content; and 3) achievement of a well-functioning copyright market. Most of the controversies over the CDSM Directive were produced by two provisions introduced under the third strand on the creation of a well-functioning copyright market. The first was art. 11, introducing the EU-wide press publishers' right, subject of this thesis. The second was art. 13, addressing a value gap problem by creating a new liability regime for online content sharing services. After a renumbering of the articles in the final text of the CDSM Directive, these provisions are now included in arts. 15 and 17 respectively. Difficulties in reaching a compromise on these provisions contributed greatly to the delay in adoption of the CDSM Directive. The CDSM Directive is a new legislative instrument rather than a revision of the InfoSoc Directive. Accordingly, both directives will exist alongside each other. Regardless of its name, the effects of the CDSM Directive are not limited to the digital environment, and will extend into the analogue world.

Although the vote on the position of the European Parliament was initially scheduled for June 2017, the final vote on the EP compromise took place in September 2018. One of the reasons for this delay was the change of rapporteur for the JURI Committee, the EP Committee tasked with the preparation of the report on the Proposal. The original rapporteur, Therese Comodini-Cachia MEP, put forward the draft report in March 2017.[130] Following her resignation, Axel Voss MEP took over responsibility for the file. Whereas the draft report of Comodini-Cachia, despite its drawbacks, presented a balanced approach, Voss' showed more sympathy towards the content industry. The suggestion to remove the press publishers' right from the Proposal and substitute it with a presumption of right's ownership by publishers included in the draft report, was rejected, and the press publishers' right restored. Four EP committees prepared

[129] CDSM Directive art. 26.
[130] European Parliament, 'Draft Report on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market' (2017) PE-601.094.

opinions on the Proposal for JURI: ITRE,[131] IMCO,[132] CULT,[133] and LIBE.[134] All opinions were published in 2017. Nearly one thousand amendments were tabled during the JURI works on the report. Following months of labour, and a leaked compromise, the JURI report was adopted in June 2018.[135] The report and the JURI suggestion to open negotiations with the Council were rejected in a plenary vote of the EP in July 2018.[136] Following a plenary debate, the EP compromise was finally adopted on 12 September 2018.[137]

The proceedings in the Council were less turbulent than in the Parliament but reaching an agreement between Member States took longer than originally anticipated. The final compromise was approved on 25 May 2018, under Bulgarian presidency.[138] After reaching an agreement on matters such as exceptions and limitations, a licensing mechanism for out-of-commerce works, remuneration of authors, and adding provisions on a general TDM exception and extended licensing mechanism in 2017, two issues remained: press publishers' right and a value gap proposal.[139] Articles 11 and 13 of the Proposal were the most controversial, and required a specific debate. Even after the adoption of the Council's compromise, some Member States withdrew their support for the Council's compromise.

The interinstitutional negotiations were originally scheduled to end in 2018, however, due to delays, the final trilogue was held on 13 February 2019. Considering the difficulties in reaching

[131] European Parliament, 'Opinion of the Committee on Industry, Research and Energy for the Committee on Legal Affairs on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market' (2017) PE-592.363.
[132] European Parliament, 'Opinion of the Committee on the Internal Market and Consumer Protection for the Committee on Legal Affairs on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market' (2017) PE599.682.
[133] European Parliament, 'Opinion of the Committee on Culture and Education for the Committee on Legal Affairs on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market' (2017) PE-595.591.
[134] European Parliament, 'Opinion of the Committee on Civil Liberties, Justice and Home Affairs for the Committee on Legal Affairs on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market' (2017) PE604.830.
[135] European Parliament, 'Report on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market' (2018) PE601.094.
[136] 'Parliament to Review Copyright Rules in September' (*European Parliament*, 5 July 2018) ‹http://www.europarl.europa.eu/news/en/press-room/20180628IPR06809/parliament-to-review-copyright-rules-in-september› accessed 5 September 2019.
[137] European Parliament, 'Copyright in the Digital Single Market Amendments Adopted by the European Parliament on 12 September 2018 on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market' (2018) A8-0245/2018.
[138] Council, 'Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market - Agreed Negotiating Mandate' (2018) 9134/18.
[139] Council, 'Note from Presidency to Delegations on Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market - Presidency Compromise Proposal (Consolidated Version) and State of Play' (2017) 15651/17.

a compromise on arts. 11 and 13 of the Proposal,[140] and the cancellation of what was supposed to be the last trilogue,[141] there were some doubts whether an agreement on the common text was even possible. In its final stage, the adoption of the CDSM Directive depended on France and Germany reaching a compromise on the shape of the exclusion of small and medium enterprises from the scope of art. 13 of the Proposal.[142] MEPs and national governments of the Member States were subject to considerable pressure from the content industries as well as the public, who intensified their activities around the time of the first, unsuccessful vote in the EP in June 2018.

The controversies over the CDSM Directive did not finish with the conclusion of the trilogue. The plenary vote in the EP was preceded by a heated debate and a vote on the possibility of amending the CDSM Directive. Following the vote, some of the MEPs claimed that the vote they cast opposed their wishes because they pushed the wrong button, which meant that (in theory) the CDSM Directive should have been reopened for the amendments.[143] The final vote in the Council was not unanimous. The trilogue compromise was not supported by five countries: the Netherlands, Luxembourg, Poland, Italy and Finland. In their joint statement, the MS pointed out that the directive would take a step back from the Digital Single Market, failed to strike the right balance between stakeholders, and created legal uncertainties.[144] Estonia abstained from voting, since the CDSM Directive did not represent the right balance of stakeholders' interests.[145] Germany, which voted in favour the trilogue compromise text, issued a statement on art. 17 of the CDSM Directive, encouraging the stakeholder dialogue and the search for a solution to safeguard freedom of expression, by finding alternatives to upload filters.[146]

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[140] See Laura Kayali, 'Germany Weighs in on Copyright with Last-Minute Proposals' (*POLITICO*, 9 January 2019) ‹https://www.politico.eu/pro/germany-weighs-in-on-copyright-with-last-minute-proposals/› accessed 5 September 2019; European Commission, 'Non-paper to facilitate the discussions at the Copyright Directive trilogue on 26 November 2018' ‹https://juliareda.eu/wp-content/uploads/2018/11/Non-paper-on-Articles-11-and-13.pdf› accessed 5 September 2019.

[141] Laura Kayali, 'Romanian Presidency Cancels Upcoming Trilogue on Copyright' (*POLITICO*, 18 January 2019) ‹https://www.politico.eu/pro/romanian-presidency-cancels-upcoming-trilogue-on-copyright/› accessed 7 July 2019.

[142] Council, 'Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market - Update of Negotiating Mandate' (2019) 5893/19.

[143] Emanuel Karlsten, 'Sweden Democrats & Swedish Social Democrats Defeat Motion to Amend Articles 11 & 13' (*Medium*, 26 March 2019) 13 ‹https://medium.com/@emanuelkarlsten/sweden-democrats-swedish-social-democrats-defeat-motion-to-amend-articles-11-13-731d3c0fbf30› accessed 27 March 2019.

[144] Council, 'Draft Directive of the European Parliament and of the Council on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC (First Reading) - Adoption of the Legislative Act - Statements' (2019) 7986/19 1–2.

[145] ibid 2.

[146] ibid 3–4.

Shortly after the adoption of the final text of the CDSM Directive, on 24 May 2019, Poland brought a challenge to the new directive before the CJEU.[147] The Polish government refused to make the text of the challenge public, however, the Minister of Culture and National Heritage, responsible for copyright policy in Poland, explained that Poland filed the challenge because the CDSM Directive would threaten the freedom of speech on the internet by introducing a mechanism of preventive control of contents published by internet users.[148] The text of the challenge, later published by the CJEU, shows that Poland seeks an annulment of arts. 17(4)(b) and 17(4)(c) of the CDSM Directive, as it considers them infringing on the right to freedom of expression and information guaranteed by article 11 of the Charter. This action of the Polish government was, most likely, a political move to attract young votes in anticipation of the 2019 European Parliament election.[149]

III. Conclusions

At the beginning of the harmonisation process, the EU had no ambition to create a copyright framework. EU interventions in the domain of copyright and related rights have largely been piecemeal, focused on solving the issues considered detrimental to the functioning of the single market. Over time, the EU copyright framework has expanded. Currently, it is composed of twelve directives and two regulations. To date, the InfoSoc Directive remains the core of the EU copyright framework. It is a horizontal act addressing copyright and related rights in a most comprehensive manner, affecting not only digital, but also analogue uses of copyrighted works and related rights subject-matter. Although national copyright laws are considered the default, a growing scope of harmonisation, and the autonomous interpretation of EU copyright concepts by the CJEU, seem to challenge this presumption. Still, the competence of the EU to act in the copyright and related rights' domain is not exclusive but shared with the Member States.

The harmonisation process focuses on limiting disparities between national copyrights and creating solutions with the potential to mitigate the territorial character of copyright and

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147 'Polska złożyła skargę do TSUE ws. ACTA2' (*Serwis internetowy Ministerstwa Kultury i Dziedzictwa Narodowego*, 24 May 2019) ‹http://www.mkidn.gov.pl/pages/posts/polska-zlozyla-skarge-do-tsue-ws.-acta2-9538.php› accessed 4 June 2019.

148 'Polska skarży do trybunału unijnego dyrektywę o prawach autorskich. Gliński: art. 17 prowadzi do cenzury prewencyjnej' (*WirtualneMedia.pl*, 27 May 2019) ‹https://www.wirtualnemedia.pl/artykul/dyrektywa-o-prawach-autorskich-polska-sklada-skarge-do-tsue-glinski-art-17-zagraza-wolnosci-w-internecie› accessed 5 September 2019.

149 'Znamy Tekst Skargi Na Dyrektywę Prawnoautorską Do TSUE' (*Centrum Cyfrowe*, 20 August 2019) ‹https://centrumcyfrowe.pl/czytelnia/znamy-tekst-skargi-na-dyrektywe-prawnoautorska-do-tsue/› accessed 5 September 2019.

related rights. From the outset, harmonisation of copyright and related rights has been linked to the creation and facilitation of the single market. This rationale continued to be valid in the digital age, when creation of the Single Digital Market became a goal. The remaining drivers of the EU intervention into the area of copyright and related rights are the enhancement of the EU competitiveness, and a desire to reap the benefits of the technological development. Copyright law is reactive: it adapts to technological development. The EU legislator strives to capture the value of technological progress to advance the competitiveness of EU businesses. Thus, even though the EU copyright framework is set to guarantee a high level of protection, expansion of copyright and related rights should not be an aim in itself.

The EU legislator's fragmentary approach to harmonisation, is complemented by the CJEU's activism. Jurisprudence of the CJEU plays a key role in advancing the harmonisation process, since it fills the gaps left by the EU legislator. The CJEU defined core concepts of the EU copyright such as work, public and fair compensation, making them autonomous concepts of the EU law, which require uniform interpretation throughout the whole EU. The CJEU jurisprudence can also have a disruptive effect on copyright by bringing further complexity to the interpretation of copyright provisions. The disruptive effect is clearly visible in connection to the right of communication to the public, discussed in detail in later parts of this thesis.

The creation of the Digital Single Market provided a framework for updating EU copyright and related rights to reflect the development of digital technologies. While taking steps towards the DSM, the EU addressed geo-blocking and multi-territorial licensing to mitigate the territorial character of copyright and related rights. The CDSM Directive was the most comprehensive instrument introduced during the copyright modernisation process of the Junker Commission. The CDSM Directive did not replace existing provisions of the EU copyright framework but introduced new solutions to address the effect of technological development on the creative industries and creators themselves. The CDSM Directive generated considerable controversies immediately after tabling of the Proposal. Art. 11 introducing the press publishers' right and art. 13 concerning the intermediary liability attracted most criticism. The difficulty in reaching a compromise on their phrasing considerably slowed down the works on copyright modernisation and put a compromise on the new directive in danger. The CDSM Directive was finally adopted on 17 May 2019, and it is currently undergoing the implementation process in the Member States.

Chapter II: Sketching the landscape of the online news environment

Due to rapid technological development, press publishing is going through a major change. Following their audiences, legacy news organisations expanded to the internet. A number of new, digital-born news organisations and digital intermediaries emerged. The linear process of news production was transformed into a networked activity. Traditional news publishers and press agencies no longer have a monopoly on provision of news and information to the readers. Legacy news organisations needed to compete with digital intermediaries for audiences' attention. The way readers consume news has radically changed. This changing news environment had a detrimental effect on the economic condition of traditional news organisations and press publishing in general. Advertising and circulation, which were a main source of revenue for news organisations in the analogue age, no longer suffice. News organisations began to explore new funding models and to question the activities of digital intermediaries.

The aim of this chapter is to demonstrate the complexity of the online news environment. First, the chapter lists actors involved in the creation, distribution, and consumption of news content online. The online news environment not only introduced new actors but gave new roles to the old ones. Second, the chapter describes the basic toolkit of online news organisations: solutions which news organisations use to distribute and promote their content on the web. Last but not least, the chapter considers the economic state of the press publishing sector. It describes funding models adopted by news organisations, both legacy and digital-born.

Considering the dynamics of the online news environment, it is far from being settled. Therefore, instead of providing an exhaustive picture, which hardly seems feasible, the chapter focuses on the new qualities digital actors bring to the traditionally linear news production process, and on the relationship of digital intermediaries with legacy news organisations. Geographically, the scope of the chapter's enquiry is limited to tools accessible, and actors active in the EU Member States. The author's intention is not only to refer to well-known actors, but also to demonstrate innovative solutions proposed by European startups. The chapter builds on studies by institutions such as the Reuters Institute for Study of Journalism, information provided by actors, and the author's own experience with accessing news online.

I. The networked process of news publishing: introducing the actors

News is a piece of information concerning something which has happened recently, is important to the public, and of interest to a considerable part of the audience.[150] Defined in this way, news embraces not only information of a political or economic nature, but also such topics as gossip or entertainment content, anything which attracts public attention. An important

[150] Svennik Høyer, 'News', *International Encyclopedia of the Social & Behavioral Sciences* (Second Edition, Elsevier 2015) 819.

factor for a piece of information to qualify as news, is its timing: it is the recent character of facts reported which makes them news. News concern either recent events, or recently discovered facts about past events. From a copyright perspective, it is important to distinguish between news as information, and news as a form of expression of this information. A variety of literary forms are used to report, describe and analyse news: articles, analyses, reports, comments, press releases, blog posts, interviews, columns, editorials, op-eds, to name a few. Unless specified otherwise, all of these forms together are referred to as news items in this thesis.

News used to be produced in a linear process, organised around the axis of journalist-publisher-reader.[151] The roles in the process were clearly defined: journalists created news items, publishers distributed and promoted them, and readers focused on their consumption. Newspapers provided a snapshot of the twenty-four hours preceding publication of a particular issue. The digitalisation and development of the web brought more complexity to the news production process, making it a truly networked activity. New types of actors emerged, not fitting into the journalist-publisher-reader division, combining and mixing their traditional functions. The process of news items production is no longer unilateral: it has no a priori defined start and finish, and it is possible for a single actor to carry the whole process herself.

A plethora of actors is involved in the creation, curation, production and dissemination of news online. Given the ease of creating in the digital environment, readers themselves go beyond a role of passive recipients of content, and interact with, and contribute to news on a daily basis. The following section presents four groups of actors active in the online news environment: authors, news organisations, digital intermediaries and readers. It describes their involvement with news items, particularly with those created by another actor. The section investigates the relations between the actors, and assesses to what extent, and in what way news organisations can exercise control over their content on the web.

A. Authors

A key figure in the process of news items creation is the author, a person who writes a news item, which later makes its way to news organisations, intermediaries, and eventually readers. We tend to associate news writing with professional journalists, either employed by a particular news organisation or freelancers. However, in the digital environment,

[151] Sacha Wunsch-Vincent and Graham Vickery, 'News in the Internet Age: New Trends in News Publishing' (OECD 2010) 52.

professional journalists are only one category of news items creators. Development of digital technologies has made it possible for everyone who wishes to do so, to make her piece of writing available to all internet users. In the age of Web 2.0, the distance between authors and audiences has been radically decreased. By using digital tools, authors can 'skip' publishers, who traditionally acted as middle men, and reach the audiences directly.

The consequences of decreasing the distance between journalists and audiences are twofold. Firstly, professional journalists have begun launching their own projects, providing journalistic content to readers through dedicated websites and applications.[152] Secondly, participatory journalism, otherwise known as citizen journalism, was born. Generally, citizen journalism stands for any involvement of non-professionals in the creation of news content, especially the writing and making available of news items online.[153] Websites of news organisations try to engage readers in the creation of news items. The first digital-born actor to recognise the potential of voluntary unpaid contributions was The HuffPost.[154] However, it is publishing platforms, intermediaries stepping into the realm of press publishers, who specialise in supporting citizen journalists. They provide writers with a pre-determined layout and a set of formatting tools, but abstain from exercising editorial control through review or approval processes. Blogging platforms such as Blogger, WordPress or Tumblr are general publishing platforms, which can be used for free by anyone. There also are publishing platforms which present themselves as tools particularly dedicated to journalism. One of them is Medium, the ambition of which is to re-shape the news reading experience by providing a record of events by people who 'are making and living' them.[155] Another example is Ghost, which labels itself as a 'professional publishing platform'.[156] Users can create either a blog or an online publication using Ghost's platform. An interesting example of a publishing platform was Small Teaser.[157] Unlike most publishing platforms, it reserved the right to make decisions about the publication of content submitted by users.[158] The reason behind this reservation was

[152] See for example Czech Center for Investigative Journalism 'České Centrum pro Investigativní Žurnalistiku | České Centrum pro Investigativní Žurnalistiku' ‹https://www.investigace.cz/› accessed 20 May 2017.
[153] For more in depth analysis of meaning of citizen journalism see Jonathan Scott, David Millard and Pauline Leonard, 'Citizen Participation in News' (2015) 3 Digital Journalism 737.
[154] Tom Nicholls, Nabeelah Shabbir and Rasmus Kleis Nielsen, 'Digital-Born News Media in Europe' (Reuters Institute for the Study of Journalism 2016) 26.
[155] 'Medium Connects You with Voices and Perspectives That Matter.' ‹https://about.medium.com/› accessed 23 April 2017.
[156] 'Ghost' (*Ghost*) ‹https://ghost.org/› accessed 16 September 2019.
[157] 'Small Teaser: Collaborative Blogging - Easy Monetization' (*Small Teaser*) ‹https://www.smallteaser.com› accessed 20 May 2017.
[158] 'Small Teaser - Contributor Terms' (27 April 2015) ‹https://www.smallteaser.com/terms?terms=CONTRIBUTION_TERMS›.

Small Teaser's funding model, which pledged part of platform's revenues to creators. In 2019, Small Teaser platform was inactive. Even though publishing platforms have no influence over the content published by their users, they tend to reserve the right to remove such content, without prior warning or explanation.[159]

An interesting new development in the online news environment is the phenomenon of automated journalism. Otherwise known as robot journalism or news-writing bots, automated journalism means the use of artificial intelligence (AI) to generate news stories automatically without involvement of journalists or other content creators.[160] An AI algorithm scans the web in search of information, analyses it, and independently writes a story on the basis of the collected information. Alternatively, an algorithm can be used to provide assistance in gathering and analysing relevant information, but the final news item is prepared a human journalist.[161] Robot reporters are used by such news organisations as Bloomberg, The Washington Post and Associated Press.[162]

B. News organisations

The second category of actors in the news publishing environment are news organisations. Traditionally, only news agencies and press publishers took a part in the news production process. In the digital age, this is no longer the case. However, in order to emphasise their established position in the analogue era, they are often referred to as legacy news organisations.[163] News agencies, otherwise known as newswires or press agencies, often precede authors and press publishers in a news item creation process. Their services include the gathering of facts on current events and selling this information to other news organisations. News agencies also offer news items which are ready for publication on press publishers' websites or apps. Services of news agencies are of a commercial nature and require payment. Even though news agencies have their own public websites and mobile applications,

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[159] 'Medium Terms of Service' (7 March 2016) ‹https://medium.com/policy/medium-terms-of-service-9db0094a1e0f›.

[160] Matteo Monti, 'Automated Journalism and Freedom of Information: Ethical and Juridical Problems Related to AI in the Press Field' (2018) 1 Opinio Juris in Comparatione. Studies in Comparative and National Law 1, 1.

[161] For in depth analysis of the automated journalism issue see Andreas Graefe, 'Guide to Automated Journalism' (Columbia Univeristy Academic Commons 2016) ‹https://pdfs.semanticscholar.org/c56d/609b3cb2ff85a3e657d2614a6de45ad2d583.pdf› accessed 16 September 2019.

[162] Jaclyn Peiser, 'The Rise of the Robot Reporter' *The New York Times* (5 February 2019) ‹https://www.nytimes.com/2019/02/05/business/media/artificial-intelligence-journalism-robots.html› accessed 16 September 2019.

[163] The term 'legacy news organisation' is consequently applied in all Reuters Institute studies and research papers.

the content which they make available there, is limited.[164] News agencies strive to be impartial, and focus on supplying facts rather than narratives.[165] Two out of three of the globally established news agencies originate in Europe: Agence France-Presse (AFP)[166] and Reuters.[167]

Traditional press publishers are those news organisations which publish newspapers in their analogue, paper format. Most, if not all, newspapers can also be found online. Prior to 2012, the online presence of traditional publishers was ancillary to paper issues of newspapers.[168] Since then, a strategy of 'digital first' has become dominant.[169] The strategy prioritises digital output over print paper publications. In extreme cases, the strategy of digital first resulted in a publisher completely discontinued the production of the print version of the newspaper, making its online presence the only one. That was the case for The Independent, which ceased to print its paper version in March 2016,[170] and for the Finnish financial daily Taloussanomat, which halted print as early as 2007.[171] The discontinuation of a printed version by legacy news organisations remains the exception rather than a rule. Traditionally, newspapers were strongly linked to a certain territory, on which they reported and whose language they were using.[172] The online presence of traditional publishers allowed them not only to attract broader audiences than readers of print versions,[173] but, in case of niche publications, to reach their audiences at all.[174]

Since the development of the internet removed barriers to market entry, such as investment in print and distribution infrastructure, it has become easier for new organisations to enter the

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[164] For example, Polish Press Agency (PAP) displays disclaimer on top of its main website: 'WARNING! Website displays only a small amount of content available through PAP services. Full version is available after concluding an agreement with PAP. More information: (+48 22) 5092225, pap@pap.pl.' 'Polska Agencja Prasowa' (*Polska Agencja Prasowa*) ‹http://www.pap.pl/› accessed 21 May 2017.

[165] Nevertheless, news agencies are often faced with accusations of favouritism towards one or the other political option, which gave rise to the creation of alternative news agencies.

[166] 'Accueil | AFP.Com' ‹https://www.afp.com/fr/accueil› accessed 21 May 2017.

[167] 'Breaking News, Business News, Financial and Investing News & More | Reuters.Co.Uk' ‹http://uk.reuters.com/› accessed 21 May 2017.

[168] Andra Leurdijk and others, 'Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: The Newspaper Publishing Industry' (Joint Research Centre 2012) EUR 25277 51.

[169] Gareth Price, 'Opportunities and Challenges for Journalism in the Digital Age: Asian and European Perspectives' (Chatham House, The Royal Institute of International Affairs 2015) 5.

[170] 'The Independent Will Become the First National Newspaper to Go Digital-Only' (*The Independent*, 12 February 2016) ‹http://www.independent.co.uk/news/media/press/the-independent-becomes-the-first-national-newspaper-to-embrace-a-global-digital-only-future-a6869736.html› accessed 10 May 2017.

[171] See Neil Thurman and Merja Myllylahti, 'Taking the Paper out of News: A Case Study of Taloussanomat, Europe's First Online-Only Newspaper' (2009) 10 Journalism Studies 691.

[172] Leurdijk and others (n 168) 25.

[173] Nic Newman and others, 'Reuters Institute Digital News Report 2016' (Reuters Institute for the Study of Journalism 2016).

[174] 'The Impact of Web Traffic on Revenues of Traditional Newspaper Publishers. A Study for France, Germany, Spain, and the UK' (Deloitte 2016) 8.

online news environment.[175] Originally, digital-born actors were focused on reuse of already available content.[176] However, a so called 'second wave' of digital companies brought digital-born actors who focus on producing their own, original content.[177] Digital-born actors are pure players, in the sense that their activities only take a digital form. Even without a print version to support, they face the same difficulties as traditional press publishers, but tend to be smaller and have less resources at their disposal than legacy news organisations.[178] Digital-born actors can be exclusively focused on provision of news items,[179] or supplying of information can be one of many services they provide.[180] Additionally, there are digital organisations which go beyond mere reporting on current events and provide deeper analyses of particular issues. An example is Apache, a Belgian start-up focusing on investigative journalism and in-depth reporting.[181] Attitudes towards digital-born brands as suppliers of news and information differ between countries. Whereas Polish readers are enthusiastic towards digital-born brands, with Onet and WP, both pure players, claiming a considerable share of the online news market,[182] the online news market in Italy remains dominated by legacy news organisations.[183]

C. *Digital intermediaries*

Unlike the two previous categories of actors, digital intermediaries were largely unknown in the analogue era.[184] They form the broadest and most diverse category of actors in online news environment. The group covers not only actors whose sole aim is to participate in the news creation and distribution processes (sometimes referred to as 'infomediaries'),[185] but also those actors whose involvement with news items is only ancillary. Digital intermediaries have significantly influenced the paths of news discovery. What we are seeing today is a distributed discovery: readers are coming across news items not only through news organisations' websites and applications, but also through searches and referrals, including social referrals.[186]

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[175] Leurdijk and others (n 168) 26.
[176] Wunsch-Vincent and Vickery (n 151) 16.
[177] Newman and others, 'Reuters Institute Digital News Report 2016' (n 173) 90.
[178] Nicholls, Shabbir and Nielsen (n 154) 8.
[179] See for example 'Mediapart' (*Mediapart*) ‹https://www.mediapart.fr/› accessed 30 May 2017.
[180] See for example 'Wikinews, the Free News Source' ‹https://en.wikinews.org/wiki/Main_Page› accessed 30 May 2017.
[181] 'Apache - Inhoud Heerst' (*Apache*) ‹https://www.apache.be/› accessed 5 May 2017.
[182] Nic Newman and others, 'Reuters Institute Digital News Report 2019' (Reuters Institute for the Study of Journalism 2019) 100.
[183] ibid 93.
[184] An exception are media monitoring services, which originate in the analogue era, but their shape went through a considerable change following the development of digital technologies and the internet.
[185] Ana Rosa del Aguila-Obra, Antonio Padilla-Melandez and Christian Serarols-Terres, 'Value Creation and News Intermediaries on Internet. An Exploratory Analysis of the Online News Industry and the Web Content Aggregators' (2007) 27 International Journal of Information Management 187, 188.
[186] Alessio Cornia, Annika Sehl and Rasmus Kleis Nielsen, 'Private Sector Media and Digital News' (Reuters Institute for the Study of Journalism 2017) 35.

Additionally, even though the reading of news items still mostly takes place on news organisations' websites, intermediaries have started to propose their own news formats. A news organisation can publish directly in the intermediary's format, which means that a user need not leave an intermediary's service to read the full text of a news item.[187] The publication of content via multiple channels, is referred to as distributed content.[188] Apart from their role in news items' distribution, digital intermediaries can also participate in news items' creation and curation, as well as facilitate news consumption. Intermediaries help readers find relevant information in the abundance of news available online by integrating various sources in one place and offering users the possibility of personalising news delivery.[189] This offer is also directed at news organisations. European start-ups offer, among others, tools to aid news organisations with content discovery,[190] to encourage users' engagement[191] or to personalise content.[192]

The following subsections provide an overview of five groups of digital intermediaries: search engines, news aggregators, social media, messaging applications, and media monitoring services. When describing the role of these intermediaries in the online news environment, the section focuses on how news items are presented, from where and how they are retrieved, and how they reach audiences. These enquiries are mainly made from a technical rather than an economic perspective, in order to create understanding of how the digital intermediaries work.

1. Search engines

A search engine is a basic tool for internet navigation. It provides structure to the decentralised architecture of the web.[193] In recent years, search engines have become crucial for the online news access: the 2016 Eurobarometer reported that, for 21% of the EU population, search engines are a main service to read news online.[194] The most popular search engine in Europe, with more than 93% market share, is provided by Google (Google Search).[195] The remaining 7% of the market is split between Microsoft Bing, Yandex.ru, Yahoo! Search, and two

[187] Those formats include, among others, Accelerated Mobile Pages (Google).
[188] Cornia, Sehl and Nielsen (n 186) 36.
[189] del Aguila-Obra, Padilla-Melandez and Serarols-Terres (n 185).
[190] 'Ezyinsights | The Fastest Content Discovery for Publishers and Content Providers.' (*ezyinsights*) ‹https://ezyinsights.com/› accessed 30 May 2017.
[191] 'RAWR | You Got Information – We Got Conversation' (*RAWR*) ‹http://newsroom.rawr.at/› accessed 30 May 2017.
[192] 'Personiq | Datenkontrolle & Personalisierung' ‹https://www.personiq.de/› accessed 30 May 2017.
[193] Ernesto Rengifo, 'Copyright in Works Reproduced and Published Online by Search Engines', *Research Handbook on Copyright Law* (Edward Elgar Publishing 2017) 392.
[194] 'Flash Eurobarometer 437 Internet Users' Preferences for Accessing Content Online' (2016) 2016.5778 30.
[195] 'Search Engine Market Share Europe' (*StatCounter Global Stats*) ‹https://gs.statcounter.com/search-engine-market-share/all/europe› accessed 16 September 2019.

alternative engines: DuckDuckGo and Ecosia. A national phenomenon is a search engine offered by the Czech company Seznam.cz, which resisted Google Search's pressure for a long-time, and remained the most-used internet search engine in Czechia till mid-2014.[196]

On a practical level, a search engine is a program which searches for a particular query within a dataset. These datasets, called indexes, consist of information about websites scanned by search engine robots. Also known as spiders, worms or web crawlers, robots are programs which visit websites and scan their content automatically, and on a regular basis.[197] This process is referred to as crawling. Each search engine has its own, unique robots, Googlebot (Google),[198] Bingbot (Bing),[199] Slurp (Yahoo!)[200] and SeznamBot (Seznam.cz),[201] to provide few examples. Crawling takes place on an opt-out basis: a search engine does not seek prior consent of a website owner for indexing, but an owner can deny or restrict robots' access to her website. Such limitations are imposed by inserting the Robot Exclusion Protocol (REP) into the website's script. The REP, often referred to as robot.txt, is a text file providing robots with instructions on what may, and what should not be scanned.[202] It is possible to restrict only certain robots from scanning a website's content.[203] The Robot Exclusion Protocol is a de facto standard.[204] It is not backed by any established organisation which would be able to enforce it, meaning that robots can simply disregard the robot.txt file, and scan the whole content of a website regardless.[205] However, it is conventional for a search engine to declare

[196] Ladislav Kos, 'Infographics: The Search Engines Google and Seznam on the Czech Internet #2019' (*eVisions Advertising*, 3 May 2019) ‹https://www.evisions-advertising.com/infographics-the-search-engines-google-and-seznam-on-the-czech-internet-2019/› accessed 10 July 2019; See also Newman and others, 'Reuters Institute Digital News Report 2016' (n 173) 65.

[197] 'So What Are Robots, Spiders, Web Crawlers, Worms, Ants?' (*The Web Robots Pages*) ‹http://www.robotstxt.org/faq/othernames.html› accessed 25 May 2017.

[198] 'Crawling & Indexing' (*Inside Search – Google*) ‹https://www.google.com/intl/es419/insidesearch/howsearchworks/crawling-indexing.html› accessed 25 May 2017.

[199] 'Meet Our Crawlers' (*Bing Webmaster Tools*) ‹https://www.bing.com/webmaster/help/which-crawlers-does-bing-use-8c184ec0› accessed 25 May 2017.

[200] 'Why Is Slurp Crawling My Page?' (*Yahoo Help*) ‹https://help.yahoo.com/kb/SLN22600.html› accessed 25 May 2017.

[201] 'SeznamBot Crawler' (*Seznam Nápověda*) ‹https://napoveda.seznam.cz/en/full-text-search/seznambot-crawler/› accessed 25 May 2017.

[202] 'The Web Robots Pages' (*The Web Robots Pages*) ‹http://www.robotstxt.org/› accessed 25 May 2017.

[203] 'Can I Block Just Bad Robots?' (*The Web Robots Pages*) ‹http://www.robotstxt.org/faq/blockjustbad.html› accessed 25 May 2017.

[204] The World Wide Web Consortium played a role in creating the robot.txt standard. The organisation is responsible for setting up internet standards in general.

[205] Jasiewicz argues that making an inclusion of robot.txt protocol an enforceable legal contract would provide publishers with a 'bargaining chip' in their negotiations with news aggregators. See Monika Jasiewicz, 'Copyright Protection in an Opt-Out World: Implied License Doctrine and News Aggregators' (2012) 122 The Yale Law Journal 837, 848–849.

that it respects REP. That is the case for Google, Bing, Yahoo! and Seznam search engines.[206] Additionally, all four service providers provide tutorials for web developers on how to successfully apply robot.txt protocols to control access to their content.[207] Consequently, it is a news organisation's decision whether it wishes to be indexed and included in the search results by a particular search engine.

Basic search results consist of the title of a news item, the name of the source website, the URL and a preview which includes a lead or a snippet of approximately 2 lines of text. Basic search results are referred to as organic search results since they appear on a results page because of their relevance to the user's query, and not because they are paid advertisements. Depending on the search engine, search results can be enriched by other elements, like Knowledge Panels, Definition Cards or Live Results in case of Google Search.[208] A news organisation which has not opted out of a search engine's index, can influence how content of its website is displayed in search results, particularly by customising previews. Even though Search Engine Optimisation (SEO) focuses on improving website's ranking in search results, it can also involve editing of information included in the page's meta-tags which will be scanned by crawlers in order to make the website's previews more attractive to users.[209] What is important is that the role of a search engine is limited to the discovery of news: a user needs to click to the source website to read the full text of a news item.

2. News aggregators

News aggregators gather news items provided by diverse sources, and display them in one place, with the aim of facilitating the discovery process for users.[210] News aggregators take a variety of forms, but all share three features: 1) they do not provide users with full text of press publications, 2) they do provide links to third-party websites where full text is accessible, and 3) as a rule, they do not create their own original content. Aggregators are not a popular way

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[206] See Seznam: 'Crawling Control' (*Seznam Nápověda*) ‹https://napoveda.seznam.cz/en/full-text-search/crawling-control/› accessed 25 May 2017; Yahoo!: 'Why Is Slurp Crawling My Page?' (n 200); Bing: 'To Crawl or Not to Crawl, That Is BingBot's Question' (*Bing blogs*) ‹https://blogs.bing.com/webmaster/2012/05/03/to-crawl-or-not-to-crawl-that-is-bingbots-question/› accessed 2 June 2017; Google: 'Learn about Robots.Txt Files' (*Search Console Help*) ‹https://support.google.com/webmasters/answer/6062608?hl=en› accessed 2 June 2017.

[207] Bing: https://www.bing.com/webmaster/help/how-to-create-a-robots-txt-file-cb7c31ec; Seznam: https://napoveda.seznam.cz/en/full-text-search/crawling-control/; Yahoo: https://help.yahoo.com/kb/SLN22600.html; Google: https://developers.google.com/webmasters/control-crawl-index/docs/robots_meta_tag?hl=en

[208] For a comprehensive overview of Google search results features see 'Google Glossary: Revenge of Mega-SERP' (*Moz*) ‹https://moz.com/blog/google-glossary› accessed 25 May 2017.

[209] Patrick Dholakiya, '4 Things You Didn't Know about Rich Snippets' (*Search Engine Land*, 3 August 2016) ‹http://searchengineland.com/4-things-didnt-know-rich-snippets-253231› accessed 6 June 2017.

[210] Isbell Kimberely, 'The Rise of News Aggregator: Legal Implications and Best Practices' (the Berkman Centre for Internet & Society at Harvard University 2010) Research publication 2010–10 2.

to access content online: according to 2016 Eurobarometer, only 14% of EU population mainly uses news aggregators to read news.[211] However, the 2019 Reuters Report notes a significant increase in use of mobile news aggregators, with weekly usage of Google News, an aggregation service of Google, rising from 10% in 2017 to 17% in 2019.[212] Compared to Latin American countries, where 41% of the population uses Google News, use in the EU remains low.

Generally, the mechanics of collection of information by news aggregators are the same as that of search engines, involving crawling.[213] However, information can also be collected in a non-automatic way. Aggregators provide users with a news item selection. The manner in which the selection is presented, depends on the particular service. Services often categorise news items, and supply users with filtering tools and suggestions. A news item selection provided by a news aggregator does not include news items' full text, but, similar to search engines, is limited to a headline, a preview, and a URL address of the source website. On occasion, also including a photograph or other media, such as video or podcast. Even though it is customary for the aggregators to indicate the name of the source website, they mention the author's name only rarely. There also are news aggregators whose content is more limited. For example, Druge Report solely provides readers with paraphrased headlines and a URL addresses of source websites.[214]

A number of different news aggregators can be found online. No commonly accepted classification exists for them.[215] News aggregators can either be website-based or take the shape of a mobile application (mobile news aggregators). News aggregators are offered by all major search engine providers: Google (Google News), Microsoft (BingNews), Yandex (Yandex News), and Yahoo! (Yahoo! News), with the latter also including original content.[216] Instead of using a general search, the user is able to choose a news tab and run her query exclusively within the indexed websites offering news items.[217] Apart from this narrowed search, news aggregators offer a selection of news items on their main site. Google News was repeatedly used as an example of a news aggregation service during the discussion on the

[211] 'Flash Eurobarometer 437 Internet Users' Preferences for Accessing Content Online' (n 194) 30.
[212] Newman and others, 'Reuters Institute Digital News Report 2019' (n 182) 16.
[213] The only difference is that crawling for the purposes of news aggregation works on an opt-in basis in Germany 'Google News Goes Opt In In Germany' (*Forbes*) ‹http://www.forbes.com/sites/timworstall/2013/06/22/google-news-goes-opt-in-in-germany/› accessed 9 February 2016.
[214] 'DRUDGE REPORT 2017®' ‹http://www.drudgereport.com/› accessed 29 May 2017.
[215] See for example Kimberely (n 210) Kimberely distinguishes feed aggregators, speciality aggregators, user-curated aggregators, and blog aggregators.
[216] 'Yahoo News - Latest News & Headlines' ‹//www.yahoo.com/news/› accessed 25 May 2017; 'Bing News' ‹http://www.bing.com/news› accessed 25 May 2017.
[217] Even though Seznam.cz does not offer a news aggregation service on its own main website, it allows narrowing search results to include only 'Články' ('Articles').

introduction of a press publishers' right into the EU copyright framework. Therefore, it would be helpful to see what Google News looks like. Figure 1 presents the home page of Google News on 19 April 2016. Figure 2 presents the home page of Google News on 16 September 2019. The desktop version of Google News underwent a redesign in 2017, when the discussion on the press publishers' right was still ongoing. Officially, the service was redesigned to enhance its readability.[218] As a comparison between Figures 1 and 2 shows, the amount of content displayed by the service has been considerably limited. Currently, Google News provides neither leads nor snippets, limiting itself to a news item title, the name of the source website, and the time at which the news item was published. On occasion, a photograph is also included.

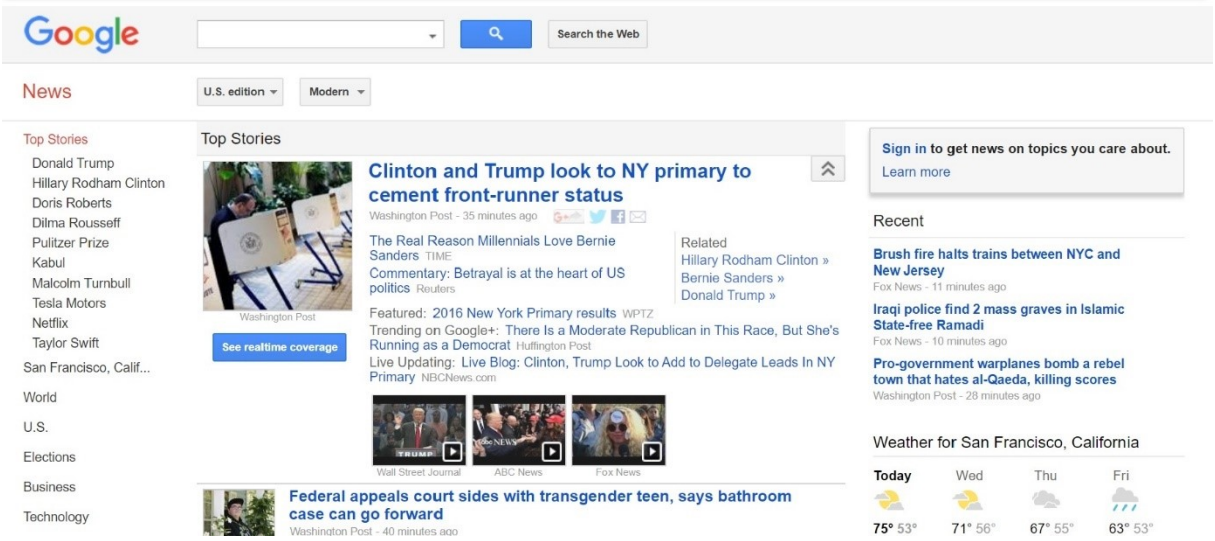

Figure 1: google.news.com on 19 April 2016 retrieved from Internet Archive (web.archive.org/web/20160419181832/http://news.google.com/ accessed 16 September 2019)

[218] Anand Paka, 'Redesigning Google News for Everyone' (*Google*, 27 June 2017) ‹http://www.blog.google:443/topics/journalism-news/redesigning-google-news-everyone/› accessed 13 September 2017.

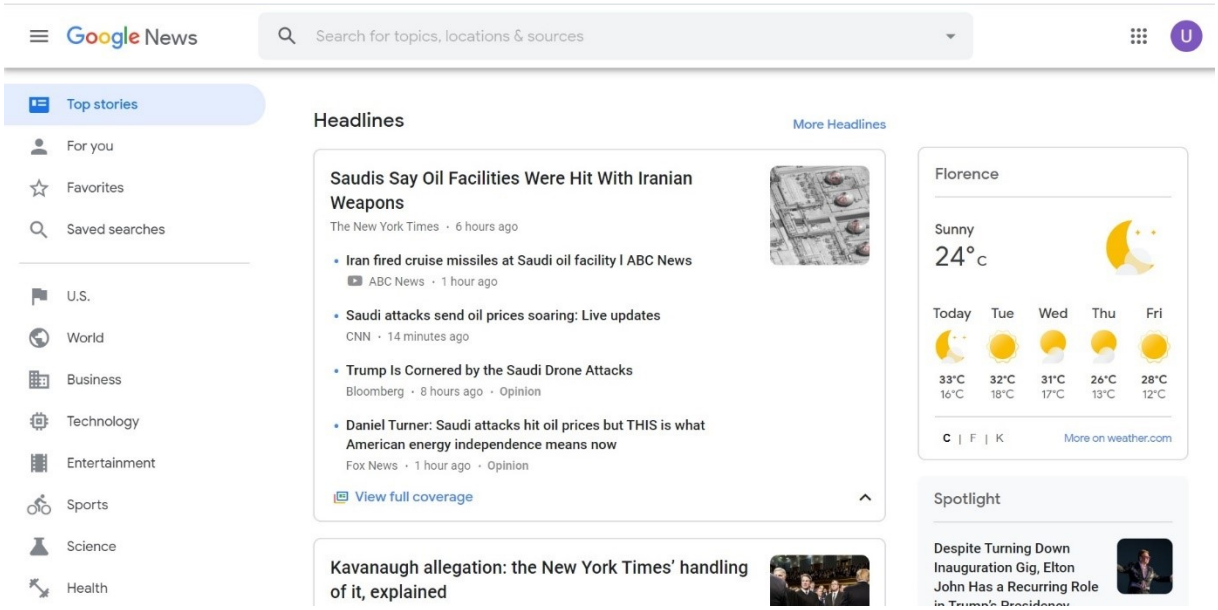

Figure 2: news.google.com accessed 16 September 2019

Even though news aggregators are not a popular way to access news online, it was their activities which urged press publishers to call for legal protection. Publishers saw aggregators as parasites, which built their business model on use of content in whose production they had not participated.[219] Press publishers pointed out the substitution effect of news aggregators' activities, i.e., that the amount of information provided by news aggregators satisfies users' informatory needs, so that they no longer need to click through to the news organisations' websites. This leads to news organisations loosing readers and the revenues they bring.[220] Users who do not click through to the news organisations' websites, are sometimes referred to as attention tax, a price which news organisations pay to be included in a news aggregator.[221] Since news aggregators provide sufficient informatory content for the readers, they compete with news organisations for the same audiences.[222] Press publishers emphasise that they, who

[219] Andrew Clark, 'Murdoch's Attack Dog Snarls at the "parasites" Threatening His Master' *The Guardian* (1 November 2009) ‹http://www.theguardian.com/media/2009/nov/01/wall-street-journal-robert-thomson-digital-content› accessed 17 February 2016.
[220] Joan Calzada and Richard Gil, 'What Do News Aggregators Do? Evidence from Google News in Spain and Germany' (2018) 2 ‹https://ssrn.com/abstract=2837553›.
[221] Chrysanthos Dellarocas and others, 'Attention Allocation in Information-Rich Environments: The Case of News Aggregators' [2015] Management Science 1, 18.
[222] Joan Calzada and Guillem Ordóñez, 'Competition in News Industry: Fighting Aggregators with Versions and Links' (NET Institute 2012) Working Paper 12–22 2.

are already in financial difficulty, pay for the production of content, and news aggregators reap the benefits from this content.

A contrary view on the activities of news aggregators emphasises the market expansion effect of aggregators. According to the market expansion effect, news aggregation reduces search time, so that users can access more informational content, including less popular news websites, which results in the growth of news organisations' audiences.[223] Aggregation generates additional traffic to websites which readers would otherwise not reach. The market expansion effect is also referred to as the quantity effect.[224]

A report on the effects of the Spanish press publishers' right published by NERA in 2017 found that numerous empirical studies confirmed the existence and positive effects of the market expansion, whereas the substitution effect was shown to be very limited.[225] Similarly, a report prepared for the EC by the Joint Research Centre (JRC) in 2016 concluded that 'quantity effect dominates the substitution effect'.[226] The JRC report was not published by the EC, and instead made available to the public following an access to documents request of 9 November 2017 submitted to the JRC by Julia Reda MEP.[227]

3. Social media

Social media provide users with a platform to create and share content, ideas and to communicate with each other. Originally, social media were not a source of news. Over time, they became an integral part of the online news environment. In 2016, 22% of the EU population declared social media to be their main gateway for reading news online.[228] The steady growth in social media's global use as a means to access news, has halted in 2018.[229] However, Facebook remains the most important social network for news.[230] As many as 60% of respondents in Hungary and Greece declared to use Facebook as a news source.[231] A widely-discussed change in Facebook's algorithm to promote content shared by users' family and

[223] Calzada and Gil (n 220) 2.
[224] 'Online News Aggregation and Neighbouring Rights for News Publishers' (Joint Research Centre 2016) 9.
[225] Pedro Posada de la Concha, Alberto Gutierrez Garcia and Javier Coronado Saleh, 'Impact on Competition and on Free Market of the Google Tax and AEDE Fee. Report for the Spanish Association of Publishers of Periodical Publications (AEEPP)' (NERA Economic Consulting 2017) 35.
[226] 'Online News Aggregation and Neighbouring Rights for News Publishers' (n 224) 9.
[227] 'Study: "The Economics of Online News Aggregation and Neighbouring Rights for News Publishers" - a Freedom of Information Request to Joint Research Centre' (*AsktheEU.org*, 9 November 2017) ‹https://www.asktheeu.org/en/request/study_the_economics_of_online_ne› accessed 23 September 2019.
[228] 'Flash Eurobarometer 437 Internet Users' Preferences for Accessing Content Online' (n 194) 32.
[229] Nic Newman and others, 'Reuters Institute Digital News Report 2018' (Reuters Institute for the Study of Journalism 2018) 10.
[230] Newman and others, 'Reuters Institute Digital News Report 2019' (n 182) 9.
[231] Newman and others, 'Reuters Institute Digital News Report 2018' (n 229) 11.

friends, did not interfere with Facebook's role in discovering news content.[232] Apart from Facebook, social media used for news include Twitter, Instagram and Snapchat.

As social media do not produce their own, original content, what becomes news in their context, are posts by their users and currently trending topics.[233] When someone posts a link to a news item on social media, this link can either take the form of a plain URL, or it can be accompanied by additional information, a preview of linked content. Usually, a preview includes a title, a snippet or a lead, and a thumbnail. To use the example of Facebook: after pasting a URL into a post which is going to be published on one's News Feed, a preview of a link is created automatically by using metadata from the URL posted.[234] A preview includes a thumbnail picture, the headline, and the name of the source website. A user can opt out from using a preview or limit its content by removing a thumbnail. A website owner cannot stop users from sharing her website on Facebook. She can, however, optimise the content of the metatags used by Facebook to generate previews, or block access of the Facebook crawler to her website, so that it cannot scrape information from metatags. In the case of latter, a preview of website's content will not be displayed on Facebook.[235] Unlike Facebook, Twitter does not automatically generate link previews, but limits itself to a plain URL.[236]

Users of social media are not only individuals, but also organisations, including news organisations. Considering the broad audience which social media attract, with Facebook having around 2.4 billion monthly active users globally,[237] they are an attractive platform for news organisations for content promotion.[238] Consequently, it is common for a news organisation to create a profile or a page on social media. Such profiles and pages are used to inform users about newly published content, and to attract new audiences. A news organisation's involvement with social media can be an integral part of this organisation's activities.[239] For example, a press publisher can publish directly in formats offered by social media, instead of referring users to news items available on its website. Such social media formats include: Instant Articles (Facebook, May 2015), Discover (Snapchat, January 2015) and

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[232] Ramya Sethuraman, 'Using Surveys to Make News Feed More Personal' (*Facebook Newsroom*, 16 May 2019) ‹https://newsroom.fb.com/news/2019/05/more-personalized-experiences/› accessed 17 September 2019.
[233] Price (n 169) 8.
[234] 'The Facebook Crawler' (*Facebook for Developers*) ‹https://developers.facebook.com/docs/sharing/webmasters/crawler› accessed 23 May 2017.
[235] Blocking Facebook Crawler follows the same pattern as blocking search engines' and news aggregators' robots.
[236] 'How to Post Links in a Tweet' (*Twitter Help Center*) ‹https://help.twitter.com/en/using-twitter/how-to-tweet-a-link› accessed 17 September 2019.
[237] 'Company Info' (*Facebook Newsroom*) ‹https://newsroom.fb.com/company-info/› accessed 17 September 2019.
[238] Rasmus Kleis Nielsen and Sarah Anne Ganter, 'Dealing with Digital Intermediaries: A Case Study of the Relations between Publishers and Platforms' [2017] New Media & Society 1, 8.
[239] Price (n 169) 8.

Moments (Twitter, September 2016). The decision whether to use a social media publishing format, belongs to the news organisation.

Apart from sharing and promotion of news organisations' content, social media is an important source of information for journalists and news organisations. An easy example is Twitter, which tries to present itself as more of an information network than a social one.[240] Journalists use Twitter to acquire scoops, but also to fact-check and enhance stories which they are already developing.[241] Twitter is also eagerly exploited by news organisations, which treat it as a tip service.[242] To use the potential of Twitter in a best way possible, Reuters has developed a special tool, Reuters News Tracer, the sole aim of which is to scan tweets in search of breaking stories. This tool combines algorithmic solutions with machine learning, which makes it possible not only to identify newsworthy content, but also to verify it.[243]

4. Messaging applications

Similar to social media, messaging applications were not originally considered a part of the online news environment. They were simply a communication tool for users. However, over time, messaging applications started to be used in the online news environment context, by both individual users and news organisations. The global use of messaging apps for news has tripled between 2014-2018.[244] The level of usage and types of applications used vary between countries. According to the Reuters Institute, the messaging apps most commonly used for news in Europe in 2019 were: WhatsApp (up to 36% in Spain), Facebook Messenger (up to 22% in Poland) and Viber (up to 17% in Greece).[245]

Users see messaging apps as an alternative to social media to share and discuss news with their friends in a more private manner. Not only do they carry on private conversations, but they also join groups, created especially for the distribution of news and information. Messaging applications, and the encryption they offer, are an attractive channel to disseminate information in countries where censorship of the media is a problem, or where mainstream media is partial. Additionally, the privacy offered by messaging apps, allows users to speak

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[240] 'Twitter Is Not a Social Network – It's an Information Network' (*The Vital Edge by Gideon Rosenblatt*, 18 October 2010) ‹http://www.the-vital-edge.com/twitter-as-information-network/› accessed 2 June 2017.
[241] Leurdijk and others (n 168) 55.
[242] 'The Making of Reuters News Tracer' (*Thomson Reuters*, 25 April 2017) ‹https://blogs.thomsonreuters.com/answerson/making-reuters-news-tracer/› accessed 2 June 2017.
[243] 'Reuters News Tracer: Filtering through the Noise of Social Media' (*Reuters*, 30 May 2017) ‹https://agency.reuters.com/content/news-agency/en/insights/articles/articles-archive/reuters-news-tracer-filtering-through-the-noise-of-social-media.html› accessed 2 June 2017.
[244] Newman and others, 'Reuters Institute Digital News Report 2018' (n 229) 11.
[245] Newman and others, 'Reuters Institute Digital News Report 2019' (n 182) 88, 100 and 108.

more freely, as they are not afraid of the reactions of their colleagues, or more distant acquaintances, who might not approve of their political views.

Use of messaging applications by press publishers is not yet common. However, they are coming to be seen as the next 'big digital platform for news consumption'.[246] By using messaging apps, news organisations can directly communicate with their readers. WhatsApp includes a broadcast list feature, which allows to send broadcast messages repeatedly to the same group of people.[247] People added to a broadcast list cannot see each other or reply to broadcast messages. However, a broadcast list has a limit of 256 participants. The channels offered by Telegram have no restrictions on the number of subscribers.[248] Public channels are open for anyone to join, and can be easily found on the Telegram Channels website.[249] Through channels, a publisher can send messages to all subscribers at the same time. Similarly, by using a public account on Viber, publishers can send updates to all their followers.[250] The Washington Post is a pioneer of messaging apps, with over 460,000 people following its Viber account in 2019.

5. Media monitoring services

Unlike the other four digital intermediaries, companies offering media monitoring services long pre-date current digital reality.[251] However, the way in which media monitoring services work, has substantially changed following the development of the internet, turning them into true actors in the online news environment. Traditionally, media monitoring involved a service's employees reading paper publications in search of keywords selected by clients. Relevant content was cut out of the publications, compiled and presented to the customer. As publication cuttings were otherwise known as press clippings, media monitoring services of that time were also referred to as a press clipping services. Usually, press clippings included the complete text of relevant news items. For this reason, companies were either buying multiple copies of the same publication or buying a single copy and making multiple photocopies themselves after the invention of the photocopier. The scope of media review

[246] Carla Zanoni, 'Messaging Apps: The next Frontier for Publishers after Social Media?' (*What's New in Publishing | Digital Publishing News*, 17 January 2019) ‹https://whatsnewinpublishing.com/messaging-apps-the-next-frontier-for-publishers-after-social-media/› accessed 3 August 2019.
[247] 'WhatsApp FAQ - Using Broadcast Lists' (*WhatsApp.com*) ‹https://faq.whatsapp.com/en/android/23130793/?category=5245251› accessed 17 September 2019.
[248] 'Channels FAQ' (*Telegram*) ‹https://telegram.org/faq_channels› accessed 17 September 2019.
[249] '2200+ Telegram Channels, Groups, Bots and Stickers List' (*Telegram Channels*) ‹https://telegramchannels.me› accessed 3 August 2019.
[250] 'Public Accounts' (*Viber Support*) ‹https://support.viber.com/customer/en/portal/topics/1000778-public-accounts/articles› accessed 17 September 2019.
[251] First media monitoring organisation is believed to be the one established by Romeike in London in 1852.

differed, but because of issues with supply of paper publications, was usually limited, especially territorially. It has always been the client of a media monitoring service, who determines the key words and the scope of media review, as well as the frequency of its delivery.

Nowadays, media monitoring services cover not only press publications, but all available media, including social media. They are often offered as a part of a broader analytics service.[252] The process of searching for information relevant to a keyword, has been extensively automated, and uses algorithmic tools for scanning the web. Human involvement has become an additional quality. Digitalisation of the process made it possible not only to cover a wider array of sources, but also to deliver results in real time. The format in which the review is presented, varies. The differences consist in, among others, the amount of text which is delivered to the customer.

Three factors distinguish media monitoring services from other intermediaries. Firstly, media monitoring is a strictly commercial activity, offered to clients in exchange of payment. Secondly, companies and public institutions usually use media monitoring services, not individuals. Thus, media monitoring is a professional service similar to news agencies. Thirdly, media monitoring organisations enter into licensing agreements with press publishers and pay the respective fees.

D. Readers

The role of readers in the analogue world was limited to consumption of news items. Readers were passive recipients, interacting with press publications via letters to the editor. Nowadays, the simple act of reading the news has become an interactive activity, with the reader being encouraged to react to, and share and supply information every step of the way. Consequently, even if they do not become authors themselves, readers can still actively participate in the online news environment. The easiest way is to leave a comment in the comment section, conventionally found under the text of a news item.

A reader can also take part in the distribution of news. Quite often, news items are accompanied by a selection of social media buttons. By clicking on one of the buttons, the reader can instantly share a news item on the selected social media or messaging app, send it by email, copy it or print it. Thus, news organisations establish not only a direct relationship

[252] For example see the offer of Meltwater: 'Media Monitoring, Social Media Monitoring & Media Intelligence Tools — Media Monitoring' (*United Kingdom — Meltwater*) ‹https://www.meltwater.com/uk/products/› accessed 7 June 2017.

with social media or messaging apps, but also an indirect one by facilitating social referrals to their content. What users share, are not full texts of news items, which remain exclusively accessible on the source website, but a set of news items' features: the title, the source website's name, a preview and a hyperlink. When sharing on Facebook, WhatsApp or LinkedIn, these elements can be supplemented by a user's own comment, which can potentially qualify as a news item itself. Considering the nature of social media, such shares can be made available to the public at large, with services such as Twitter not even providing a possibility to limit the circle of people who can access the share. When news organisations provide a set of social media buttons, these buttons can be used by everybody, on the condition that they are registered with the relevant social media platform, or they are users of a particular messaging app. Whether they are individuals or organisations is not important.

A share function, an equivalent of social media buttons, can also be built into news organisation's mobile application. A share function usually provides users with a choice between messaging apps and social media installed on their phones to share news. However, some paid applications limit the sharing possibilities. For example, a news item from the Financial Times application can only be shared via a link. Links to other Financial Times subscribers can be shared in an unlimited manner. However, should someone want to share with non-subscribers, a guest link has to be created. The number of guest links is limited to 20 a month.

II. The toolbox of online news organisations

In the analogue world, news organisations had only one way to communicate information to their readers: a paper publication. The development of digital technologies and the internet have radically changed this situation. Apart from exploring their relationship with digital intermediaries, news organisations have developed their own solutions to keep readers informed and interested in news organisation's content. The following section describes four basic solutions at the news organisation's disposal: websites, mobile applications, newsletters and syndication tools. News organisations have full control over the shape of these solutions. Furthermore, they are free to decide whether to use them at all.

A. Websites

Launching a website has been a common response of traditional publishers to changes in the news environment brought about by digitalisation and the development of the internet.[253] A

[253] Leurdijk and others (n 168) 7.

dedicated website is a basic platform for showcasing a news organisation's content.[254] Considering the exclusive control over the selection and presentation of news items which it provides, it remains a central means for the distribution of content, even for digital-born actors.[255] Consequently, distribution strategies of news organisations are built around websites.[256] News organisations' focus on websites is mirrored by users' preferences for consumption of news: together with news organisations' mobile applications, websites remain the most popular platform to read news online.[257] A user can reach a website either directly by typing its URL address into the internet browser, or by following a reference provided by a digital intermediary. Visits conveyed by intermediaries create referential traffic, which can amount up to two thirds of a website's traffic in general.[258] Even so, while the discovery of news which directly concerns referential traffic, became distributed, the majority of news items are consumed directly on the websites.[259]

Considering the digital-first strategies of news organisations, the content of a press publisher's website tends to be richer than the content of a printed version of a newspaper. The digital translation of a newspaper copy, called an e-copy, e-paper or simply a digital edition, is a separate product, often offered through a dedicated platform.[260] Websites of news organisations do not have a common format, their arrangement is up to the news organisation. Besides displaying news items, websites have numerous additional features, to name a few: search function, archive, forum, RSS, personal profile, most read articles, tagcloud, widgets.[261] When the pace of news delivery is considered, the most important feature of a website is breaking news. It allows a news organisation to report on developments in real time, precisely when an important event is unfolding.[262] Text entries are usually short, and displayed as part of a common, frequently updated thread.

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[254] Nicholls, Shabbir and Nielsen (n 154) 25.
[255] ibid.
[256] ibid 6.
[257] When asked which service they mainly use to read news online 42% of respondents indicated the answer 'The website or app of newspapers and magazines'. See 'Flash Eurobarometer 437 Internet Users' Preferences for Accessing Content Online' (n 194) 30.
[258] One of the key findings of Deloitte's study on the impact of web traffic on traditional publishers' revenues was that in the UK, Germany, Spain, and France, referral traffic accounted for on average 66% of website views to publishers. See 'The Impact of Web Traffic on Revenues of Traditional Newspaper Publishers. A Study for France, Germany, Spain, and the UK' (n 174) 5.
[259] Newman and others, 'Reuters Institute Digital News Report 2016' (n 173) 10.
[260] See for example: 'EGazety.Pl - Prasa Online, e-Wydania, Prenumeraty' (*eGazety.pl*) ‹http://www.egazety.pl/› accessed 6 June 2017.
[261] Leurdijk and others (n 168) 58.
[262] Such a feature is offered for example by 'Wyborcza.Pl - Najświeższe Wiadomości Od Gazety Wyborczej' ‹http://wyborcza.pl/0,0.html?disableRedirects=true› accessed 6 June 2017.

Not all users are presented with the same website: both format and content of a website can differ depending on who accesses it. News organisations can offer their subscribers special features and restricted zones, which are sometimes not visible to non-paying readers.[263] Additionally, in case a website operates a metered paywall, different non-paying users will have access to full texts of different news items, meaning that there is no one version of a website available to readers without subscription. Additionally, websites can be personalised to better reflect the preferences of a reader. This personalisation can either concern the format of the website, or, more commonly, the news items displayed. As such, websites of news organisations are fragmented, making it difficult to assess what a home page of a service actually is.

B. Newsletters

A newsletter is a basic communication tool of news organisations, regularly delivered to their subscribers via email message. Even though the idea of a newsletter originates in the analogue world, it has been successfully adapted to digital reality. Currently, newsletters are going through a renaissance period, with news organisations having teams devoted especially to their creation.[264] The reason for this is that, together with websites and mobile applications, newsletters are a direct channel of communication for news organisations.[265] They provide an opportunity to get users back to the news organisation's website, without digital intermediaries' involvement.[266]

The main idea behind the newsletter, is to let the reader know what new content is available on a news organisation's website. A newsletter is delivered following a user's subscription. The type, amount and shape of content included in a newsletter, are entirely at a news organisation's discretion. Generally, a newsletter includes titles, previews and links leading to the full text of news items. However, they can also take different forms, for example a short, original text providing a description of a day with inline links leading to the news items on the news organisation's website.[267] A newsletter can either provide a general overview of recently published content, for example by referring to the most-read statistics or be a subjective selection of an editor or a journalist. The frequency of its newsletter is decided by the

[263] Nicholls, Shabbir and Nielsen (n 154) 25.
[264] Lucia Moses, 'Publishers Confront Email Newsletter Design Challenges - Digiday' (*Digiday*, 12 January 2017) ‹https://digiday.com/media/publishers-embrace-newsletters-wrestle-design-headaches/› accessed 17 May 2017.
[265] Nicholls, Shabbir and Nielsen (n 154) 28.
[266] Max Willens, 'Publishers Are Using Their Newsletters as Labs for New Offerings' (*Digiday*, 2 November 2016) ‹https://digiday.com/media/publishers-use-newsletters-fine-tune-offerings/› accessed 17 May 2017.
[267] See for example newsletter of Wyborcza.pl, website of Polish daily newspaper Gazeta Wyborcza 'Newsletter' (*wyborcza.pl*) ‹http://s.enewsletter.pl/n/451/270A9/index.html› accessed 20 May 2017.

newsletter provider. Considering that the news-cycle is 24/7 in the digital age, it is possible to alert readers of new content at any time, through alerts or breaking news messages. While keeping readers up to date, newsletters remove readers' need to check the website themselves.

C. *Mobile applications*

The popularity of mobile internet access and use of portable devices such as tablets and smartphones for reading news online, is growing. News organisations have responded to this development by launching dedicated mobile applications. Analogous to the websites, which are a basic platform for showcasing news organisation's content for the desktop browsers, mobile applications facilitate dissemination of news organisation's content to mobile devices users. These apps adopt the display of content to smaller screens of tablets and smartphones and take account of the interactivity these devices offer.

The structure, functions and amount of content offered by news organisations' mobile apps differs. Similar to websites, applications often include: a home screen, presenting a selection of content by the news organisation; a thematic catalogue of content, usually including such sections as national, world, economic, cultural, and sports news. Content provided by the app is not limited to text and photos, often including multimedia such as video, audio, reading of a news item by a voice assistant, radio, and podcasts. Usually, readers can save selected news items for a later read, on or offline, and share them with friends via social media, messaging apps or email. Mobile applications allow news organisations to provide their users with live coverage of events. First, news organisations can send push notifications on breaking news, so that users are immediately notified, and know to open the app to receive a comprehensive news coverage. And secondly, news organisations' apps can include a breaking news feature, where they inform readers about the development of events on a particular issue on a rolling basis, without the need to publish multiple news items on the same topic. Some news organisations offer a timeline feature, where news items on different topics are listed chronologically. That is the case for the 'A la flash' section in Le Fiagro app (a French daily), and the 'CM ao Minuto' section of Correio da Manhã app (a Portuguese daily).

The amount of content available in a news organisation's mobile app differs. It can be the same as that published on the news organisation's website or its paper edition, be more limited, or completely different. Some news organisations offer more than one mobile application. For example, Kronen Zeitung, an Austrian daily newspaper, offers two apps: Krone-ePaper, which is limited to an e-newspaper, and Krone, offering a wider selection of content. Agora, the publisher of Gazeta Wyborcza, a Polish quality daily, also offers two mobile applications:

Gazeta Wyborcza, available only to the paying subscribers, and Gazeta.pl, which is available to everyone, but its content is more limited compared to the former. A division between app features available for free and those only accessible to subscribers, is not uncommon. As a case in point, news items simply reporting on current events could be available for free, while those offering a thorough analysis on the issue, might only be available to the paying subscribers.

D. Syndication tools

Syndication means making website's content available for reuse by others.[268] When a news organisation permits syndication, other websites can republish its content.[269] Republication is accompanied by the attribution of the text to the original source. News organisations decide themselves how much content can be reused by others. Contrary to aggregation of content, which pulls the content from various sources in one place, syndication makes it possible for a news organisation to push its content towards the readers.

One of the syndication formats is an RSS feed, otherwise known as an RSS file or RSS channel. As the acronym RSS refers to a group of formats, it can be developed in a number of ways, including Real Simple Syndication or Rich Site Summary.[270] The RSS feed, is a text file with information on news items and links referring to the website where they are available.[271] The scope of information included in the RSS feeds differs according to the website's owner wishes. Generally, information provided includes a title, a short description (a preview), the source, the date and a URL.[272] Therefore, if someone using the RSS feed wants to access the full text of a news item, she has to click on the URL and go to the source website. In principle, however, it is possible to include the full text of news items in the RSS feed. The purpose of the RRS feed is for users to receive automatic updates on new content published on the websites they follow via a feed reader.[273] The feed reader retrieves information on content recently published on websites to whose RSS feeds a user has subscribed.

Feed readers, sometimes referred to as feed aggregators, are programs designed to gather and display the RSS feeds a user has subscribed to. They take a variety of shapes. A feed reader can

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[268] 'What Is Web Content Syndication? - Definition from Techopedia' (*Techopedia.com*) ‹https://www.techopedia.com/definition/23886/web-content-syndication› accessed 11 May 2017.
[269] Lars Vage and Lars Iselid, *News Search, Blogs and Feeds: A Toolkit* (1 edition, Chandos Publishing 2010) 168.
[270] Paul Gil, 'What Does "RSS" Stand For?' (*Lifewire*) ‹https://www.lifewire.com/what-is-rss-2483592› accessed 11 May 2017.
[271] Wendy Boswell, 'How RSS Feeds Work: RSS 101' (*Lifewire*) 101 ‹https://www.lifewire.com/rss-101-3482781› accessed 11 May 2017.
[272] Malcolm Moffat, 'RSS - a Primer for Publishers and Content Providers' (2003) 9 New Review of Information Networking 123, 126.
[273] Tyler Lacoma, 'Confused about RSS? Don't Be. Here's What It Is and How to Use It' (*Digital Trends*, 21 August 2019) ‹https://www.digitaltrends.com/computing/what-is-an-rss-feed/› accessed 27 September 2019.

be website-based, a desktop or mobile application, an internet browser add-on, or an email message. The format of information presentation depends on the feed reader's design. Whereas some feed readers present content in the most attractive way possible, others advocate simplicity in order to guarantee clarity of the display.[274]

A user can subscribe to the RSS feeds in two ways. A user can subscribe via a news organisation's website. A number of news organisations place social buttons on their websites. One of these buttons is usually an orange RSS feed icon. To subscribe, a user needs to click on the icon and add the feed to her feed reader. Social buttons are available either on a home page, or next to a particular news item. Alternatively, a news organisation's website can have a separate page dedicated to RSS feeds it offers. The second option is a built-in search function offered by some of the feed readers. By typing a name of a website in a search box, a user can check if a particular news organisation offers RSS feeds, and add the feeds directly to her reader.[275] Some feed readers allow users to choose how the RSS feed will be updated, by selecting between available filters, or picking time frequency.[276] Syndication tools providers do not create their own, original news items. They simply display content to whose reuse news organisations have agreed.

From a technical point of view, RSS readers and news aggregators are vastly different. Whereas news aggregators pull content from news organisations' websites by using crawlers, feed readers use content pushed by news organisations themselves. The manner in which news aggregators and feed readers are received by users, can be confusingly similar however. This is particularly the case for mobile applications. Without a thorough investigation, a user who downloads a news app from the Google Play Store or the App Store, does not know how an application acquires its content. To provide an example, Figure 3 presents a screenshot of the home screen of Google News, a news aggregator, and Figure 4 presents a screenshot of the home screen of Feedly, one of the most popular mobile feed readers.

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[274] See for example: Jesse Monroy, *Text-Only RSS Reader* (Jesse Monroy 2016) ‹https://play.google.com/store/apps/details?id=com.bsdmasterindex.text_only_rss_reader&hl=en› accessed 11 May 2017.

[275] Search function is provided for example by Feedly. *Feedly - Get Smarter* (Feedly Team 2017) ‹https://play.google.com/store/apps/details?id=com.bsdmasterindex.text_only_rss_reader&hl=en› accessed 6 June 2017.

[276] Possibility to choose time intervals of updates and filters is provided for example by Feeder. 'Feeder.Co - RSS Feed Reader' ‹https://feeder.co/› accessed 6 June 2017.

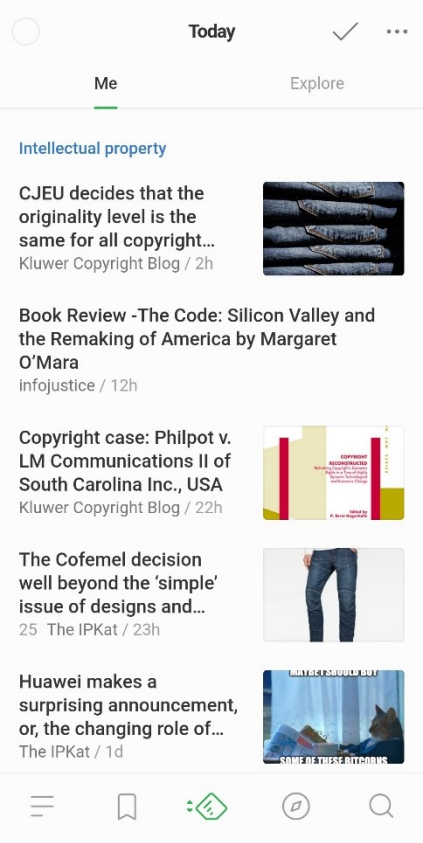

Figure 3: home screen of Feedly app accessed on 18 September 2019

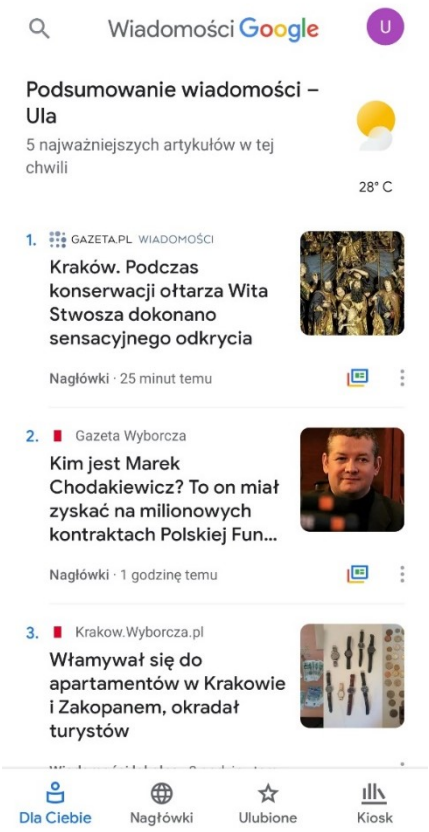

Figure 4: home screen of Google News app accessed 18 September 2019

At first glance, there is no visible difference between the two applications, when the amount and type of content presented is considered. Of course, there exist design differences between the services: the structure of the sections, available functions, and the display are not identical. However, the amount and type of content provided is similar. In case of Feedly, after clicking on an item, the user is taken to the individual page where all the information is available provided on this news item by an RSS feed. In case of Google News, a click takes a user directly to the source website. Indeed, feed readers are often referred to as news aggregators, even though the way they gather content, and the legal consequences thereof, differ.

III. Economy of press publishing: funding models

News organisations adopt a variety of solutions to generate revenue and retain part of this revenue as a profit. These solutions are referred to as funding models.[277] A choice of a particular funding model determines not only what the main source of an organisation's revenue is, but also what part of content, if any, is available to the users for free. In the analogue world, legacy

[277] Mauel Goyanes and Catherina Dürrenberg, 'A Taxonomy of Newspapers Based on Multi-Platform and Paid Content Strategies: Evidence from Spain' (2014) 16 International Journal of Media Management 27, 8.

news organisations had two main sources of revenue: circulation and advertising.[278] The proportion between these revenue streams differed, and still differs, depending on the publisher's country of origin.[279] In the analogue world, access to news items was limited to the readers who paid for a newspaper's copy, and advertisers had no other medium to reach newspaper's audiences than by putting an ad in a newspaper itself. This dynamic has radically changed in the online news environment, which had an impact on the print press market and legacy news organisations' revenues.

The circulation of print press in Europe continues to drop. In Germany, circulation of daily newspapers decreased by more than 48% between 1991 and 2018.[280] Swedish dailies noted a nearly 60% drop in circulation between 2007 and 2017.[281] In Poland, between 2017 and 2018 alone, circulation of the three most popular daily newspapers dropped between 8.52 and 14.8%.[282] Additionally, newspaper advertising expenditure in the EU fell by more than 8.5 million EUR between 2009 and 2017.[283] In the UK, the income from advertising in print press decreased by 70% between 2007 and 2017.[284] Legacy news organisations often fail to attract advertisers when competing with global digital intermediaries, the likes of Facebook and Google.

To date, traditional press publishers have not been able to offset the revenue losses from print publications through their online activities.[285] Print remains the main source of revenue for traditional press publishers.[286] Therefore, traditional publishers, alongside digital-born actors, continue to seek new funding models to finance their activities, both online and offline. Funding models currently used by news organisations, can be divided pursuant to two criteria:

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[278] 'The Impact of Web Traffic on Revenues of Traditional Newspaper Publishers. A Study for France, Germany, Spain, and the UK' (n 174) 8.
[279] Wunsch-Vincent and Vickery (n 151) 11.
[280] 'Circulation of Daily Newspapers Germany 2018' (*Statista*) ‹https://www.statista.com/statistics/380784/circulation-daily-newspapers-germany/› accessed 22 September 2019.
[281] 'Newspapers in Sweden' (*Statista*) ‹https://www.statista.com/study/37996/newspapers-in-sweden-statista-dossier/› accessed 22 September 2019.
[282] Paweł Dembowski, '"Gazeta Polska Codziennie" z największym spadkiem sprzedaży w 2018 roku' (*Press.pl*, 6 February 2019) ‹https://www.press.pl/tresc/56132,_gazeta-polska-codziennie_-z-najwiekszym-spadkiem-sprzedazy-w-2018-roku› accessed 22 September 2019.
[283] 'Newspaper Advertising Spend EU 2009-2017' (*Statista*, 17 September 2019) 2009–2017 ‹https://www.statista.com/statistics/434708/newspaper-advertising-expenditure-in-the-eu/› accessed 22 September 2019.
[284] Frances Cairncross, 'The Cairncross Review. A Sustainable Future for Journalism' (2019) 40.
[285] 'The Impact of Web Traffic on Revenues of Traditional Newspaper Publishers. A Study for France, Germany, Spain, and the UK' (n 174) 6.
[286] Cornia, Sehl and Nielsen (n 186) 15 The study has found that a split 80-20 or 90-10 split between legacy and digital revenues is common for the newspapers covered by the study.

1) restrictions to free access to the content; 2) readers' financial involvement.[287] For the latter criterion, a distinction can be made between two basic funding models: free models and paywall models.[288] The following section outlines currently used funding models following this basic division. Additionally, a third category of innovative funding models is introduced, in which revenue is derived from neither advertising nor subscriptions. The funding model of a news organisation is not fixed. News organisations strive to combine various sources of income to have more assurance about their financial situation.[289] Furthermore, news organisation can go through plethora of funding models throughout their existence.

A. Free model

Initially, legacy news organisations made their content online available for free. Online advertising was their only source of revenue. News organisations hoped that, with the growth of online audiences, online advertising would generate sufficient revenues to sustain free distribution.[290] Even though online advertising remains the main source of income for news organisations online,[291] it is not producing the expected results. News organisations adopted two separate strategies to increase revenues from online advertising. Firstly, they aimed at maximising clicks on their content by increasing their website's reach.[292] Secondly, they tried to increase the value of advertising spaces, by placing them in the most visible places of a website.[293] Neither proved fully successful. Actually, revenues from advertising continue to decline.[294] Yet, the free model remains a preferred business model for digital-born actors. In its comparative study of funding models for online news, the Reuters Institute noted that as many as 94% of surveyed digital-born news outlets offer free access to their content.[295]

Traditionally, publishers operated on a two-sided market: they sold newspaper copies to readers and the readers' attention to advertisers.[296] This is no longer the case for the online news environment. Digitalisation has brought more competition to attracting advertisers and readers' attention.[297] Digital intermediaries became attractive partners for advertisers,

[287] 'The Impact of Web Traffic on Revenues of Traditional Newspaper Publishers. A Study for France, Germany, Spain, and the UK' (n 174) 11.
[288] Goyanes and Dürrenberg (n 277) 22.
[289] Nicholls, Shabbir and Nielsen (n 154) 22.
[290] Cornia, Sehl and Nielsen (n 186) 17.
[291] ibid 12; Felix Simon and Lucas Graves, 'Pay Models for Online News in the US and Europe: 2019 Update' (Reuters Institute for the Study of Journalism 2019) 1.
[292] Cairncross (n 284) 42.
[293] ibid 44.
[294] Wunsch-Vincent and Vickery (n 151) 13.
[295] Simon and Graves (n 291) 2.
[296] Leurdijk and others (n 168) 26.
[297] 'The Impact of Web Traffic on Revenues of Traditional Newspaper Publishers. A Study for France, Germany, Spain, and the UK' (n 174) 6.

especially global actors such as Google and Facebook, because of the broad audiences they engage.[298] Additionally, overwhelmed by the vast amounts of online advertising they were exposed to every day, users began to use ad-blocking software, which removes advertising content during internet browsing.[299] Ad-blockers are either computer programs installed by users themselves, or built-in features of web browsers.[300] The usage of ad-blockers is constantly rising. In 2018, 42% Greek, 36% Polish and 34% French users used software which blocked advertisements on any of their devices.[301] This percentage is considerably higher for desktop computers than mobile devices.

In response to this development, a number of news organisations began to request users of ad-blocks to whitelist their websites. When a website is whitelisted, an ad-block is disabled, making advertising content visible to the user. Users who refuse to whitelist a website, are either denied access, or asked to pay a subscription fee to use an ad-free version of a website.[302] In 2011, AdBlock Plus, a popular ad-blocker, launched a whitelist program: a publisher could pay a fee to AdBlock Plus to be whitelisted for all its users.[303] The launch of the whitelist program angered a number of press publishers, since it imposed a fee on the profits from their own advertisements.[304]

B. Paywall model

Paywall models are funding models which restrict access to a website's content by placing a metaphorical wall on the website, which users can only pass after paying a subscription fee. Seeing as traditional news organisations initially made their content available free of charge, key in making paywall models work is to convince users to pay for content which they were

[298] Cornia, Sehl and Nielsen (n 186) 17.
[299] 'What Is an Ad Blocker?' (*Techopedia.com*) ‹https://www.techopedia.com/definition/23090/ad-blocker› accessed 6 June 2017.
[300] Google Chrome, Google's internet browser includes a built-in ad-blocker, which filters ads failing to meet the Better Ads Standards. See Chris Bentzel, 'Under the Hood: How Chrome's Ad Filtering Works' (*Chromium Blog*, 14 February 2018) ‹https://blog.chromium.org/2018/02/how-chromes-ad-filtering-works.html› accessed 27 September 2019.
[301] Newman and others, 'Reuters Institute Digital News Report 2018' (n 229) 26.
[302] See for example system adopted by Wired 'How WIRED Is Going to Handle Ad Blocking' (*WIRED*) ‹http://www.wired.com/how-wired-is-going-to-handle-ad-blocking/› accessed 14 February 2016.
[303] Ross Benes, 'Untangling the AdBlock Plus Whitelist' (*Digiday*, 13 October 2016) ‹https://digiday.com/media/know-dont-know-adblock-plus-whitelist/› accessed 18 September 2019.
[304] Jessica Davies, 'Inside Axel Springer's War with AdBlock Plus' (*Digiday*, 19 April 2019) ‹https://digiday.com/media/inside-axel-springers-war-adblock-plus/› accessed 18 September 2019; See also Michelle Castillo, 'Public's Love for Ad Blockers Infuriating Publishers' (*CNBC*, 18 September 2015) ‹https://www.cnbc.com/2015/09/16/why-the-battle-over-digital-ads-is-escalating.html› accessed 18 September 2019.

used to getting for free.[305] This presents difficulties considering that an important factor in a user's choice of a news outlet, is whether it is available free of charge.[306]

There are three different types of paywalls, depending on the amount of content a news organisation makes accessible to a non-paying reader: hard, metered, and freemium paywalls.[307] The hard paywall is the most radical solution. No content of a news organisation using a hard paywall is available free of charge. Hard paywalls are rarely used.[308] In case of a metered paywall, there is a limit to the amount of news items which a user can access for free in a given period of time, usually a month. On exhausting this limit, the user is invited to pay for a subscription, or, occasionally, to make a one-time payment to restore access. The freemium model is the most liberal solution among paywalls. In a freemium model, a news organisation divides its content into two categories: freely accessible and premium. Access to premium content requires payment of a subscription fee.[309]

Paywall models are the domain of traditional press publishers, with a very limited number of digital-born actors restricting access to their content in this way. Paywalls are preferred over advertising-based models since they provide news organisations with more financial stability. Key to the success of a paywall, is to persuade users to pay for the content.[310] News organisations using a metered paywall, gradually limit the number of news items which a user can read for free.[311] An innovative solution to find the most efficient limit, are dynamic paywalls. Such paywalls adjust the limit to each user, taking account of her willingness to pay on the basis of her online behaviour.[312]

Even though the overall willingness to pay for news is low, it seems to be slowly increasing.[313] In Europe, the use of paid news services ranges between 6 and 30% depending on the

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[305] 'The Impact of Web Traffic on Revenues of Traditional Newspaper Publishers. A Study for France, Germany, Spain, and the UK' (n 174) 3.
[306] When asked which of the indicated factors is important when choosing the service to use to read news, 77% of respondents indicated the answer 'Service is free'. See 'Flash Eurobarometer 437 Internet Users' Preferences for Accessing Content Online' (n 194) 35.
[307] 'The Impact of Web Traffic on Revenues of Traditional Newspaper Publishers. A Study for France, Germany, Spain, and the UK' (n 174) 12.
[308] Simon and Graves (n 291) 1.
[309] Goyanes and Dürrenberg (n 277) 30.
[310] On users' attitudes to paying for access to news content online, see 'Attitudes to Paying for Online News. Qualitative Research Report' (Kantar Media 2017).
[311] Laura Hazard Owen, 'Tighten up That Paywall! (And Some Other Lessons from a Study of 500 Newspaper Publishers)' (*Nieman Lab*, 13 August 2019) ‹https://www.niemanlab.org/2019/08/tighten-up-that-paywall-and-some-other-lessons-from-a-study-of-500-newspaper-publishers/› accessed 17 August 2019.
[312] Michael Leitner, 'How Media Companies Use Data to Sign up Digital Subscribers (and Keep Them)' (Reuters Institute for the Study of Journalism 2018).
[313] 'News in the Internet Age: New Trends in News Publishing' (OECD 2010) 40.

country.[314] The introduction of a paywall can potentially generate negative reactions from readers, who might abandon the website in favour of free alternatives. An extreme example of this phenomena is The Times, which has lost nearly 90% of its traffic in the month following the introduction of a paywall.[315] In some cases, news organisations regain their audiences after some time; in others, they take down the paywall.[316] An alternative way to implement a paywall, is to bundle the content multiple news organisations and offer readers one subscription fee. This is the case for VIO, a Norwegian platform grouping 60 newspaper titles, which provides its users with an unlimited access to all its content for a single fee.[317] A recent success story of bundling is the Apple News+ platform. Launched in 2019, it offers access to more than 300 magazines and newspapers for a single monthly fee.[318] Users are currently suffering from so called subscription fatigue: an excess of separate subscription fees they need to pay to enjoy content online.[319] Consequently, bundling news subscriptions, which often lose to entertainment services such as Netflix or Spotify, is an opportunity for news organisations to gain more subscribers.[320]

When a news organisation hides its content behind a paywall, it is still possible for crawlers to scan it, and include such content in search results and news aggregators. Readers can freely share links to hidden news items. Usually, after clicking on such a link, a user who is a non-subscriber will not be able to access the content. However, paywalls can be circumvented when they are not properly installed.[321] Google's policy of First Click Free required news organisations listed in Google News to provide non-paying users with free access to a full text of the first news item they click on every day. The First Click Free policy was replaced by a

[314] However, the question asked by Reuters to retrieve those percentages was very broad and also covered micropayments for particular news items: 'Have you paid for ONLINE news content, or accessed a paid-for ONLINE news service in the last year?'. See Newman and others, 'Reuters Institute Digital News Report 2019' (n 182) 23.
[315] Josh Halliday, 'Times Loses Almost 90% of Online Readership' *The Guardian* (20 July 2010) ‹https://www.theguardian.com/media/2010/jul/20/times-paywall-readership› accessed 28 May 2017.
[316] Jessica Davies, 'After Dropping Its Paywall, The Sun Focuses on Rebuilding Traffic' (*Digiday*, 21 March 2016) ‹https://digiday.com/uk/dropping-paywall-sun-focuses-rebuilding-traffic/› accessed 28 May 2017.
[317] 'VIO | Hjem' ‹https://vio.no/› accessed 6 May 2017.
[318] Sarah Perez, 'Apple Unveils Its $9.99 per Month News Subscription Service, Apple News+' (*TechCrunch*, 25 March 2019) ‹http://social.techcrunch.com/2019/03/25/apple-unveils-its-9-99-per-month-news-subscription-service-apple-news/› accessed 19 September 2019.
[319] Toni Fitzgerald, 'Is Subscription Fatigue A Concern For Netflix As Other Services Pop Up?' (*Forbes*) ‹https://www.forbes.com/sites/tonifitzgerald/2019/07/17/is-subscription-fatigue-a-concern-for-netflix-as-other-services-pop-up/› accessed 18 September 2019.
[320] Newman and others, 'Reuters Institute Digital News Report 2019' (n 182) 12.
[321] Ariel Stulberg, 'Testing News Paywalls: Which Are Leaky, and Which Are Airtight?' (*Columbia Journalism Review*, 23 May 2017) ‹https://www.cjr.org/business_of_news/news-paywalls-new-york-times-wall-street-journal.php› accessed 6 June 2017.

Flexible Sampling in 2017.[322] According to the new policy, news organisations are free to decide on what amount of content they would like to make available for free, or to keep limitations of access intact. In case of metered paywalls, unlike hard and freemium paywalls, each non-paying user enjoys free access to a different selection of news items.

To circumvent limits imposed by metered paywalls, users began to use private modes of internet browsers (incognito mode). The information on the number of news items accessed by a user in a particular period of time is recorded in and read from the cookies stored on a reader's device. The use of a private mode which disables cookies, makes it impossible for a news organisation to check whether a reader have reached their free limit, which means that users can bypass the paywall.[323] To put an end to this practice, some press publishers began to ban access to their website to users who used an incognito mode, or to require such users to log in before they accessed the website.[324] However, to apply this ban in practice, a news organisation needed to know whether a reader was using a private mode. In its Chrome 76 web browser released in July 2019, Google eliminated this possibility, calling website's ability to recognise whether a user was in an incognito mode as a 'bug' which needed to be fixed.[325]

C. *Alternative funding models.*

As both advertising-based and paywall models have their drawbacks, news organisations are open to alternative ways to generate revenue. In order to keep the content freely available to the public, but to limit reliance on advertising income, some news organisations are turning to their readers for donations. That is the case for The Guardian, known for its openness and progressive approach. Not only are its readers encouraged to make one-time donations through messages placed below each news item, but the paper also launched a membership program, which makes it possible for readers to financially support The Guardian in a more structured

[322] Cody Kwok, 'Enabling More High Quality Content for Users' (*Official Google Webmaster Central Blog*, 1 October 2017) ‹https://webmasters.googleblog.com/2017/10/enabling-more-high-quality-content.html› accessed 4 October 2017.
[323] Joshua Benton, 'Your Favorite Way to Get around The New York Times Paywall Might Be about to Go Away' (*Nieman Lab*, 28 February 2019) ‹https://www.niemanlab.org/2019/02/your-favorite-way-to-get-around-the-new-york-times-paywall-might-be-about-to-go-away/› accessed 29 June 2019.
[324] ibid.
[325] Christine Schmidt, 'Publishers Will Soon No Longer Be Able to Detect When You're in Chrome's Incognito Mode, Weakening Paywalls Everywhere' (*Nieman Lab*, 24 June 2019) ‹https://www.niemanlab.org/2019/06/publishers-will-soon-no-longer-be-able-to-detect-when-youre-in-chromes-incognito-mode-weakening-paywalls-everywhere/› accessed 29 June 2019; Monojoy Bhattacharjee, 'This July, Google Chrome Will Make It Easier to Bypass Paywalls' (*What's New in Publishing | Digital Publishing News*, 20 June 2019) ‹https://whatsnewinpublishing.com/2019/06/this-july-google-chrome-will-make-it-easier-to-bypass-paywalls/› accessed 29 June 2019.

way.[326] Any reader who decides to make monthly or yearly donations, depending on the amount of this donations, is awarded a particular status (Supporter, Partner or Patron), a peek behind the scenes and access to The Guardian's events. Even though this model is similar to subscription-based arrangements, full text of all news items remains freely available to everybody. In November 2018, The Guardian reported that it received donations from more than one million readers.[327]

Another way to call for readers' support, is through crowdfunding campaigns. A news organisation can launch an open call for donations to collect a set amount of money to support a particular project. The most successful story of crowdfunding in the online news environment, is that of a Dutch website De Correspondent.[328] Its launch was made possible by the raising of 1.7 million USD in a crowdfunding campaign in the Netherlands.[329] Daily activities of De Correspondent are supported by readers' subscriptions.[330] However, when De Correspondent wanted to launch a website in English, it organised another fundraising campaign.[331]

An alternative to subscription-based models, are micropayments. A micropayment is a small amount of money which users pay to access the full text of a particular news item they are interested in reading (pay-per-article). A micropayment model is used by Blendle, a Dutch startup, whose platform offers access to the content of numerous news organisations.[332] To use Blendle, a reader is required to create an account and top-up its balance. Payments for news items read by a user are automatically deducted from the account balance.[333] Blendle was a success story, eagerly used by the European Commission to show that it is possible for a digital intermediary to license press publishers' content, and to turn the profit thanks to users'

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[326] 'Guardian Members / The Guardian Members' ‹https://membership.theguardian.com/#introducing-members› accessed 28 May 2017.
[327] Katharine Viner, 'Katharine Viner: "The Guardian's Reader Funding Model Is Working. It's Inspiring"' *The Guardian* (12 November 2018) ‹https://www.theguardian.com/membership/2018/nov/12/katharine-viner-guardian-million-reader-funding› accessed 20 November 2018.
[328] 'De Correspondent' ‹https://thecorrespondent.com› accessed 27 May 2017.
[329] Ernst-Jan Pfauth, 'How We Turned a World Record in Journalism Crowd-Funding into an Actual Publication' (*Medium*, 27 November 2013) ‹https://medium.com/de-correspondent/how-we-turned-a-world-record-in-journalism-crowd-funding-into-an-actual-publication-2a06e298afe1› accessed 27 May 2017.
[330] Ernst-Jan Pfauth, 'Selling Ads Is a Short-Term Strategy. Here's Why Subscriptions Are the Future of Journalism' (*Media Newsletter*, 21 December 2015) ‹https://medianewsletter.net/selling-ads-is-a-short-term-strategy-here-s-why-subscriptions-are-the-future-of-journalism-6721226d52ca#.nvakrf23i› accessed 28 May 2017.
[331] Laura Hazard Owen, 'The Correspondent's Editor-in-Chief Talks about What U.S. Expansion Means (and Doesn't — an Office)' (*Nieman Lab*, 27 March 2019) ‹https://www.niemanlab.org/2019/03/the-correspondents-editor-in-chief-talks-about-what-u-s-expansion-means-and-doesnt-an-office/› accessed 31 May 2019.
[332] 'Blendle' ‹https://blendle.com/› accessed 5 May 2017.
[333] Marten Blankesteijn and Alexander Klöpping, 'Publishers and Blendle' (*Blendle*) ‹https://launch.blendle.nl/publishers/› accessed 28 May 2017.

payments.[334] When the first version of this chapter was prepared in 2016, the success story was holding. However, due to low payment levels, Blendle needed to abandon the micropayments-only approach, and started to invite users to pay subscription fees.[335]

IV. Conclusions

The online news environment is complex and constantly evolving. New digital actors, and new technological solutions to create, curate and distribute news items online, continue to be developed. Unlike in the analogue press publishing process, in the online environment, there is no clear division between actors who create and publish news items, and those who are consumers. Although legacy news organisations remain important information suppliers, they have lost the monopoly on informing readers. The phenomena of distributed discovery and distributed content led to considerable variations in how readers find and consume the news online. Direct access to news organisations' websites or reading of a paper newspaper, gave way to search engines, social media and messaging applications. While social media and messaging apps strive to become a news source, legacy news organisations are becoming more interactive, taking on characteristics traditionally belonging to social platforms.

With paths to news discovery undergoing a considerable change, a full text of a news item remains accessible under the auspices of a news organisation. News organisations make news items available on their websites or mobile applications, on social media through dedicated formats, as a part of content bundles offered by digital intermediaries such as Apple News+ or VIO, and exceptionally via RSS feeds. News organisations actively engage in the promotion of their content in the online news environment by creating profiles and sharing content on social media and messaging applications, as well as curating RSS feeds. To promote their publications, news organisations provide links and previews of their content, which can be viewed by anyone, free of charge.

News organisations recognise the importance of search engines and news aggregators in readers' news discovery, and do not restrict crawlers' possibility to index their content. At the same time, legacy news organisations object to the digital intermediaries free use of their content, seeing such activities as parasitic, and detrimental to their already weak financial condition. However, search engines and news aggregators, even though they do not seek prior

[334] European Commission, 'Impact Assessment' (n 126) 157 part 1/3.
[335] Christine Schmidt, 'Micropayments-for-News Pioneer Blendle Is Pivoting from Micropayments' (*Nieman Lab*, 10 June 2019) ‹https://www.niemanlab.org/2019/06/micropayments-for-news-pioneer-blendle-is-pivoting-from-micropayments/› accessed 18 September 2019.

consent of news organisations for displaying parts of their news items, do not go beyond what is already offered to the readers by news organisations themselves through RSS feeds or social media.

Traditional news organisations are in financial difficulty, caused by declining press circulation and the drop in advertising revenues. To sustain their activities, news organisations actively search for funding models which would secure sufficient revenue to support their digital activities and offset analogue losses. They are gradually moving away from free models supported by advertising revenues, and experiment with subscription schemes. These experiments aim at changing users' attitudes towards paying for news content, which they used to get for free in the early days of the internet. As changing readers' attitudes is a gradual process, the search for sustainable models continues.

Chapter III: Call for a new right for press publishers: reconstructing narratives

The press publishers' right is a novel solution to European copyright. The idea of a new right for press publishers has been controversial from the outset. The new right has outspoken supporters as well as fierce critics. And there seems to be no middle ground between them. The debate on the press publishers' right began shortly after plans for the modernisation of copyright were announced in 2014. Slowly gaining impetus, the discussion on press publishers' right ended up being highly polarised and emotional, and involved some unorthodox methods. It grabbed the attention of a multitude of actors, those whose interests were directly vested in the online news environment, and these who were outside of it. Furthermore, users did not stay idle when they perceived the possibility of the new right influencing their online activities. Provisions on the press publishers' right and intermediary liability are the two most controversial solutions of the CDSM Directive.

The aim of this chapter is to present the concept of the press publishers' right, and to reconstruct the main narratives of the discussion on the right's introduction into the EU copyright framework. The chapter sets out the provisions on press publishers' right in the national copyright laws of Germany and Spain, and traces how the provision on the press publishers' right in the CDSM Directive has changed over time. Additionally, it outlines the goals which the new right was to achieve according to the legislators. In its second part, the chapter provides insight into the discussion on the introduction of the press publishers' right to the EU copyright framework. It lists the discussion's participants, the documents they issued, and the actions they have taken. Moreover, it considers the temporal relationship between the discussion and the CDSM Directive's legislative process. In its final part, the chapter reconstructs the main lines of argument used in the discussion, the narratives, by looking at the content of the documents and the actions of the discussions' participants. The narratives provide useful insights into the actors' reasoning in favour of or against the extension of the copyright into the news domain.

I. Press publishers' right: introducing the concept

A. Identifying the problem

The press publishers' right is a novel solution for copyright, both at the European, and global level. In order to truly understand the nature of press publishers' right, it is important to explore the incentives for its introduction. While providing an overview of the online news environment, Chapter II singles out two possible reasons. The first is the economic crisis in the press publishing industry, associated with the move from the analogue to the digital world. The second one is the use of press publishers' content by digital intermediaries without any remuneration for press publishers, often referred to as free-riding or parasitism. Keeping both issues in mind, the following section focuses on how the legislators, creators of the press publishers' right, defined the problem addressed by the new right.

The problems identified in Germany and Spain, are directly connected to the functioning of content aggregation services and search engines. In Germany, the press publishers' right was to secure equal treatment of press publishers and other content producers by improving the press products' protection.[336] The new right directly addressed the lack of compensation received by press publishers for the systematic online uses of their content. The right's application was to be limited to commercial uses by services operating pursuant to the business models specifically designed to generate revenues from the use of third-party content, the content in the production of which they did not participate.[337] An explicit example of such a service provided by the German legislator, were search engines. The desired effects of the press publishers' right were to be broader than mere compensation of press publishers. The new right was supposed to rebalance the interests of press publishers and service providers, as well as to facilitate the enforcement of the publishers' rights.[338]

In Spain, the press publishers' right was introduced as an element of a broader modernisation of copyright law, and no focused justification was provided. Nevertheless, a look at the wording of the provision on the press publishers' right itself, reveals that the lack of compensation for the use of creative content by search engines and content aggregation services was the problem the right aimed to tackle.[339] Additionally, the press publishers' right was to provide legal security to both publishers and service providers, as stated in the impact assessment presented to the Spanish parliament by the Spanish government.[340] Thus, the Spanish legislator followed the German approach of defining the problem addressed by the press publishers' right with a focus on the functioning of particular online services. As such, the problems tackled in both Spain and Germany directly relate to the parasitism phenomenon identified in Chapter II.

At the European Union level, the definition of the problem addressed by the press publishers' right, has gone through considerable change. In its communication 'Towards a modern, more European copyright framework', the EC voiced concerns whether the current set of rights recognised by the EU law was sufficient and well-designed to address the new forms of content

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[336] 'Referentenentwurf Des Bundesministeriums Der Justiz. Entwurf Eines Siebenten Gesetzes Zur Änderung Des Urheberrechtsgesetzes' (2012) Bundestag-Drucksache 17/11470 6.
[337] ibid.
[338] ibid 9.
[339] Law No. 21/2014 of November 4, 2014, amending the Consolidated Text of the Law on Intellectual Property, approved by Royal Legislative Decree No. 1/1996 of April 12, 1996, and Law No. 1/2000 of January 7, 2000, on Civil Procedure art 32.2.
[340] 'Memoria de Analisis de Impacto Normativo Anteproyecto de Ley Por El Que Se Modifica El Texto Refundido de La Ley de Propiedad Intelectual, Aprobado Por Real Decreto Legislativo 1/1996, de 12 de Abril, y La Ley 1/2000, de 7 de Enero, de Enjuiciamiento Civil.' 14.

distribution online, including content aggregation.[341] The EC noted that, when applied to digital transmissions, the rights of communication to the public and making available to the public are surrounded by a grey area and might not provide the required legal certainty.[342] Following the finding that these rights did not guarantee the authorisation and remuneration of protected works' uses, the Commission promised to consider if any action specific to news aggregators were required, including an intervention on rights.[343] Delivering on this promise, the Public Consultation on the role of publishers in the copyright value chain, described the problem as the potential difficulties for press publishers to license and be paid for online uses of their content.[344] Accordingly, the problem addressed by the EU press publishers' right initially concerned the licensing and application of the exclusive rights in the digital environment alone.

The Impact Assessment accompanying the Proposal provided a clear definition of the problem addressed by the press publishers' right: 'The shift from print to digital has enlarged the audience of press publications but made the exploitation and enforcement of the rights in publications increasingly difficult. In addition, publishers face difficulties as regards compensation for uses under exceptions'.[345] Therefore, besides the initial notion of difficulties with the exploitation of rights in the digital environment, the Impact Assessment indicated another problem area: the enforcement of rights. Yet, the most important addition to the understanding of the problem addressed by the press publishers' right was a reference the Impact Assessment made to the essential role played by publishers in democratic societies: the facilitation of access to knowledge and quality information.[346] The Commission noted that only sustainable press publishers, backed by appropriate revenues, can fulfil this crucial role. Consequently, it was the threat to free and pluralist press which became to be seen as the core of the problem, and the press publishers' right which would facilitate licensing and enforcement, became the tool to solve it.

The free and pluralist press also came to the fore in the Proposal. The proposition for the introduction of the press publishers' right was included within the Proposal's third objective:

[341] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Towards a Modern, More European Copyright Framework COM(2015) 626 Final' 10.
[342] ibid 9.
[343] ibid 10.
[344] 'Public Consultation on the Role of Publishers in the Copyright Value Chain and on the "Panorama Exception"'.
[345] European Commission, 'Impact Assessment' (n 126) 155.
[346] ibid 160.

fostering a well-functioning and fair copyright marketplace.[347] Actions foreseen under this objective focused on the difficulties faced by the right holders in seeking to authorise and be remunerated for the online uses of their content.[348] The Memorandum to the Proposal accordingly defined the problem addressed by the press publishers' right as 'difficulties in licensing their [publishers] publications online and obtaining a fair share of the value they generate'.[349] Additionally, the Memorandum singled out three issues making up the problem: 1) sustainability of the press sector; 2) press publishers' difficulties in licensing of their content, and obtaining a fair share of the value they generate; 3) legal uncertainty. As noted in the recitals to the Proposal, the resolution of these three issues was to guarantee 'a free and pluralist press [which] is essential to ensure quality journalism and citizens' access to information'.[350] The final text of the CDSM Directive did not introduce any substantial changes to the problem's definition, leaving the part of the recital on the guarantee of free and pluralist press intact.[351] Added in the CDSM Directive recitals, was further emphasis on the problems with licensing content to online services whose business models focus on the reuse of the press publications, making it more difficult for press publishers to recoup their investments.[352]

The problem addressed by the press publishers' right at the EU level, consists of a number of interdependent issues. Following the EC's reasoning, three aspects can be distinguished: 1) a threat to free and pluralist press; 2) the need for a sustainable press sector; 3) the unreliability of the licensing and enforcement environment. Although the Commission attempted to elevate the first issue concerning the current dangers for free and pluralist press in its later definitions of the problem, the justification for the regulatory intervention based on this rationale is very limited. The argument of a free and pluralist press serves more as an ancillary reason for the main goal of creating a reliable licensing and enforcement environment, providing legal certainty for its actors.

B. Naming the answer

The term 'press publishers' right' is one of many used to describe regulatory responses to benefit press publishers. Other names include, but are not limited to: publisher's intellectual

[347] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Promoting a Fair, Efficient and Competitive European Copyright-Based Economy in the Digital Single Market' (n 107) 2.
[348] ibid 7.
[349] European Commission, 'Explanatory Memorandum to the Proposal to the Directive of the European Parliament and of the Council on Copyright in the Digital Single Market' (2016) COM(2016) 593 final 3.
[350] European Commission, 'Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market' (2016) COM(2016) 593 final.
[351] CDSM Directive recital 54.
[352] ibid recital 54.

property right,[353] publishers' right,[354] neighbouring right for press publishers,[355] ancillary copyright for news publishers,[356] ancillary rights in news products,[357] and ancillary copyright,[358] as well as link tax,[359] snippet tax[360] or Google tax.[361] The choice of a particular term can provide insight into the understanding of, and attitude towards the regulatory interventions to benefit press publishers. For example, a person choosing to refer to a regulatory response as a tax, emphasises the financial burden which the new right generates, and is most likely negatively oriented towards such a regulatory intervention.[362] Someone using the word 'ancillary' stresses the subsidiary nature of the new right in respect of copyright.[363] The auxiliary character is also expressed by the use of the terms neighbouring or related rights. However, this term is particularly slanted towards drawing a parallel with neighbouring (related) rights of other content producers recognised at the EU level. The press publishers' right introduced in the CDSM Directive is indeed a related right. For the purposes

[353] Mireille van Eechoud, 'A Publisher's Intellectual Property Right. Implications for Freedom of Expression, Authors and Open Content Policies' (2017).
[354] Richard Danbury, 'Is an EU Publishers' Right a Good Idea?' (CIPIL 2016) ‹http://www.cipil.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cipil.law.cam.ac.uk/documents/copyright_and_news/danbury_publishers_right_report.pdf› accessed 1 April 2017.
[355] Ana Ramalho, 'The Competence of the EU to Create a Neighbouring Right for Publishers' [2016] Working Paper of University of Maastricht ‹https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2842313› accessed 29 November 2016.
[356] 'The Ancillary Copyright for News Publishers: Why It's Unjustified and Harmful' (Computer & Communications Industry Association 2016) ‹http://www.ccianet.org/wp-content/uploads/2016/05/CCIA_AncillaryCopyright_Paper_A4-1.pdf› accessed 31 October 2016.
[357] EDiMA, 'Impact of Ancillary Rights in News Products' (2015) ‹http://www.europeandigitalmediaassociation.org/pdfs/EDIMA%20-%20Impact%20of%20ancillary%20rights%20in%20news%20products.pdf› accessed 2 December 2015.
[358] Bo Vesterdorf, 'The Effect of Failure to Notify the Spanish and German Ancillary Copyright Laws' (2015) 37 European Intellectual Property Review 263.
[359] Laura Tribe, 'European Parliament Approves Unpopular Link Tax and Mandatory Content Filtering in Its Final Vote on the Copyright Directive' (*OpenMedia*, 26 March 2019) ‹https://openmedia.org/en/european-parliament-approves-unpopular-link-tax-and-mandatory-content-filtering-its-final-vote› accessed 3 April 2019.
[360] Duncan Robinson, 'Google Faces Brussels Move on "Snippet Tax" for News' *Financial Times* (9 December 2015) ‹http://www.ft.com/intl/cms/s/0/634c7e72-9e7f-11e5-b45d-4812f209f861.html#axzz453SmGsL2› accessed 6 April 2016; Joshua Benton, 'Google Is Threatening to Kill Google News in Europe If the EU Goes Ahead with Its "Snippet Tax"' (*Nieman Lab*, 22 January 2019) ‹http://www.niemanlab.org/2019/01/google-is-threatening-to-kill-google-news-in-europe-if-the-eu-goes-ahead-with-its-snippet-tax/› accessed 28 January 2019.
[361] Eleonora Rosati, 'The German "Google Tax" Law: Groovy or Greedy?' (2013) 8 Journal of Intellectual Property Law & Practice 497; Joe Mullin, 'Country by Country, Europe Falls in and out of Love with a "Google Tax"' (*Ars Technica*, 31 October 2014) ‹http://arstechnica.com/tech-policy/2014/10/country-by-country-europe-falls-in-and-out-of-love-with-a-google-tax/› accessed 16 February 2016.
[362] See for example Joe Mullin, 'New Study Shows Spain's "Google Tax" Has Been a Disaster for Publishers' (*Ars Technica*, 30 July 2015) ‹http://arstechnica.com/tech-policy/2015/07/new-study-shows-spains-google-tax-has-been-a-disaster-for-publishers/› accessed 9 February 2016; Tim Cushing, 'A Google Tax Isn't Going To Give Publishers The Payout They Think It Will' (*Techdirt.*, 21 August 2017) ‹https://www.techdirt.com/articles/20170806/10515437943/google-tax-isnt-going-to-give-publishers-payout-they-think-it-will.shtml› accessed 8 September 2017; Cory Doctorow, 'The EU's Link Tax Will Kill Open Access and Creative Commons News' (*Electronic Frontier Foundation*, 28 October 2018) ‹https://www.eff.org/deeplinks/2018/10/eus-link-tax-will-kill-open-access-and-creative-commons-news› accessed 6 December 2018.
[363] See van Eechoud (n 353) 9.

of this thesis, aiming at the most neutral and inclusive term, the author has adopted the term press publishers' right, which will be interchangeably used with the term new right for convenience's sake.

C. *National solutions: Germany and Spain*

Prior to the CDSM Directive, only two Member States adopted regulatory measures referred to as press publishers' right: Germany and Spain. In both cases, the relevant provisions were placed in the acts on copyright and related rights. Other than that, the adopted approaches differ.

As the first country to adopt a special provision to benefit press publishers, Germany introduced three new articles 87f, 87g and 87h, into the Copyright Act during the act's revision in 2013.[364] The German legislator has granted producers of press products an exclusive right to make press products or parts thereof available to the public ('Leistungsschutzrecht für Presseverlege'). The right solely applies to commercial uses and is limited in time to one year following the publication.[365] Single words and very small text snippets are exempted from the right's scope, unless they are used by commercial providers of search engines or commercial providers of services which process the content accordingly. This exception is imprecise on two points: firstly, the length of the exempted snippets is undetermined; and secondly, no explanation is offered on what type of services are considered to process content accordingly to search engines: social media, news aggregators or others.

A press product covered by the German press publishers' right is defined as an edited compendium of journalistic contributions, in the context of a collection published periodically under a single title, which, overall, is predominantly typical for the publishing business, and its overwhelming majority does not serve self-advertising purposes. Journalistic contributions forming the compendium should aim to convey information, shape opinions or provide entertainment. Right holders of a press publishers' right in Germany are producers of press content, regardless of their business models. The German press publishers' right is not only exclusive, but also independent: it is not conditioned on the author's copyright and it is transferrable. The press publishers' right holder has the freedom to decide whether she would like to exercise her right and receive remuneration for the uses within its scope. Authors should

[364] Achtes Gesetz zur Änderung des Urheberrechtsgesetzes 14.05.2013 BGBl I 2013 1161.
[365] The wording here follows the unofficial translation by the German Federal Ministry of Justice and Consumer Protection. See 'Act on Copyright and Related Rights (Urheberrechtsgesetz, UrhG)' ‹https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html› accessed 24 January 2019

be provided with a reasonable share of the remuneration received by press publishers pursuant to the new right.

Following a reference from the regional court of Berlin, the validity of the German press publishers' right was recently considered by the CJEU. The request for a reference was made in the context of legal proceedings between VG Media, a CMO representing publishers, and Google. The proceedings concerned the payment of damages for the use of text excerpts, images and videos in Google's services following the enactment of the press publishers' right in Germany. The regional court of Berlin doubted whether the press publishers' right was properly enacted. Pursuant to the Directive on Provision of Information, Member States are obliged to notify the European Commission of any draft technical regulation on services.[366] Germany had failed to notify the EC about the introduction of the press publishers' right. The regional court of Berlin decided to refer two questions to the CJEU, in essence asking whether the German press publishers' right was a technical regulation aimed specifically at the information society service providers and whether the Commission should have been notified. The penalty for the lack of notification is the inapplicability of the legislative provisions, in the sense that they cannot be enforced against individuals. In its decision of 12 September 2019, the CJEU found that the German press publishers' right is a rule specifically aimed at information society services.[367] In the Court's opinion, the fact that the German press publishers' right specifically concerned search engines was apparent from the German government's submission.[368] And it is a common ground that search engines are information society service providers.[369] Therefore, the German press publishers' right was a technical regulation which the EC should have been notified of. Following the CJEU judgement, it has become inapplicable.

The Spanish legislator took a different path than a German one: by introducing art. 32.2 into the Spanish Copyright Act,[370] it extended the quotation exception to cover making available of non-significant fragments of contents by providers of digital services of content

[366] Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (Text with EEA relevance) OJ L 241/1 2015 art. 8(1).
[367] *VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH v Google LLC* [2019] Court of Justice of the European Union C-299/17, EU:C:2019:716.
[368] ibid 36.
[369] ibid 34.
[370] Ley 21/2014, de 4 de noviembre, por la que se modifica el texto refundido de la Ley de Propiedad Intelectual, aprobado por Real Decreto Legislativo 1/1996, de 12 de abril, y la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil 268 Boletin Oficial del Estado, 5 November 2014.

aggregation.[371] Fragments of content used needed to come from periodical publications or periodically updated websites, and to be aimed at providing information, entertainment or creation of public opinion. According to this provision, content aggregation services do not need to seek prior permission to use right holder's content, but they are under an obligation to pay an equitable compensation to the right holder for the use of her works. The right of press publishers to receive compensation is unwaivable and needs to be exercised via a designated collective management organisation. In a comment directly following the adoption of press publishers' right in Spain, Xalabarder named this solution a remunerated statutory license.[372]

Apart from the exception for aggregation services, art. 32.2 of the Spanish Copyright Act provides another quotation exception to the benefit of search engines, or, as the Spanish Copyright Act describes them, 'providers of services which facilitate search instruments of isolated words'. Similar to content aggregation services, search engines can make fragments of content available without prior permission of the copyright holder, but only when such use does not have its own commercial purpose, is strictly limited to what is necessary for the service to operate, and the search results include a link to the original source. Search engines are under no obligation to compensate copyright holders for such uses.

The Spanish legislator decided not to provide press publishers with an independent exclusive right. It limited the benefits received by publishers to a fair compensation, but only for one of the exceptions introduced. The possibility to benefit from the exception is dependent on the copyright protection of the content used. The wording of art. 32.2 of the Spanish Copyright Act has created uncertainties about the exceptions' basic characteristics: who is obliged to pay the compensation and who should receive it, remains uncertain as the provision refers not only to publishers but also to other right holders. Because the application of the exception is not limited to literary content, the term 'other right holder' could apply to any creator of content incorporated in the periodical publication or on a periodically updated website. The proposal for art. 32.2 of the Spanish Copyright Act was tabled by the government quite late during the copyright modernisation process, and passed through the legislative process untouched, with all textual uncertainties remaining.

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[371] The wording here follows the translation by Raquel Xalabarder. See presentation during conference 'Copyright, related rights and the news in the EU: Assessing potential new laws' CIPIL University of Cambridge, hosted at IViR University of Amsterdam, 23 April 2016.

[372] Raquel Xalabarder, 'The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government - Its Compliance with International and EU Law' (Universitat Oberta de Catalunya Internet Interdisciplinary Institute 2014) WP14-004 7.

The Spanish and German solutions take different shapes, but because of the common goal they pursue (remuneration of the press publisher), the literature refers to both of them as press publishers' rights. The case of the European Commission is different. According to the Impact Assessment accompanying the Proposal, the Spanish provision is a 'compensation right for the use by content aggregators', not a press publishers' right.[373] In the Commission's opinion, in order for a provision to be called a press publishers' right, it needs to grant its beneficiaries exclusive rights.[374] Both national press publishers' rights concern only the right of making available, an element of the broader right of communication to the public. The scope of both national rights is determined through the content used, and not the person producing it.

D. The solution of the CDSM Directive: a related right

The proposition for a press publishers' right at the European Union level was included in the Commission's Proposal tabled in September 2016. The EC took a different path than Germany and Spain, and decided to shape the press publishers' right as a related right, similar to the rights granted to other content producers, such as film and phonogram producers.[375] The discussion on the final wording of the press publishers' right lasted two and a half years, with the CDSM Directive finally adopted in April 2019. As the public discussion on the press publishers' right analysed in this chapter, was ongoing during the legislative process, and echoed the changes made to the press publishers' right by the EP, the Council and during the trilogue, it is helpful to show how the provision on press publishers' right changed over time.

The provision on the press publishers' right, as found in article 11 of the Proposal, provided publishers of press publications with a right of making available to the public and a right of reproduction for digital use of their press publications, in whole or in part. The Commission defined press publication as the fixation of a collection of literary works of a journalistic nature, constituting an individual item within a periodical or a regularly-updated publication under a single title, such as a newspaper or a general or special interest magazine, having the purpose of providing information related to news or other topics and published in any media under the initiative, editorial responsibility and control of a service provider.[376] The collection could also include works other than journalistic, as well as what the EC identified as 'other subject

[373] European Commission, 'Impact Assessment' (n 126) 190 Annex 13B.
[374] See introductory notes to Annex 13B ibid 189.
[375] Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market 2016 [COM(2016) 593 final] para 32.
[376] Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (n 375) art. 2(4).

matter'. Pursuant to the Proposal's recitals, scientific and academic publications were not considered as press publications.

The Proposal explicitly excluded hyperlinks from the scope of the new right, which do not constitute acts of communication to the public,[377] and required the application of the InfoSoc Directive provisions on copyright exceptions, TDMs, sanctions and remedies respectively. The right was limited in time to 20 years after publication. The press publishers' right, as proposed by the Commission, was very broad in its scope and granted press publishers a set of two exclusive rights. This was a step further than the German solution. The press publishers' right did not depend on the existence of author's copyright, and there was no threshold of protection to be met, based on neither originality, nor the level of investment made by the publisher. The exercise of the right by press publishers was not to interfere with the right of the authors.

The text proposed by the Commission provided the basis for further proceedings in the Council and the European Parliament. As Axel Voss MEP observed when commenting on the amendments submitted by MEPs during the JURI Committee works, the proposed changes represented 'all the colours of the rainbow'.[378] Nevertheless, three general trends can be distinguished in the modifications to the press publishers' right proposed in the EP and the Council. Firstly, a number of proposed changes aimed to extend the right's scope by means of adding news agencies as beneficiaries,[379] removing the exclusively digital characteristics of uses covered,[380] adding rights stemming from the Rental and Lending Directive (distribution right, rental and lending right),[381] as well as explicitly stating that the right should cover automatically generated content which usually accompanies a link.[382] The second group of amendments intended the reverse: to limit the scope of the new right by, among others, introducing an exception for private, non-commercial uses,[383] and adding an originality

[377] ibid recital 33.
[378] Axel Voss during the JURI Committee meeting, Brussels, 13 July 2017.
[379] Axel Voss, 'Proposal for a Directive on Copyright in the Digital Single Market Draft Compromise Amendments on Article 11 and Corresponding Recitals'; European Parliament, 'Amendments 673 - 872 Draft Report Therese Comodini Cachia' (2017) 2016/0280(COD) Amendment 753.
[380] European Parliament, 'ITRE Opinion' (n 131) 27; European Parliament, 'Opinion of the Committee on Culture and Education for the Committee on Legal Affairs on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market' (n 133) 46; European Parliament, 'Amendments 673 - 872' (n 379) amendments 755-758.
[381] European Parliament, 'Amendments 673 - 872' (n 379) amendments 750, 751.
[382] European Parliament, 'Opinion of the Committee on Culture and Education for the Committee on Legal Affairs on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market' (n 133) 23.
[383] ibid 46; Council, 'Note from Presidency to Delegations on Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market - Discussion Paper on Article 11 and Article 13' (2018) 5902/18.

requirement where uses of parts of press publications were concerned.[384] Additionally, suggestions were made to shorten the term of protection,[385] and to guarantee authors' share in the revenues generated thanks to the press publishers' right.[386] Both trends, in favour of, and against the extension of the right's scope, did not call into question the exclusive and independent character of the press publishers' right. The third trend concerned the erasure of the press publishers' right from the Proposal, or its substitution by a legal presumption to benefit of press publishers. Pursuant to the presumption, the publisher would be entitled to conclude licenses and enforce copyright in press publications in case of lack of proof to the contrary, without the need to prove its legal standing.[387] Alternatively, it could be left to the Member States to decide whether they would grant press publishers an independent right, or the presumption of a right.[388]

The main modifications to the press publishers' right's wording made by the Council, included the limitation of the right's application to online uses of press publications by information society service providers; the exclusion from the right's scope of uses of insubstantial parts of press publications, where the insubstantiality was to be determined by the MS, pursuant to either the originality or length criterion, or both; the shortening of the new right's duration to one year.[389] The compromise adopted by the Parliament championed a shorter term of protection, of only five years.[390] Additionally, the press publishers' right was solely to apply to digital uses by information society service providers. Legitimate private and non-commercial uses by individual users, and mere hyperlinks accompanied by individual words, were excluded from the scope of the new right. In accordance with the EP's compromise, Member

[384] Council, 'Note from Presidency to Delegations on Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market - Presidency Compromise Proposal (Consolidated Version) and State of Play' (n 139).
[385] Council, 'Note from Presidency to Permanent Representatives Committee on Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market - Mandate for Negotiations with the European Parliament' (the Council of the European Union 2018) 8145/18 59.
[386] European Parliament, 'Opinion of the Committee on Culture and Education for the Committee on Legal Affairs on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market' (n 133) 47.
[387] European Parliament, 'JURI Draft Report' (n 130).
[388] Council, 'Note from Netherlands Delegation to Delegations on Proposal for a Directive If the European Parliament and of the Council on Copyright in the Digital Single Market - NL Proposal on Article 11 and Relevant Recitals' (2018) 7111/18.
[389] Council, 'Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market - Agreed Negotiating Mandate' (n 138).
[390] European Parliament, 'Copyright in the Digital Single Market Amendments Adopted by the European Parliament on 12 September 2018 on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market' (n 137).

States were obliged to guarantee that authors would receive an appropriate share of the revenues generated by publishers on the basis of the new right.

Compared to the Proposal, the essence of the press publishers' right has remained the same in the final text of the CDSM Directive: it is a related right of publishers of press publications. Following the renumbering of the articles, the press publishers' right is included in art. 15 of the CDSM Directive. The bundle of rights granted to publishers of press publications has remained the same and includes right of making available and right of reproduction. Following the Council's compromise, the new right covers the online uses by information society service providers alone. Private or non-commercial uses of press publications, as well as use of individual words or very short extracts of press publications, are excluded from the new right's scope. The duration of the new right is shortened to two years, and its retroactive application is excluded. Additionally, following the EP's compromise, the MS need to provide authors with an appropriate share of the revenues generated by press publishers pursuant to the new right. What remains to be seen, is how the Member States will implement the provision on the press publishers' right into their national legal orders: whether they will simply copy art. 15 of the CDSM Directive or take a different approach. Another question is how Germany and Spain, which already have press publishers' rights, will address the relationship between the EU press publishers' right and their national solutions. The implementation deadline is 7 June 2021.

II. The discussion

The following section provides an overview of the public discussion on the protection of press publications and the introduction of the press publishers' right at the EU level during the copyright modernisation process of the Junker Commission. Together with the so-called value gap proposal, establishing a new intermediary liability regime, the introduction of the press publishers' right was the most controversial provision of the CDSM Directive. To describe the discussion on the new right, the section refers to: press releases, position statements, studies, open letters and similar documents, as well as opinions expressed in op-eds and blog posts. Apart from the public discussion on the press publishers' right, stakeholders continuously lobbied in European institutions to influence the legislative process of the CDSM Directive. The scale of lobbying activities was unprecedented, and the involvement of public at the last stage of the discussion overwhelming.

The section begins with an outline of the groups of actors involved in the discussion on protection of press publications and the introduction of the press publishers' right. Secondly, it provides an overview of the discussion, together with a timeline of developments. It lists

documents issued by the discussion's participants, taking account of all documents identified by the author. The list does not claim to be exhaustive. The section finishes with the consideration of the Public Consultation, a unique opportunity to collect stakeholders' opinions on the EU's intervention on rights for publishers. The section only considers the discussion ongoing at the European Union forum, excluding the debates in the individual Member States.

A. Actors

The possibility of the introduction of the press publishers' right at the EU level, gave rise to a highly engaging discussion. The discussion involved not only the stakeholders whose interests are directly vested in the online news environment, but also actors from other creative sectors, as well as the general public. The section provides an outline of the actors participating in the discussion. The division of actors into groups takes into account their character and relationship with the online news environment. Actors were identified with reference to: list of respondents to the Public Consultation;[391] list of entities and persons who provided input during the preparation of the JURI draft report on the Proposal published by Comodini Cachia, MEP;[392] documents made public due to access to the documents' request of 1 August 2016 submitted to DG CNECT by Mathias Schindler from the office of Julia Reda MEP;[393] the report of the Corporate Europe Observatory (CEO) on the CDSM Directive;[394] authors and signatories of statements and open letters issued during the discussion.

News organisations. The category of news organisations groups together actors whose interests are of an immediate concern for the press publishers' right. Firstly, it includes traditional press publishers and their associations, who fully supported the introduction of the new right. At the European Union level, traditional press publishers were represented by four associations: the European Publishers Council (EPC), the European Magazines and Media Association (EMMA), the European Newspapers Publishers' Association (ENPA), and the News Magazines Association (NMA), which often acted jointly. Advocacy was also done by traditional press publishers themselves, including Axel Springer and Agora, national press

[391] 'Synopsis Reports and Contributions to the Public Consultation on the Role of Publishers in the Copyright Value Chain and on the "Panorama Exception"' (n 128).
[392] European Parliament, 'JURI Draft Report' (n 130).
[393] '2015 and 2016 Documents on the Ancillary Copyright Law ("Leistungsschutzrecht") - a Freedom of Information Request to Communications Networks, Content and Technology' (*AsktheEU.org*, 1 August 2016) ‹https://www.asktheeu.org/en/request/2015_and_2016_documents_on_the_a› accessed 11 September 2019 Request number Gest Dem 2016/4441.
[394] 'Copyright Directive: How Competing Big Business Lobbies Drowned out Critical Voices' (*Corporate Europe Observatory*, 10 December 2018) ‹https://corporateeurope.org/power-lobbies/2018/12/copyright-directive-how-competing-big-business-lobbies-drowned-out-critical› accessed 22 December 2018.

publishers' associations, such as the Instytut Wydawców Prasy (Poland), and groupings of regional and local press publishers. Secondly, the group of news organisations includes digital and innovative press publishers, who looked unfavourably upon the new right. They were represented, among others, by the coalition of European Innovative Media Publishers (IMP). Thirdly, other actors included in the news organisations group are publishers from other sectors, such as: academic publishers (STM), music publishers (The International Association of Music Libraries, Archives and Documentation: IAML), and book publishers (Federation of European Publishers: FEP); as well as news agencies, such as ANSA, DPA, EANA, and AFP, also represented by the European Alliance of News Agencies.

Authors. Authors, and journalists in particular, form another group of actors in the discussion on press publishers' right. Their interests were represented by professional associations such as the International Federation of Journalists (IFJ), the European Federation of Journalists (EFJ), and the Association of European Journalists (AEJ). Additionally, journalists directly provided their comments on press publishers' right, and copyright reform in general, in their press articles and editorials published online or in print. Additionally, journalists and other authors were signatories of open letters, including a letter by Sammy Ketz, a long-time war correspondent, published simultaneously in several media outlets across Europe in August 2018.[395] Opinions on the press publishers' right among journalists varied.

Digital intermediaries. The group of digital intermediaries includes a number of different actors, whose relationship with the online news environment varied. First, the group involves so-called tech giants such as Google, Microsoft, Yahoo! or Mozilla, who offer a wide array of online services, including search engines, news aggregators and communication tools. Secondly, it covers small and medium-sized enterprises, startup companies and their associations, such as Allied for Startups. Thirdly, it includes specialised service providers, like media monitoring companies (AMEC, FIEB) and content recognition software producers (Audible Magic). Fourthly, the group includes digital intermediaries which cannot be directly linked with the online news environment, such as Amazon or EBay. Interests of digital intermediaries were also represented by trade associations, including EDiMA (association representing online platforms and platform-related businesses), the Computer and Communications Industry Association (CCIA) and DigitalEurope.

[395] Sammy Ketz, 'War Reporters like Me Will Cease to Exist If the Web Giants Aren't Stopped | Sammy Ketz' The Guardian (28 August 2018) ‹https://www.theguardian.com/commentisfree/2018/aug/28/war-reporters-internet-giants-news-journalism-facebook-google-eu-vote-copyright› accessed 4 September 2018.

Collective management organisations (CMOs). This group brings together organisations acting in the interest or on behalf of the right holders. These organisations conclude licenses, collect copyright levies and distribute the revenues to the right holders. CMOs participating in the discussion represented right holders from different creative industries, authors and publishers alike: the music industry (Société des auteurs, compositeurs et éditeurs de musique, SACEM), the audiovisual industry (Zwiazek Autorów i Producentów Audiowizualnych, ZAPA), or the book sector (Authors Licensing and Collecting Society, ALCS).

Civil Society Organizations (CSOs). This group is composed of non-governmental organisations (NGOs) and other public policy advocates (associations, coalitions). Actors included in this group do not argue for themselves, but on behalf of others: users, creators, research institutions, or libraries. These actors tried to inform the public on and involve it in the discussion on press publishers' right, and the reform of the EU copyright in general. Actors covered by the CSOs group include: the Communia Association, Kennisland, Centrum Cyfrowe, Initiative Against Ancillary Copyright (IGEL), European Digital Rights (EDRi), the Scholarly Publishing and Academic Resources Coalition (SPARC Europe), OpenForum Europe, and the Electronic Frontier Foundation (EFF). These organisations often acted in a coordinated way, issuing common statements and organising joint events.

Users. The categorising of users as a separate group of actors is justified considering the high number of individual replies to the Public Consultation on the role of publishers in the copyright value chain (1469 replies, nearly 40% of all responses), as well as public protests against the adoption of the CDSM Directive, and activities of users on social media. Apart from users speaking out by themselves, their interests were also represented by the CSOs and consumer organisations, such as the European Consumer Organisation (BEUC) or Altroconsumo (Italy). In the age of Web 2.0, users are often authors as well, and thereby sometimes participating in the discussion in a double capacity.

Research and academic institutions. This group brings together actors involved in research and education, including individual libraries (Europeana, Helsinki University Library), as well as their associations (Association of European Research Libraries: LIBER Europe, European Bureau of Library Information and Documentation Associations: EBLIDA). It embraces universities and their associations (European Universities Association: EUA), as well as educational resources providers such as the Wikimedia Foundation.

Content producers from other creative industries. This group involves actors who, even though they do not belong to the online news environment, decided to participate in the discussion on

the press publishers' right. The group covers producers from creative sectors, such as the music industry (Sony, SoundCloud), the film industry (Polish Filmmakers Association, 21st Century Fox, Motion Picture Association) or television (ZDF German Television).

Academia. The activity of researchers and academics in the context of copyright reform was not limited to the publication of scholarly articles and organisation of conferences. Academics actively participated in the discussion on the press publishers right by submitting responses to the Public Consultation, issuing open letters and statements, with a Statement of 24 April 2018 collecting more than 200 signatures.[396]

B. Outline and timeline

The discussion on protection of press publications began shortly after Junker delivered his statement to the EP on the Political Guidelines for the next European Commission, in which he had signalled the need for the modernisation of copyright rules. At the outset, the issue of press publishers' right did not garner much public attention. Only a limited number of actors participated, with publishers and their organisations mainly setting the tone. The number of documents issued by actors was limited, at least those publicly available. With no concrete proposal for a press publishers' right on the table, the actors based their arguments in favour of, or against the new right, on their own understanding of what a press publishers' right would entail. This was particularly visible in the Public Consultation.

The discussion intensified following the publication of the Proposal in September 2016. The Proposal streamlined the arguments, as it provided actors with a definition of a press publication and a press publishers' right they could reference. Documents issued and statements made after the publication of the Proposal, or even after its leak in August 2016, are mostly reactions to subsequent versions of the press publishers' right, put forward by the Council, the EP and the EC. Following the Proposal, the number of actors involved, and documents issued, gradually begun to grow. The actors' activities escalated around the time of an unsuccessful plenary vote in the European Parliament on the report of the JURI Committee in July 2018. From this moment on, the number of open letters, statements and other documents considerably increased, to reach its peak in March 2019, when the EP voted on the adoption of the final text of the CDSM Directive.

[396] 'Academics against Press Publishers' Right: 169 European Academics Warn against It' ‹https://www.ivir.nl/academics-against-press-publishers-right/› accessed 26 April 2018.

Figure 5 presents a time correlation between the actions of the EU bodies taken as a part of the copyright modernisation process, and the actors' documents. The figure is composed of two timelines. The first timeline represents the documents of the EU bodies which refer to the news publishing sector and the press publishers' right: the EC's official communications, the Council's working documents, opinions and reports published by the EP and its committees (JURI, IMCO, CULT and ITRE), as well as the trilogue meetings on the CDSM Directive. The second timeline represents documents published by the actors. Each dot on the timeline represents one document. The documents are arranged chronologically for each timeline. Every year is represented by dots of a different colour. Timelines are parallel and cover the same period of time: from Junker's statement on the EC's priorities on 15 July 2014 to the publication of the CDSM Directive on 17 May 2019.

Due to the high number of documents issued by the actors (77), it was impossible to name them in Figure 5. Figures 6, 7 and 8 capture parts of a second timeline presented in Figure 5. Figure 6 represents documents issued by actors between the start of copyright modernisation process and the tabling of the Proposal; Figure 7 represents documents issued by actors between tabling of the Proposal and a month before the failed plenary vote in the EP on 5 July 2018; Figure 8 represents the documents issued by the actors after the failed plenary vote in the EP.

A detailed list of the documents represented in the second timeline in Figure 5 is included in a table in Annex I. The listed documents vary in form and depth. They range from short statements in favour of or against introduction of the new right, to comprehensive position papers, discussing features of the press publishers' right in detail. The list includes the documents which focus on the press publishers' right or protection of press publications, as well as those which discuss the Proposal in general, and refer to the press publishers' right as one of the provisions of the CDSM Directive. None of the identified documents is a quantitative empirical study. As a rule, the documents were made available online by their authors, most often through their websites. On one occasion, the document was disclosed by a CSO.[397] As is the case for the timelines, documents are chronologically ordered.

The analysed documents show that the distinction between supporters and opponents of the press publishers' right is not completely clear. Although press publishers generally supported the new right, there were some local, regional and innovative publishers who objected to the

[397] See an annex to the 'Open Letter in Light of the Competitiveness Council on 30 November 2017' ‹https://cdt.org/files/2017/11/Open-Letter-COMPET-Council-30-Nov-online.pdf› accessed 17 April 2018.

right's introduction,[398] or would rather have seen the adoption of other solutions to aid the press.[399] The IFJ and EFJ, major journalist associations, were generally favourable to the new right. However, they did object to changes in the right's wording detrimental to the journalists' share in the publishers' revenues.[400] Their support was therefore not unconditional. The AEJ was less enthusiastic about a press publishers' right than the EFJ and IFJ, questioning whether art. 11 of the Proposal would indeed provide the best solution.[401] CSOs were unified in their criticism of the press publishers' right, from the beginning of the discussion until the adoption of the final text of the CDSM Directive.

The discussion on the press publishers' right, like the discussion on the CDSM Directive in general, was highly polarised. In practice, there was no common ground between stakeholders. The polarisation can clearly be seen in the way actors were expressing themselves, using some unorthodox methods, and harsh language. In its call for support of the CDSM Directive before the final vote in the EP, the EPC phrased the vote to be: 'For or against independent press [...] for European content creators or for US tech giants [...] for workable copyright or legitimised content theft'.[402] When criticising opponents of the new right, the IFJ and EFJ called them 'self-styled freedom defenders'.[403] During the trilogue negotiations, Google began an experiment, displaying Google News Service without any previews to some of its European users 'to understand what the impact of the proposed EU Copyright Directive would be to our users and publisher partners'.[404] Users simply perceived the Google Service as a page which

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[398] 'Common Position Statement on the Proposed EU Directive on Copyright in the Single Market' (*News Now*, 28 February 2017) ‹http://www.newsnow.co.uk/eu-link-tax/publishers-position-statement.html› accessed 15 December 2017.

[399] 'Open Letter to Members of the European Parliament and the Council of the European Union on the Introduction of a New Neighboring Right under Art. 11 of the Copyright' (*European Innovative Media Publishers*, 25 September 2017) ‹http://mediapublishers.eu/2017/09/25/open-letter-to-members-of-the-european-parliament-and-the-council-of-the-european-union-on-the-introduction-of-a-new-neighboring-right-under-art-11-of-the-copyright-directive/› accessed 23 November 2017.

[400] 'Copyright Directive: IFJ/EFJ Reject the Romanian Compromise' (*European Federation of Journalists*, 7 February 2019) ‹https://europeanjournalists.org/blog/2019/02/07/copyright-directive-ifj-efj-reject-the-romanian-compromise/› accessed 26 February 2019.

[401] 'AEJ Statement on the Proposed Directive on Copyright in the Digital Market' (*Association of European Journalists*, 25 March 2019) ‹https://www.aej.org/page.asp?p_id=677&fbclid=IwAR14c62hROPEEt9BFvyLG3IEEVmlPYFKreRT3vn6Jz64LyGf3dwtTYmHD8k› accessed 30 April 2019.

[402] 'As You Prepare to Vote for the EU Copyright Reform This Week, Whose Side Are You on? | EPC' (25 March 2019) ‹http://epceurope.eu/as-you-prepare-to-vote-for-the-eu-copyright-reform-this-week-whose-side-are-you-on/› accessed 25 March 2019.

[403] 'We Call on the EU to Protect Author's Rights and Deliver on Fairer Europe' (*European Federation of Journalists*, 18 January 2019) ‹https://europeanjournalists.org/blog/2019/01/18/we-call-on-the-eu-to-protect-authors-rights-and-deliver-on-fairer-europe/› accessed 22 January 2019.

[404] Greg Sterling, 'EU Copyright Directive Nearing Final Form as Google Tests Stripped-down News SERPs' (*Search Engine Land*, 16 January 2019) ‹https://searchengineland.com/eu-copyright-directive-nearing-final-form-as-google-tests-stripped-down-news-serps-310494› accessed 14 September 2019.

had not properly loaded. A comparable play with blank pages was used by publishers. The day before the final vote on the CDSM Directive in the EP, all major Polish newspapers came out with blank first pages. A text following the blank pages included a call for Polish MEPs to vote for the CDSM Directive, and was accompanied by a small threat: 'Those who allow others to continue to steal from us, we will remember' (*Tych, którzy pozwolą dalej nas okradać, zapamiętamy*).[405]

With the progression of the legislative process, the press publishers' right became one of the reasons why the Proposal was criticised, and largely gave way to art. 13 on the intermediary liability as the most controversial provision. The CDSM Directive, and the press publishers' right included in it, began to generate considerable media coverage around the time of the unsuccessful vote in the EP in July 2018. The discussion was no longer limited to the statements and open letters of stakeholders with interests directly vested in the online news environment, it had become a matter of general interest. In the last stages of the legislative process, organisations which had remained silent until then, such as EFF or Reddit, decided to speak up.[406]

The discussion became more tense, with supporters of the CDSM Directive seeing the tech giants' lobbying as the main instigators of the public's opposition towards the directive. MEPs received numerous emails from concerned citizens. The large volume of emails led some of the former to believe, and openly claim, that the messages were not sent by EU citizens, but automatically generated by bots.[407] In reaction to these statements, a Botbrief Campaign was launched.[408] Users were provided with a tool to create and print a paper letter, which they could then sent via traditional post to MEPs, to prove that they were not computer programs but real persons. The public was not shy and went out into the streets to protest against the

[405] 'Dyrektywa o prawach autorskich: Apel do eurodeputowanych' (25 March 2019) ‹https://www.rp.pl/Media/190329669-Dyrektywa-o-prawach-autorskich-Apel-do-eurodeputowanych.html› accessed 25 March 2019.

[406] 'The EU Copyright Directive. What Redditors in Europe Need to Know' (*Reddit*, 28 November 2018) ‹https://redditblog.com/2018/11/28/the-eu-copyright-directive-what-redditors-in-europe-need-to-know/› accessed 6 December 2018; Cory Doctorow, 'The EU's Copyright Proposal Is Extremely Bad News for Everyone, Even (Especially!) Wikipedia' (*Electronic Frontier Foundation*, 7 June 2018) ‹https://www.eff.org/deeplinks/2018/06/eus-copyright-proposal-extremely-bad-news-everyone-even-especially-wikipedia› accessed 28 August 2018.

[407] Emanuel Karlsten, 'What Do Bots and Zombies Look Like? We'll Find Out Today.' (*Medium*, 23 March 2019) ‹https://medium.com/@emanuelkarlsten/what-do-bots-and-zombies-look-like-well-find-out-today-449b9bdf76c0› accessed 4 April 2019.

[408] 'BotBrief.Eu | Your Letter to the Members of the EU Parliament' (*BotBrief.eu*) ‹https://botbrief.eu/en/› accessed 7 March 2019.

CDSM Directive, especially the upload filters (art. 13) and the link tax.[409] At that point, the CDSM Directive earned itself the questionable nickname ACTA2.[410] Publishers called users' protests a fake mobilisation of tech giants and copyleft activists.[411] Even academics were being accused of having their activities solicited by Google and other internet giants.[412] The significance of tech giants' involvement in the discussion on the CDSM Directive was called into question in a report of the Corporate Europe Observatory.[413] The CEO's investigation into lobbying on the CDSM Directive, has shown that the lobbyists with the highest access to the EU bodies were collecting societies, creative industries and publishers. Moreover, it demonstrated that the lobby dominated the discussion, with opinions and interests of the citizens having limited impact. The EC itself was not exempt from disregarding citizen's concerns. In its infamous post on Medium entitled 'The Copyright Directive: how the mob was told to save the dragon and slay the knight', it warned the public not to follow a 'catchy' slogan but to consider what the CDSM Directive truly represents: an attempt to create a level playing field so that everyone could benefit from technological development.[414] The post was quickly deleted following wide-spread criticism of the EC considering citizens a misinformed mob.

Following the final vote in the EP on 26 March 2019, the actors focused their activities on individual Member States, trying to influence governments' position during the final vote in the Council.

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[409] Markus Reuter, 'Protests against Copyright Directive: All Cities, Dates and Numbers of Participants across Europe' (*netzpolitik.org*, 25 March 2019) ‹https://netzpolitik.org/2019/protests-against-copyright-directive-all-cities-dates-and-numbers-of-participants-across-europe/› accessed 15 September 2019.

[410] Cory Doctorow, 'Poland Saved Europe from ACTA: Can They Save Us from ACTA2?' (*Electronic Frontier Foundation*, 4 December 2018) ‹https://www.eff.org/deeplinks/2018/11/poland-saved-europe-acta-can-they-save-us-acta2› accessed 6 December 2018.

[411] Tom Tivnan, 'FEP Urges MEP Lobbying on Copyright | The Bookseller' (*The Bookseller*, 10 October 2018) ‹https://www.thebookseller.com/news/fep-urges-mep-lobbying-copyright-872121#› accessed 31 October 2018.

[412] 'The Copyright Directive: Misinformation and Independent Enquiry. Statement from European Academics to Members of the European Parliament in Advance of the Plenary Vote on the Copyright Directive on 5 July 2018' (2018) ‹https://www.create.ac.uk/wp-content/uploads/2018/06/Academic_Statement_Copyright_Directive_29_06_2018.pdf› accessed 27 September 2019.

[413] 'Copyright Directive: How Competing Big Business Lobbies Drowned out Critical Voices' (n 394).

[414] 'The Copyright Directive: How the Mob Was Told to Save the Dragon and Slay the Knight' (*Medium*, 16 February 2019) ‹https://web.archive.org/web/20190216094123/https://medium.com/@EuropeanCommission/the-copyright-directive-how-the-mob-was-told-to-save-the-dragon-and-slay-the-knight-b35876008f16› accessed 3 April 2019.

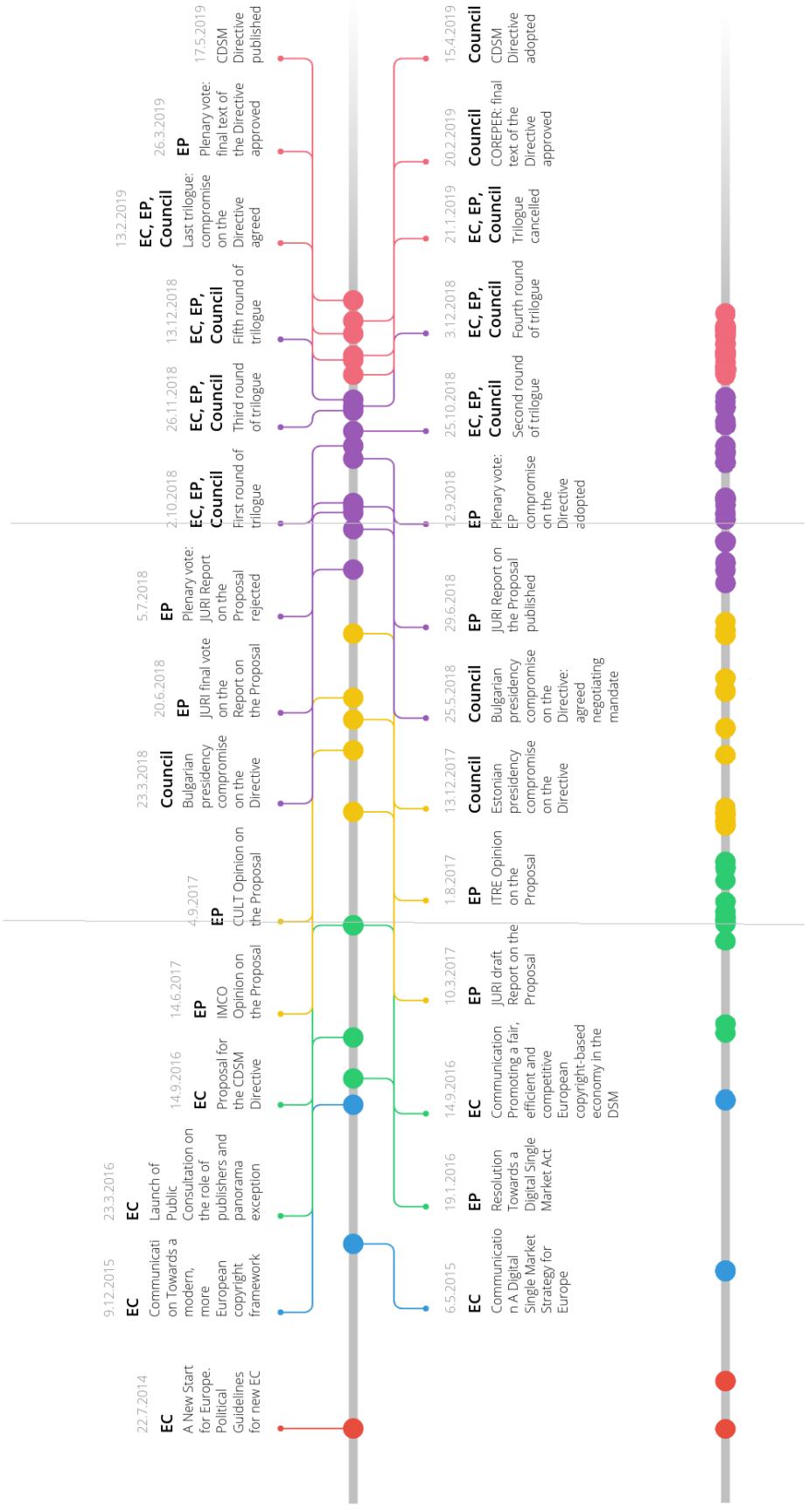

Figure 5: A time correlation between the actions of the EU bodies taken as a part of the copyright modernisation process, and the actors' documents.

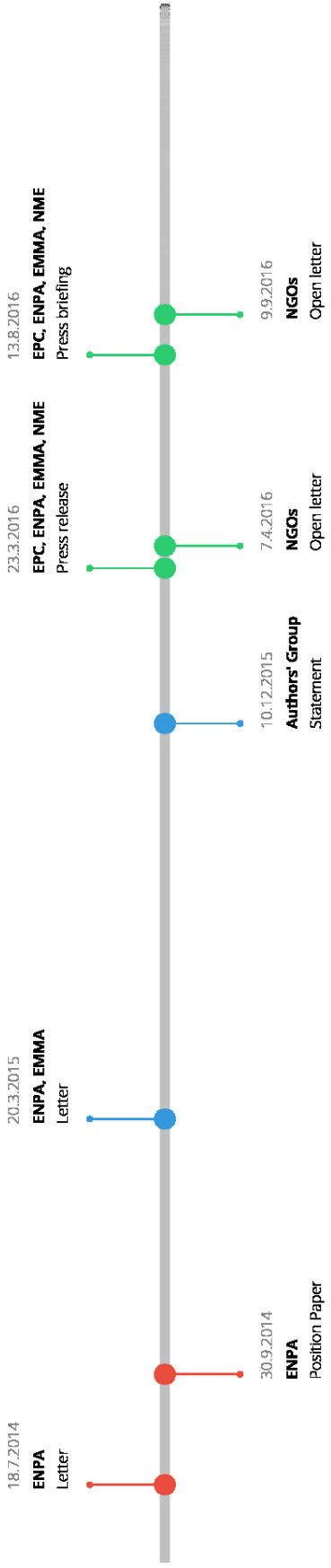

Figure 6: The timeline of documents issued by the actors from the beginning of the copyright modernisation process until the Proposal

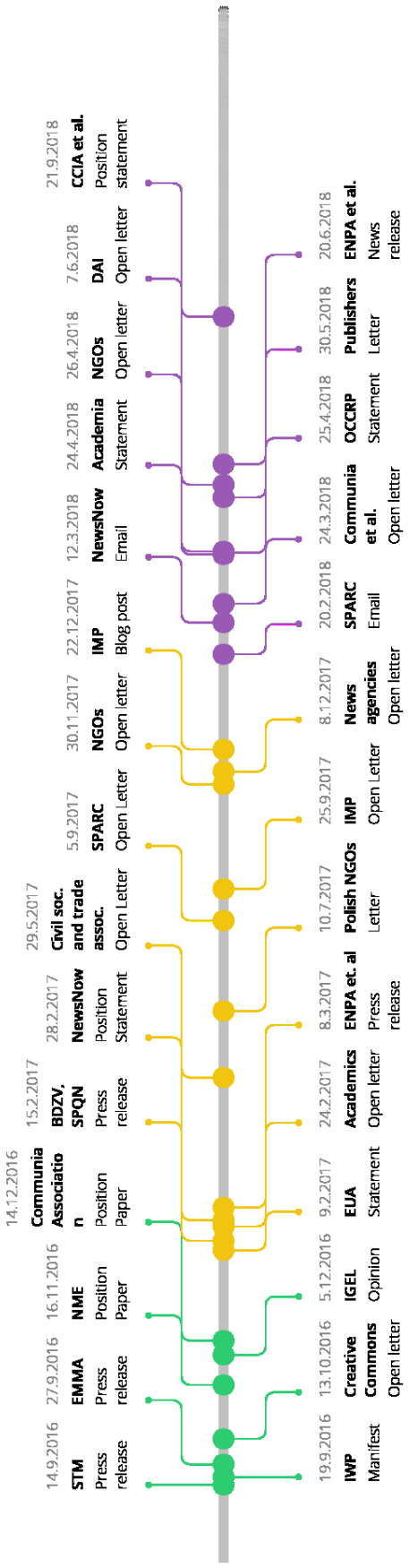

Figure 7: The timeline of documents issued by the actors after the Proposal up to a month before the failed plenary vote in the EP on 5 July 2018

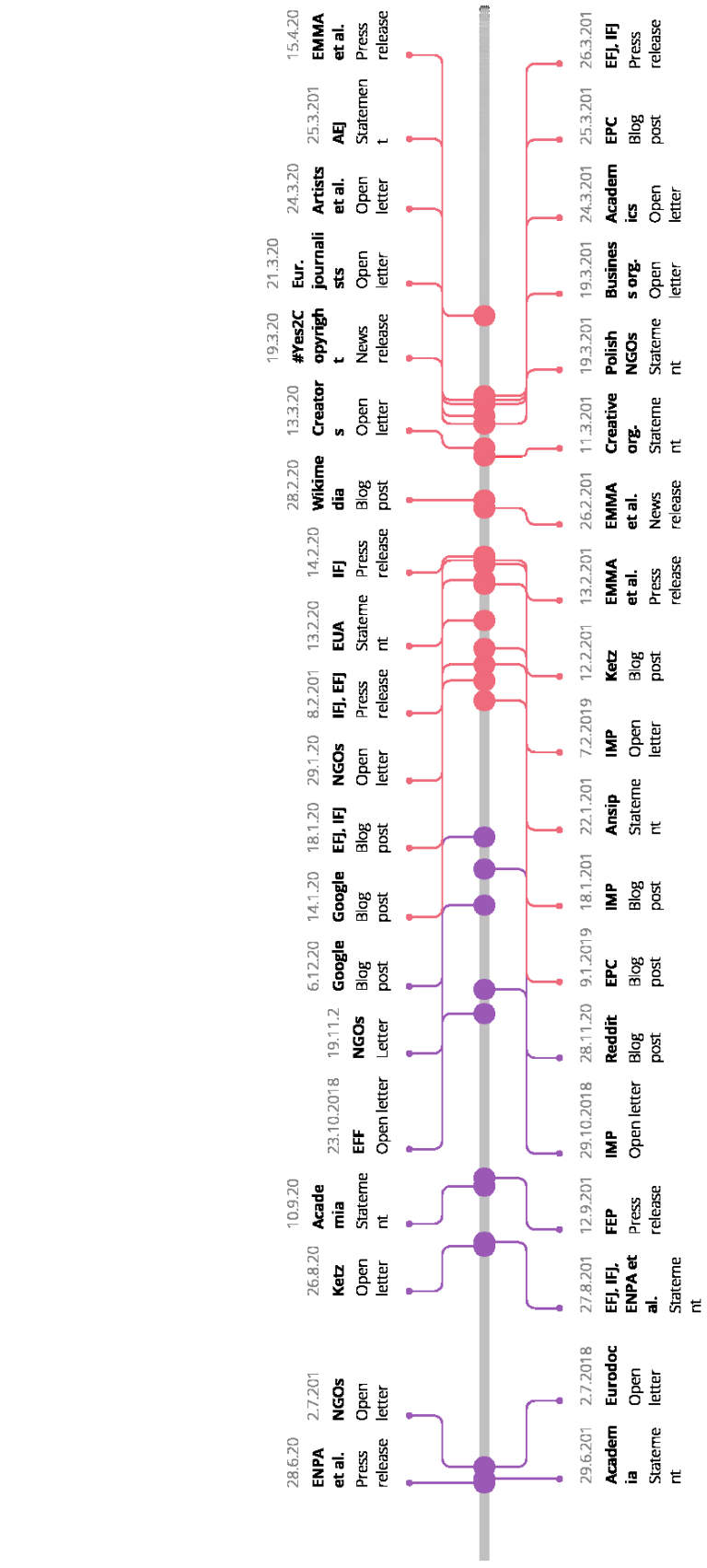

Figure 8: The timeline of documents issued by the actors between a month before the failed plenary vote in the EP on 5 July 2018 until the adoption of the CDSM Directive on 17 April 2019

C. *The Public Consultation*

The Public Consultation on the role of publishers in the copyright value chain was launched by the European Commission on 23 March 2016.[415] As the protection of press publications was not addressed in the 2013 Consultation, the Commission saw fit to make a focused enquiry into possible regulatory measures to benefit press publishers before making any proposals. The Public Consultation focused on two issues: 1) publishers' problems with licensing and being paid for online uses of content caused by the current copyright legal framework; and 2) the consequences of possibly granting publishers a new neighbouring right.[416] The Commission's enquiry was not limited to press publishers, but covered publishers from all sectors. This expansion came as a surprise, as none of the EC's official documents preceding the Public Consultation mentioned the possibility of a regulatory response benefitting publishers beyond the press sector.

While the launch of the Public Consultation was a step in the right direction, its form left a lot to be desired. The Consultation document's formulation was vague, leaving key terms undefined. While the Consultation focused on 'a possible change in the EU law to grant publishers a new neighbouring right', it did not explain what this right would entail exactly. A short explanation on the nature of neighbouring rights in general was included in a footnote of the Consultation document. It explained that neighbouring rights are 'rights similar to copyright', rewarding either the performance of a work, or organisational or financial effort. No suggestion was given on what a related right concerning (press) publishing could look like. The Consultation failed to outline the objectives of the introduction of the new neighbouring right. Furthermore, the Consultation inquired into issues with concluding licenses for online uses of content. As the Consultation document did not explain what it considered online uses, the EC avoided using problematic terms such as link and hyperlink. Thus, provided with no interpretative help, the respondents were to answer a number of questions on the effects of a right of which they did not know the form, scope or aim.

The Consultation finished on 15 June 2016. The Synopsis Report (the Report) and the responses were only published by the Commission on 14 September 2016, the day of the

[415] 'Commission Seeks Views on Neighbouring Rights and Panorama Exception in EU Copyright' (*Digital Single Market*) ‹https://ec.europa.eu/digital-single-market/en/news/commission-seeks-views-neighbouring-rights-and-panorama-exception-eu-copyright› accessed 17 April 2018.
[416] 'Public Consultation on the Role of Publishers in the Copyright Value Chain and on the "Panorama Exception"' (n 344).

publication of the Proposal.[417] The text of the Report is very limited and solely provides a qualitative overview of the responses to the Consultation. Even though most of the respondents were end users, the Report was largely dedicated to the views of the publishing sector.[418] The general impression on the Report's discourse is the positive reception of the idea of a new neighbouring right across all respondents' groups. This universal enthusiasm towards a press publishers' right is inconsistent with the content of the discussion. Some doubts about the accuracy of the Report were raised by the MEPs. Nessa Childers MEP requested that the Commission clarifies a statement made in the Report that some of the consumer rights organisations recognised the positive impact of the press publishers' right on the quality of news.[419] In its reply to the parliamentary question, the EC indicated a response by BEUC which 'mentioned the stimulation of content production as a possible argument in favour of such introduction'.[420] The EC's reading of the BEUC's statement seems far-reaching, as BEUC was simply listing the arguments used in favour of, and against the new right. Additionally, when replying to the MEP's question, the EC indicated that around 94% of individual consumers and 81% of the organisations who responded, indicated a potential negative impact of the new right on consumers.

The vagueness of the Consultation makes it difficult to compare and contrast the views of the respondents. However, it is that which makes the Consultation an interesting and a valuable source of information. When preparing their answers, respondents had to build upon their own prior understanding of the press publishers' right. This revealed how many different interpretations of a press publishers' right existed, and what purpose and form respondents believed the right should have. This variety of opinions makes the responses to the Consultation a valuable source of information for reconstructing the narratives of the discussion. Considering the questionable accuracy of the Report, section III of this chapter refers directly to the responses' text in reconstructing the main lines of argument used in the discussion. Due to large volume of responses, a selection of 95 responses was analysed. The selection includes respondents from each category, as identified in the Consultation

[417] 'Synopsis Reports and Contributions to the Public Consultation on the Role of Publishers in the Copyright Value Chain and on the "Panorama Exception"' (n 128).
[418] From the total of 3957 responses, 1469 were submitted by End users/consumers/citizens. Respondents self-identified with a particular category when submitting a response.
[419] Question for written answer to the Commission Rule 130 Nessa Childers (S&D) E-003148-17.
[420] Andrus Ansip, 'Answer to Question No E-003148/17' (*European Parliament*, 27 July 2017) ‹http://www.europarl.europa.eu/doceo/document/E-8-2017-003148-ASW_EN.html› accessed 12 September 2019.

document, and all press publishers' responses identified by the author. The complete set of analysed responses is included in Annex II.

III. Narratives

The analysis of the documents outlined in the previous section and the answers to the Public Consultation, makes it possible to identify a number of lines of argument used by the actors in the discussion. These lines of argument, also referred to as narratives, shed light on the actors' understanding of the concept of the press publishers' right and its relationship with copyright in general. Even though the section enumerates presents narratives one by one, there is no clear separation between the arguments used. Different narratives share concepts, such as innovation, investment or quality content. The majority of the narratives were shaped by the press publishers, with other actors arguing either in concert or against them. The section presents an account of the arguments as used by the actors in the discussion, none of its text should be read as an opinion of the author.

A. Better off argument

One of the basic narratives in the discussion was the better off argument advanced by publishers. It is based on the hypothesis that a press publishers' right would inevitably improve the economic situation of press publishers, because it would generate new revenues. As such, the basic premise of the better off narrative is this: the positive effects of an improved economic situation of press publishers would not be limited to publishers but would extend to other actors. In the publishers' words, '[t]he better the publisher is financially, the better content we [publishers] provide to our readers and the bigger will be competition for good content between authors'.[421] According to this line of argument, the introduction of a press publishers' right would serve everyone's interest, as the new revenues received by publishers, would directly translate into investments beneficial to everyone.

The actors using the better off narrative eagerly enumerated the benefits which the publishers' strong economic position would bring to the authors. As authors are dependent on publishers in a multitude of ways, it would be in their interest to be linked to an economically strong party. A financially stable publisher would be better equipped to protect authors' interests,[422] and efficiently manage authors' rights.[423] Furthermore, the press publishers' right would

[421] Ringer Romania response to the Public Consultation q 6, 10.
[422] IMPRESA response to the Public Consultation q 6, 7.
[423] Edi.pro response to the Public Consultation q 5, 7.

'clearly assist' employment of new journalists.[424] Using the newly-acquired revenues, the publishers would be better placed to employ authors,[425] as well as halt or even reverse the process of letting them go.[426] Additionally, the better-off publishers would be able to buy more content from authors,[427] and in turn, authors would have more choice in deciding where to publish their works because of the greater availability of publishers.[428] If publishers were not awarded the new right, they would have no means to compensate authors[429] and the investment in publishing would diminish in general.[430]

Actors sceptical about the positive effects of the press publishers' right on the authors pointed out that the total price which users would be willing to pay for content, would not change following the enactment of the new right. Consequently, a new layer of regulation was likely to put the creators at a disadvantage, as they would receive less compensation compared to what they could count on up until then.[431] In case the amount of revenues would not grow, and the number of right holders entitled to receive a share would, it is only natural that each share would reduce. Using the pie theory metaphor, the pie would remain the same, but the pieces would become smaller.[432] To battle this argument, some actors specified that this effect could be mitigated by a built-in condition introduced into the new right, obliging publishers to share their newly-acquired revenues with authors and other right holders, who had transferred or licensed their rights to the publishers. Such a safeguard was indeed included in the final version of the CDSM Directive.[433] For some of the actors, addressing the objections was sufficient,[434] others remained unconvinced.[435]

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[424] Local Ireland response to the Public Consultation q 6, 6.
[425] News Media Corporation response to the Public Consultation q 5, 7.
[426] Wydawnictwo Sztafeta response to the Public Consultation q 5, 7.
[427] Springer Slovakia response to the Public Consultation q 5, 10.
[428] STM response to the Public Consultation q 5, 13.
[429] Stowarzyszenie Kretywna Polska response to the Public Consultation q 5, 16.
[430] IMPRESA (n 421) q 6, 7.
[431] Nexa response to the Public Consultation q 5, 11.
[432] Christophe Geiger, Oleksandr Bulayenko and Giancarlo Frosio, 'The Introduction of a Neighbouring Right for Press Publisher at EU Level: The Unneeded (and Unwanted) Reform' (2017) 39 European Intellectual Property Review 202, 205.
[433] CDSM Directive art. 15(5).
[434] 'IFJ/EFJ Hail Adoption of Copyright Directive and Urge EU Member States to Adopt Laws That Ensure Fair and Proportionate Remuneration for Journalists / IFJ' (26 March 2019) ‹https://www.ifj.org/media-centre/news/detail/category/press-releases/article/ifjefj-hail-adoption-of-copyright-directive-and-urge-eu-member-states-to-adopt-laws-that-ensure-fai.html?fbclid=IwAR2siYu3l-p57sqj56bXgaZEwinfLT0-G-W5TV0smwQ_irYeLKlEMI0Y81A› accessed 26 March 2019.
[435] Till Kreutzer, Paul Keller and Ruth Coustick-Deal, 'Your Proposal from March 28 2018 Concerning the EU Commission's Proposal for an Art. 11 in the Draft Directive on Copyright in the Digital Single Market' (23 April 2018) ‹https://www.communia-association.org/wp-content/uploads/2018/04/OpenLetter_AxelVoss_DeleteArticle11_English.pdf› accessed 25 April 2018.

An important outcome of publishers having additional revenues, would be the investments which they were bound to make in the creation of new content.[436] These investments would positively affect not only the quantity, but also the quality of the available press publications.[437] This enhancement of quality was seen as a natural consequence of the rising level of investment,[438] and the better environment for publishers which it would create.[439] The availability of a variety of quality content would be beneficial to all content consumers, making the introduction of the press publishers' right in everyone's interest. It would be advantageous to the digital intermediaries, as there would be more content for them to use in their services, making these services more attractive to the consumers.[440] This in turn, would benefit users, having broader access to quality content.[441] Last but not least, the availability of a broad spectrum of publications would be in the interest of research and education institutions.[442] However, this last notion was contested by the research institutions themselves, who indicated that, should they be faced with double licensing fees, they would need to stop licensing some of the content which they had licensed so far. Consequently, there would be less resources available for educators and researchers, and quality of research would reduce.[443]

Keywords: financial stability, revenue, investment, share, quality content.

B. Legal certainty argument

The second line of argument focused on the notion of legal certainty. Prior to the press publishers' right, the EU copyright framework lacked an explicit statement that a press publisher was a right holder. Generally, publishers acquired copyright from authors, on the basis of a license or transfer, or employment agreements. The scope of the rights acquired pursuant to contractual relationships may vary, which, combined with complexity and uncertainty of the EU copyright framework, left press publishers unsure of what rights they held.[444] The new right was to put an end to this uncertainty by guaranteeing press publishers an independent legal standing. In this way, not only would the publishers' status as right

[436] Flemish Book Publishers Association response to the Public Consultation q 9, 15.
[437] Styria medijski servisi d.o.o. response to the Public Consultation q 13, 13.
[438] Axel Springer Espana response to the Public Consultation q 10, 11.
[439] Europapress holding response to the Public Consultation q 6, 10
[440] Union de la Presse en Région response to the Public Consultation q 11, 15; Finnish Newspaper Association response to the Public Consultation q 11, 15.
[441] Japan Book Publishers Association response to the Public Consultation q 4, 6.
[442] Wydawnictwo Sztafeta (n 426) q 9, 10.
[443] LACA response to the Public Consultation q 9, 3.
[444] Stowarzyszenie Kreatywna Polska (n 429) q 7, 18.

holders be confirmed, but also the scope of the rights they own.[445] A clarification of the position of press publishers would bring legal certainty to the online news environment, positively affecting all actors involved.[446] While referring to the legal certainty argument, press publishers indicated three areas, which they believed would particularly benefit from the introduction of the new right: 1) contracting with digital intermediaries, 2) enforcement, and 3) the investment environment.

In the context of contracting with digital intermediaries, the new right would clarify in which cases and for which uses licenses are needed.[447] No room would be left for interpretation, often used as a justification for illegal activities.[448] Press publishers argued that the mere fact that, following the introduction of press publishers' right, some of the actors who did not previously license content from press publishers would be required to do so, could not be negatively interpreted.[449] On the contrary, the press publishers' right would positively affect service providers, since they would be sure which uses they need to license.[450] Concurrently, confident in the uses their rights would cover, publishers would be able to efficiently and profitably compete on the news market.[451] In addition, if they would so choose, they would be able to waive their rights, making their content available for free online. Ultimately, the decision on how and where their content would be available, would belong to the publishers.[452]

Opponents of the new right argued the contrary. They maintained that the new right would further complicate an already complex copyright system.[453] The press publishers' right would not make already existing issues to disappear, but would simply overshadow them by introducing a new layer of regulation. Potentially, there would be two right holders to contract

[445] At the same time, press publishers themselves claimed that they were right holders from the moment that they signed a contract with an author in case this contract transfers the rights to commercial exploitation of the content. What publishers needed, was the recognition of this status. See Hachette Livre response to the Public Consultation q 4, 9.

[446] 'Newspaper and Magazine Publishers Slam European Parliament Report for Dismissing Proposal for a Publisher's Right and Prioritising Litigation over Licensing and Cooperation' (EPC ENPA, EMMA, NME 2017) ‹http://epceurope.eu/newspaper-and-magazine-publishers-slam-european-parliament-report-for-dismissing-proposal-for-a-publishers-right-and-prioritising-litigation-over-licensing-and-cooperation/› accessed 17 April 2018.

[447] Hachette Livre (n 445) q 11, 13; News Media Association response to the Public Consultation q 11, 9.

[448] IWP response to the Public Consultation q 12, 22.

[449] idem 12, 22.

[450] Axel Springer Espana (n 438) q 11, 12.

[451] 'Publishers in the Digital Age' (EPC, ENPA, EMMA, NME 2016) 1 ‹http://epceurope.eu/wp-content/uploads/2012/10/coalitionpressbriefing-PRSept6-3.pdf› accessed 17 April 2018.

[452] Wout van Wijk, 'News Media Europe News Media Europe's Wout van Wijk Speech on Copyright at EJC and Google Debate' (*News Media Europe*, 10 October 2016) ‹http://www.newsmediaeurope.eu/news/news-media-europes-wout-van-wijk-speech-on-copyright-at-ejc-and-google-debate/› accessed 8 April 2017.

[453] Kennisland response to the Public Consultation q 9, 13.

with: a copyright holder and a press publishers' right holder. Therefore, the problems with identifying the correct party to license from, were bound to double.[454] As a result, third parties would find it more difficult to secure relevant agreements, potentially disrupting licensing schemes already in place.[455] The problem of double-licensing would likely concern publishers themselves as well, as they also use third-party content.[456] Uncertainties within the licensing environment could cause digital intermediaries to limit the services available on their platforms, making less content available and providing users with less opportunities to express themselves.[457] The limitation of online services would harm competition and since licensing agreements are concluded on a territorial basis, it could even further fragment the Digital Single Market.[458] Such consequences contradict the goals set in the Digital Agenda.[459]

The second area to benefit from legal certainty brought by the press publishers' right, was said to be enforcement. As it stood, publishers predominantly derived their rights from authors. In order to prove their legal standing, publishers needed to demonstrate acquisition of all the relevant rights from the primary right holders (authors). Considering the large scale of infringements on the internet, and the large quantities of content involved, producing the required documents was a costly and a time-consuming task.[460] The new right, making press publishers primary right holders, would simplify the proof of legal standing, making the possibility of legal action a more efficient deterrent.[461] Enforcement would become 'simpler, quicker, cheaper and with less parties involved'.[462] Such efficient mechanisms are essential to combat both piracy and parasitism.[463] Only when publishers are sure of the rights they own, and tools they can use to protect them, they will attempt to enforce their entitlements.[464] Since compared to authors, publishers are better placed to enforce rights, authors would also benefit from the increased effectiveness of publishers' enforcement activities.[465] As a result, assuming

[454] Google response to the Public Consultation q 11, 13.
[455] ALCS response to the Public Consultation q 9, 11.
[456] Yeebase response to the Public Consultation q 11, 8.
[457] Centre for Democracy & Technology response to the Public Consultation q 11, 13.
[458] Google (n 454) q 11, 13.
[459] European Digital Rights response to the Public Consultation q 12, 16.
[460] Flemish Book Publishers Association (n 436) q 3, 9.
[461] STM (n 428) q 3, 10.
[462] IMPRESA (n 422) q 4, 6.
[463] 'Re: Press Publishers' Key Concerns Ahead of Discussion in the College of Commissioners on the Digital Single Market'.
[464] 'Publishers in the Digital Age' (n 451).
[465] EPC response to the Public Consultation q 7, 18.

that the interests of authors and publishers are aligned, the new right would bring more security to both.[466]

The third area to benefit from the legal certainty brought by the press publishers' right was the investment environment. A clear legal framework was considered a condition *sine qua non* for investment and innovation in the online news environment.[467] Investors would need a clarification of the press publishers' legal standing and the scope of the rights they owned before they would spend money on the publishing market.[468] Thus, the press publishers' right would be key in encouraging investment in 'professional, diverse, fact-checked content for the enrichment and enjoyment of everyone, everywhere'.[469]

Keywords: legal certainty, legal standing, investment, double-layering, right clearance.

C. *Strengthening the negotiation position.*

The next line of argument is closely related to the legal certainty narrative, as it delves further into the issue of contracting with digital intermediaries. The narrative was built on the hypothesis that the press publishers' right, and the independent legal standing that it would bring to publishers, were bound to strengthen the publishers' position in the licensing negotiations with third parties. The setting in which press publishers operated, was asymmetrical: due to their market position, digital intermediaries, especially dominant service providers, could take advantage of publishers or even cut them off from their audiences.[470] Thus, the position of press publishers on the licensing market required strengthening. Publishers maintained that exclusive rights would be the best solution to counter-balance the market power of others.[471] Hence, the introduction of a press publishers' right would create a level-playing field for press publishers and digital intermediaries.[472] Additionally, this would be a step towards a creative ecosystem, where interests of all stakeholders would be balanced.[473] Absent the new right, publishers' difficulties in negotiating with digital

[466] Spain response to the Public Consultation q 5, 11.
[467] REPROPOL response to the Public Consultation q 12, 9.
[468] See Flemish Book Publishers (n 436) q 9, 15.
[469] 'More than 270 National, European and International Organisations from the Entire Cultural Sector Call for Adoption of Copyright Directive' (2019) ‹https://www.enpa.eu/sites/default/files/inline-files/%23Yes2copyright%20press%20release%20March%2019.pdf› accessed 26 March 2019.
[470] 'News Media Europe Copyright Position Paper' (News Media Europe 2016) ‹http://www.newsmediaeurope.eu/issues/copyrightinthedsm/› accessed 23 November 2017.
[471] Flemish Book Publishers Association (n 436) q 11 p 16.
[472] 'Press Release' (BDZV, SPQN 2017) ‹https://www.bdzv.de/fileadmin/bdzv_hauptseite/aktuell/pressemitteilungen/2017/assets/EU_-_Zukunft_der_Presse_engl.pdf› accessed 17 April 2018.
[473] Finnish Newspaper Association (n 440) q 13, 17.

intermediaries would continue.[474] Unable to license their content, publishers would be tempted to hide their publications behind paywalls, which would negatively impact access to information.[475]

Actors argued that the legal certainty brought by the press publishers' right, would allow the development of the licensing market for press content. Since publishers would have an independent legal standing, they would be able to propose reasonable licensing offers, which third parties, including digital intermediaries, would find harder to ignore.[476] Having only one right holder to negotiate with, would streamline the right-clearance: those seeking permission to use press publications would not enter individual agreements with authors of works incorporated in a press publication, but negotiate a single license with a publisher.[477] In this way, a one-stop-shop for rights clearance would be created, a solution beneficial not only to digital intermediaries, but to all licensees, including educational and research institutions.[478]

The opponents of the press publishers' right exposed a major flaw in the argument that press publishers' right would streamline rights clearance. The fact is that licensees already had one party to contract with, a press publisher. Since publishers secured rights to all content included in their press publications, licensees had no need to seek separate agreements with the authors.[479] The conclusion of a single license with a publisher would suffice. Thus, the licensing process has already been streamlined. Additionally, opponents of the new right argued that it was unlikely that the press publishers' right would create a level-playing field for publishers and digital intermediaries. A possible scenario was that new right would further strengthen the position of large platforms such as Google and Facebook, which would be better prepared to negotiate contracts in the new legal setting, than small service providers, which would have no resources to negotiate agreements and pay for them.[480]

Press publishers contract not only with digital intermediaries and other third parties, but also with authors to secure copyright on works included in press publications. The press

[474] Wydawnictwo Sztafeta (n 426) q 4, 7.
[475] IWP (n 448) q 4, 13; Stowarzyszenie Kreatywna Polska (n 429) q 4, 15; Union de la Presse en Région response to the Public Consultation q 12, 16.
[476] Finnish Newspaper Association (n 440) q 2, 9, STM (n 428) q 2, 9.
[477] The Publishers Association response to the Public Consultation q 13, 10.
[478] Springer Slovakia response to the Public Consultation q 9, 11.
[479] 'EU Copyright Reform Proposals Unfit for the Digital Age. Open Letter to Members of the European Parliament and the Council of the European Union' (2017) ‹https://www.create.ac.uk/wp-content/uploads/2017/02/OpenLetter_EU_Copyright_Reform_24_02_2017.pdf?x10213› accessed 27 September 2019.
[480] 'Position Paper: New Rights for Press Publishers' (Communia Association 2016) ‹https://www.communia-association.org/wp-content/uploads/2016/12/COMMUNIAPositionPaperonNewRightsforPressPublishers-final.pdf› accessed 27 September 2019.

publishers' right supporters claimed that the new right would have no effect on contractual relationships between authors and publishers, and even if it would, the result would be positive.[481] Having a right of their own, publishers would be more flexible when negotiating contracts with authors, since they would be less determined to secure the transfer of rights or an exclusive license.[482] Authors would remain free to decide on the scope of the rights they would transfer to publishers.[483] Not all actors saw this situation as advantageous. Since publishers would be less motivated to acquire rights from authors, they would be less willing to pay them.

Opponents of the new right additionally argued that authors already had little or no leverage when negotiating with publishers. Faced with a choice between signing a contract or not having their work published at all, journalists often granted publishers exclusive rights to use their works.[484] The press publishers' right was bound to have further negative impact on the authors' situation. To avoid potential conflicts between copyright and press publishers' right, journalists would most likely be required to sign over their rights not only for a single publication, but for any publication of their work in the future.[485] This would severely restrict journalists' opportunities to benefit from subsequent uses of their works.[486]

Following the introduction of press publishers' right, the influence of publishers over authors would grow significantly. The new right would strengthen the position of press publishers in the online news environment above a desired level, providing publishers with a 'hegemonic situation and power in the whole value chain'.[487] Such a strong position of publishers would have a negative effect on digital intermediaries, authors, media monitoring organisations, and end users. Publishers owning copyright acquired from authors, and the press publishers' right, would be in a better position to ask users and digital intermediaries for higher licensing fees.[488] This would disturb the power balance between authors and publishers, and potentially lead

[481] 'European Newspaper and Magazine Publishers Welcome European Commission's Launch Of Consultation on Publishers' Rights' ‹http://epceurope.eu/european-newspaper-and-magazine-publishers-welcome-european-commissions-launch-of-consultation-on-publishers-rights/› accessed 17 April 2018; Verlag CH Beck response to the Public Consultation q 5, 7.
[482] Finnish Newspaper Association (n 440) q 6, 12.
[483] Flemish Book Publishers Association (n 436) q 5, 13.
[484] EFJ response to the Public Consultation q 2, 9 and q 1, 8.
[485] idem q 5, 10.
[486] Union of Journalists in Finland response to the Public Consultation q 5, 10.
[487] AMEC FIEB response to the Public Consultation q 4, 8.
[488] FEVEM response to the Public Consultation q 4, 11.

to a situation similar to that in the music industry, dominated by big record labels, where musicians are put at a disadvantage.[489]

Keywords: level-playing field, rights clearance, balance, contract, license, independence.

D. Equality argument

The argument of equality focused on the disadvantaged position of press publishers in comparison with other content producers. Producers of phonograms and films, as well as broadcasting organisations enjoy neighbouring rights: rights related to copyright. These rights reward financial and organisational efforts of content producers and broadcasters, providing them with an independent legal standing. Prior to the introduction of the press publishers' right by the CDSM Directive, press publishers, as well as publishers in other sectors, were not beneficiaries of related rights. Since press publishers made financial and organisational efforts similar to that of other content producers, they saw no reason for the difference in treatment. Therefore, they argued that, for the sake of consistency in the EU copyright framework and acting in the spirit of equality of all content producers, press publishers should be granted related rights on the press content.[490] This would give publishers an equal standing with other content producers.[491]

Press publishers have seen the lack of publishers' recognition as right holders in the InfoSoc Directive as a 'historical mistake' requiring prompt amendment.[492] Whereas the omission of publishers may have been an 'acceptable and manageable' situation in the analogue world, it was no longer so in the digital age.[493] Traditionally, publishers had had full control over the exploitation of press publications, and did not require legal protection. This is one of the reasons why they had not been awarded the same set of rights as other content producers. However, on account of the technological development, press publications came to be copied by third parties within seconds after publication.[494] This called for an upgrade of press publishers' legal protection to the level of other content producers.[495] To counter-balance this line of reasoning, some actors indicated that related rights were merely harmonised rather

[489] LIBER response to the Public Consultation q 5, 11.
[490] See an early call by ENPA and EMMA to grant press publishers' rights modelled on long-existing rights in other creative industries 'Re: Press Publishers' Key Concerns Ahead of Discussion in the College of Commissioners on the Digital Single Market' (n 463).
[491] 'All Publishers United for a Publishers' Right' (2018) ‹http://www.magazinemedia.eu/news/letter-to-meps-all-publishers-united-for-publishers-right› accessed 27 September 2019; Axel Springer Espana response to the Public Consultation q 5, 9; Finnish Newspaper Publishers response to the Public Consultation q 2, 9
[492] Flemish Book Publishers (n 436) q 4, 11.
[493] News Media Association (n 447) q 2, 5.
[494] REPROPOL (n 467) q 2, 8-9.
[495] Professional Publishers Association response to the Public Consultation q 16, 13.

than created by the EU legislator, which made the omission of press publishers as right holders more complex than publishers claimed.

In addition, the opponents of the equality argument posited that granting a new right to press publishers would be following the bad example set by the music industry. Due to their independent legal standing, music publishers have become powerful players, strongly disadvantaging artists. As a result, the EU needed to intervene in the contractual relationships in the music industry, banning certain clauses and requiring a part of the producers' revenues to be paid to the artists.[496] Additionally, the press publishers' right could establish an unwanted precedent for other groups to call for new rights, including performing arts producers, distributors and event organizers.[497]

The equality argument was strongly influenced by the CJEU's decision in *Reprobel*.[498] The case itself was not connected to the issue of press publishers' right. However, it was often referred to in the discussion to draw attention to the fact that the InfoSoc Directive does not explicitly recognise press publishers as right holders. The *Reprobel* case concerned copyright levies applicable to multifunctional devices imported by Hewlett-Packard into Belgium, which Reprobel, a collective management organisation, believed Hewlett-Packard was obliged to pay. The Brussels Court of Appeals (Cour d'appel de Bruxelles) considering Reprobel's claim referred a number of preliminary questions to the CJEU. For the discussion, the third question is the most relevant. It enquired about the possibility of allocating to publishers half of the fair compensation due to right holders, pursuant to the exceptions to the right of reproduction envisaged in the InfoSoc Directive. Publishers were under no obligation to guarantee that authors would benefit, even indirectly, from the part of the compensation taken from them. The CJEU answered the third question in the negative. The Court noted that the InfoSoc Directive does not recognise publishers as right holders of a reproduction right. Consequently, they did not suffer harm from the reproduction of works under the exceptions.[499] Thus, in the CJEU's opinion, the publishers were not entitled to receive a part of the compensation to the right holders' disadvantage.

The judgement in *Reprobel* was not welcomed by publishers, who quickly began to call for the situation created by the CJEU ruling to be amended, so that they could continue to receive a

[496] Copyright for Creativity response to the Public Consultation q 5, 12.
[497] 'Position Paper: New Rights for Press Publishers' (n 480). AMEC FIEB response to the Public Consultation q 4, 8.
[498] *Hewlett-Packard Belgium SPRL v Reprobel SCRL* Court of Justice of the European Union C-572/13, EU:C:2015:750.
[499] ibid 47–48.

part of the copyright levies.[500] The publishers called to be explicitly recognised as right holders in the InfoSoc Directive.[501] Such a change would allow for the national systems of remuneration to be maintained.[502] Even though the *Reprobel* judgement was used as an argument in support of press publishers' calls for the new right, the levy-division issue created by the *Reprobel* decision was addressed through a separate measure. Pursuant to art. 16 of the CDSM Directive, Member States may provide that should an author have transferred or licensed a right to a publisher, this transfer or licence would provide a sufficient legal basis for the publisher to receive a share of the compensation for the use of the work made under an exception or limitation to the transferred or licensed right. This provision renders the CJEU decision in *Reprobel* irrelevant.

Keywords: related (neighbouring) right, equal treatment, technological development, independence.

E. Innovation

The innovation narrative was the first line of argument shaped primarily by opponents of the press publishers' right. It focused on the obstacles to innovation and the development of the online news environment, which the new right would likely bring. In the actors' opinion, the press publishers' right would contribute to the preservation of the status quo, as it would disincentivise press publishers from adapting to 'the realities of the digital age'.[503] The new right would provide press publishers with a source of revenue independent from the business model they adopt. Having a guaranteed income, press publishers would most likely retain the business models from the 'analogue past',[504] rather than search for and risk new business solutions.[505] Consequently, press publishers' right would promote analogue business models.[506] Some actors critical of the new right, took the argument a step further, as in their opinion, the new right would not even be a tool for the preservation, but for the destruction of

[500] Verlag CH Beck (n 481) q 16, 11.
[501] Danske Forlag response to the Public Consultation q 4, 3.
[502] Hachette Livre (n 445) q 5, 10.
[503] European Digital Rights (n 459) q 6, 10.
[504] 'Open Letter to Members of the European Parliament by Polish Digital Rights Organisations' ‹http://www.politico.eu/wp-content/uploads/2017/07/Open-Letter-to-MEPs-by-Polish-Digital-Rights-Organisations.pdf› accessed 17 April 2018.
[505] EDRi response to the Public Consultation q 6, 10.
[506] 'Open Letter to Members of the European Parliament by Polish Digital Rights Organisations' (n 504); Richard Gingras, 'Updating Copyright Rules for News: There's a Better Way' (*euractiv.com*, 14 January 2019) ‹https://www.euractiv.com/section/media4eu/opinion/updating-copyright-rules-for-news-theres-a-better-way/› accessed 16 January 2019.

existing business models. Publishers rely on a variety of channels to distribute their content, which would no longer be a feasible choice under the new right.[507]

Actors further argued that the additional burdens and restrictions brought by the new right would stifle innovation and creativity in the online environment, beyond press publishers' business models. Firstly, the additional layer of regulations introduced by the new right would complicate the right-clearance for anyone who would want to use a piece of pre-existing work.[508] As the ability to refer to previous works was crucial for new creations, such limits would impoverish and lower the quality of available content.[509] Secondly, any attempt to regulate sharing on the internet, and especially linking, was likely to limit the activities of start-ups, entities bringing the most innovation to digital markets.[510] Difficulties in licensing content would make new businesses less likely to launch,[511] and interfere with the development of new research techniques, such as text and data mining and massive open online courses.[512] Furthermore, the press publishers' right would hinder ambitious plans for open access and open science of the EU,[513] and would interfere with the development of open business models, based on creative commons licenses.[514]

According to some publishers, the new right would undoubtedly aid innovation in the online news environment. Since investments would increase, press publishers would have more possibilities to develop new products.[515] Thanks to the investments following the introduction of the press publishers' right, and the revenues which the new right would generate, press publishers would have considerable funds at their disposal.[516] As a result of these funds, they would not only be able to sustain their businesses, but could also grow, and launch new services. This would be beneficial for the whole publishing industry, including authors who

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[507] European Innovative Media Publishers, 'RE: Open Letter to Members of the European Parliament and the Council of the European Union on the Introduction of a New Neighbouring Right under Art. 11 of the Copyright Directive' ‹http://mediapublishers.eu/wp-content/uploads/2017/09/Coalition-of-Innovative-Media-Publishers_Open_Letter_neighbouring-right.pdf› accessed 17 April 2018.
[508] Open Media response to the Public Consultation q 5, 12.
[509] Mozzilla response to the Public Consultation q 4, 9.
[510] LIBER (n 489) q 4, 9.
[511] Jos Poortvliet, '240 EU Businesses Sign Open Letter against Copyright Directive Art. 11 & 13' (*Nextcloud*, 19 March 2019) ‹https://nextcloud.com/blog/130-eu-businesses-sign-open-letter-against-copyright-directive-art-11-13› accessed 28 September 2019.
[512] LIBER (n 489) q 10, 15.
[513] 'Eurodoc Writes Open Letter to European Parliament on Copyright Directive' (*Eurodoc*, 2 July 2018) ‹http://eurodoc.net/news/2018/eurodoc-writes-open-letter-to-european-parliament-on-copyright-directive› accessed 28 June 2019.
[514] Open Media (n 508) q 11, 18.
[515] 'Publishers in the Digital Age' (n 451) 4.
[516] Flemish Book Publishers Association (n 436) q 16, 18.

are a part of it.[517] Thus, the press publishers' right was seen as essential for fostering innovation.

Keywords: investment, technological development, double-layering, innovation.

F. Value of press

The value of press narrative focused on the role of the press in democratic societies. It was based on the idea that plurality and high quality of press are a precondition for any free and democratic society to exist.[518] The narrative assumed that only press publishers which were economically healthy could supply professional and quality content to readers, and rightly fulfil their role. Thus, guaranteeing the sustainability of the press sector would be essential. The key to the press publishers' economic fitness was considered to lie in a reliable legal framework, which the new right would provide.[519] Only when press publishers were to be protected by law, relevant investments would follow.[520] The press publishers' right was thus seen as indispensable to guarantee the sustainability of the press sector, required to preserve high-quality, independent journalism.[521] Should the new right not be created, the free and independent press would likely be threatened, since the press sector would not be able to finance its activities.[522]

Press publishers saw the new right as an expression of support for the press industry, which is facing considerable economic problems.[523] By creating a press publishers' right, the EU would acknowledge that the press was not an ordinary business venture.[524] To support their claim for the new right, a group of European press publishers and their associations launched a campaign under the name 'Empower Democracy'.[525] The campaign website described the poor economic state of the press sector, providing an estimate of the number of journalists who were let go, and the newspapers which were discontinued in recent years.[526] By calling

[517] EPC (n 465) q 6, 17.
[518] 'European Newspaper and Magazine Publishers Welcome European Commission's Launch Of Consultation on Publishers' Rights' (n 481); 'News Media Europe Copyright Position Paper' (n 470).
[519] IMPRESA (n 422) q 9, 9-10.
[520] 'Re: Press Publishers' Key Concerns Ahead of Discussion in the College of Commissioners on the Digital Single Market' (n 463).
[521] 'Press Release' (n 472).
[522] 'Free News Has a Cost' ‹https://images.derstandard.at/2017/12/14/brief.pdf› accessed 28 September 2019. Stowarzyszenie Kreatywna Polska response to the Public Consultation q 2, 10.
[523] News Media Association (n 447) q 4, 6, IMPRESA (n 422) q 8, 7.
[524] Finnish Newspaper Publishers (n 440) q 2, 9; IMPRESA (n 422) q 7, 7.
[525] 'Press Publishers Join Forces to Safeguard Democratic Values in Europe by Making the Case for a Strong European Copyright' (27 September 2016) ‹http://www.magazinemedia.eu/pr/press-publishers-join-forces-to-safeguard-democratic-values-in-europe-by-making-the-case-for-a-stron› accessed 17 August 2017.
[526] 'Empower Democracy - Support Independent Media For A Strong Europe' ‹http://www.empower-democracy.eu/› accessed 16 February 2017.

the press 'the cornerstone of our democracy', the campaign endeavoured to make an immediate connection between the economic threat to independent journalism, and danger to democracy. The campaign's official hashtag, #SaveThePress, was a response to the Save The Link campaign, and an attempt to present the press publishers' right in a positive manner, as a means of reinforcement of democratic values, rather than a way to curtail users' internet freedoms.

Wout van Wijk, an executive director of one of the press publishers associations, the NME, described the reasons for the introduction of the press publishers' right to be 'about preserving quality journalism, content that is subject to editorial oversight, written by journalists that are granted the freedom to produce quality content'.[527] Therefore, another aspect of the value of press narrative, was the new right's ability to foster the production of quality content. Press publishers were presented as the ones defending citizens at the forefront of 'an information war'.[528] They safeguarded users' right to be properly informed in the age of fake news and misinformation. Since press publishers are bound by editorial responsibilities, readers were sure to find reliable information on their websites. However, some actors were sceptical of whether the press publishers' right was the appropriate tool to fight misinformation, since such a right would not be able to distinguish between different content producers. Consequently, producers of quality and fake news would both enjoy the same protection.[529]

Another feature of the press, which the new right would affect, was the diversity of information sources. In press publishers' opinion, the new right was a necessary step to guarantee media pluralism.[530] The right would have a positive effect on the diversity of available content, incentivising more complex projects, such as those of investigative journalism.[531] It would foster the creation of independent content, not reliant on advertising revenue.[532] Regardless, this notion was not widely shared, even among publishers. In its statement on press publishers' right, the OCCRP noted that investigative journalism relies on transparency, and requires the citation of sources, which takes a form of links and quotations on the web.[533] A press publishers' right would make such references difficult. Additionally, by

[527] van Wijk (n 452).
[528] Finnish Newspaper Association (n 440) q 14, 18.
[529] Kreutzer, Keller and Coustick-Deal (n 435).
[530] 'European Newspaper and Magazine Publishers Welcome European Commission's Launch Of Consultation on Publishers' Rights' (n 481) 1.
[531] Springer Slovakia (n 478) q 13, 13.
[532] Ringer Romania (n 421) q 13, 12.
[533] 'OCCRP's Position on the Proposed Directive on Copyright in the Digital Single Market' (*Organized Crime and Corruption Reporting Project (OCCRP)*, 25 April 2018) ‹https://www.occrp.org/en/62-press-releases/8003-occrp-s-position-on-the-proposed-directive-on-copyright-in-the-digital-single-market› accessed 10 January 2019.

restricting the sharing of content online, the new right would limit the audiences of independent media outlets.

A negative aspect of the value of press narrative challenged the media plurality argument. Some actors claimed that the press publishers' right would limit the number of news sources available to the readers. A right which restricts linking was likely to harm the online availability of news sources and information sharing.[534] It would curtail aggregators' activities, indexing of content and presentation of search results alike.[535] This would make it more difficult for consumers to search for news stories, and discover new sources of news.[536] Small publishers, who greatly rely on search engines and similar services to reach new audiences, would be particularly disadvantaged. The new right could further strengthen the position of established media outlets, contributing to the problem of media concentration in numerous Member States.[537]

Keywords: democracy, freedom of press, sustainability, pluralism, link, quality content.

G. Internet freedom

The internet freedom narrative was the second line of argument shaped primarily by the opponents of the press publishers' right. It focused on the constraints that the new right would impose on users' activities online, and the functioning of the internet in general. The narrative assumed that the effects of the new right would extend beyond the online news environment, creating uncertainties about basic activities on the web, and undermining internet's fundamental principles.[538] The source of internet's economic power is its open horizontal structure. The new right would create barriers, impairing the web's functioning. It would undermine the principle of innovation without permission, causing development to stifle.[539] The internet allows everyone to enter a conversation and share their views. Actors argued that introduction of the press publishers' right would establish gatekeepers in the online environment. In order to use a work, a user would need to seek permission from not only the author, but also the publisher of the work.[540] The notion of independent rights of content

[534] Open Media (n 508) q 13, 20.
[535] idem q 16, 24.
[536] Google (n 454) q 13, 15.
[537] 'Academics against Press Publishers' Right: 169 European Academics Warn against It' (n 396).
[538] 'A Digital Single Market for Creativity and Innovation: Reforming Copyright Law without Curtailing Internet Freedoms' (2016) ‹http://www.openforumeurope.org/wp-content/uploads/2016/04/Open-letter-Copyright-Reform-1.pdf› accessed 28 September 2019.
[539] Mozilla (n 509) q 6, 12.
[540] idem q 7, 13.

producers, originates in the pre-internet era, and its extension to press publishers would ignore the current digital reality.[541]

Some actors claimed that the introduction of the press publishers' right was bound to put common forms of communication on the internet in a legal grey area.[542] Internet's value rests on the number of connections between related and relevant pieces of information. Links are the internet's building blocks, and the ability to use links is internet's fundamental premise. From the outset, the press publishers' right was focused on restricting the ability of third parties to link to press publishers' content. A press publishers' right also covering links to content which is not protected by copyright,[543] would limit the number of connections available on the web.[544] This would not only impair users' internet experience, but also have a negative impact on their participation in social and cultural life, education and information awareness.[545]

The actors using the freedom of the internet narrative often referred to the press publishers' right as a link tax and warned about web censorship. Potential negative effects of the press publishers' right on freedom to link, captured the attention of multiple actors, most notably civil society organisations. The new right made its way into the public debate exactly because it could negatively influence linking, a daily activity of all internet users. One of the actors' initiatives focusing on the negative impact of the press publishers' right on linking, was the Save the Link campaign, launched by OpenMedia in May 2015, and later joined by a number of other CSOs.[546] The campaign explicitly called the new right an outdated media publishers' attempt to restrict linking, and to introduce censorship on the web.[547] Later on, concerns about core internet concepts led to a collaborative campaign of platforms and startups, under the name 'Don't Wreck the Net'.[548] The campaign focused on the negative impact of art. 11 and 13 of the Proposal on the way the internet functions, and its effects on creativity and communication online. Following the Save Your Internet campaign, it used the #saveyourinternet hashtag.

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[541] OpenForum Europe response to the Public Consultation q 4, 10.
[542] Kreutzer, Keller and Coustick-Deal (n 435).
[543] 'Open Letter to Members of the European Parliament by Polish Digital Rights Organisations' (n 504).
[544] Mozilla (n 509) q 5, 11.
[545] EDRi (n 505) q 14, 17; IAML response to the Public Consultation q 13, 20.
[546] Meghan Sali, 'Why Internet Users Everywhere Should Be Watching The EU Right Now | OpenMedia' (*OpenMedia*, 5 May 2015) ‹https://openmedia.org/en/why-internet-users-everywhere-should-be-watching-eu-right-now› accessed 25 August 2017.
[547] 'Save The Link' ‹/save-link› accessed 25 August 2017.
[548] 'Don't Wreck The Net!' (*Don't Wreck The Net*) ‹https://dontwreckthe.net› accessed 15 November 2018.

Another negative consequence of introducing a press publishers' right singled out by actors using the freedom of internet narrative, was an expansion of copyright's scope, by some called 're-copyrighting' of the whole web.[549] The new right which would apply not only to links, but also small fragments of text (snippets), could be relevant for all basic web activities. Such a new right would likely upset the copyright balance, giving right holders truly exclusive rights.[550] As a result of the legal uncertainty generated by the new right, the number of take-down requests would likely increase. Service providers, erring on the side of caution, would likely respect such requests.[551]

Press publishers flatly denied that the new right would have a negative effect on linking. A mythbuster on the press publishers' right jointly published by the EMMA, EPC, ENPA and NME states that '[t]he claim that the publishers' right is a threat to the link is the most misleading scare tactic of all from those who seek to undermine the case for a new publishers' right'.[552] In their opinion, the link would be under no threat, and the new right would influence freedom on the internet in no way.[553] Publishers further declared that they actively encouraged users to share their content. Therefore, as long as users would link and share content in accordance with copyright rules, their activities would not be influenced by the new right.[554]

Keywords: link, innovation, technological development.

H. Right to information

The right to information narrative is closely related to the value of press argument. However, unlike the latter, it was primarily used by the opponents of the press publishers' right. The right to information narrative was based on the notion that the new right would interfere with users' right to receive and impart information. Compared to the freedom of press narrative, its main focus were users, and not publishers and other information suppliers. Arguments on users' access to information could be found in other narratives, whenever opponents of the press publishers' right argued against the extension of the press publishers' control over information. The actors using right of information narrative, pointed out that the press

[549] Copyright 4 Creativity response to the Public Consultation q 4, 10.
[550] LACA (n 443) q 13, 4.
[551] CCIA Europea response to the Public Consultation q 11, 18.
[552] 'Eupublishersright | MYTHBUSTER' (*eupublishersright*) ‹https://www.publishersright.eu/mythbuster› accessed 27 August 2017.
[553] 'Newspaper and Magazine Publishers Welcome the European Commission's Proposal for Publishing Rights' (*European Media and Magazine Association*, 14 September 2016) ‹http://www.magazinemedia.eu/pr/newspaper-and-magazine-publishers-welcome-the-european-commission-s-proposal-for-publishing-rights› accessed 17 April 2018.
[554] 'Re: Press Publishers' Key Concerns Ahead of Discussion in the College of Commissioners on the Digital Single Market' (n 463).

publishers' right would not only be a burdensome restriction on users' access to information, but that it also contradicted EU policies on open access and open science.[555] They maintained that the new right would be a threat to a literate and informed society.[556]

Actors using the right to information narrative argued that the new right would limit users' possibilities to stay informed. Finding and using information would become more difficult.[557] Firstly, the new right was likely to give press publishers too much control over access to news sources and the ways in which they would be consumed.[558] Each act of sharing and linking to news content would need to be approved by a press publisher. Consequently, a variety of information channels available would be impacted, since some channels would need to restrict the content they offer, or would close down entirely.[559] The limitations would likely concern such information services as news aggregators and RSS feeds, making it more difficult for users to discover news and information.[560] As Richard Gingras of Google noted, information services would need to pick and choose which content they would license from publishers, since they would not be able to afford to license with everyone.[561] As a result, users would have access to a smaller number of sources, and would not be able to check and compare different news reports.[562] The increase in the news' prices following the introduction of the new right, would likely impact users themselves. Like the information services, they would need to pick and choose the services to which they would subscribe. Therefore, they would not be able to support their online activities to the same extent as prior to the new right introduction.[563] As users would limit the number of services used, the circulation of information would decrease.[564] Moreover, it would be likely that when users would not able to link and access

[555] 'EU Copyright Reform Threatens Open Access and Open Science. Open Letter to the Members of the Legal Affairs Committee in the European Parliament' ‹https://www.scienceeurope.org/media/rarjdoir/joint-open-letter-copyright-reform-sep-2017.pdf› accessed 17 April 2018.
[556] ibid.
[557] Allison Davenport, 'We Do Not Support the EU Copyright Directive in Its Current Form. Here's Why You Shouldn't Either' (*Wikimedia Foundation*, 28 February 2019) ‹https://wikimediafoundation.org/2019/02/28/we-do-not-support-the-eu-copyright-directive-in-its-current-form-heres-why-you-shouldnt-either/› accessed 8 March 2019.
[558] AMEC FIEB (n 487) q 4, 8.
[559] 'Position Paper: New Rights for Press Publishers' (n 480) 2.
[560] 'Position Paper: New Rights for Press Publishers' (n 480).
[561] Richard Gingras, 'Proposed Copyright Rules: Bad for Small Publishers, European Consumers and Online Services' (*Google*, 6 December 2018) ‹https://www.blog.google/around-the-globe/google-europe/proposed-copyright-rules-bad-small-publishers-european-consumers-and-online-services/› accessed 2 January 2019.
[562] Altroconsumo response q 14 p 11.
[563] FEVEM (n 488) q 14, 15.
[564] Altroconsumo (n 562) q 13, 11.

quality publications, they would read and share content which was freely available, which could be of a lesser quality, or even fake news.[565]

Press publishers strongly opposed the argument of the new right restricting users' freedom to information. They noted that users should be aware that there is no such thing as free news, and someone is always paying for content to be created. Therefore, users should not expect to access information for free.[566] Moreover, it would be in the users' own interest that large quantities of quality content would be available. This would only be possible if press publishers' revenues were kept at least at the current level, and publishers' content would be better monetised online. As a stable and reliable legal framework would be crucial for development of the publishers' offers, the new right would be beneficial for consumers and users in the long run.[567]

Keywords: pluralism, link, access, information monopoly.

IV. Conclusions

The discussion on the introduction of the press publishers' right into the EU copyright framework involved a variety of actors. The discussion was highly polarised: it is difficult, if not impossible, to find a common ground between actors advocating in favour of, and against the new right. Differences in opinions were common even among the representatives of the same actors' group. For example, while the majority of press publishers and their associations supported the introduction of the new right, they faced considerable opposition from the digital-born actors and small publishers. The actors were not afraid to address each other directly. The discussion had an interactive character, with opponents and supporters of the new right engaging with each other's arguments. Sometimes, the engagement was limited, as in the case of the internet freedom argument, which was usually dismissed with a short statement that the new right would not infringe upon users' ability to link. On other occasions, it was more developed, as in the case of the legal certainty narrative, with both sides presenting a number of arguments to support their claim.

At the outset, the press publishers' right aimed to solve a particular problem (lack of press publishers' compensation), concerning particular services (content aggregators and search engines). Over time, further goals for the new right materialised, referring to such fundamental

[565] 'Academics against Press Publishers' Right: 169 European Academics Warn against It' (n 396).
[566] 'Free News Has a Cost' (n 522).
[567] Wydawnictwo Kruszona response to the Public Consultation q 13, 12 and q 14, 15.

values as freedom of press, access to information and functioning of the internet in general. This change is particularly visible when observing how the European Commission's definition of the problem evolved. The justification for the introduction of the new right became more versatile after the conclusion of the Public Consultation. Instead of focusing on the need to clarify the scope of the right of communication to the public and the right of making available, the EC began to refer to the general concepts of freedom of press and access to information.

Before the Proposal, in explaining what form the EU press publishers' right would take, the actors had often been unsure about the relationship between the new right, copyright and related rights, and they did not place the press publishers' right in the context of the EU copyright framework. Following the Proposal, the actors consistently referred to the press publishers' right as a related right, even when criticising it for going beyond the protection awarded to other creative content producers. With the discussion concentrating on the form of the press publishers' right in the Proposal, the national press publishers' rights in Germany and Spain were referred to in an exclusively comparative manner, to make an argument in favour of or against the new right. The inability of the national press publishers' rights to secure significant revenues, was often used as an argument against the adoption of the EU's solution. Others referred to the national press publishers' rights' unfitness to generate profit in order to substantiate that the EU-wide right was needed, since the MS were not able effectively to address the issue of press publishers' remuneration on their own. The German press publishers' right was invalidated only after the adoption of the CDSM Directive. The referral to the CJEU on the matter of the German press publishers' right, considering that it concerned a procedural issue, was not a salient point in the discussion. Not only did the legislative process of the CDSM Directive influence the discussion, but the discussion also influenced the legislative process. The justification for the introduction of the press publishers' right clearly related to the arguments used by the respondents of the Public Consultation, and the explicit removal of hyperlinks from the scope of the new right was an answer to the public outcry against the restriction on the freedom to link.

None of the identified narratives dominated the discussion. The debate on the press publishers' right offered a cluster of interrelated issues, with a number of key words characterising more than one narrative. Keywords such as investment, media pluralism, linking and internet freedom, as well as quality content, were used in various narratives, by both opponents and supporters of the new right. Some narratives failed to have a sound basis to support their argument. Considering the lack of empirical evidence, the better-off narrative

is purely theoretical in nature. This made difficult to accept its hypothesis on the positive effect of the press publishers' right on all actors of the online news environment. While arguing in favour of the value of the press, the actors focused on the traditional press publishers, known from the analogue world, forgetting that they no longer had a monopoly on provision of news and information. As such, the narrative did not reflect the current shape of the online news environment, ignoring digital-born news organisations.

The general lack of consideration for the current shape of the online news environment by the actors, resulted in two hurdles in the discussion. The first problem related to the difficulties in defining who was a press publisher. Considerable differences existed between the right's supporters and opponents in the identification of the beneficiaries of the press publishers' right. Whereas the supporters exclusively referred to traditional press publishers, the opponents pointed to the wide variety of actors who supplied news and information, also those whose content did not meet basic standards, and could be labelled 'fake news'. The second issue was the discussion's focus on the most obvious actors of the online news environment, traditional press publishers and US tech giants, especially Google. Although the press publishers' right was initially seen as a direct response to the parasitism of third-party services, the focus subsequently shifted to the figure of a traditional press publisher itself. SMEs, startups and other digital actors appeared in the discussion only incidentally, when brought up by the opponents of the new right.

Chapter IV: News as an object of protection: challenging the concept of copyright subject-matter

Press publication plays a central role in understanding the effect of the introduction of a press publishers' right into the EU copyright framework. A press publication, and not the press publisher, is the key for determining the scope of the new right. Thus, understanding what a press publication is, and how it relates to copyright-protected works and subject-matter of other related rights, is crucial. The definition of a press publication, or the press in general, is however, difficult to delineate. Press publications' form is not settled, instead, it 'perpetually reinvents itself' ,[568] particularly in the online news environment. The press and media laws of the Member States are not harmonised, with the approach to regulating the press varying from one Member State to the other. Prior to the discussion on the press publishers' right, EU copyright was largely ambivalent towards the press or news.

The purpose of this chapter is to understand what makes a press publication, and consequently, what the subject-matter of the press publishers' right is. The chapter begins with an investigation into how copyright protection of press and news has been addressed at the international level, and what, if any, special provisions for press or news are in force. Subsequently, it defines the subject-matter of copyright and related rights in the EU and considers their reciprocal relationship. The chapter then proceeds to the discussion of different definitions of press and press publications in national media and press laws, and within provisions on press publishers' rights at the national level and in the CDSM Directive. In its final part, the chapter makes two claims. First, it argues that it is difficult to distinguish a press publication as the object of the press publishers' right from news items as works protected by copyright. Secondly, it argues that the protection of press publications under the umbrella of copyright and related rights undermines the legal certainty and coherence of the EU copyright framework by granting special protection to a subcategory of literary works which are hard or impossible to distinguish from other literary works, and by violating copyright egalitarianism.

I. Protection of news: historical overview and special provisions

Traditionally, there was no need for rights on news in the press publishing sector. The exclusive access to news before its publication was sufficient to safeguard publishers' interests. Specialised legal protection was neither existent nor needed. In the 19th century, a common practice among press publishers was to copy facts, or even whole articles, published in another newspaper, and include them in one's own publication. At that time, professional publishers were the sole providers of news to the public. It was thus possible to regulate access to and use of news and information through private licensing mechanisms, based on the notion

[568] CIPIL to UK Intellectual Property Office, 'Call For Views: Modernising the European Copyright Framework' (5 December 2016) 10 ‹http://www.iposgoode.ca/wp-content/uploads/2016/12/IPOModernisingIPProfResponsePressPublishers.pdf› accessed 4 January 2017.

of property right on news. Press agencies were the main collectors and distributors of facts. They entered into exclusive agreements with press publishers, excluding other information providers.[569] These agreements helped to guard press agencies' investments in acquiring facts. At that point, the interests of publishers and press agencies were not aligned. Press publishers were searching for savings in acquiring facts by concluding group licenses with press agencies. Looking for investment returns, press agencies were not favourable to the group licensing schemes, as they would rather sell facts to each publisher separately.[570]

With private agreements failing press publishers and press agencies alike, both groups began to seek legal protection on national and international fora. The initial claims concerning the exclusivity on news prior to its publication were gradually extended to the post-publication period and the text of the news items. The temporal extension in the exclusivity claims was strictly linked to technological development. First, the cost of obtaining news had risen considerably, due to the use of such inventions as the telegraph. Secondly, the improvement of printing technologies had shrunk the 'temporal window of exclusivity',[571] making it easier, cheaper and quicker to copy content from competitors.

This section investigates how the claims of press publishers and press agencies have been addressed in the international treaties. It asks what are the special provisions of copyright law concerning press and press publishers on an international, EU and MS level. It further investigates the motives behind the introduction of special provisions and enquires why some of the claims of press publishers and press agencies have gone unanswered.

A. News in the international conventions

The international pursuit to protect press and news began with the Berne Convention. Berne's catalogue of copyright protected works is open, only including an exemplary list. This means that, in principle, news items can be protected by copyright through the national laws of the Berne-contracting states. However, as any other work, a news item has to meet the copyright protection requirements. The possibility of copyright protection of news items does not exclude a divergent treatment of news and information by some of Berne's provisions.

There are three types of Berne's provisions treating news and information in a distinct manner. Not all of these provisions are included in Berne's current text. The first is a provision granting

[569] Heidi JS Tworek, 'Protecting News before the Internet', *Making News. The Political Economy of Journalism in Britain and America from the Glorious Revolution to the Internet* (Oxford University Press 2015) 198.
[570] ibid 199.
[571] ibid 197.

a blank license to freely reproduce newspaper articles, absent a reservation to the contrary (a system of presumed authorisation). This provision was included in the original text of Berne, and recognised the common practice of verbatim copying among newspapers.[572] The original broad scope of the provision was gradually narrowed by requiring the original source to be indicated,[573] limiting the personal scope to press,[574] and outlining the topics which the copied articles were to concern (current economic, political or religious topics).[575] Eventually, the provision was removed from Berne's text, and the decision on blank licenses for newspaper articles on current topics, was left to national jurisdictions.[576] One of the reasons for a gradual disappearance of blank licenses from Berne's text, was the changing news environment, and the slow disappearance of the practice of verbatim copying.[577]

The second type of provisions concerns news of the day and miscellaneous information. Under Berne's original text, it was not possible to opt-out of a blank license for articles on political discussion, as well as for news of the day and miscellaneous information. This provision was included in its subsequent versions. Its scope has gradually grown, and currently Berne does not apply to news of the day and miscellaneous information. This broad exclusion was first included in art. 9 of the Berlin Act, and later moved to art. 2(8), a core provision on copyright-protected works, in the Stockholm Act. The change in placement within Berne's text was accompanied by minor modifications in the wording. Since the Stockholm Act, miscellaneous information is required to have the character of mere items of press information.[578]

Relevant for the enquiry in this thesis is to understand what the reason was behind the explicit exclusion of the news of the day and miscellaneous facts from the scope of Berne. In their comment on Berne, Ricketson and Ginsburg identify two possible explanations for the exclusion in art. 2(8) of Berne: 1) public policy concerns about the availability of daily news reports, which could potentially fall under copyright protection, and 2) a simple confirmation of the idea-expression dichotomy, one of the basic copyright principles excluding the

[572] See Kathy Bowrey and Catherine Bond, 'Copyright and the Fourth Estate: Does Copyright Support a Sustainable and Reliable Public Domain of News?' (2009) 4 Intellectual Property Quarterly 399, 409–414.
[573] Berne Convention for the Protection of Literary and Artistic Works (Paris, 4 May 1896), entered into force 5 December 1887, as revised at Berlin on 13 November 1908 (Berlin Act) art. 7.
[574] Berne Convention for the Protection of Literary and Artistic Works (Paris, 4 May 1896), entered into force 5 December 1887, as revised at Rome on 2 June 1928 (Rome Act) art. 9.
[575] ibid.
[576] Berne Convention for the Protection of Literary and Artistic Works (Paris, 4 May 1896), 828 UNTS 221, entered into force 5 December 1887, as revised at Stockholm on 14 July 1967 (Stockholm Act) art. 10bis.
[577] See Sam Ricketson and Jane C Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Second edition, Oxford University Press 2006) 799.
[578] Stockholm Act art. 2(8).

copyright protection of facts and information *per se*.[579] The second interpretation is commonly accepted in copyright literature, and it can be inferred from the records of the Berlin revision conference, which gave art. 2(8) of Berne its current wording. The Berlin revision conference report states: 'The reproduction of news of the day and miscellaneous information, which are simply press news without any literary character, cannot be forbidden. It is an accepted point; they do not come within the subject-matter of copyright.'.[580] Therefore, in the opinion of contracting parties, news and press information were excluded from the scope of Berne simply because they do not fall within the province of copyright.

Since the provision of art. 2(8) of Berne simply restates an accepted principle, it could be seen as superfluous from a systematic perspective. The deletion of art. 2(8) from Berne was considered during the Stockholm revision conference. It did not take place considering art. 2(8) of Berne had two functions in the opinion of the Study Group.[581] First, as Berne in no place explicitly recognises the principle of idea-expression dichotomy, art. 2(8) of Berne is a reminder that this principle indeed applies. Secondly, the article draws a clear line between copyright and other means of legal protection, such as competition law.[582] As such, Berne does not exclude the protection of news of the day and miscellaneous information in general. It only excludes the application of its rules to national provisions protecting such content. One of the reasons for excluding news of the day and miscellaneous information from the scope of Berne, was that contracting parties wanted to avoid granting copyright protection to purely commercial interests. The need to protect investments in collecting and distributing news was considered to fall outside the copyright domain.[583] This notion is worth bearing in mind for further considerations in this thesis.

The third type of Berne's provisions on news and information concerns the quotation exception. This exception, first introduced in the Brussels Act in 1948, allowed anyone to use short quotations from newspaper articles, for whatever purpose, as long as the source, and possibly the author, of a publication was indicated. The Brussels Act also allowed the use of quotations in press summaries. In later versions of Berne, the designated exception for quoting from newspapers was merged into a general quotation exception, which imposed significant

[579] Ricketson and Ginsburg (n 577) 498–499.
[580] 'Records of the Conference Convened in Berlin October 14 to November 14, 1908', *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, vol 2 (Second Edition, Oxford University Press 2006) 201.
[581] The Study Group composed of representatives of a country where revision conference was about to be held and representatives of BIRPI/WIPO was responsible for drawing of the program of revision conference.
[582] Study Group 'Document S/1 Proposals for Revising the Substantive Copyright Provisions (Articles 1 to 20)' (BIRPI) 45.
[583] 'Records of the Conference Convened in Berlin October 14 to November 14, 1908' (n 580) 201.

limitations based on the purpose, fair practice and lawfulness of making work available to the public.

An important question is why Berne contracting parties decided to adopt special provisions on news and information, and if these provisions exclude, or lower the level of, copyright protection of works included in newspapers and periodicals. When referring to newspapers, press, periodicals or articles Berne provided respective definitions in none of its versions. Only the Rome revision conference report gives a minor terminological explanation. The report notes that the term press was used in Berne to cover both newspapers and periodicals.[584] The text of Berne and records of revision conferences show that contracting parties clearly distinguished between newspapers and periodicals, and recognised that not all their content would be articles.[585] During the Berlin revision conference, contracting parties made a clear distinction between articles published in newspapers and those published in periodicals. Free copying was only allowed for the former.[586] A possible explanation for this was that discussion is more elaborate in periodicals than in the newspapers, which simply report on the facts of the day. When the provisions of Berne were drafted, the news publishing environment was vastly different to now, and all legislative decisions were taken with analogue publishing in mind. Thus, according to Ginsburg and Ricketson, it should be left to contracting states to decide whether the news reporting exception of art. 10*bis* of Berne should also cover electronic versions of publications, and other new digital formats available on demand.[587]

Two conclusions on the definition of the press and news can be drawn from Berne. Firstly, Berne provides only a limited explanation on what press or news is, as it relies either on the common, every-day, understanding of these terms, or on national definitions. Secondly, limited guidance of Berne applies only to the analogue form of press and news. Special provisions on press and information, are justified in two ways: 1) the former practice of verbatim copying by newspapers, and 2) concerns about the freedom of press. While the introduction of special provisions was based on the former, their continuation is due to the latter.

Even though the idea of protection of news had been rejected by Berne as early as 1908, press publishers and press agencies continued their attempts to secure protection of news at the

[584] 'Records of the Diplomatic Conference: Convened in Rome, May 7 to June 2, 1928', *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, vol 2 (Second Edition, Oxford University Press 2006) 248.
[585] Records of the Berlin revision conference explicitly state that '[n]ewspapers must be clearly distinguished from periodicals'. See 'Records of the Conference Convened in Berlin October 14 to November 14, 1908' (n 12) 200.
[586] Berlin Act art. 9.
[587] Ricketson and Ginsburg (n 577) 801.

international level. The first forum was the League of Nations. After brief consideration, the League of Nation's Conference of Press Experts rejected the idea of a quasi-property right in news, leaving this matter to national law.[588] The second forum was the Paris Convention for the Protection of Industrial Property (Paris Convention). Since 1911, the Paris Convention includes a general obligation of protection against unfair competition.[589] Publishers and press agencies tried to include unauthorised copying and distribution of news of a commercial value in the Paris Convention as examples of unfair competitive behaviour. This proposal was rejected as unsuited to the Paris Convention goals.[590] The third forum was UNIDROIT. The protection of press information was the subject to one of the draft international agreements on related rights prepared by the Samden Committee of UNIDROIT in 1939.[591] Due to the outbreak of the Second World War, work on the draft was discontinued. The Rome Convention did not take the issue of protection of news by related rights up.

The protection of news and information was also considered at the national level. The most notable was the adoption of the Telegraphic Property Laws in Australia and other parts of the Commonwealth in late 19th century.[592] The laws granted a monopoly on facts and information transmitted through the telegraph. The laws safeguarded investment returns for publishers who carried the high cost of acquiring facts and information. The Telegraphic Property Laws gave publishers a short-term (e.g. forty-eight hours) property right on telegraphic messages published in their newspapers. The messages needed to come from outside the colony and be marked as such. The right covered not only verbatim copying of the message in whole or in part, but also the reuse of its substance. Therefore, it was not a copyright in its classical sense, but a property right in facts. The Telegraphic Property Laws were only in force for a limited time, and the attempt to transpose them to Europe and the US failed. The debate on the introduction of Telegraphic Property Laws was similar to the discussion on the press publishers' right in the EU. Both debates concerned issues of protection of facts and investment, and were connected to technological development and its impact on the news environment.

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[588] Tworek (n 569) 212.
[589] Paris Convention for the Protection of Industrial Property (Paris, 20 March 1883), entered into force 7 July 1884, as amended on 28 September 1979 art. 10bis.
[590] Jane Ginsburg and Sam Ricketson, 'Intellectual Property in News? Why Not?', *Research Handbook on Intellectual Property in Media and Entertainment* (Edward Elgar 2017) 24.
[591] Sam Ricketson, 'Rights on the Border: The Berne Convention and Neighbouring Rights', *Copyright law in an age of limitations and exceptions* (2016) 368–369.
[592] For a thorough analysis of the issue see Lionel Bently, 'Copyright and the Victorian Internet: Telegraphic Property Laws in Colonial Australia' (2004) 38 Loyola of Los Angeles Law Review 176.

B. News in the EU and Member States

The protection of news and information had not been a topic of major concern at the EU level prior to the emergence of the press publishers' right issue. In general, being bound by the provisions of Berne, the EU follows the convention's approach to the protection of news and information. Since the InfoSoc Directive does not explicitly regulate the subject-matter of copyright, it does not exclude news of the day and miscellaneous information from copyright protection. However, the InfoSoc Directive does foresee a possibility for MS to adopt an exception for news reporting.[593] The exception covers uses of published articles on current economic, political and religious topics, in connection with the reporting of current events, to the extent justified by the informatory purpose. Such use needs to be accompanied by an indication of the original source, including the author's name. The exception applies to both the right of reproduction and right of communication to the public. In case of an explicit reservation to the contrary, it is not possible to rely on this exception. Even though the news reporting exception is included in art. 5's catalogue, the EU legislator did not provide an indication of how to understand terms 'press' or 'published article'.

Apart from the InfoSoc Directive, only some of the most recent regulatory instruments mention news and information in the copyright context. First, the Collective Management Directive briefly refers to press publishers as a category of content producers.[594] Secondly, the Orphan Works Directive,[595] as well as the Marrakesh Directive and the Marrakesh Regulation, name journals, newspapers and magazines as forms of copyright-protected works.[596] Additionally, both the instruments implementing the Marrakesh Treaty claim that they aim to improve access to this types of work no matter if they are 'digital or analogue, online or offline',[597] explicitly recognising that the press exists not only in its traditional paper form, but also in a digital, online-accessible form.

Where the MS's copyright frameworks are concerned, a number of national legislators have chosen to implement the news reporting exception, with mild variations in scope. Some MS decided to limit the sources of articles which could be reused pursuant to the news reporting provision, listing such sources as newspapers (Spain, Italy), informational sheets other than newspapers (Germany), periodicals (Spain), magazines (Italy) or simply media (Poland).

[593] InfoSoc Directive art. 5(3)(c).
[594] CRM Directive recital 16.
[595] Orphan Works Directive art. 1(2)(a).
[596] Marrakesh Directive art. 2(1); Marrakesh Regulation art. 2(1).
[597] Marrakesh Regulation recital 7; Marrakesh Directive recital 7.

Others limit the group of exception beneficiaries, pointing out that the exception could only be used by newspapers (the Netherlands),[598] periodicals (Sweden), magazines (Italy),[599] or the press in general (Poland). Other national jurisdictions are ambivalent towards the personal scope of the exception, and solely focus on the purpose which the news reporting should fulfil: informing the public (Ireland,[600] Hungary).[601] Additionally, in some countries, the news reporting exception covers the use of works' translations (Poland,[602] the Netherlands).[603]

Apart from the news reporting exception, the MS's copyright acts follow Berne in excluding news of the day and simple press information from the copyright's scope. However, they do so in varying manners. In the case of Germany the exception is included in the same article as the exception for news reporting.[604] The German Copyright Act states that, for news items and miscellaneous items, it is not possible to exclude the application of the news reporting exception, which mirrors Berne's initial approach.[605] A different approach to the exclusion of news of the day and miscellaneous information has been taken by Poland[606] and Hungary,[607] where it is included in the first articles of the copyright acts, which define what a copyright protected work is. At the same time, some of the MS's copyright laws explicitly list newspapers and periodicals as examples of protected works in general (Portugal),[608] or as an example of a collective work more specifically (Italy).[609] Interestingly, some MS envisage an additional layer of protection for titles of newspapers and periodicals. In the case of Italy, such a title cannot be reproduced in connection to any other work.[610] The same is the case of Portugal, which, however, requires such a press title to be duly registered to benefit from the special regime.[611]

To conclude, the approach taken towards copyright protection of news and information varies between the MS. However, as in the case of the InfoSoc Directive, it is consistent with Berne's

[598] Wet van 23 september 1912, houdende nieuwe regeling van het auteursrecht, Stb. 1912, 308 (Dutch Copyright Act) art. 15(1).
[599] Legge 22 aprile 1941, n. 633 (Italian Copyright Act) art. 65(1).
[600] Copyright and Related Rights Act, 2000 (Irish Copyright Act) sec. 51(2).
[601] 1999. évi LXXVI. törvény a szerzői jogról (Hungarian Copyright Act) art. 36(2).
[602] Ustawa z dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych t.j. Dz.U.2019.1231 (Polish Copyright Act) art. 25(3).
[603] Dutch Copyright Act art. 15(3) .
[604] Urheberrechtsgesetz vom 9 September 1965, BGBl. I S. 1273 (German Copyright Act) art. 49(2).
[605] ibid art. 15(1) .
[606] Polish Copyright Act art. 4(4).
[607] Hungarian Copyright Act art. 4(4).
[608] Código do Direito de Autor e dos Direitos Conexos (conforme alterado de acordo com DL n.º 100/2017, de 23/08) (Portuguese Copyright Act) art. 2(1).
[609] Italian Copyright Act art. 3.
[610] ibid art. 100.
[611] Portuguese Copyright Act art. 5.

stance. Special provisions on news and information predominantly concern two issues: 1) the scope of copyright protection, and 2) exceptions for the purposes of news reporting. The implementation of the latter differs among the Member States, and the consequences of these differences have yet to be assessed by the CJEU. A general trend is the lack of definitions of press, news, or a press publisher connected to the special provisions within the copyright framework.

II. Subject-matter of copyright and related rights in the EU

The European Commission perfectly summarised copyrightability of news items. In an explanatory memorandum to the proposal for a regulation on cross-border portability of content, the EC stated that '[c]ertain elements of online content services, such as [...] news [...] are not necessarily protected by copyright'.[612] While it is evident that some news items, such as journalistic articles, are copyrightable, assuming that all news items are copyrightable, is questionable. This did not stop the CJEU from declaring in its judgement in *Infopaq* that 'it is a common ground that newspaper articles, as such, are literary works covered by Directive 2001/29'.[613] This statement can be read in two ways. The first would be that the InfoSoc Directive applies to newspaper articles, and the second, that all newspaper articles are protected by copyright pursuant to the InfoSoc Directive. Whereas the latter reading seems far-fetched and contrary to the EC's position, it is only natural for newspaper articles to fall within the scope of the InfoSoc Directive. And in case a newspaper article fulfils the copyright requirements, to be protected by copyright.

EU law does not offer a general definition of the subject-matter of copyright. However, it does indicate two requirements which each copyright-protected work needs to fulfil: expression and originality. The section discusses both requirements, recalls how they were developed by the CJEU's jurisprudence, and explores how they are applied to news items. Considering that the press publishers' right introduced in the CDSM Directive is a related right, the section also examines what the subject-matter of related rights is, and how it is addressed in EU law. The section concludes with a brief discussion of the relationship between the subject-matter of related rights and copyright-protected works.

[612] European Commission, 'Proposal for a Regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market' 2015 [COM(2015) 627 final] s 2.
[613] *Infopaq* (n 75) para 44.

A. *Copyright protection requirements*

The InfoSoc Directive, the core instrument of the EU copyright framework, is where one would instinctively look for a definition of work, a subject-matter of copyright protection. However, neither the InfoSoc Directive, nor any other directive, define what a subject-matter of copyright is in the EU. This empty space has been filled by the CJEU's jurisprudence, as the Court developed the concept of copyright subject-matter, an independent concept of EU law. As noted by the Court in the *SGAE* case, when provisions of EU law do not make an express reference to the law of Member States for the purpose of determining their meaning and scope, these provisions need to be given an autonomous and uniform interpretation throughout the EU.[614] In order to ensure a uniform interpretation of copyright in MS, the CJEU took it upon itself to clarify the copyright protection requirements. A clear account of what the subject-matter of copyright is in the EU, was provided by the Court in the recent *Levola* case, which enquired into the possibility of a copyright protection of the taste of cheese. In its judgement, the CJEU listed two criteria which need to be fulfilled: 1) originality of the subject-matter, and 2) expression of the subject-matter.[615] Considering that only a work which is expressed, can be assessed for originality, the criteria are considered in the reverse order below.

1. Expression

A work begins with an idea, which is later expressed in a particular form by an author. Only the form in which this idea is expressed, can be subject to copyright protection. This rule stems from a commonly-recognised principle of idea-expression dichotomy: the need to distinguish between an idea and its expression, to rightly establish the subject-matter of copyright protection. The WCT explicitly states that copyright protection does not extend to ideas, procedures, methods, and concepts.[616] A similar exclusion can be found in TRIPS, which leaves 'ideas, procedures, methods of operation or mathematical concepts as such' from copyright's scope.[617] Berne does not explicitly preclude ideas from its scope. However, the idea-expression principle is implicit in two of its provisions. First, as discussed in section I above, the exclusion of news of the day and miscellaneous information from Berne's scope, is nothing else than a manifestation of the idea-expression dichotomy. Secondly, the definition of literary and artistic works clearly states that they are protected 'whatever may be the mode or form of its

[614] *SGAE* (n 72) para 31.
[615] *Levola* (n 73) paras 36–37.
[616] WCT art. 2.
[617] Agreement on Trade-Related Aspects of Intellectual Property Rights (adopted 15 April 1994) Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1197 (1994) art. 9(2).

expression'.[618] Thus, like the other international agreements, Berne does not protect ideas or facts, but solely their expression.

At the EU level, neither the directives making up the EU copyright framework, nor the CJEU's jurisprudence mention the idea-expression principle by name. However, as in the case of Berne, the application of this principle is implicit. Both the Software Directive and the Database Directive concern the protection of the expression of respective subject-matters: computer programs and databases. Ideas and principles underlying computer programs cannot be protected.[619] Moreover, the EU as a party to TRIPS and MS as parties to the WCT, are bound by the idea-expression dichotomy principle included in these international agreements.

In the case of information works, the idea-expression dichotomy is sometimes referred to as the fact-expression dichotomy.[620] The content of an information work is facts or information, a message which a work communicates to its recipients. This factual record needs to be separated from and juxtaposed with the form in which it is expressed.[621] Consequently, there is no obstacle to extract factual account of events from an information work, and present it using different means of expression, literary or other.[622] Thus, the factual content of news items is under no circumstance subject to copyright protection. If the text of a particular item is not copied verbatim, and a third-party has limited itself to presenting the relevant facts and information in a different form, such act is not copyright-relevant.

The decision on the form in which ideas or facts are expressed, rests with the creator of a work. No limitations on acceptable forms are laid out in Berne or EU legislation. The expression does not even need to be permanent: the performance of a choreographic work is enough for it to be expressed, and there is no requirement for it to be recorded. However, following the CJEU judgement in *Levola*, a form of expression needs to allow for the identification of a copyright subject-matter with sufficient precision and objectivity.[623] This means that the perception of an expression of work should be independent from the characteristics of a particular

[618] Berne Convention Art. 2(1).
[619] Software Directive art. 1(2); Database Directive art. 1(1).
[620] Richard Bronaugh, Peter Barton and Abraham Drassinower, 'A Right-Based View of the Idea/Expression Dichotomy in Copyright Law' (2003) 16 Canadian Journal of Law and Jurisprudence 3.
[621] Christophe Geiger, 'Flexibilising Copyright - Remedies to the Privatisation of Information by Copyright Law' (2008) 39 International Review of Intellectual Property and Competition Law 178, 178.
[622] Hoeren refers to information as the 'common heritage of mankind', which should be free for anybody to use. In his opinion, the general rule of intellectual property is freedom of information. See Thomas Hoeren, 'The Hypertheory of German Copyright Law - and Some Fragmentary Ideas on Information Law', *Kritika: essays on intellectual property*, vol 3 (ElgarOnline 2018) 37.
[623] *Levola* (n 73) para 40.

recipient.[624] Perception should not be subjective, and it may not vary depending on the audience. In the case of news items, expressed through words or pictures, fulfilling this requirement is not an obstacle.

The idea-expression dichotomy is essential for determining the subject-matter of copyright protection. It allows authorities responsible for protecting copyright to identify clearly and concisely the subject-matter of their actions, and shows third parties, especially the competitors of copyright holders, what can be freely used, and what falls under the copyright of others.[625] The principle of the idea-expression dichotomy effectively limits the monopoly of the copyright holders by leaving ideas and facts in the public domain. The extension of the protection to include ideas and facts would impose unreasonable restrictions on the freedom to operate and create by others.[626] Therefore, it is in the public interest for ideas to stay free, to remain a part of the common good. Additionally, the ability to identify the subject-matter of the protection according to the idea-expression dichotomy precisely and objectively, removes an element of subjectivity from copyright, aiding the legal certainty in general.[627]

However, the principle of the idea-expression dichotomy has its drawbacks. It is criticised as requiring an artificial distinction, which is difficult or even impossible in some cases. These cases concern works with a limited number of expression possibilities, where the creative freedom of authors is limited, or even non-existent. This may be the case for information works: there is a limited number of ways in which a certain fact or information can be expressed, especially where literary works are concerned, and a work needs to provide an accurate account of a particular fact. Despite this criticism, the principle of the idea-expression dichotomy is a guiding principle in the EU copyright framework, and it is used as a tool for fostering creation and development. In the case of *SAS*, the CJEU rejected the copyright protection of computer program functionality exactly because it would harm the technological and industrial development.[628] The Court clearly stated that copyright was selected to protect computer programs, because it protects an individual expression of a work alone, leaving space for the others to create programs with identical or similar functionalities, as long as they are created independently and not copied.[629] Therefore, copyright cannot result

[624] ibid 42.
[625] ibid 41.
[626] Janusz Barta and Ryszard Markiewicz, *Prawo Autorskie* (3rd edn, Oficyna Wolters Kluwer 2010) 41.
[627] *Levola* (n 73) para 41.
[628] *SAS Institute Inc v World Programming Ltd* [2012] Court of Justice of the European Union C-406/10, EU:C:2012:259 [40].
[629] ibid 41.

in the monopolisation of ideas or facts, even in cases where it is difficult or impossible to distinguish between these ideas and facts and their expression.

2. Originality

Key to determining whether a work is subject to copyright protection, lies in the requirement of originality. Only original works are protected by copyright. Regardless of its essential role, no general standard of originality has been included in the directives making up the EU copyright framework. The meaning of originality was explicitly specified only in the context of particular categories of works: computer programs, photographs and databases. Pursuant to art. 1(3) of the Software Directive, a computer program is original when it is author's own intellectual creation.[630] This provision has been subsequently repeated in the Database Directive with regard to copyrightable databases,[631] and in the Term Directive in the context of photographs.[632] Additionally, all three directives explicitly exclude the application of other criteria for determining the copyrightability of the respective subject-matters. Accordingly, the harmonisation of the originality requirement for certain categories of works followed the same standard.

The judgement in the *Infopaq* case marks a passage into the new era, with the originality requirement subject to *de facto* harmonisation by the CJEU jurisprudence.[633] The *Infopaq* case has a double significance for this thesis. Not only is it vital from the originality perspective, but it also directly addresses copyrightability of news articles and their fragments. A detailed consideration of the *Infopaq* case is therefore valuable. Infopaq was a company operating a media monitoring service. It prepared summaries of articles from Danish newspapers and periodicals, following the keywords defined by clients and using the data capture process.[634] The data capture process followed five distinctive stages, and was partially automated. It involved, among others: the scanning of publications, the creation of TIFF (Tagged Image File Format) files and text files of these publications, and a keyword search of the text files. After the completion of the relevant stages, the TIFF and text files were deleted. What remained were eleven-word extracts: a keyword together with the five preceding and five following words. The final result of the data capture process was a printed sheet containing the eleven-

[630] Software Directive art. 1(3).
[631] Database Directive art. 3(1).
[632] Term Directive art. 6.
[633] See Eleonora Rosati, 'Originality in a Work, or a Work of Originality: The Effects of the Infopaq Decision' (2011) 33 European Intellectual Property Review 746.
[634] *Infopaq* (n 75) paras 13–21.

word extract, accompanied by the name of the source newspaper or periodical, and its publication date.

The dispute concerning Infopaq's service began when the DDF, an association of Danish daily newspaper publishers, questioned the lack of publishers' authorisation for the use of their newspapers and periodicals in Infopaq's commercial activities. Infopaq disputed this claim, and searched for a declaratory judgement confirming that the consent of DDF and its members is not required to carry the data capture process.[635] After the case was dismissed by the court of first instance, the appeal court (the Højesteret) noted a disagreement between the parties on which of the activities of the data capture process involves reproduction. The court stayed the proceedings and referred a number of questions to the CJEU. Crucial for this thesis is the first question, in which the referring court essentially asked whether the concept of reproduction in part within the meaning of the InfoSoc Directive, encompasses the storing and printing of eleven-words extracts. It is this question which gave the CJEU an opportunity to address a number of important issues, such as the requirement of originality, copyrightability of newspaper articles, and partial reproduction. Whereas the two first issues are discussed in the following paragraphs, the third is addressed in Chapter V, where the scope of exclusive rights of copyright and related rights holders is discussed.

The CJEU's first step in answering the first question, was to state that reproduction is only a copyright-relevant act when it concerns a work.[636] To understand what the work is, the Court referred to art. 2(5) (collective works) and 2(8) (news of the day and miscellaneous information) of Berne,[637] concluding, a bit perversely, that 'the protection of certain subject-matters as artistic or literary works presupposes that they are intellectual creations'.[638] This conclusion prompted the Court to observe that originality, as defined in respect of computer programs, databases and photographs, stands for the intellectual creation of the author. Building on the notion that the harmonised copyright framework is based on the same principles, the Court concluded that originality of work in the context of the InfoSoc Directive should be understood in the same way. Thus, according to the CJEU, what the InfoSoc Directive, and the EU copyright framework in general, protects are works, which are original

[635] ibid 22.
[636] ibid 33.
[637] Art. 2(8) of Berne concerns the exclusion of the news of the day and miscellaneous information, and has been considered in section I of this chapter. Art. 2(5) of Berne touches upon collective works and reads as follows: '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.'
[638] *Infopaq* (n 75) para 34.

in the sense that they are author's own intellectual creation.[639] This line of reasoning has been followed by the CJEU in a number of subsequent judgements, including *BSA*,[640] *Murphy*,[641] *Painer*,[642] *SAS*,[643] and most recently *Levola*.[644] The understanding of originality as an author's own intellectual creation is now a commonly recognised, judge-made standard of the EU copyright framework.[645]

When addressing the originality of newspaper articles, the CJEU first noted that it is a common ground that newspaper articles are literary works.[646] What attests to their originality is 'the form, the manner in which the subject is presented and the linguistic expression'.[647] The building blocks of a linguistic expression are words. The way an author of a newspaper article expresses her creative input is by the choice, sequence and combination of words, she uses to expresses certain fact.[648] Whether and how to use particular words is the creative choice of an author. However, an author's choice might be restricted. The CJEU drew attention to creative restraints imposed on authors in the cases following *Infopaq*. First, assessing the originality of a graphic user interface in the *BSA* case, the Court noted that, when the expression of the interface's elements is dictated by their function, leaving the author no space to make her own choices, such an expression cannot be original.[649] The same line of reasoning was followed by the CJEU in the *Premier League* case, in which the Court noted that football matches do not meet the originality requirement, as they need to observe the rules of the game, which leave no space for creative freedom.[650] According to the Court, when the creative constraints are so far-reaching that an author is left with no choice, an author's own intellectual creation is not possible. That was not the case in *Painer*, another CJEU case addressing the originality requirement. Assessing the copyrightability of a portrait photograph, the Court considered that, even though the photographed person is predetermined, the photographer still makes a number of decisions, including the choice of the angle and the position of a portrayed person,

[639] ibid 37.
[640] *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury* [2010] Court of Justice of the European Union C-393/09, EU:C:2010:816.
[641] *Premier League* (n 40).
[642] *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2013] Court of Justice of the European Union C-145/10, EU:C:2011:798.
[643] *SAS* (n 628).
[644] *Levola* (n 73).
[645] For a comprehensive analysis of the harmonisation of the originality requirement see Eleonora Rosati, *Originality in EU Copyright. Full Harmonisation through Case Law* (Edward Elgar Publishing Limited 2013).
[646] *Infopaq* (n 75) para 44.
[647] ibid.
[648] ibid 45.
[649] *BSA* (n 640) paras 49–50.
[650] *Premier League* (n 40) para 98.

the background, the sharpness, as well as the lighting. According to the CJEU, all these choices left to the photographer allowed her to leave a personal mark on the work.[651]

The creative choice of journalists as well as other news items' authors might be limited in two ways: by the editorial statute (the mission) of a particular publisher, and by requirements of a particular genre of content, especially a news report.[652] News reports require that a standard set of facts is covered, and a given structure is followed. Therefore, the creative choice of an author is restricted from the outset, as the number of ways in which a particular fact can be expressed, is limited. When describing a fact, one cannot be as creative as when communicating an idea, because the factual recollection calls for a high level of accuracy. Additionally, a publisher might require authors to use a particular template for their literary submissions.[653] Even if such a template only sets requirements for the headlines and lead parts of news items, it needs to be considered a creative restraint. It is the use of such short parts as headlines and lead paragraph which give raise to most of the controversies in the online news environment. Regardless of the creative constraints imposed on the author, it is a common belief that the EU standard of originality is not a high one, and it is not difficult to achieve.[654] Thus, news items are generally able to fulfil the requirement of originality and attract copyright protection.

B. Subject-matter of related rights

In the case of the neighbouring rights, there is no one overarching concept of the subject-matter of protection. What a related right covers, is inherent to this particular right, and there are no general criteria for assessing whether something is protected or not. The EU recognises four categories of related rights, based on the person of right holder: performers, phonogram producers, broadcasting organisations and film producers. The subject-matter of related rights is secondary to their holder, and it is respectively: a performance, a phonogram, a broadcast, or a film. The first three categories of related rights are classic categories, in the sense that they are included in the Rome Convention. Conversely, the rights in films are distinctive for the EU. Possibly because of this distinctiveness, the EU legislator decided to provide a definition of a film, leaving unspecified the subject-matter of the remaining related rights. As noted by

[651] *Painer* (n 642) para 124.
[652] Stef van Gompel, 'Creativity, Autonomy and Personal Touch. A Critical Appraisal of the CJEU's Originality Test for Copyright', *The work of authorship* (Amsterdam University Press 2014) 116.
[653] To provide an example, Reuters, a press agency, publishes the Reuters Handbook of Journalism, which includes a number of guiding principles which journalists are instructed to take into consideration when preparing news items. See 'Handbook of Journalism' (*Reuters*) ‹http://handbook.reuters.com/index.php?title=Main_Page› accessed 27 March 2019.
[654] van Gompel (n 652) 95, 100.

van Eechoud, another reason could be the EU legislator's desire not to interfere with the definitions of the Rome Convention and respective national law provisions in MS.[655] The EU is a not a party to the Rome Convention. However, it is a party to the WPPT and the Beijing Treaty, and all but one of the Member States (Malta) are parties to the Rome Convention.[656] Provisions on related rights are scattered throughout a number of directives within the EU copyright framework, but most are included in the Rental and Lending Directive, the Term Directive and the InfoSoc Directive. International treaties as well as directives need to be considered when the subject-matter of related rights within the EU copyright framework is discussed.

Pursuant to the Rome Convention, a phonogram is 'any exclusively aural fixation of sounds of a performance or of other sounds'.[657] The WPPT builds on this definition, adding fixations of a representation of sounds to its scope, and excluding fixations incorporated in cinematographic and other audiovisual works.[658] The technique used to fix sound is irrelevant. Additionally, there is no requirement for the fixed sound to be a musical work. Recordings of nature sounds, such as rain or forest, made for relaxation purposes, easily count as phonograms. Phonograms are sound recordings, so they do not concern visuals. What inherently involves registration of visual images, is a film. Pursuant to the Rental and Lending Directive, a film is a cinematographic or audiovisual work, or moving images, regardless of it being accompanied by sound or not.[659] Thus, a film can be either silent or accompanied by a sound recording. Of importance is its visual layer.

The definition of a subject-matter for the related right of broadcasting organisations is more difficult, as neither the EU directives, nor the Rome Convention define a broadcast. The Rome Convention focuses on the activities of broadcasting organisations instead, providing the following definition of broadcasting: a transmission by wireless means for the public reception of sounds or of images and sounds.[660] A broadcast is therefore what a broadcasting organisation broadcasts. The rights of broadcasting organisations were not included in the WPPT, as they were supposed to be addressed in a separate treaty. This latter treaty, often referred to as the WIPO broadcasting treaty, has been on the WIPO Standing Committee on Copyright and Related Rights' (SCCR) agenda since 1997. In spite of more than 20 years of

[655] Eechoud and others (n 8) 38.
[656] 'WIPO-Administered Treaties Contracting Parties › Rome Convention' (n 39).
[657] Rome Convention art. 3(b).
[658] WPPT art. 2(b).
[659] Rental and Lending Directive art. 1 ter 4.
[660] Rome Convention art. 3(f).

discussions, the SCCR has not yet produced a full draft of the broadcasting treaty to date. As observed by Hugenholtz, a fair share of the SCCR's discussion has concerned key definitions, including that of broadcasting.[661] According to the current position of the SCCR committee, broadcasting stands for the transmission by wire or wireless means for the reception by the public of a programme-carrying signal, covering transmission by satellite, but excluding the one over computer networks.[662] At the same time, in its working document on the broadcasting convention, the SCCR considered the introduction of the term broadcast, meaning the transmission of a signal for the reception by the public.[663] If defined in this way, broadcast would become a synonym of broadcasting rather than its object, as it currently stands.

The nature of the subject-matter of rights awarded to performers is notably different from rights of broadcasting organisations, and phonogram and film producers. This difference stems from the differing foundations of these rights. Whereas the latter are justified by organisational and financial contributions of content producers, the former is connected to the individual character of the performers' performances. And it is the performance which is the subject-matter of performers' related right. Similar to the broadcast, the EU Directives, the Rome Convention and the WPPT fail to define what is to be understood under performance. However, the international treaties do identify performers as actors, singers, musicians, dancers, and others who act, sing, deliver, declaim, play, interpret, or otherwise perform literary or artistic works, or works of expression of folklore.[664] Therefore, a performance is an activity of a performer.[665] The performance can, but does not need to, concern a copyright protected work. The subject of a performance can be a work which is no longer protected by copyright, as well as one which was never subject to copyright protection.

The subject-matter of the related right is not only different, but also independent from copyright works. Although there is no obstacle to a copyright work being included in the subject-matter of a related right, it is not a requirement. A performer can sing a protected song or dance a choreographic work, but she does not need to. A phonogram can be a fixation of a performance of a musical composition, but it can also register sounds which do not attract any

[661] Bernt Hugenholtz, 'The WIPO Broadcasting Treaty: A Conceptual Conundrum' (2019) 41 European Intellectual Property Review 199, 201.
[662] 'Revised Consolidated Text on Definitions, Object of Protection, Rights to Be Granted and Other Issues' (WIPO Standing Committee on Copyright and Related Rights 2018) SCCR/37/8 2.
[663] 'Working Document for a Treaty on the Protection of Broadcasting Organizations' (WIPO Standing Committee on Copyright and Related Rights 2014) SCCR/27/2 REV art. 5.
[664] Rome Convention art. 3(a); WPPT art. 2(a).
[665] *Guide to the Rome Convention and to the Phonograms Convention* (WIPO 1981) 21–22.

protection by themselves. The same applies to films and broadcasts. A copyright-protected work can thus be an element, a contribution to the subject-matter of a related right. Yet, even if it is incorporated into this subject-matter it preserves its independence, and its status of a copyright-protected work. When all the elements of a subject-matter of a related right are fixed together, a new subject is created, with a quality different from the simple sum of its contributions. The subject-matter of neighbouring rights and copyright works are related to one another but are not bound to one another.

III. Press publication: the subject-matter of the press publishers' right

When Berne speaks of articles, newspapers, periodicals or press, it does not define any of the terms, but builds on their common understanding at the time of its enactment. An argument could be made that, in this way, Berne establishes a tricky precedent for copyright law, of terminology vagueness and a practice of referring to a common understanding of terms which do not necessarily have one. As was already signalled in Chapter II of this thesis, the terms press, news and similar, currently do not have a fixed meaning, tend to be used interchangeably, and are being further challenged by the development of easily-accessible online publishing tools and citizen journalism.

A way to solve the press-terminology conundrum, and provide a reference point for press publishers' rights, would be to refer to the regulatory tools which directly regulate press, such as press and media law acts of Member States. However, with some minor exceptions, this field of law has not been subject to the harmonisation, and the EU competence in this area is disputable.[666] As a result, Member States champion a variety of solutions where press is concerned, including the lack of special regulatory tools, self-governance of the press sector, and a dedicated regulatory framework for the press' activities. The Member States which introduced the press publishers' rights into their legal orders, decided on self-standing provisions to designate the rights' scope. The same is the case at the EU level, where a new definition of a press publication was created only for the purposes of the CDSM Directive.

In order to demonstrate how difficult it is to define what makes a press publication, the following subsection provides an overview of available definitions of press, news and similar terms in MS and at the EU level. Firstly, it focuses on definitions in press and media laws of

[666] Although the EU harmonises rules on audiovisual services, to some extent, it does not address the regulation of the press. Online versions of newspapers are explicitly excluded from the scope of the AVMS Directive. See Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) OJ L 95 2010 recital 28.

Member States, illustrating that there is no common approach towards the press in the EU. Secondly, it discusses how the subject of protection in national press publishers' rights was addressed in Spain and Germany. In its last, and most elaborate part, the subsection discusses the definition of press publications included in the CDSM Directive.

A. National press and media regulation

Even though the press publishers' right belongs to the copyright domain, looking at the definitions in national press and media laws is justified by one of the main arguments of the new right's proponents: the economic crisis in the press publishing industry. As legacy press publishers argue, they need additional legal tools to safeguard revenues, and offset the high costs of production of content. The costs are higher compared to online media outlets because press publishers need to adhere to standards others do not. These high standards, and other obligations, go hand in hand with privileges and often preferential liability regimes for the published content. The acts explaining these obligations and privileges belong to the domain of press and media regulation, and are only applicable to designated entities, qualified as (journalistic) media or press. Consequently, following the economic argument of the legacy press publishers, it is justified to examine which entities are bound by these additional obligations and standards, and possibly incur higher costs for content production. Additionally, there are situations where the literature and judiciary refer to the press and media regulation to aid in the interpretation of the copyright provisions. Such is the case in Poland, where the literature refers to the definition of the press in the Polish Press Law when discussing the exception for news reporting.[667]

An overarching principle of the press regulation is the freedom of press. It is a constitutional principle shared among Member States, which found its way into primary EU law through the Charter of Fundamental Rights of the European Union.[668] Some of the Member States have established the meaning of the term press, and address press' privileges and obligations exclusively on the basis of the constitutional guarantee of press freedom. This is the case in Germany, where art. 5 of the German Constitution warranting freedom of press and freedom of reporting, provides the grounds for the judicial and doctrinal interpretation of the term press.[669] Member States which regulate press on a national level, do so in different ways. The

[667] Zbigniew Radwański and Janusz Barta, *Prawo Autorskie* (Third Edition, Wydawnictwo C H Beck: Instytut Nauk Prawnych PAN 2013) 78. It is an essential handbook on copyright law in Poland.
[668] Charter of Fundamental Rights of the European Union OJ C 326 2012 art 11(2).
[669] Grundgesetz der Bundesrepublik Deutschland art. 5.

press can be the subject of a separate act, as in Poland,[670] Spain,[671] Cyprus[672] or France;[673] included in an general act on media law, as in Croatia;[674] addressed in an act on the freedom of press, as in Sweden;[675] or included in an act on the freedom of expression in the media in general, as in Finland.[676] Additionally, some of the Member States rely on self-regulatory schemes to set responsibilities and privileges of the press, as in Austria through the Austrian Press Council (Österreichische Presserat),[677] or through an independent regulation as in Ireland, where the Press Council of Ireland and the Office of the Press Ombudsman are responsible for setting standards for the press.[678]

Following the differences in the structural approaches to press regulation, there are also considerable disparities in explanations of the core terms and the regulations' addressees. Not all of the regulatory instruments include the term press, deciding to focus on 'press publication',[679] 'written matter'[680] or 'periodicals'[681] instead, or not explaining key terms at all.[682] The legislators which decided to define press, take into consideration such distinctive elements as format (written, printed, graphic),[683] mode of reproduction (mechanical technical process),[684] number of copies (large number, minimum of 200, 500),[685] intention to disseminate the copies,[686] regular intervals of publication or minimum frequency of publication (every three months, every six months),[687] as well as publication under a particular

[670] Ustawa z dnia 26 stycznia 1984 r. Prawo prasowe Dz.U.1984.5.24 (Polish Press Law).
[671] Ley 14/1966, de 18 de marzo, de Prensa e Imprenta BOE-A-1966-3501 (Spanish Press Law).
[672] Ὁ περί Τύπου Νόμος του 1989 145/1989 (Cypriot Press Law).
[673] Loi du 29 juillet 1881 sur la liberté de la presse (French Freedom of Press Law); and Loi n° 86-897 du 1 août 1986 portant réforme du régime juridique de la presse (French Press Law).
[674] Zakon o medijima no 1324 NN 59/2004 (Croatian Media Law).
[675] Konglige Majestäts Nådige Förordning, Angående Skrif- och Tryck-friheten 2 december 1766 (Swedish Freedom of Press Act).
[676] Laki sananvapauden käyttämisestä joukkoviestinnässä 460/2003 (Finnish Freedom of Expression Act).
[677] See 'Presserat.at - Aufgaben' ‹https://www.presserat.at/› accessed 23 January 2019.
[678] See 'Press Council of Ireland - Office of the Press Ombudsman' ‹http://www.presscouncil.ie/› accessed 23 January 2019.
[679] French Press Law art. 1.
[680] Finnish Freedom of Press Act art. 5.
[681] Zákon o právech a povinnostech při vydávání periodického tisku a o změně některých dalších zákonů (tiskový zákon) 17/2000 (Czech Press Law)§3(a).
[682] See 'Presserecht.de - Presse (LPG/LMG)' ‹http://88.198.44.111/index.php?option=com_content&task=category&sectionid=4&id=14&Itemid=27› accessed 23 January 2019 In Germany each land has a separate press law act. However, these acts do not define the term press, building solely on the constitutional understanding of press in reference to the freedom of press.
[683] Spanish Press Law art. 9.
[684] Cypriot Press Law art. 2; Legge n. 47/1948, 8 febbraio 1948 (Italian Press Law) art. 1.
[685] Cypriot Press Law art. 2; Croatian Media Law art. 2; Par presi un citiem masu informācijas līdzekļiem 20.12.1990, Latvijas Vēstnesis 32 (5091) (Latvian Press Act) art. 2.
[686] Spanish Press Law art. 9.
[687] Latvian Press Act art. 2.

title.[688] The regulations sometimes provide a non-exhaustive list of publications which are considered press. For example, in the Croatian Media Act, the press includes newspapers and periodicals.[689] On occasion, different press forms have their own definitions, as in the Polish Press Law, which addresses daily newspapers and magazines separately.[690] A criterion based on the type of content is not often used to define press. Some modest examples include Poland, which requires daily newspapers to have a general informatory purpose,[691] and Croatia, which uses a separate category of a general-information press, providing the public with information on current social, especially political, economic, cultural life and events.[692] The decision whether a particular publication belongs to the press on the basis of the content it includes, or the topics it covers, is an exception rather than a rule.

With press traditionally taking a paper form, and some of the national press and media regulations dating back to when internet did not yet exist, online publications cannot be assumed to qualify as press. Only on rare occasions, MS explicitly address online publishing. More often, it is a grey area, left to the discretion of courts and relevant regulatory bodies. Two of the cases where a national legislator decided to explicitly address online publications are worth addressing in the context of press publishers' right. Firstly, Italy decided to introduce a definition of an online newspaper (*quotidiano on line*) in 2016. Pursuant to this definition, an online newspaper cannot be a mere electronic transposition of a paper one, it needs to publish its journalistic content mainly online and primarily produce information, and it cannot exclusively be a news aggregator.[693] The last element creates a clear division between services using their own content, and those which aggregate content derived from other services. This division corresponds to the primary adversaries in the discussion on press publishers' right.

The second example is France, which defines an online press service (*service de presse en ligne*) as any public communication service which is professionally edited by a person having editorial control over its content, producing and making available to the public, containing original content of general interest, composed of information related to the news and subject to a journalistic treatment.[694] Not all of the online press services qualify as press. In case of press services of a political and general information nature, only services which regularly employ at

[688] Polish Press Law art. 7(2)(1).
[689] Croatian Media Law art. 2.
[690] Polish Press Law art. 7(2)(2) and 7(2)(3).
[691] ibid art. 7(2)(2).
[692] Croatian Media Law art. 2.
[693] Legge n. 62/2001, 7 marzo 2001 (New Italian Press Law) art. 1(3bis).
[694] French Press Law art. 1.

least one professional journalist are considered press. Similar to Italy, France requires the production of original content by online publications. What distinguishes France from Italy is the need for editorial control and the specification of the content included in a publication: news, or more precisely, political and general information. The idea of editorial intervention is not unique to France and is also present in the Croatian Electronic Media Act, which considers edited websites and portals as electronic publications.[695]

The last element of national regulations on press and media to consider is the possible registration requirement. In some of the jurisdictions, only publications which are duly registered by a relevant authority, can be considered as press. In some cases, this registration needs to take place before the first publication, in others, it can be completed later. A registration requirement is not a foreign concept even to online publications: in countries where online publications are qualified as press, and there is a general press registration requirement, this requirement also applies to the online publications.[696] Press registers are run by administrative[697] or civil courts;[698] the executive, for example the Ministry of Information and Tourism in Spain,[699] or Ministry of Culture in Czechia;[700] a professional association as in Croatia.[701] The scope of information which is required at the registration, varies, but it tends to include owner (publisher) data, editor-in-chief data (including address), a title, frequency of publication, and estimated circulation. The sanctions for lack of registration depend on the Member State and can be limited to the lack of application of a preferential liability regime, or a financial penalty. The registration requirement is not, however, universal. There are jurisdictions where it is not accepted to require any formal action before press publication. This is the case in France and Germany. Additionally, in some cases, there is no requirement of registration *per se*, but a set of formalities which the press needs to fulfil. In Sweden, for example, a periodical needs to apply for a certificate of no impediment to the publication to enjoy the special provisions on the liability of the Freedom of the Press Act.[702]

The Member States have adopted a variety of solutions where the regulation of press is concerned. Consequently, it is difficult to unambiguously define press and indicate a group of entities which enjoy the privileges and are bound by obligations for the press throughout the

[695] Zakon o elektroničkim medijima no 3740 NN 153/09 (Croatian Electronic Media Act) art. 2(1).
[696] ibid art. 80 .
[697] Italian Press Law art. 5.
[698] Polish Press Law art. 20(1).
[699] Spanish Press Law art. 51.
[700] Czech Press Law§7.
[701] Croatian Media Law art. 12 (Croatian Chamber of Commerce).
[702] Finnish Freedom of Press Act Chapter 5, art. 5.

territory of the EU. Additionally, Member States do not take a uniform approach towards online publications, with their qualification as press often depending on the courts, whose judgements might be inconsistent even within a single national jurisdiction.

B. Press publishers' right in the Member States

Prior to the CDSM Directive, only two Member States adopted press publishers' right into their national copyrights: Germany[703] and Spain.[704] Whereas the German legislator took on the task of defining a 'press product' which the right protects, the Spanish legislature limited itself to a brief indication on the use of what the exception covers, without resorting to such terms as press or press publication. None of the national provisions on press publishers' right refers to the national regulations on press and media law. This lack is understandable to the extent that in Germany, there is no statutory definition of press, and in the case of Spain, such a definition does not apply to online publications, which are the focus of the press publishers' right.

The Spanish provision on press publishers' right takes the form of a copyright exception authorising the use of non-significant fragments of contents. It covers the making available of 'contents, available in periodical publications or in periodically updated websites and which have an informative purpose, of creation of public opinion or of entertainment'.[705] Thus, there are two factors which need to be taken into consideration when the subject-matter of the press publishers' right is considered: one, the source of content (periodical, or periodically updated website); two, the purpose which the content serves (information, creation of public opinion, or entertainment). Considering the lack of any indication as to what a 'periodical update' is, it seems that any regularly updated website could qualify. Examples could include a culinary blog, whose author posts a new recipe every week, with the purpose of informing the public on how to prepare a particular dish, or a Facebook page, which regularly publishes jokes, with a clear entertainment objective. This broad coverage differs from the Spanish government's intentions of protecting the content of publishing companies and news authors.[706] Additionally, the Spanish provision applies not only to literary works, but also to content of

[703] Achtes Gesetz zur Änderung des Urheberrechtsgesetzes 14.05.2013 BGBl I 2013 1161.
[704] Ley 21/2014, de 4 de noviembre, por la que se modifica el texto refundido de la Ley de Propiedad Intelectual, aprobado por Real Decreto Legislativo 1/1996, de 12 de abril, y la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil 268 Boletin Oficial del Estado, 5 November 2014.
[705] The wording follows the translation by Raquel Xalabarder. See presentation during conference 'Copyright, related rights and the news in the EU: Assessing potential new laws' CIPIL University of Cambridge, hosted at IViR University of Amsterdam, 23 April 2016.
[706] 'La Moncloa. 14/02/2014. Aprobada la reforma parcial de la Ley de Propiedad Intelectual [Consejo de Ministros]' ‹http://www.lamoncloa.gob.es/consejodeministros/paginas/enlaces/140214-enlaceleypropiedadintelectual.aspx/› accessed 25 January 2019.

any type, including audiovisual works, but excluding photographs.[707] Considering the broad range of the relevant content, it would be safe to say that all regularly updated content is covered by the Spanish press publishers' provision, not only what would be considered a press publication in everyday language.

The German press publishers' right aims at the protection of, a 'news publication'[708] or a 'press product', depending on the provision's translation.[709] The definition provided by the German legislator shares a number of similarities with the definition included in the CDSM Directive. To understand the definition's complexity, it is useful to cite it in full:

> A press product shall be the editorial and technical preparation of journalistic contributions in the context of a collection published periodically on any media under one title, which, following an assessment of the overall circumstances, can be regarded as largely typical for the publishing house and the overwhelming majority of which does not serve self-advertising purposes. Journalistic contributions are, more specifically, articles and illustrations which serve to disseminate information, form opinions or entertain.[710]

The quoted definition is complex and includes six cumulative clauses, most of which pose interpretative challenges. At its core, a press product is a collection of journalistic contributions. These contributions do not need to be works protected by copyright, nor do they need to be only literary. Unlike the Spanish provision, the German press product may also comprise illustrations, including photographs. The overall purpose of journalistic contributions of the press product is to inform, shape opinions or entertain. It is easy to imagine that all the content on the internet is informative or entertaining in one way or the other, including memes, pornographic press or gossip columns. The fact that the collection needs to be generally typical for a particular publishing house seems to be an attempt to limit the scope of press product to the professional publications alone, and eliminate more unofficial publications of individual authors, such as bloggers. However, this limitation might be unjustified as independent professional journalists have their personal webpages, where they

[707] Raquel Xalabarder, 'Press publications. The German and Spanish provisions.' presentation delivered during 'European Copyright – Quo Vadis?' conference, European University Institute, 28-29 April 2017.
[708] See Igor Barabash, 'Ancillary Copyright for Publishers: The End of Search Engines and News Aggregators in Germany?' 35 European Intellectual Property Review 243.
[709] See Vesterdorf (n 358).
[710] The wording follows the unofficial translation by the German Federal Ministry of Justice and Consumer Protection. See 'Act on Copyright and Related Rights (Urheberrechtsgesetz, UrhG)' ‹https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html› accessed 24 January 2019.

publish quality pieces of journalism. Even though it is vague, the German definition served as a template for the definition of a press publication in the CDSM Directive.

C. *The CDSM Directive and press publications*

Before the Proposal, there had been no attempt to define press, news or similar terms at the EU level. As explained in the previous paragraphs, press publications, journals or newspapers were mentioned in the context of copyright, but never thoroughly considered. Even the EC's Public Consultation on the role of publishers in the copyright value chain, did not address the matter head on. The first definition of a press publication as a subject-matter of protection, was included in the Proposal. Once proposed, the definition was only subject to small modifications. No revolutionary changes to its construction, phrasing or scope were made during the legislative process, by neither the Council nor the European Parliament.

By including a definition of a press publication in the CDSM Directive, the EC took a similar approach to the one in the rights of film producers. Absent international agreements concerning film producers' rights which could be referenced, the EU legislator proposed a definition of film solely for the purposes of a new related right. The press publishers' right as a new legal construct has not yet been addressed at the international level. Consequently, a definition for press publication was needed. By making press publication key for determining the scope of the new right, the EU legislator shifted the right's focus away from the person of right holder. This differs from classic categories of related rights, for which the subject-matter is secondary to the right holder.[711] The person of the press publisher plays a role in defining the scope of the new right. However, this role is derivative from the concept of press publication. The idea of a 'publisher of a press publication' as a separate concept surfaced only two years after the Proposal's publication. It simply defined publisher as a service provider, such as a news publisher or news agency, when they publish press publications as defined by the CDSM Directive.[712] The only function of this addition, which is currently included in the recitals of the CDSM Directive, was to exclude individual persons from being beneficiaries of the new right, possibly limiting the application of the new right to those services which provide press publications in a professional way.

[711] See sec II.B of this chapter.
[712] Council, 'Working Paper Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market - Articles 11 and 13' (2018) WK 13586/2019 INIT. Additionally, recital 32 of the Trilogue compromise.

Since the Proposal, the definition of press publication is included in art. 2(4) of the CDSM Directive. Pursuant to the Proposal a press publication was:

> [A] fixation of a collection of literary works of a journalistic nature, which may also comprise other works or subject-matter and constitutes an individual item within a periodical or regularly-updated publication under a single title, such as a newspaper or a general or special interest magazine, having the purpose of providing information related to news or other topics and published in any media under the initiative, editorial responsibility and control of a service provider.[713]

The EU legislative process brought only small changes to the wording of the press publication definition. The changes considered during the process can be divided into three categories. The first category concerns journalistic works included in the press publication, and either required them to constitute the majority of content,[714] or to allow them to be produced by one or more authors.[715] Following these suggestions, the decision was made during the trilogue that journalistic works should be a main component of a press publication. The second category of changes attempted to limit press publications to those collections which were professional in nature, either by requiring the fixation to be professional, [716] or to be done by a publisher or news agency.[717] The third category concerns the exclusion of periodicals published for scientific and academic purposes, such as scientific journals, from the scope of press publication.[718] This exclusion, the only explicit one, was originally included in the recitals to the Proposal,[719] and made its way to art. 4(2) of the CDSM Directive in the final text. One of the more important changes made to the definition of press publication, was the removal of the fixation requirement. Even though it was suggested by the Council, it did not generate much discussion, and was accepted during the last trilogue. Following the changes

[713] Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (n 375) art. 2(4).
[714] Council, 'Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market - Agreed Negotiating Mandate' (n 138).
[715] European Parliament, 'Opinion of the Committee on Culture and Education for the Committee on Legal Affairs on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market' (n 133).
[716] ibid.
[717] European Parliament, 'Copyright in the Digital Single Market Amendments Adopted by the European Parliament on 12 September 2018 on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market' (n 137).
[718] ibid.
[719] Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (n 375).

made during the legislative process, the CDSM Directive defines a press publication in the following manner:

> [A] collection composed mainly of literary works of a journalistic nature, but which can also include other works or subject-matter, and which:
>
> a) constitutes an individual item within a periodical or regularly-updated publication under a single title, such as a newspaper or a general or special interest magazine;
>
> b) has the purpose of providing the general public information related to news or other topics; and
>
> c) is published in any media under the initiative, editorial responsibility and control of a service provider.[720]

Essentially, a press publication is a collection with an informatory purpose, published periodically under a single title and under the initiative, editorial control and responsibility of a service provider. The definition is composed of a number of cumulative clauses and requires more than one read to decipher its meaning. In her study, van Eechoud calls the definition elaborate, and distinguishes nine requirements which need to be met.[721] Bently is more moderate, singling out only five.[722] The multitude of boxes which the content needs to check in order to qualify as a press publication, has tempted Höppner to call the definition of press publication 'rather narrow',[723] limiting the special protection of the press publishers' right to the publications which truly merit it.[724] It seems ill-founded to argue that the scope of the definition is limited on the basis of the number of requirements alone, particularly, if such statement is not backed by a thorough analysis of the requirements' content. And it is exactly the requirements' content which causes difficulties. To think that, because the definition refers to what we all intuitively know, makes the terminology self-explanatory,[725] is simply wrong. As the previous sections have shown, there is no such thing as a common understanding of the press, especially in the digital environment.

There are two reasons why the scope of the press publication definition is both broad and not entirely certain. Firstly, the language used in the definition is rather vague, inviting subjective

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[720] CDSM Directive art. 2(4).
[721] van Eechoud (n 353) 33.
[722] CIPIL to UK Intellectual Property Office (n 568) Appendix: The Definition of Press Publication .
[723] Thomas Höppner, Raquel Xalabarder and Martin Kretschmer, 'CREATe Public Lectures on the Proposed EU Right for Press Publishers' (2017) 39 European Intellectual Property Review 607, 608.
[724] Thomas Höppner, 'The Proposed Directive on Copyright in the Digital Single Market (Articles 11, 14 and 16) Strengthening the Press Through Copyright' (European Parliament 2017) 5.
[725] ibid.

judgements to its interpretation. For example, what information related to news is exactly, is unclear. Potentially, this phrase can refer to any piece of information available online, as news means something different to each one of us. For a law researcher, the EC proposing a new copyright directive would be news. Yet, a professional bee-keeper would most likely be completely ambivalent towards what the European Commission does on copyright and be more interested in the effects of pesticides on bees spatial-orientation.[726] Secondly, the definition's clauses tend to be open-ended or based on the non-exhaustive list of examples. The definition requires that the press publication includes mainly literary works of a journalistic nature, yet there is no obstacle to include other types of content or subject-matter which is not protected by copyright. The press publication includes, among others, newspapers or magazines, but can cover also other forms, literary or otherwise. Accordingly, some clauses provide an indication, but not a binding rule, as to what constitutes a press publication. Flexibility in defining terms is desired, especially in the digital age, but too much flexibility can make a definition redundant.

Three aspects of the press publication definition are key to understanding the relationship between the press publishers' right and the EU copyright framework. The first is the lack of an explicit threshold of protection, based on the criterion of originality or the other, and the removal of the fixation requirement. Each could potentially make a distinction between a press publication as the subject-matter of a related right, and a news item as a copyright-protected work. The second element is the journalistic character of works which the right aims to protect. What does it mean that the content is journalistic, and does the EU copyright framework allow for varying levels of protection for different categories of works? The third element relates to the initiative, editorial control and responsibility of a service provider. This aspect is connected to one of the main arguments behind the introduction of the press publishers' right: the protection of quality journalism. It is, however, questionable whether copyright can (and should) be used as a tool to promote works of a certain quality, and if so, how quality content would be identified. All three aspects are discussed in more detail in sections IV and V of this chapter.

Apart from these three elements, there is a number of other aspects of the press publication definition requiring consideration. Firstly, a press publication is a collection. The notion of newspapers and periodicals as collections is not new, with some of the Member States

[726] 'Are Honeybees Losing Their Way?' (*National Geographic News*, 14 February 2013) ‹https://news.nationalgeographic.com/news/2013/13/130213-honeybee-pesticide-insect-behavior-science/› accessed 28 January 2019.

explicitly listing newspapers and periodicals as examples of collective works.[727] In this case, there needs to be originality in the selection and arrangement of the collection's elements for it to attract copyright. This is not, however, a requirement for press publications. What can be problematic, is how many elements the collection has to include,[728] and what does it mean that a collection should mainly include journalistic works. In case half of the collection are journalistic works, does that mean that such a collection is mainly composed of journalistic works, or does the share of such works in the whole collection need to be greater?

A press publication needs to be included in the periodical or periodically updated publication under a single title. The notion of periodical updates does not require a website to be updated daily or in equal intervals. Therefore, individual articles can safely be excluded from the scope of the right, but personal webpages not necessarily.[729] The case of books is similar. In general, books and other single titles are excluded from the rights' scope. However, whether the same applies to editions of regularly updated textbooks, is less clear.[730] The CDSM Directive itself provides the following examples of periodicals and websites: (daily) newspapers, weekly or monthly magazines of general or special interest, and news websites.[731] All need to be published under a single title, which is a requirement familiar to the press and media laws. In his comment, Höppner read the requirement of a single title as a tool for the protection of established brands of legacy news organisations, and the values, trust and reliability they stand for.[732] This reading seems to be too far-reaching. Requirement of a single title is more likely to aid identification of a particular publication than to limit protection to the legacy press publications.

As was briefly mentioned before, a press publication is required to have the purpose of providing information related to news and other topics. The inclusion of 'other topics' in the clause means that there is practically no restriction of the type of issues which a protected publication can cover, and the clause fails to substantially contribute to the understanding of a press publication.[733] One of the modifications of the press publication definition concerning this clause, was the introduction of a requirement that the information should be provided to

[727] Italian Copyright Act art. 3; Polish Copyright Act art. 14.
[728] van Eechoud (n 353) 33.
[729] See to the contrary Höppner, 'The Proposed Directive on Copyright in the Digital Single Market (Articles 11, 14 and 16) Strengthening the Press Through Copyright' (n 724) 5.
[730] CIPIL to UK Intellectual Property Office (n 568) 11.
[731] CDSM Directive art. 2(4) and para 56.
[732] Höppner, 'The Proposed Directive on Copyright in the Digital Single Market (Articles 11, 14 and 16) Strengthening the Press Through Copyright' (n 724) 5.
[733] CIPIL to UK Intellectual Property Office (n 568) 12.

the general public. This would exclude internal communications within companies, and publications addressed to close friend or colleague circles. However, every publication made available without any restrictions on the internet is addressed to the general public. Adding a requirement of the general public has limited significance. The thematic limitation of press publications comes, however, from the exclusion of periodicals published for scientific or academic purposes, such as scientific journals, from the scope of the new right.

IV. Blending the subject-matter of copyright and related rights

Under the CDSM Directive, the press publishers' right is a related right. Thus, the object of the new right, a press publication, is different from the object of copyright, a creative work. This does not mean that the objects of press publishers' right and copyright are disconnected. Copyrightable works, such as news items, photographs or videos, are the building blocks of press publications. Other related rights are similar, in the sense that their object can include copyrighted works. As a case in point, a phonogram usually includes a copyright-protected musical composition and lyrics. Distinguishing between the building blocks of a press publication, and the press publication itself, is generally more complex than making a similar distinction with regard to other related rights.

The following section investigates the relationship between a press publication and the copyright-protected works incorporated in that press publication. It questions whether a press publication, absent a threshold of protection, offers a valuable contribution, deserving of legal protection, above the sum of the originality of its building blocks. The section refers not only to the originality threshold relevant for copyright law, but also the requirement of substantial investment used in the context of the sui generis database right. Additionally, the section asks whether the requirement of fixation, originally included in the press publication definition, could be useful for distinguishing between the press publication and the individual works it collects.

A. Fixation: a boundary between copyright and related rights

The fixation requirement is used in copyright as well as related rights context. Fixation is closely linked to expression: both concern the transition of an abstract idea or fact into a specific, protectable form. Whereas the form of expression is not important, fixation requires that a work is recorded in such a way that others can perceive and use it. Users need to be able

to copy, publish or otherwise communicate the work.[734] Fixation is thus a qualified form of expression. Generally, fixation requires a work to be embodied in a tangible medium. Whereas Berne speaks of 'fixation in some material form',[735] the US Copyright Act explicitly demands works to be 'fixed in any tangible medium of expression'.[736] To fulfil this requirement, literary works were traditionally written down or printed on paper, and presented as books, newspapers, magazines, pamphlets, or similar.

Fixation is not an obligatory requirement for copyright works, at neither the international nor the European Union level. The current text of the Berne Convention leaves it to the contracting states to decide whether to require a work to be fixed.[737] This solution has been a compromise, reconciling not only varying attitudes of contracting states, but also the diverging treatment of different categories of works. At the outset, the fixation requirement was solely linked to such works as performances, dumb shows and choreographic works, as fixation was necessary to prove their existence and to identify them.[738] Therefore, art. 2(2) of Berne allows countries to decide individually on either a general requirement of fixation, or one limited to particular categories of works.[739] The EU follows Berne's approach, leaving it to MS to decide whether to include fixation in their copyright laws. The EU copyright framework is thus indifferent towards the fixation requirement, with none of the relevant directives referring to the fixation of copyrightable works.[740] Different is the case with related rights.

Whereas there is no general requirement of fixation of related rights' subject-matter, fixation remains an important concept in the context of related rights, at an international and EU level alike. The Rome Convention, the WPPT and the Rental and Lending Directive repeatedly refer to fixation, which plays three crucial roles in the context of related rights. First of all, fixation is a constitutive requirement for a right to subsist. Should a subject matter not be fixed, a right would not arise. This is directly visible in the case of rights of phonogram producers, as fixation has been explicitly included in the definition of a phonogram in the Rome Convention and the WPPT: 'a phonogram is a fixation of sounds'.[741] In case of other related rights

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[734] Antoine Latreille, 'From Idea to Fixation: A View of Protected Works', *The Future of EU Copyright* (First Edition, Edward Elgar 2009) 145.
[735] Berne Convention art. 2(2).
[736] 17 U.S.C. §102(a).
[737] Berne Convention art. 2(2).
[738] *Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms* (World Intellectual Property Organization 2003) 28.
[739] 'Records of the Intellectual Property Conference of Stockholm: June 11 to July 14, 1967', , *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, vol 2 (Second Edition, Oxford University Press 2006) 296.
[740] Latreille (n 734) 140.
[741] Rome Convention art. 3(b); WPPT art. 2(b).

recognised in the EU, the requirement of fixation can be inferred from the subject-matter of rights granted to related right holders: the rental and lending right and the distribution right under the Rental and Lending Directive, as well as the rights of reproduction and communication to the public in the InfoSoc Directive. These rights subsist in the fixation of performances,[742] first fixations of films,[743] and fixations of broadcasts.[744] Therefore, rights of a related right holder are only granted on the fixations of respective subject-matters.

Secondly, fixation itself is the object of an exclusive right of a related right holder: the right to fixation. Only performers and broadcasting organisations hold a fixation right pursuant to the Rental and Lending Directive. Reinbothe and von Lewinski refer to the right to fixation as a 'precursor of all other acts of exploitation',[745] because a first fixation created thanks to this right is the object of all subsequent acts of exploitation of a related right subject-matter. Thirdly, fixation is linked to the term of protection of related rights. In case of films and phonograms, the beginning of the term of protection is marked by the first fixation.[746] In case of performers' rights, the term of protection begins with a performance itself. However, in case a performance was fixed, and this fixation has been lawfully published or otherwise communicated, the term of protection runs from the day of publication or communication of a fixation, whichever happened earlier.[747]

Fixation marks the moment when contributions are brought together and transformed into a subject-matter of a related right. The right arises solely on the particular fixation, in the specific way that the right holder brought the contributions together. A related right does not apply to contributions themselves, and the same contributions can be fixed in a different manner by others. For example, a phonogram is a fixation of a particular performance by an artist, but there is no obstacle to someone else performing the same musical composition which may then be fixed by a different phonogram producer. The final shape of a fixation depends on a variety of producer's decisions, supported by her financial and organisational efforts.

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[742] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property art. 3(1)(b) and art. 9(1)(a).
[743] ibid art. 3(1)(d) and art. 9(1)(c).
[744] ibid art. 9(1)(d).
[745] Jörg Reinbothe and Silke von Lewinski, *The E.C. Directive on Rental and Lending Rights and on Piracy* (Sweet & Maxwell 1993) 86.
[746] Term Directive art. 3(2) and (3).
[747] ibid art. 3(1).

The original definition of press publications in the Proposal included the requirement of fixation, which stated that a press publication is 'a fixation of collection'.[748] This requirement was quickly rejected by the Council, which already removed it in the first compromise proposal in 2017.[749] The Council did not reintroduce the fixation requirement later in the negotiation process. As the definition of press publication in the final version of CDSM Directive follows the Council's position, it does not include fixation requirement. No substantial discussion accompanied this change in the definition's wording, and the fixation requirement was not questioned during the works in the EP.[750] The fixation requirement is, however, included in the German definition of a press product, which grants protection to the 'editorial and technical fixation of journalistic contributions'.[751]

While the interpretation of the fixation requirement is not a contentious issue in the context of other related rights, its meaning is debatable in the context of press publications. According to both Peukert and Moscon, a fixation could mean a layout, a particular arrangement of literary works and other subject matter on a press publishers' website.[752] Interpreted in this way, a press publishers' right resembles a right on typographical arrangement in published editions, and it would only be triggered when the original format of a press publication is copied. A reproduction of the plain text of a press publication would not suffice. The interpretation of fixation as a layout would allow for a clear distinction between copyrightable news items and a press publication as a subject-matter of a related right. It would, however, be of little significance in the online news environment, where the reproduction of a format is rather uncommon.

The second interpretation of the fixation requirement proposed by Moscon reads the fixation as a 'transfer of the work onto carriers'.[753] However, she points out that there is no difference between expression and fixation of works in the digital environment. It essentially means that

[748] Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (n 375) art. 2(4).
[749] Council, 'Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market - Presidency Compromise Proposal Regarding Articles 1, 2 and 10 to 16' (2017) 11783/17 16.
[750] None of the Committee reports suggested the removal of the fixation requirement from the definition, with the press publication definition included in the EP position of 12 September 2008 only mildly differing from the original EC definition.
[751] German Copyright Act sec. 87f(2).
[752] Alexander Peukert, 'An EU Related Right for Press Publishers Concerning Digital Uses. A Legal Analysis' (Goethe Universitat) Research Paper 22/2016 para 108; Valentina Moscon, 'Neighbouring Rights: In Search of a Dogmatic Foundation. The Press Publishers' Case', *Online Distribution of Content in the EU* (Edward Elgar Publishing 2019) 48.
[753] Moscon (n 752) 48.

in her opinion the writing down of a news item by an author amounts to fixation.[754] Distinguishing a separate requirement of fixation of a press publication would thus be redundant. The problem with the interpretation of the fixation requirement as a 'transfer of works onto carrier' is not necessarily the lack of distinction between expression and fixation of literary works in the digital environment. It is true that for a fixation requirement to be significant, a distinction should be possible between fixations of contributions and the fixation of a press publication itself. But the problem with the application of the fixation requirement is of a temporal nature, and concerns the ability to single out a moment in time when the collection of contributions is assembled and fixed. In case of paper publications, that moment is easy to identify, with newspapers' issues being published every day. The case of the online news environment is different, since press publications are constantly updated, and no separate issues are distinguished. Van Eechoud makes a similar observation, when she considers fixation as a possible substitute for publication as a marker for the beginning of a term of protection.[755] She notes that no single moment of publication exists online, particularly for personalised publications, which display different content to different people.

The lack of a single publication date has not been considered by the EU legislator. Pursuant to the CDSM Directive, the press publishers' right expires two years after the publication of a press publication.[756] Except for the shortening of the right's duration, this provision has remained unchanged during the legislative process. This means that it was introduced when fixation was still part of the press publication's definition. As there is indeed no single date of publication of an issue of a press publication online, the duration of the term will likely be calculated based on the publication date of separate contributions. The EU legislators' indifference towards marking the beginning of a protection term for a press publication as a whole, calls into question whether it is indeed a collection of contributions which is the subject-matter of protection, or are they rather individual contributions.

The fixation requirement for the press publication was used by the supporters of a press publishers' right to emphasise a difference between the subject-matter of the new right and copyrightable works. Höppner referred to fixation as a factor which excludes the conflict between a press publishers' right and copyright, as well as a justification for the introduction of the press publishers' right in the first place. In his opinion, the entrepreneurial effort of press

[754] Hilty and Moscon (n 105) 81.
[755] van Eechoud (n 353) 33.
[756] CDSM Directive art. 15(4).

publishers in making the fixation of press publication merits the special protection.[757] However, Höppner fails to explain what he considers to be a fixation. The impression that he leaves is that it is not fixation, but the collection itself which engages the entrepreneurial effort of the press publisher, and fixation is used solely as a tool to frame the press publishers' right argument, so that it better corresponds to other related rights.

The inclusion of a requirement of fixation in the definition of press publication would be consistent with the regulations of other related rights. Fixation has been traditionally used as a tool to distinguish an end product, the subject-matter of a related right, from copyright-protected contributions which were incorporated therein. This function does not apply to press publications in the online news environment. Firstly, since press publications are mainly composed of literary works, there is no distinction between their expression and fixation. A work which is expressed by its author, is automatically fixed. Thus, a press publication is actually a collection of fixations, whether the requirement is included in the definition or not. Secondly, as the interpretation of fixation as the layout of a press publication is redundant in the online news environment, what remains is that the press publishers' right is attached to the content of a press publication itself. Consequently, it is not important whether the definition of press publication mentions 'fixation of collection' or 'collection' itself, as the subject-matter of the press publishers' right would also cover the content of the collection's elements in both cases.

B. Removing a threshold of protection

From the outset, advocates for the press publishers' right saw it as an opportunity to tackle systematic uses of, not necessarily copyrightable, content. When responding to the Public Consultation, some publishers argued that copyright did not provide sufficient protection exactly because it did not cover short fragments of text and simple press information which failed to meet the standard of originality.[758] In its response to the Consultation, the REPROPOL Association, a major Polish CMO representing press publishers, admitted that aggregators and platforms do not want to license the use of mere items of information, exactly because they view them as uncopyrightable.[759] The press publishers' right was to amend this situation by awarding protection even to simple unoriginal texts, whose aggregate systematic

[757] Thomas Höppner, 'EU Copyright Reform: The Case for Publisher's Right' (2018) 1 Intellectual Property Quarterly 1, 10.
[758] IWP response to the Public Consultation q 2, 9.
[759] See Polish Copyright Act. Pursuant to art. 4(4), simple items of information are not subject to copyright.

use could be harmful to publishers.[760] Consequently, the publishers' right would protect investment, irrespective of whether its product was copyrightable itself.[761]

Neither the Proposal, nor the final text of the CDSM Directive require a press publication to be original. The requirement of originality has been, however, considered by the Council, but only in the context of parts of press publications. Pursuant to the Council's final compromise, MS could exempt use of short extracts of press publications, which are not author's own intellectual creation, from the rights' scope when implementing a press publishers' right.[762] The suggestion of the introduction of an originality requirement for press publication parts gave rise to a fierce discussion between representatives of different publishers' associations. In an opinion published by Euractiv, Christian Van Thillo, an EPC chairman, called the originality requirement a caveat emptying press publishers' right of any value, and a loophole promoting big tech.[763] He strongly advocated for the press publishers' right to cover (commercial) reuse of all content. Replying to Van Thillo's op-ed, Carlos Astiz, a chairman of IMP, welcomed the introduction of the originality requirement, noting that a right covering unoriginal content as well would have a chilling effect on freedom of information, as information accompanying a link needs to be sufficient for a reader to understand its context.[764] Conversely, Thillo pointed out that local news, whose interests Astiz represents, is heavily fact-based, and the originality requirement would make the press publishers' right unenforceable.[765]

The call for the protection of both original and unoriginal press publications by the press publishers' right pleads for nothing else than the circumvention of a basic principle of copyright, using copyright-like measures. It flies directly in the face of the reasons for choosing an exclusion from the scope of Berne instead of a copyright exception to apply to news of the day and mere items of information. The Berne-contracting parties wanted to avoid recognizing copyright protection of purely commercial interests. The argument of protection of investments in collecting and distributing news was not considered sufficient to justify the

[760] REPROPOL (n 467) q 2, 9.
[761] Association of Finnish Newspapers (n 440) q 2, 9.
[762] Council, 'Note from Presidency to Permanent Representatives Committee on Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market - Mandate for Negotiations with the European Parliament' (the Council of the European Union 2018) 8145/18 art. 11(1).
[763] Christian Van Thillo, 'Loopholes the Size of a Double-Decker Bus Would Make a Mockery of the Copyright Reform' (*euractiv.com*, 9 January 2019) ‹C› accessed 16 January 2019.
[764] Carlos Astiz, 'Protecting Journalism Is Not Synonymous with Protecting the Interests of Big Press Publishers' (*euractiv.com*, 18 January 2019) ‹https://www.euractiv.com/section/media4eu/opinion/protecting-journalism-is-not-synonymous-with-protecting-the-interests-of-big-press-publishers/› accessed 15 February 2019.
[765] Comment by Christian Van Thillo in the comment section under ibid.

protection, because it fell outside the province of copyright.[766] It is true that the originality requirement also does not apply to the subject-matter of other related rights. However, there is a substantial difference between press publications and a phonogram or a film, the subject-matter of related rights of other content producers, to which press publishers tend to compare themselves.

When contributions to a phonogram or a film are brought together and fixed, a new subject is created, with contributions acquiring a new meaning, changing their substance. In reverse, when contributions to a press publication are brought together, they stay the same, as a press publication is simply a collection of these contributions. If someone wants to use a press publication, for example copy a part of it, she can limit herself to a single contribution because a contribution to a press publication, a news item, a photograph or other type of content, is synonymous with a part of a press publication. This is not the case for phonograms or films. Should one copy lyrics to a song the performance of which is registered on a phonogram, one would not take a part of the phonogram. The use of a phonogram needs to involve all its elements, all the contributions to this phonogram. A short fragment of a phonogram inevitably includes lyrics, performance, music composition, and other elements. Whereas the use of a single contribution to a film or phonogram does not imply use of a film or phonogram itself, use of an individual contribution to a press publication is likely to suggest that the press publication is used. The EU legislator herself has trouble with distinguishing between press publications and contributions to these publications, as the considerations on the fixation requirement have shown. The beginning of a term of protection of a press publication is likely to be determined based on the publication of separate contributions rather than a press publication in its entirety.

The originality requirement also does not apply to databases protected by the sui generis database right. The sui generis right is neither a copyright nor a related right, at least not in a strict sense, but is rather a unique solution for the protection of databases.[767] The purpose of the sui generis right is to protect databases which are not original, but whose creation involves considerable investment. Original databases attract copyright protection.[768] Therefore, the Database Directive, which introduced the sui generis right into the EU legal order, established

[766] Records of the Diplomatic Conference: Convened in Berlin, October 14 to November 14, 1908 in Ricketson and Ginsburg (n 9) 201 vol 2.
[767] See Bernt Hugenholtz, 'Something Completely Different: Europe's Sui Generis Database Right', *The Internet and the Emerging Importance of New Forms of Intellectual Property*, vol 37 (I, Wolters Kluwer Law& Business 2016) 218.
[768] Database Directive art. 3(1).

a two-tier protection scheme for databases: copyright protection for original databases, and the sui generis right protection for unoriginal ones. The harmonisation of the database protection was motivated by not only the diverging legal landscapes of Member States, but also a desire to encourage investment in the European database sector through the provision of a uniform protection scheme.[769] Therefore, the sui generis right and the press publishers' right share an economic reasoning for their introduction, and the lack of the originality requirement. Additionally, press publications could be considered as databases.

The Database Directive defines a database as a collection of independent works, data or other material arranged in a systematic or methodological way, and individually accessible by electronic or other means.[770] Literary, artistic, musical, and other collections, composed of texts, sounds, images, numbers, facts, and data, can be databases.[771] What is important, is that the material included in a database is independent, in the sense that it can be separated from the database without losing its informative value.[772] This means that elements of a database need to be conceptually independent, and have the same meaning when included in, or excluded from a database.[773] The directive's definition of a database is quite broad. Examples listed by Hugenholtz of databases enjoying protection include telephone directories, collections of legal materials, biographies, encyclopaedias, address lists, tourism websites, as well as collections of hyperlinks.[774] Additionally, as van Eechoud notes, 'it stands to reason' that print and electronic newspapers, periodicals and news websites can be protected databases.[775] Like a database, a press publication is a collection composed of works of a journalistic nature, other works and subject-matter, which are independent material. When included in a press publication, they have the same informative meaning as when they are accessed independently. Whether a press publication is a database protected by the sui generis right, depends on the substantiality of the investment made in its creation.[776]

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[769] ibid recitals 2, 11-12.
[770] ibid art. 1(2).
[771] ibid recital 17.
[772] *Fixtures Marketing Ltd v Organismos prognostikon agonon podosfairou AE (OPAP)* [2004] Court of Justice of the European Union C-422/02, EU:C:2004:697 [29].
[773] Tanya Alpin, 'The EU Database Directive: Taking Stock', *New Directions in Copyright Law*, vol 2 (Edward Elgar 2006) 101.
[774] Hugenholtz, 'Something Completely Different: Europe's Sui Generis Database Right' (n 767) 212–213.
[775] van Eechoud (n 353) 31.
[776] Senftleben argues that the copyright protection of original databases and the sui generis database right provide press publishers with a 'robust legal position and considerable legal security'. Thus publishers are protected online, and can develop new financing models and distribution platforms. See Marin Senftleben and others, 'New Right or New Business Models? An Inquiry into the Future of Publishing in the Digital Era' (2017) 47 International Review of Intellectual Property and Competition Law 538, 550.

While copyright protection is awarded to databases based on the originality requirement, the sui generis right is concerned with the investments made in the database's creation by its maker. Pursuant to the Database Directive, the application of the sui generis right requires that there has been a substantial investment in either the obtaining, verification or presentation of the contents of a database.[777] The investment can be substantial either qualitatively or quantitatively, and involve human, technical and financial resources.[778] The investment in the creation of the material included in a database is, however, irrelevant because the purpose of the sui generis right is to promote the creation of databases of existing information, and not the creation of material itself.[779] If the content of the database are copyright-protected works, resources involved in their creation cannot be taken into consideration where the substantial investment threshold is concerned. This limitation has been one of the reasons why supporters of the new right have seen the sui generis protection as insufficient to safeguard press publishers' interests. Considering that most of press publishers' output concerns the creation of news items and other content included in the press publication.

The subject matter and reasons behind the introduction of the press publishers' right and the sui generis database right are similar. A press publication, a collection of elements whose meaning is not changed simply because they are included in the publication, is conceptually more like a database than the subject-matter of other related rights. Like the CDSM Directive, the Database Directive recognises, and aims to encourage, the financial and organisational contributions of database makers and press publishers respectively, by guaranteeing the recoupment of their investments.[780] Both the sui generis and the press publishers' right are to safeguard against the misappropriation of the fruits of their investment by third parties reaping what they did not sow.[781] The rights, however, differ where the threshold of protection is concerned, as the press publishers' right does not follow the requirement of substantial investment applicable to the sui generis database right. This means that even a minimal contribution to the creation of a press publication would merit the new right's protection, regardless of its actual quantitative or qualitative significance for the production of a press publication. Therefore, the new right applies to any content defined as a press publication. The lack of a substantial investment threshold in the German press publishers' right caused

[777] Database Directive art, 7(1).
[778] ibid recital 7.
[779] *The British Horseracing Board Ltd and Others v William Hill Organization Ltd* [2004] Court of Justice of the European Union C-203/02, EU:C:2004:695 [31].
[780] Database Directive para 7; CDSM Directive paras 54–55.
[781] Database Directive para 39; CDSM Directive para 54.

Westkamp to declare the right a possible violation of European law, as it expands the protection of investment in information beyond what is offered by the Database Directive.[782]

Whereas the interpretation of what constitutes a substantial investment still causes difficulties,[783] the use of a protection threshold based on the level of investment makes it possible to exclude databases whose creation required minimum input from the scope of the sui generis right's protection. The database right does not concern itself with the investment made in the creation of database contents. However, there was no obstacle to take this investment into account in case of the press publishers' right. According to Musso, lowering the protection requirements, so that they are easier to meet, is contrary to the incentive paradigm, the main justification for the IP protection in the EU.[784] He points out that 'rewards should be due only when substantial and worthwhile works are made'.[785] Lowering or removing the threshold of protection could incentivise the production of content which does not require substantial investment for its production. A lack of a threshold requirement for a press publication appears contrary to the press publishers' right objectives of supporting quality journalism and citizens' access to information. A right which is given to everyone, no matter the level of investment put into the creation of press publications, is not the right tool to encourage higher level of investment, but possibly a bigger volume of production. And the volume of information available in the online news environment is not a problem.

V. Journalistic works and quality journalism: undermining the coherence of the EU copyright framework

An overarching goal of the press publishers' right was the desire to support quality journalism. An essential step in achieving this goal is the strengthening of the position of press publishers, who inform the public, and keep it safe on the forefront of the information war.[786] The need to guarantee press publishers' ability to support quality journalism was mentioned very early in the discussion on the new right, when the introduction of the press publishers' right was first considered in Germany in 2009.[787] The quality journalism argument was picked up by supporters of the introduction of the press publishers' right at the EU level, especially by the

[782] Guido Westkamp, 'The New German Publisher's Right - A Violation of European Law: A Comment' (2013) 3 Queen Mary Journal of Intellectual Property 241, 243.
[783] 'Study in Support of the Evaluation of Directive 96/9/EC on the Legal Protection of Databases' (European Commission DG Communications Networks, Content & Technology 2018) 7–9.
[784] Alberto Musso, 'Grounds of Protection: How Far Does the Incentive Paradigm Carry?', *Common principles of European intellectual property law* (Tübingen: Mohr Siebeck 2012) 48.
[785] ibid 47.
[786] Finnish Newspaper Association (n 440) q 14, 18.
[787] Christopher Buschow, 'The Ancillary Copyright Law for Press Publishers in Retrospective' 3.

press publishers and their organisations. Even before the Proposal was tabled, they argued that, unless the press publishers would be able to rely on copyright to recoup their investments, there would be no quality content available.[788]

The Commission joined in the quality journalism argument, clearly stating in the communication accompanying the Proposal that the press publishers' right is a recognition of the press publishers' contribution to the creation of quality journalistic content.[789] The Impact Assessment strengthened this message further, emphasising that the lack of support for the press publishers in the form of regulatory response would have negative consequences for the consumers' access to quality information.[790] The text of the CDSM Directive itself, from the Proposal to its final version, considered free and pluralist press essential to ensure quality journalism.[791] Making the ability of press publishers to supply quality journalism the goal for the new right, corresponds to one of the problems motivating the right's introduction as identified by the EC: the threat to free and pluralist press.[792] The quality element did not find its way into the press publication definition. However, only a collection composed of mainly works of a journalistic nature can be considered a press publication according to the CDSM Directive. While it may be true that the significance of this requirement is weakened by the fact that other types of works and subject-matter might be included in the press publication, the inclusion of works of a journalistic nature is a condition *sine qua non* for a press publication to exist.

The simple statement that quality journalism merits protection is not controversial. However, providing that protection under the umbrella of copyright and related rights, is. The quality-based justification for the protection urges the conclusion that only press publications considered as quality journalism should fall within the scope of the press publishers' right. Such a limitation is, however, questionable considering the subjective character of quality judgements. Additionally, the text of the CDSM Directive does not explain what a work of a journalistic nature is, nor what is understood as quality journalism.

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[788] 'Re: Press Publishers' Key Concerns Ahead of Discussion in the College of Commissioners on the Digital Single Market' (n 463) 1.
[789] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Promoting a Fair, Efficient and Competitive European Copyright-Based Economy in the Digital Single Market' (n 107) 7.
[790] European Commission, 'Impact Assessment' (n 126) 160 Part I .
[791] Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (n 375) para 31.
[792] The definition of the problem is discussed in detail in Chapter III section 1.A.

This section explores whether a special regime for the protection of a particular (sub)category of works, and a protection limited to works of a certain quality, fits the EU copyright framework. In its first part, the section provides an overview of existing categories of works, and the criteria on the basis of which they are distinguished. It enquires what is a work of journalistic nature, and by what factors it is defined. In the second part, the section examines the issue of quality journalism. It considers what quality journalism means, and whether the protection warranted by the content quality is acceptable under the umbrella of copyright and related rights. The section finishes with a consideration of editorial initiative, control and responsibility, as potentially objective requirements meriting the special protection of press publications.

A. Works of a journalistic nature as a separate category of works

1. Work of a journalistic nature

Dictionaries define 'journalistic' simply as relating to,[793] or characteristic for[794] journalism or journalists. Definitions of journalism are more diversified, focusing on journalism as an activity of writing for newspapers, magazines or news websites, or broader as the collection or editing of news, or they simply equate journalism with the public press. Understood in this way, journalism encompasses a number of literary forms, from complex pieces of investigative journalism to interviews, columns, editorials, and simple press notes. A work of a journalistic nature, or simply a journalistic work, would therefore be any literary work considered journalistic.

The understanding of a journalistic work was not a point of contention in the press publishers' right debate. The inclusion of journalistic work in the press publication mostly has been downplayed as only exemplary, with the protected collection possibly including other types of content. Whereas that was the case for the Proposal, the final text of the CDSM Directive clearly states that works of a journalistic nature are a main component of a press publication. Therefore, it is essential to question what a work of journalistic nature stands for, whether distinguishing it as a separate category of works has any significance and whether it is coherent with the EU copyright framework. Singling out the category of journalistic works,

[793] 'Journalistic | Definition of Journalistic in English by Oxford Dictionaries' (*Oxford Dictionaries | English*) ‹https://en.oxforddictionaries.com/definition/journalistic› accessed 11 March 2019.
[794] 'Definition of JOURNALISTIC' ‹https://www.merriam-webster.com/dictionary/journalistic› accessed 11 March 2019.

the CDSM Directive provides a modest explanation on a journalistic work being a literary work. Otherwise, its interpretation is left open.

One way to distinguish journalistic works, is to refer to the person of its creator: a professional journalist. Therefore, a journalistic work would be any work prepared by a trained and employed or freelance journalist.[795] Making a creator a defining factor would not be a rational solution. The press and media laws of the MS have not been harmonised, which means that there is no common standard of who is a professional journalist. This shortcoming could be amended by considering membership in self-governing journalist organisations. As a rule, these organisations are national. Even though they are often members of European alliances such as the Association of European Journalists or the Federation of European Journalists, these European organisations do not concern themselves with setting membership standards for individuals. The requirements to join a national journalist organisation might not be substantial. Take the Polish Journalists Association (Stowarzyszenie Dziennikarzy Polskich) for example, which requires its members to be journalists (active or retired) or to have practised journalistic activities, for a long proven time.[796] The decision on whether a particular person is a journalist is left to the discretion of the governing body of the association. Considering the lack of common standards for journalists organisations, and the subjective judgements which might be linked with the membership decision, it does not seem feasible to rely on the self-governing journalist bodies to determine who should be considered a professional journalist in the EU. Additionally, making the person of a creator, a professional journalist, a distinguishing factor could be harmful to other content creators, such as citizen journalists. Even though they do not treat their journalistic activity as a full-time profession, they may well be able to produce works of the same standard as professional journalists. At the same time, if 'everyone who can hold a pen or type on a keyboard'[797] is considered a journalist, the term journalistic work would have no substance. Thus, making the person of a creator a distinguishing factor for journalistic works, seems unworkable.

An alternative criterion could be the organisational framework within which the content has been produced: the press. Following this criterion, everything which the press produces, would count as a work of a journalistic nature. However, this would not be factually correct,

[795] Höppner, 'The Proposed Directive on Copyright in the Digital Single Market (Articles 11, 14 and 16) Strengthening the Press Through Copyright' (n 724) 5.
[796] 'Statut Stowarzyszenia Dziennikarzy Polskich' para 13(2) ‹http://sdp.pl/s/statut-stowarzyszenia-dziennikarzy-polskich›.
[797] 'A Free and Pluralistic Media to Sustain European Democracy. The Report of the High Level Group on Media Freedom and Pluralism' 34.

with even legacy press providing other content as well, such as weather forecasts, puzzles, trivia, and cartoons. Consequently, it does not seem appropriate simply to equate press-produced content with journalistic works. Moreover, accepting the press origin as a defining factor of journalistic works, would create a vicious circle, where press is defined through the provision of journalistic content, and the EU legislation requires journalistic content to be included in press publications. Another approach could be to consider as journalistic only the content created following particular standards. These standards could especially include the fact-checking process, ensuring the accuracy of a press publication.[798] However, this approach would require either the creation of a set of standards which press publishers are to meet, or the identification of an already existing, commonly accepted set of standards. Either of these actions could raise doubts about the EU competence in press and media regulation.

In the framework of EU law, journalism is addressed only incidentally by the provisions on data protection. The Data Protection Directive required MS to adopt exceptions to some of its provisions in order to accommodate the processing of data for journalistic purposes.[799] The aim of these exceptions was to reconcile conflicts between the fundamental rights of individuals and freedom of information, and especially the right to receive and impart information.[800] Exceptions were permissible only to the extent necessary to tackle the conflicts between fundamental rights. The General Data Protection Regulation (the GDPR), which has replaced the Data Protection Directive, includes a similar provision. It requires MS to provide exceptions to listed chapters of the GDPR for the processing of data for journalistic purposes, to the extent required to balance the right of protection of personal data with the freedom of expression.[801] Accounting for the similarity between the provisions, the considerations under the Data Protection Directive remain valid.

Neither the Data Protection Directive, nor the GDPR specified what activities constitute the processing of data for journalistic purposes. This gap has been, however, filled by the CJEU's judgement in the *Satamedia* case.[802] The case concerned the mass publication in a newspaper,

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[798] 'Publishers Applaud MEPs' Support of Free Press as Lead European Parliament Committee Votes in Favour of a Publisher's Right in Key Copyright Reform' (ENPA,EMMA, EPC, NME 2018) ‹http://epceurope.eu/wp-content/uploads/2018/06/news-publishers-right-voted.pdf› accessed 25 February 2019.
[799] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data OJ L 281 1995 art. 9.
[800] ibid 37.
[801] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119 2016 art. 85.
[802] *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy* [2008] Court of Justice of the European Union C-73/07, EU:C:2008:727.

and making available via text messages, of tax information of individuals in Finland. Even though taxation information is public in Finland, the large scale of its dissemination (1.2 million entries) and the individual character of its delivery (SMS), has prompted the data protection ombudsman's objection, resulting in a case at the Finnish administrative court and a reference to the CJEU. The Court was asked, among others, whether the disputed activities qualify as processing of data for journalistic purposes. To answer this question, the CJEU formulated a definition of journalistic activities, treating it as synonymous to journalism. Before outlining the relevant criteria, the Court noted that to take account of the importance of the right of freedom of expression, it is necessary to interpret notions relating to that freedom, including journalism broadly.[803] Subsequently, the CJEU singled out three characteristics of journalistic activity. First, they are activities whose 'object is the disclosure to the public of information, opinions or ideas, irrespective of the medium which is used to transmit them'.[804] Secondly, such activities do not need to be carried out by media undertakings, but rather cover actions of any person involved in journalism. Thirdly, there is also no obstacle for journalistic activities to be performed for profit. The application of these criteria in specific cases was left to the MS's discretion.

This broad interpretation of the journalistic activities by the CJEU has attracted considerable criticism, particularly because of its incompatibleness with the understanding of journalism championed by the European Court of Human Rights (ECtHR). Information is a broad concept, including facts and data of any kind. Absent any restrictions, like in the case of the CJEU's interpretation, any communication to the public, including posting information about one's meals on social media, could be considered a journalistic activity, as long as there are people reading and caring about this information.[805] For this reason, the AG Kokott, suggested to follow the jurisprudence of the ECtHR in her opinion in the *Stamedia* case, which requires that the information and ideas imparted by journalism concern matters of public interest.[806] This requirement stems from the vital roles journalism plays in democratic societies, particularly that of a public watchdog. The AG pointed at the information relating to the ongoing public debate, as an example of information concerning matters of public interest.[807] The CJEU, however, decided not to follow this suggestion, and remained inclusive of

[803] ibid 56.
[804] ibid 64.
[805] See Anne Flanagan, 'Defining "journalism" in the Age of Evolving Social Media: A Questionable EU Legal Test' (2012) 21 International Journal of Law and Information Technology 1, 6.
[806] 'Opinion of Advocate General Kokott Delivered on 8 May 2008 Case C-73/07 Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy' paras 66–67.
[807] ibid 73.

information concerning all matters in its interpretation of journalism. Nowhere in the *Satamedia* judgement does the CJEU refer to the jurisprudence of the ECtHR on the issue of journalism and freedom of expression, ignoring its usual, inspirational role, in the cases requiring interpretation of fundamental rights. Moreover, the competence of the CJEU to construct a definition of journalism itself has been questioned. The reason for that is the previously discussed lack of EU competence in the area of media and press regulation, and the potential spill-over effects of the journalism definition in the *Satamedia* judgement to press and media laws of Member States.[808]

Regardless of the criticism, the CJEU has confirmed its interpretation of journalism in the case of *Buivids*, concerning the making available of a video recording from a Latvian police station on YouTube, a popular video platform.[809] Recognising the need to interpret the notion of journalism in a broad manner, the Court further emphasised that journalistic activities could be carried out by anyone, not only professional journalists, and could use any media outlet, including a publicly accessible video platform.[810] The considerations on whether the information imparted by journalism contributes to the public debate, as well as on the subject of information were included in the CJEU's judgement, but not as a part of the journalism definition itself. They were listed as one of criteria, which, following the jurisprudence of the EctHR, should be considered when the right to privacy and freedom of expression have to be balanced.[811] The Court recognised that not all the information published online should be covered by the journalistic purposes exception. However, it did not see fit to limit the scope of the definition of journalism itself.[812] The need for a broad interpretation of journalism, as a notion related to the freedom of expression, has been explicitly included in the recitals of the GDPR.[813]

It is true that the definition of journalism has been provided by the Court on the basis of the Data Protection Directive, a legislative tool which is no longer in force and which does not belong to the copyright framework. However, considering the journalistic purposes exception transplant into the GDPR, and lacking other interpretative guidelines in the EU law framework, it seems suitable to consider the definition of journalism developed by the CJEU in *Stamedia* and *Buivids* for the purposes of the press publishers' right. Firstly, it is important to

[808] See Flanagan (n 805) 10.
[809] *Sergejs Buivids* [2019] Court of Justice of the European Union C–345/17, EU:C:2019:122.
[810] ibid 55.
[811] ibid 66.
[812] ibid 58.
[813] GDPR para 153.

note that the CJEU takes account of the technological development, and the changes it has brought about in the press publishing sector, and does not attach significance to the organisational structure (media undertakings) or medium of expression (paper, radio, internet) while defining journalism. In this way, it rules out the first two factors potentially capable of distinguishing journalistic works: its creator and its organisational framework. Secondly, the definition created by the CJEU seems somehow universal in nature, with the fundamental rights concerns underlying the exceptions considered. In this case, however, the only distinguishing factor for the journalistic works would be their purpose: dissemination of information, facts, and ideas to the public. Categorising journalistic works in this manner would make it difficult, if not impossible, to distinguish them from other literary works.

2. Categories of works

Since the beginning, the Berne Convention includes an open catalogue of literary and artistic works. Originally included in art. 4, and currently found in art. 2 of Berne, the catalogue lists, among others, the following categories: books, pamphlets, writings, dramatic, dramaticomusical and choreographic works, drawings, paintings, architecture, sculpture, photography, illustrations, as well as maps.[814] The list is only exemplary, and any other, non-listed work can fall within Berne's scope if it meets the relevant criteria. The categories of works included are, however, privileged as all parties to Berne are obliged to secure their protection at the national level.[815] As a result, while there is no obstacle to protect non-listed categories of works, there are no guarantees of the uniform treatment of such categories in the Berne-contracting countries. The categorisation of works is also relevant in the context of the fixation requirement: the decision on its application to particular categories of works rests with the national legislators.

In listing the categories of works, Berne uses general terms, and covers all principal categories recognised by the majority of national copyright laws.[816] The categories' distinction is not governed by a single overarching criterion, but a set of varying factors, such as form of expression (words, sounds, movement, pictures, or shapes), technique used (photography), mode of expression (spoken, material or performance), and purpose serves (accompaniment of other works in case of illustrations or utilitarian purposes for works of applied art). A more detailed definition of what particular categories of works include and what the distinguishing criteria are, is left to the national legislators. The categorisation of works proposed by Berne is

[814] Berne Convention art. 4.
[815] ibid art. 2(4).
[816] Ricketson and Ginsburg (n 577) 409.

included in the WCT and TRIPS by reference. The only type of work which the WCT singles out explicitly, are computer programs, considered a form of literary works.

Similar to Berne's catalogue, national copyrights of MS often include a list of categories of copyrightable works.[817] However, works falling outside these categories are rarely refused protection, as catalogues tend to be open. An exception is the copyright law of the UK, where a work needs to belong to one of the enumerated categories to be protected. This is so called closed list system, where protection is limited to explicitly listed categories of works alone.[818] The four main categories included in the UK's Copyright Designs and Patents Act (CDPA) are literary, dramatic, musical and artistic works, jointly referred to as LDMA.[819] The categories are organised according to the properties of the works' form. However, the meaning of form varies between categories.[820] In case of literary works, the form refers to the mode of a work's presentation, namely being represented by words. As definitions of LDMA works are formalistic, courts often refer to additional criteria, such as the process of creation of a work, its context and comparison with other works in a particular category and the purpose of the work.[821]

At the EU level, copyright-protected works do not constitute a homogeneous group. The EU explicitly recognises different categories of works, with some of the directives making up the EU copyright framework concerning only works of a particular category, such as databases, computer programs or orphan works. The first directive in the field of copyright law was the Software Directive exclusively concerning computer programs. Even though the Software Directive does not define a computer program, it clearly states that a computer program could be expressed in any form.[822] Form is thus not a criterion distinguishing computer programs. In contrast, the Database Directive provides quite a complex definition of a database: a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.[823] Therefore, a database is distinguished through its form. In case of orphan works, addressed in the Orphan

[817] See for example Polish Copyright Act art. 1(2); Italian Copyright Act art. 2; Texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las Disposiciones Legales Vigentes sobre la Materia (aprobado por el Real Decreto legislativo N° 1/1996 de 12 de abril de 1996, y modificado hasta el Real Decreto-ley N° 2/2019, de 1 de marzo) BOE-A-1996-8930 (Spanish IP Act) art. 10.
[818] Tanya Alpin, 'Subject Matter', *Research handbook on the future of EU copyright* (Edward Elgar 2009) 54.
[819] Copyright Designs and Patents Act 1988 (UK CDPA) art. 1(1)(a).
[820] Justine Pila, 'Copyright and Its Categories of Original Works' (2010) 30 Oxford Journal of Legal Studies 229, 236.
[821] ibid 239.
[822] Software Directive art. 1(2).
[823] Database Directive art. 1(2).

Works Directive, what distinguishes them as a category is the person of the right holder, or more accurately the lack thereof. A work is an orphan work when none of the right holders is identified or, even if one or more of them are identified, none is located despite a diligent search.[824] Therefore, in the EU copyright framework, there is no one universal criterion governing the grouping of works into categories. It seems that distinguishing the categories of works and their regulation through separate directives is governed by more complex motives than the nature of the works themselves. For example, in case of orphan works, the adoption of the Orphan Works Directive and the establishing of a separate category of works was motivated, among others, by the digitalisation of European libraries.[825]

The Term Directive singles out two additional categories of works: photographs and publications of critical and scientific works. While not providing a definition of photograph itself, the directive recitals urge to interpret it as photographic work pursuant to the Berne Convention.[826] In the case of scientific and critical works, the directive allows Member States to protect publications after they enter public domain.[827] This is a unique example in which the EU links the protection with the content of the literary work. However, it is not the work itself which is the subject-matter of protection, but a particular publication of that work.

The recognition of particular categories of works was significant prior to the harmonisation of the originality requirement through the CJEU case law. This is because the directives harmonised the originality requirement only in connection to particular categories of works: computer programs, databases and photographs. However, thanks to the CJEU jurisprudence, there is now one common standard of originality of works protected under the EU copyright framework. Therefore, the fact that a work belongs to a particular category does not have any significance where the existence of copyright protection is concerned. It is true that the type of work is taken into account when originality is assessed, as it implies creative freedom and creative constraints imposed on the author. However, the fact that a work belongs to a particular category does not influence the scope of its protection. Whereas the possibility to differentiate the level of copyright protection for particular categories of works might have remained open after the *Infopaq* judgement, the *Painer* case has explicitly excluded such

[824] Orphan Works Directive art. 2(1).
[825] ibid 1.
[826] Term Directive para 16.
[827] Term Directive art. 5.

possibility.[828] In *Painer*, the CJEU was faced with the question whether a particular type of work, namely portrait photographs, should be awarded a weaker copyright protection or be refused protection altogether, because of the limited formative freedom they leave to the author.[829] As explained in the sections above, as long as the author retains sufficient formative freedom to make creative choices, the created work is eligible for copyright protection. The fact that one category of work offers authors more creative freedom than another, is irrelevant. Thus, the category a work belongs to has no impact on the scope of the copyright protection, with all works being protected equally under the EU copyright framework.

The press publishers' right broke with the precedent of the category of works being irrelevant for protection's scope. It is true that the press publishers' right is a related right, and the subject-matter of its protection is a press publication rather than a journalistic work. However, the inclusion of a work of a journalistic nature in a press publication is a condition *sine qua non* of its protection. Additionally, a journalistic work as a contribution to a press publication is a part of this press publication, to which apply both the right of making available and the right of reproduction of a press publisher. Consequently, a press publishers' right is a measure aimed at creating an additional layer of protection for a particular category of works, journalistic works. This is an unprecedented solution in the EU copyright framework. There is no clear criterion for defining journalistic works. It is not a form of expression, as the CDSM Directive clearly states that a work of a journalistic nature is a literary work. Thus, a journalistic work is a sub-category of literary works. None of the potential criteria for distinguishing a press publication, its press provenience, creation by a professional journalist, or the following of a set of standards, is clear-cut. A criterion stemming from the CJEU decisions in the *Stamedia* and *Buivids* cases, a purpose of dissemination of information, facts and ideas to the public, is also imprecise and difficult to apply in practice, and mirrors another clause included in the CDSM Directive's definition of press publication, requiring that a press publication provides the general public with information related to news or other topics.

[828] Estelle Derclaye, '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' (2010) 32 European Intellectual Property Review 247, 249.
[829] *Painer* (n 642) para 107.

B. *Quality journalism and copyright egalitarianism*

1. Defining quality journalism

Historically, it was easy to recognise quality journalism. Newspapers came in two formats: broadsheet and tabloid, with the former being synonymous with quality. The criterion applied was simple: the physical size of the paper publication. Even though the distinction between broadsheets and tabloids is still in use, its original significance was lost, especially with the press publishers' move to the online environment. There is a universal agreement that quality journalism should be protected, even among opponents of the press publishers' right. What is not there, is an agreement on what quality journalism is and how it should be protected. A common saying among journalism experts is that one knows quality journalism when one sees it.[830] Although this may hold true for some cases, it is highly unlikely that a decision on quality of every press publication can be made absent any benchmark. Additionally, as one of the journalists herself has stated: 'To be honest, there is plenty of bad journalism in high-quality publications'.[831] Accordingly, the fact that a news item is included in a quality press publication, does not guarantee that it stands for quality itself.

Even though the CDSM Directive and the discussion on the new right emphasise the press publishers' right's purpose of aiding quality journalism, the CDSM Directive does not explain what quality journalism is. However, two elements in the recitals hint at what the EU legislator would like quality journalism to stand for. The first is that quality journalism, in conjunction with citizen's access to information, is to make a fundamental contribution to the public debate and the proper functioning of democratic societies.[832] The second element is that the recognition and encouragement of press publishers' investment is to foster the availability of reliable information.[833] Therefore, a quality journalistic work should stand for content making a contribution to the public debate and providing reliable information. The focus is on the impact of works on their recipients rather than on the form of the works themselves.

The European Union is not the only international body concerned with the protection of quality journalism. In 2018, the Council of Europe (CoE) established the Committee of experts

[830] Johanna Vehkoo, 'What Is Quality Journalism and How Can It Be Saved' (Reuters Institute for the Study of Journalism 2010) 7.
[831] Alexandra Borchardt, 'In Institutions We Trust: What Is Quality Journalism?' (*European Journalism Observatory - EJO*, 5 November 2018) ‹https://en.ejo.ch/comment/in-institutions-we-trust-what-is-quality-journalism› accessed 9 November 2018.
[832] CDSM Directive recital 54.
[833] ibid recital 55.

on quality journalism in the digital age (the CoE Committee).[834] One of the CoE Committee's tasks is to draft recommendations on promoting a favourable environment for quality journalism in the digital age.[835] The CoE Committee has been cautious in defining quality journalism from the outset. During its first meeting, the CoE Committee opted for approaching journalism in a functional manner.[836] Consequently, quality journalism will be defined through a list of requirements concerning 'the methods and processes of reporting, as well as the principles, values and purposes involved in the news production'.[837] Some of these elements can already be found in the first draft of the recommendations, and include the provision of timely, accurate and relevant information, free from undue influence; the use of trustworthy, fact-checked sources.[838] At the same time, the functional approach adopted by the CoE Committee allows to take account of both established and new actors in the online news environment.[839] In other words, from the CoE perspective, there is no difference between legacy and digital-born brands. The importance lies in the process of the production of journalistic content and its characteristics.

An alternative understanding of quality journalism is based on the notion of truth and credibility. In this case, truth and factual correctness is a condition *sine qua non* of quality journalism.[840] The requirement of factual correctness connects the discussion on the press publishers' right with the debate on disinformation and the fake news phenomenon. The High Level Expert Group on fake news and online disinformation (HLEG), an advisory body of the Commission, has defined disinformation as false, misleading information, designed, presented and promoted intentionally to cause public harm or for profit.[841] Defined in this way, disinformation is one of the possible forms of fake news, which encompasses a wide range of informational behaviour online, including honest factual mistakes, shocking headlines, as well

[834] 'MSI-JOQ Committee of Experts on Quality Journalism in the Digital Age' (*Freedom of Expression*) ‹https://www.coe.int/en/web/freedom-expression/msi-joq› accessed 9 November 2018.
[835] 'Committee of Experts on Quality Journalism in the Digital Age Terms of Reference' (Council of Europe 2017) CM(2017)131.
[836] 'Meeting Report, 1st Meeting, 8-9 March 2018, Strasbourg' (Council of Europe, Committee of experts on quality journalism in the digital age 2018) para 8.
[837] 'Meeting Report, 2nd Meeting, 24-25 October 2018. Strasbourg' (Council of Europe, Committee of experts on quality journalism in the digital age 2018) para 3.
[838] 'Draft Recommendation on Promoting a Favourable Environment for Quality Journalism in the Digital Age' (Council of Europe, Committee of experts on quality journalism in the digital age 2018) para A.
[839] ibid.
[840] Vehkoo (n 830) 19.
[841] 'A Multi-Dimensional Approach to Disinformation. Report of the Independent High Level Group on Fake News and Online Disinformation' (European Commission, High level Group on fake news and online disinformation 2018) 10.

as malicious fabrications or factual misrepresentations. The question arises whether quality journalism could simply be defined as the opposite of fake news.

As noted in the declaration on the financial sustainability of quality journalism by the CoE Committee of Ministers, quality journalism, the meaning of which extends to a range of diverse and credible information, counteracts propaganda and disinformation.[842] This statement is certainly correct. However, to say that everything which is not fake news or propaganda is quality journalism is an oversimplification. Not all factually correct journalism is quality journalism.[843] The truthfulness of the information communicated is a condition *sine qua non* of quality journalism; it is not, however, its sole indicator. Furthermore, the place of quality journalism in the discussion on fake news and disinformation is more in the background than in the forefront. Deficiencies in the provision and accessibility of quality journalism are seen as one of the causes for the disinformation problem.[844] Thus, the promotion of quality journalism is one of the tools for fighting the spread of unwanted informational behaviour online.[845] However, it is not an indispensable one, without which the supply of the reliable news and information could not be secured. Quality journalism is often mentioned in the discussion on misinformation in a derivative manner, in the context of the supply of quality information and quality news. To conclude, quality journalism certainly does not fall under the umbrella of fake news. Yet, quality journalism and fake news cannot simply be juxtaposed.

Among journalism scholars, there is no consensus on what qualifies as quality journalism. An overview provided by Vekhoo shows that scholars consider a number of factors as potential indicators of quality journalism. These factors include a high level of circulation or investment, journalistic activity involved in the preparation of a particular publication (such as conducting interviews, travelling, or analysing material), as well as a publication's influence over the public, where the shaping of opinions and informing is concerned.[846] However, they are only indicators and they do not merit definite judgements. For example, there is no proof that a decrease in quality would cause a drop in circulation, or that an increase of investment would result in a higher quality of the content.[847] Nevertheless, the need for the continuous financial

[842] 'Declaration by the Committee of Ministers on the Financial Sustainability of Quality Journalism in the Digital Age' (Council of Europe, Committee of Ministers 2019) Decl(13/02/2019)2 para 2.
[843] Vehkoo (n 830) 19.
[844] 'Position Paper "Fake News" and Information Disorder' (European Broadcasting Union 2018) 7.
[845] 'A Multi-Dimensional Approach to Disinformation. Report of the Independent High Level Group on Fake News and Online Disinformation' (n 841) 23; 'Position Paper "Fake News" and Information Disorder' (n 844) 9.
[846] Vehkoo (n 830).
[847] ibid 10.

support for quality journalism is apparent.[848] Even if new revenue is acquired thanks to the press publishers' right, there is no guarantee that it will lead to higher quality journalism. Apart from the indicator-based theories on quality journalism, Vekhoo singles out two additional approaches, similar to the approach taken by the CoE Committee. The first focuses on the press publication's characteristics, indicating that it needs to be, among others, free, courageous, reliable, and independent. The second centres on the production process, which needs to observe journalistic principles. They could be defined by journalists themselves in codes of conduct or similar self-regulatory tools.

Repetitive calls for the protection of quality journalism did not lead to a common understanding of what quality journalism stands for. The production process following certain standards seems to be the focus. However, standards are referred to as both an indicator of quality journalism and a marker of journalism in general. As a result, it can be difficult to judge which criteria make the content journalistic, and which raise the bar and make it quality journalism. Considerations on quality journalism are not limited to the work itself and require knowledge of the context in which a work was produced, and possibly a comparison with other available works. No attempts at defining quality journalism consider that that quality should be associated exclusively with particular topics, for example those which touch upon public policy issues, economy, religion or politics. Therefore, quality journalism seemingly has no thematic restrictions.

2. Egalitarianism of copyright and related rights

Quality is not of concern to the EU copyright framework. The key to determining whether a work is subject to copyright protection, is the requirement of originality. Only original works are protected by copyright. A work does not need to be novel, or have a certain degree of quality or merit.[849] It only needs to be an expression of the author's own intellectual creation. Prior to the CJEU's decision in *Infopaq*, the requirement of originality was explicitly specified solely in connection to three categories of works: computer programs, photographs and databases. Apart from stating that originality stands for the author's own intellectual creation, the Software Directive, the Database Directive and the Term Directive, include a no other criteria clause.[850] The clause excludes the application of any other criteria than originality

[848] As Lacy puts it in Stephen Lacy, 'Comment of Financial Resources as a Measure of Quality', *Measuring media content, quality, and diversity. Approaches and issues in content research* (Turku School of Economics and Business Administration 2010) 25: "Money is not sufficient for content quality, but for a news organisation to produce high quality content consistently over time, sufficient financial support is crucial.".
[849] van Gompel (n 652) 99.
[850] Software Directive art 3(1); Database Directive art. 3(1); Term Directive art. 6.

when assessing the copyrightability of a work. Thus, the Database Directive specifically prohibits any aesthetic and qualitative criteria.[851] The Software Directive emphasises that no tests should be applied as to the qualitative or aesthetic merits of the program.[852] The Term Directive reasons that no other criteria, such as merit or purpose, should be taken into account.[853] Consequently, aesthetics, quality or merit, should not be considered alongside the originality criterion. As noted by van Gompel and Lavik, neither the directives nor the preparatory documents explain what quality, aesthetics, merit and purpose stand for.[854] However, this is of no significance, as whatever the meaning, the application of any other criteria is simply prohibited.

The no other criteria clause was not considered by the CJEU in the *Infopaq* case. However, pursuant to the CJEU jurisprudence, there are only two requirements which a work needs to fulfil: expression and originality. The general standard of originality established in *Infopaq* was based on the already existing provisions on originality of computer programs, photographs and databases. In the Court's opinion, because the InfoSoc Directive contributes to the harmonised legal framework, it follows the same principle of the author's own intellectual creation as included in the Database, Software and Term Directive.[855] If the InfoSoc Directive builds on the same principle, it seems only logical that the no other criteria clause should apply to all copyrightable works. Thus, the copyright protection applies regardless of merit, aesthetics or quality of work. If a work is expressed, the sole condition for copyright protection is its originality. EU copyright law is thus egalitarian: it embraces all original works, no matter their merit.

The assessment of the originality requirement in copyright, unlike the novelty requirement for community designs or patents, is focused on the work itself, and does not require a consultation in the light of a broader context of available works. For example, in the context of community designs, novelty means that no identical design has been made available to the public.[856] The assessment whether a community design submitted for registration is indeed novel, calls for a comparison of the submitted design with other, pre-existing designs. Novelty is therefore an inherently comparative criterion. Conversely, the originality judgements focus

[851] Database Directive recital 16.
[852] Software Directive recital 8.
[853] Term Directive recital 8.
[854] Stef van Gompel and Erlend Lavik, 'Quality, Merit, Aesthetics and Purpose: An Inquiry into EU Copyright Law's Eschewal of Other Criteria than Originality' (2013) 236 Revue Internationale du Droit d'Auteur 2.
[855] *Infopaq* (n 75) para 36.
[856] Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs OJ L 3/1 2001 art. 5.

on the relationship between the work and its author. An assessment is needed of whether an author was free in making her creative choices or there were creative constraints put in place. Furthermore, it is important that a work is the author's own creation, in the sense that it is not copied from another work. Yet, it is not relevant how novel or unique a work is in comparison to other, pre-existing works. Thus originality is an independent normative concept.[857] The lack of contextualisation of a work makes it impossible to argue that some works are more deserving of protection than others, because they are of a better quality, represent a higher level of aesthetics, or are of more value to society. Copyright cannot be used as a tool to reward works of a certain quality exclusively, even if it is quality journalism benefitting society.

The press publishers' right introduced in the CDSM Directive is a related right, not guided by the originality requirement. There is no one, over-arching concept of the subject-matter of related rights. The subject-matter of a related right is inherent to that related right: if a subject reflects the description of the subject-matter, it is protected by that related right. No qualitative or quantitative judgements are required. A phonogram is a fixation of sounds, not matter the character or quality of those sounds. Thus, a recording of a symphonic orchestra performing the fifth symphony by Ludwig van Beethoven will attract the same level of protection as a recording of a performance by a Polish disco band. The intuitive feeling that the first one is more of a quality phonogram than the latter, has no effect on their producers being granted a related right. The same applies to films, cinematographic or audiovisual works or moving images. A film producer who produced the best motion picture of the year, and was awarded an Oscar for it, enjoys the same protection as the producer who was responsible for a film receiving the Golden Raspberry Award for failure in cinematic achievement. If both productions are considered films, their producers enjoy the same related right. Therefore, related rights and copyright alike are not tools to promote works of a certain quality, which are aesthetically pleasing, or highly informative. A documentary enjoys the same protection as a simple entertaining cartoon for children.

The only right which calls for qualitative or quantitative judgements, is the sui generis database right. The protection of the sui generis right is conditioned by the substantial investment into creation of a database, in either a qualitative or quantitative manner. Regardless of the similarities between the sui generis right and the press publishers' right, the EU legislator did not decide to adopt the substantial investment requirement for protected

[857] van Gompel (n 652) 102.

press publications. The qualitative or quantitative assessment does not directly concern the database, the subject-matter of the right, but rather the investment in its creation. Nevertheless, following the legacy press publishers' argument that, because of the obligations which the law imposes, their cost of production of content is higher than online news outlets, a requirement of substantial investment could have an indirect effect on limiting the scope of the right to publications of a certain quality alone.

The press publishers' right is ill-suited to protect quality journalism. Neither copyright nor related rights take into consideration quality or merit of protected subject-matters. Both are egalitarian in the sense that they protect the respective subject-matter, as long as it meets the criteria or reflects the specific definitions, and they remain indifferent towards its other characteristics. The press publishers' right introduced in the CDSM Directive will apply to both quality journalism and not-so-quality journalistic content. Presenting it as a promotional tool for quality journalism, is an attempt to prescribe a new role for the related right, which is inconsistent with the current egalitarian EU copyright framework. Additionally, accepting that only press publications of a certain quality should be protected by the press publishers' right, would require an assessment which goes beyond a press publication itself, analysing its production process and potentially making comparison with other press publications. This would champion a different approach of assessing protection eligibility than the current focus on the work or a subject-matter itself.

C. Editorial initiative, control and responsibility: introducing objectivity?

A requirement with the potential to bring the press publishers' right closer to the goal of supporting quality journalism, without involving qualitative judgements, is that of initiative, editorial responsibility and control of the press publisher. Pursuant to art. 2(4) of the CDSM Directive, only press publications which are published under the initiative, editorial responsibility and control of a service provider, can benefit from the press publishers' right. Legacy press publications naturally come to mind, with their editorial boards and editors in chief, competent to make final decisions on the publication's content, guarding the quality of the press publication under their purview. The application of the press publishers' right is not, however, limited to the legacy press publishers, and the CDSM Directive does not explain the meaning of initiative, editorial responsibility and control of a service provider.

The requirement of editorial initiative, control and responsibility has been a part of the press publication's definition from the Proposal, and unlike other clauses, it was not contested during the legislative process. No clear reason for including this requirement was provided.

The recitals to the CDSM Directive merely hint that the EU legislator wanted to exclude blogs and similar websites from the scope of the new right.[858] Therefore, the idea behind a requirement of editorial initiative, control and responsibility might be that of protection of professional press publishers, and not incidental information providers.[859] The Joint Research Centre's study on the press publishers' right, commissioned by the EC, linked the rise of fake news and misleading content to the disappearance of the (human) editor, whose job has been taken over by automatic curation of content in the online news environment.[860] In the JRC's opinion, weakening editorial control over newspapers is a threat to the quality of news.[861] Requiring that a press publication benefitting from the new right is published under the editorial initiative, control and responsibility, could be read as a promotion of factually accurate and quality press. Another explanation for including the requirement of editorial initiative, control and responsibility could be the one offered by van Eechoud. She suggests that the requirement is meant to set apart platforms which only provide a forum for users to publish their content, and traditional forms of publishing.[862] At the same time, however, she notes that it is nowadays no longer possible to make a clear-cut division between platforms which exclusively communicate content, and those which also exercise editorial control. The more plausible reason for the introduction of the editorial initiative, control and responsibility criterion, is that of the intention to promote only the professional quality press through the new press publishers' right.

Editorial initiative, responsibility and control are not concepts commonly used in press and media studies to describe editorial activity. The press and media scholarship traditionally emphasises a different concept, that of editorial independence. Editorial independence stands for the ability to make free choices in the topics covered by a publication, absent any outside influence, especially political.[863] Therefore, it is an element of political independence of media. According to the annual Media Pluralism Monitor, guarantees of editorial independence are

[858] CDSM Directive recital 56.
[859] In the context of media studies, Duffy argues that editorial supervision is a factor distinguishing professional journalism from what he calls 'interloper media': blogs, public relations and citizen journalism. See Andrew Duffy, 'Out of the Shadows: The Editor as a Defining Characteristic of Journalism' [2019] Journalism 1, 1–3.
[860] 'Online News Aggregation and Neighbouring Rights for News Publishers' (n 224) 24.
[861] ibid 5.
[862] van Eechoud (n 353) 35.
[863] Tony Harcup, 'Editorial Independence', *A Dictionary of Journalism* (Oxford University Press 2014) ‹http://www.oxfordreference.com/view/10.1093/acref/9780199646241.001.0001/acref-9780199646241-e-439› accessed 26 April 2019.

indispensable to the existence of media freedom and pluralism.[864] The significance of editorial independence has also been recognised by the Council of Europe, which advised its member states to introduce respective safeguards for newsrooms while creating a regulatory framework favourable to media pluralism and transparency.[865] This was motivated by the fact that only media which enjoys editorial independence, can fulfil its key role in democratic societies.[866] Even though the press publishers' right shares the goal of supporting press pluralism, the EU legislator decided to refer to different concepts than editorial independence to describe the required editorial activity.

Generally, the requirement of editorial oversight in the context of online publications is not uncommon. Some of the Member States explicitly addressing the status of online publications, have included such a requirement in their press and media laws. In Croatia, only a website which has an editor can be considered an electronic publication.[867] In the case of Sweden, only websites with an editor may apply for a certificate of no legal impediment to publication, and benefit from the same liability regime as the printed press.[868] French law includes a more elaborate provision, requiring that the online press is professionally edited by a natural or legal person with editorial control over its content.[869] This requirement is quite similar to the one included in the CDSM Directive's press publication definition. However, the directive's requirement does not imply that there needs to be an editor. Editorial can simply mean related to editing rather than the existence of a person bearing the title of editor, who is responsible for the content of a press publication.

The importance of editorial oversight in the online news environment has been recognised by the Council of Europe. Pursuant to the CoE recommendations on the new notion of media, editorial control is one of the criteria used to decide whether a particular online service or activity qualifies as media.[870] Of the six criteria distinguished by the CoE, editorial control is among those which carry the most weight, as its absence is likely to disqualify a service from

[864] Elda Borgi, Iva Nenadic and Mario De Azevedo Cunha, 'Monitoring Media Pluralism in Europe: Application of the Media Pluralism Monitor in 2017 in the European Union, FYROM, Serbia & Turkey' (European University Institute, Centre for Media Pluralism and Media Freedom 2018) 47.
[865] 'Recommendation CM/Rec(2007)2 of the Committee of Ministers to Member States on Media Pluralism and Diversity of Media Content' (Council of Europe, Committee of Ministers 2007) 2.
[866] 'Recommendation CM/Rec(2018)11 of the Committee of Ministers to Member States on Media Pluralism and Transparency of Media Ownership' (Council of Europe, Committee of Ministers 2018) s 1.3.
[867] Croatia Electronic Media Act art. 2(1)(2)
[868] Finnish Freedom of Expression Act art. 5.
[869] French Press Law art. 1.
[870] 'Recommendation CM/Rec(2011)7 of the Committee of Ministers to Member States on a New Notion of Media' (Council of Europe, Committee of Ministers 2011) para 7.

being a medium.[871] Editorial control is determined through four indicators: editorial policy, editorial process, moderation and editorial staff. Meeting all the indicators is not, however, necessary.[872] The standard for editorial control established by CoE is quite low, and not difficult to achieve. This ease especially concerns the first indicator: editorial policy. A policy decision is a decision concerning content: whether to make it available, whether to promote it, how to present or arrange it. Because these decisions are listed in the alternative, it seems that editorial policy is also considered to be exercised when a decision is limited to the arrangement of content on a website. Moreover, the editorial process does not need to be carried out by a professional editor: it can be either automated or involve users, either *ex ante* or *ex post*.[873] When understood in this way, editorial control resembles content moderation, a concept often used in the context of intermediary liability. The existence of editorial staff, such as editorial boards, designated controllers or supervisors, is also an indicator of editorial control. However, as not all of the indicators need to be met for editorial control to exist, a medium can exercise editorial control even without an editor.[874] In its recommendation on the new notion of media, the CoE gives no consideration to the editorial initiative, and only briefly touches upon the need for editorial responsibility of media. However, in the CoE, editorial responsibility simply stands for the media acting in a responsible manner.[875]

Different to the one proposed by the CoE is the understanding of editorial responsibility in the AVMS Directive.[876] The AVMS Directive concerns television and on-demand audiovisual services. The application of its provisions to the online versions of the newspapers is directly excluded.[877] However, it is still helpful to consider the AVMS Directive's interpretation of editorial responsibility in the context of the CDSM Directive's definition of press publication. Firstly, the AVMS Directive is the only EU legislative instrument which defines the term editorial responsibility. Secondly, both the CDSM Directive and the AVMS Directive are relevant for the online environment, and services commonly provide both press publications and audiovisual content. Additionally, pursuant to the CDSM Directive, a press publication can include other types of works than literary, such as audiovisual. Therefore, the CDSM and AVMS Directives could be applicable to the same online service, which makes desirable the

[871] 'Recommendation CM/Rec(2011)7 of the Committee of Ministers to Member States on a New Notion of Media' (n 870) Appendix para 11.
[872] ibid Appendix, Criterion 3 -Editorial control.
[873] ibid Annex para 32-33.
[874] ibid Annex para 34.
[875] ibid Annex para 87.
[876] AVMS Directive.
[877] ibid recital 28.

compatibility (if not unity) of the understanding of editorial responsibility under these directives.

The AVMS Directive defines editorial responsibility as an exercise of effective control over the selection and organisation of the programs.[878] The key element in this definition is effective control. Unlike the definition of press publication, where control and responsibility are separated, in the AVMS Directive, these acts are merged under the umbrella of editorial responsibility. For effective control to subsist, it does not need to be exercised. A possibility of control is sufficient, as long as it is both factual and legal.[879] The effective control concerns the selection and organisation of programs: whether a program is included in the broadcast, and if so, in what manner. As such, editorial responsibility in the AVMS Directive focuses on the distribution of the content rather than its production, setting the initiative for the production of programs aside. The CDSM Directive and its requirement of editorial initiative, control and responsibility is more demanding, as it embraces the process of content creation and distribution in full.

The editorial responsibility of the AVMS Directive lies within the scope of editorial control as explained in the CoE recommendations on the new notion of media. Both terms emphasise the ability to make decisions on whether, and how to include content in the service. However, the concept of editorial control proposed by the CoE is broader, as it finds the control also in the situations where decisions concern lesser issues, such as arrangement of content. Neither the CoE recommendations, nor the AVMS Directive concern themselves with the requirement of the press publisher's initiative in publishing a press publication. Possibly, the requirement of a press publisher's initiative is to serve the same function for the press publishers' right as the requirement of editorial control has in the AVMS Directive: to make a distinction between services which are content providers, and those which merely disseminate third-party content. Therefore, news aggregators, which do not produce content themselves, cannot be beneficiaries of the press publishers' right.

The notion of a press publication being published on the initiative of a service provider does not explain whether all the steps of the publication process need to be initiated by a press publisher. The question remains whether a publisher needs to commission the creation of each piece of content included in a press publication, or it is acceptable for the content to be

[878] ibid art. 1(c).
[879] Wolfgang Schulz and Stefan Heilmann, 'IRIS Special: Editorial Responsibility' (European Audiovisual Observatory 2008) 15.

submitted unsolicited by freelance authors. In the latter case, it might be sufficient for a press publisher to fund a press publication or to create a framework for users and freelance authors to publish their content, similar to services such as Medium. Whereas requiring the publishers' initiative in the creation of every piece of content included in a press publication seems far-reaching, asking for the publishers' approval for each piece before it is made available online, does not. The fact that the requirement of a publishers' initiative in the publication of a press publication is objective in nature, does not guarantee that only quality content makes it through, and is made available online. It could indicate a service provider with a particular vision on what a press publication should include, publishing only the contents which fits its vision and the standards it has defined. However, this does not mean that the standards promoted by this service provider are necessarily going to be high.

VI. Conclusions

Press publishers and press agencies have argued for special copyright protection of news and press for more than a century. To date, none of the international agreements on copyright and related rights grants press publishers a right on the content they produce. The Berne Convention does not exclude copyright protection of press and news in national laws. However, its provisions do not apply to news of the day and miscellaneous information, since the contracting parties rejected the idea of copyright protection of purely economic interests in the collection and publication of news and information. Press publications and news items can be subject to copyright protection within the EU copyright framework, as long as they fulfil the copyright protection requirements: they are expressed and original, the author's own intellectual creation. Additionally, some of the Member States see press publications as collective works, with copyright vested in their publishers.

Absent harmonisation, Member States have adopted a variety of solutions where the regulation of press is concerned. Consequently, it is difficult to define press unambiguously, or to indicate a group of entities which enjoys the privileges and is bound by the obligations of the press throughout the territory of the EU. Additionally, Member States do not take a uniform approach towards online publications, with their qualification as press often being decided on in the judiciary, whose judgements might be inconsistent even within a single national jurisdiction. The press publishers' rights in Spain and Germany were the first to grant special protection to press publishers under the umbrella of copyright and related rights. The subject-matter of these rights was defined independently, with no reference to national press and media regulations.

Press publication, as defined in the CDSM Directive, is an independent concept of EU copyright law. The scope of the press publication definition is, however, both broad and uncertain. Firstly, the definition's language is rather vague and invites subjective judgements. Secondly, the numerous clauses included in the definition are either open-ended or based on a non-exclusive list of examples. There is insufficient distinction between a press publication as the subject matter of the press publishers' right, and copyright-protected news items, the contributions to a press publication. When contributions to a phonogram or a film are brought together and fixed, a new object is created. Contributions acquire a new meaning. In contrast, when contributions to a press publication are brought together, they stay the same, since a press publication is simply a collection of these contributions. If someone would want to use a press publication, for example to copy a part, she can limit herself to using a single contribution. This is not possible in the case of films and phonograms: the use of a film or a phonogram inevitably involves using numerous, if not all, contributions. The lack of a clear distinction between a press publication, and the contributions to such a press publication, makes the new right a tool to circumvent the originality requirement, which grants a press publishers' right holder a monopoly over news items which fail to meet originality criterion.

A press publication, a collection of elements whose meaning does not change simply because they are included in a press publication, is conceptually more similar to a database than to the subject-matter of other related rights. Both the sui generis database right and the press publishers' right recognise, and want to, encourage investment in particular sectors (the press and database sectors respectively), and safeguard producers against misappropriation by third parties. The press publishers' right does not adopt the sui generis database right's requirement of substantial investment, which means that it is applicable to any press publication, regardless of the investment made in its production. By not including a threshold of protection, the press publishers' right can potentially incentivise the production of exactly those press publications which do not require substantial investment. This is contrary to its goal of the promotion of quality journalism. The press publishers' right is likely to encourage the volume of production, but not necessarily its quality (should it encourage anything in the first place).

The protection of quality journalism is a valid cause. However, copyright and related rights are ill-suited to protect only content of a certain quality, merit or purpose. Copyright and related rights are egalitarian, in the sense that they protect content as long as it meets copyright requirements or corresponds to the related rights' subject-matter's definition. The quality of content is not considered. The quality assessment of a press publication would require the

consideration of external factors, such as the process of publication, and possibly a comparison with other press publications. By requiring an analysis of external factors, the press publishers' right would deviate from what is known in the EU copyright framework. When assessing whether a given content is protected, copyright and related rights focus on the object of protection, not on the broader context. The assessment does not involve comparative judgements.

Even though the requirement of editorial control, responsibility and initiative, built into the definition of the press publication, brings objectivity to otherwise subjective judgements, this requirement is not capable of guaranteeing the high quality of protected press publications. The fact that a press publication needs to meet certain standards, does not guarantee that these standards are going to be high. Additionally, a special regime of protection for a particular subcategory of works (journalistic works), does not fit within the EU copyright framework. All works meeting the copyright protection requirements, are awarded the same level of protection in the EU copyright framework. The fact that a special protection of the press publishers' right is provided via a related right, and not copyright itself, is irrelevant, considering the elementary difficulties in distinguishing between the subject-matter of a press publishers' right, and copyright protected works, the contributions to a press publication.

Chapter V: Control over content: the entanglement of old and new exclusive rights

One of the press publishers' right's goals was to bring legal certainty to the online news environment. Some of the press publishers argued that the existing copyright framework was no longer sufficient. Due to technological development, new ways of sharing and distribution of news online had become available, and third-party services built around the use of press publishers' content were developed. Neither the users, nor the third-party services seek prior consent of the copyright holders, against the press publishers' objections. The rise of news aggregation services and the press publishers' unsuccessful attempts to license content to such services, have raised the question whether the exclusive rights held by press publishers, provide a legal basis for the conclusion of licensing agreements, or whether the activities of news aggregators and similar services fall outside copyright's scope. News aggregators, as well as other ways of distribution and sharing of the news online, are based on links, a basic communication tool on the web. Consequently, the key question is whether copyright and the newly introduced press publishers' right give their right holders control over acts of linking, including previews which accompany links.

The purpose of this chapter is to outline what exclusive rights of copyright and related right holders are relevant for the online news environment, what their scope is and how the new exclusive rights of publishers of press publications fit into the EU copyright framework. The chapter begins with a brief consideration of who the right holders are in the EU copyright framework, and which exclusive rights they enjoy. In its second section, the chapter considers two exclusive rights relevant in the context of linking: the right of communication to the public and the right of reproduction. It answers the question of what the copyright status of news aggregators and similar services is, that is, whether they are infringing on copyright. The section also draws attention to the multiplicity of the rights applicable to the single act of using a work, and the obstacles which this multiplicity creates. The third section of the chapter discusses the new exclusive rights of making available and communication to the public which the new right grants to the publishers of press publications. It addresses the claims of double-layering of rights as well as the circumvention of copyright provisions. In its final part, the chapter discusses the possible use of copyright exceptions and limitations in the online news environment, and indicates the diverging catalogues of exceptions among the Member States.

I. The catalogue of rights: rights of copyright and related right holders

Neither copyright nor related rights provide their holders with a single entitlement to a protected subject-matter. On the contrary, they receive a bundle of rights with varying scopes and purposes. Similarly, beneficiaries of copyright and related rights are not monolith groups. Copyright vests not only in authors, the creators of works, but also in others, including legal entities. Related rights are inherently linked to their right holders, who define them. The

purpose of this section is to outline how the EU copyright framework addresses the initial ownership of copyright and related rights, and what rights are included in the right holders' bundles. The section also singles out cases in which a press publisher is the original copyright holder, and reviews the role played by press publishers in introducing the new right into the EU copyright framework. Whereas the discussion on the press publishers' right was originally publisher-centred, publishers eventually gave way to press publication as the core concept of the new right.

A. The right holders

The authorship and initial ownership of copyright and related rights remains largely unharmonised in the EU copyright framework. This was a deliberate choice of the EU legislator, who left the decision on the rights' ownership to national laws.[880] The InfoSoc Directive does not include any general rules on authorship and copyright's initial ownership. The directive's text simply refers to authors as beneficiaries of exclusive rights on their works.[881] The EU copyright framework only includes special provisions on the initial ownership of copyright for three categories of works: computer programs, databases and films. In case of related rights, each right benefits a particular category of right holders, and there is no one, over-arching concept of a related rights holder.

Both the Term Directive and the Rental and Lending Directive name the principle director as an author of a cinematographic or audiovisual work.[882] Member States may choose others to be considered as co-authors as well. Secondly, pursuant to the Database Directive, an author of a database is a natural person, or a group of natural persons who have created a database, unless the MS' law recognises a legal person as the author.[883] If a database was created by a group of natural persons, they are joint authors.[884] Thirdly, with respect to computer programs, the EU legislator applied the work for hire doctrine. This means that copyright in works created by an employee in the course of, and in relation to, her employment, vests in the employer. Therefore, the Software Directive grants economic rights on computer programs to employers, should the program have been created by the employees in the course of their duties or following the instructions of the employer.[885] With the exception of databases, films and

[880] See Antoon Quaedvlieg, 'Authorship and Ownership: Authors, Entrepreneurs and Rights', *Codification of European Copyright Law. Challenges and Perspectives* (Kluwer Law International 2012) 216.
[881] InfoSoc Directive art. 2(a), art. 3(1) and 4(1).
[882] Rental and Lending Directive art. 2(2); Term Directive art. 2(1).
[883] Database Directive art. 4(1).
[884] ibid art. 4(3).
[885] Software Directive art. 2(3).

computer programs, decisions on authorship and initial ownership of copyright belong to the MS.

Whereas the majority of MS copyrights recognise that the work's creator is its author,[886] a number of exceptions subsist. Some of these exceptions are relevant in the context of the online news environment. First of all, in some of the Member States, the work for hire doctrine applies to all works created in the course of employment, not only to computer programs as envisaged in the Software Directive. This is the case in Poland,[887] Ireland,[888] Slovakia,[889] and the Netherlands.[890] In Hungary, the right is originally vested in an employee, but it is automatically transferred to the employer the moment that the employee delivers the work product.[891] In Greece, the transfer of rights is limited to those economic rights which are necessary for the fulfilment of the purpose of the contract.[892] Where the work for hire doctrine applies to all employment relationships, it means that a press publisher is an initial copyright holder for works created by journalists and other authors it employs.

Secondly of all, some of the Member States explicitly, and some implicitly, recognise newspapers or periodical publications as collective works. Rules on the initial ownership and authorship of collective works may differ from those for other types of works. As an example, newspapers and other periodicals are presumed to be collective works under Portuguese copyright law, with the copyright being vested in their publisher.[893] The Polish Copyright Act grants copyright in periodical publications to their publishers, and presumes that a publisher holds the rights to the publication's title.[894] Thus, under the Member States' law, a press publisher can sometimes be an initial holder of copyright in the news items created by journalists and other authors, which are included in a press publication.[895]

In the context of related rights, there is no one, over-arching concept of a right holder, similar to that of an author for copyright. Each of the related rights benefits a particular category of

[886] Quaedvlieg (n 880) 199.
[887] Polish Copyright Act art. 12.
[888] Irish Copyright Act art. 23(1)(a).
[889] Zákon č. 185/2015 Z.z. o autorskom práve a právach súvisiacich s autorským právom (v znení zákona č. 125/2016 Z.z.) (Slovak Copyright Act) art. 90.
[890] Dutch Copyright Act art. 7.
[891] Hungarian Copyright Act art. 30.
[892] Νόμος 2121/1993, Πνευματική Ιδιοκτησία, Συγγενικά Δικαιώματα και Πολιτιστικά Θέματα (επικαιροποιημένος μέχρι και τον ν. 4531/2018) (Greek Copyright Act) art. 8.
[893] Portuguese Copyright Act art. 19.
[894] Polish Copyright Act art. 11.
[895] The initial ownership of copyright by press publishers was recognised by the EC in the Impact Assessment accompanying the Proposal. See European Commission, 'Impact Assessment' (n 126) part 3 189-192.

right holders. The EU copyright framework names these categories, but, like in the case of the related rights' subject-matter, it fails to explain who stands behind them. Instead, the EU legislator relies on the provisions of international treaties and their definitions.[896] The related rights holders are performers, phonogram producers, broadcasting organisations, and film producers. Related rights of film producers are unique for the EU copyright framework. Whereas the Rental and Lending Directive briefly defines what the subject-matter is of these rights (a film), when designating rights' beneficiaries, it limits itself to a statement that the rights rest with the producers of the first fixation, without further explanation.[897] In addition to the four categories of related rights harmonised at the EU level, Member States are free to create additional related rights, an opportunity which the German legislator used to introduce a press publishers' right in 2013.

The EU legislator provides a more detailed explanation of who the beneficiary is in the case of the sui generis database right. Pursuant to the Database Directive, the sui generis right belongs to the maker of a database.[898] The directive's recitals further explain that a database maker is either a natural or a legal person taking the initiative and the risk of investing in the creation of a database.[899] At the same time, only citizens and companies established in the EU, or companies which have their registered office, central administration or principal place of business within the EU, can be beneficiaries of the sui generis right.[900] The same limitation applies to authors of a database enjoying copyright protection. This geographical limitation is closely related to the motives behind the harmonisation of the database protection, concerned with the promotion of European database creators, and boosting the database sector in the EU.[901] Because a press publication can be a database, its publisher can be considered a database maker.

Press publishers can be initial holders of copyright in news items following the work for hire doctrine, or when press publications are considered collective works. They can also be the sui generis database right holders. However, one needs to keep in mind that publishers in general are not explicitly recognised as right holders in the InfoSoc Directive. This lack of recognition was confirmed by the CJEU in the *Reprobel* case, concerning the allocation of a part of the

[896] Reinbothe and Lewinski (n 745) 11.
[897] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property art. 2(d) and art. 3(2)(c).
[898] Database Directive art. 7.
[899] ibid recital 41.
[900] ibid art. 11.
[901] ibid recitals 11-12.

copyright levies to publishers.[902] The Court did not find it appropriate to set aside half of the compensation for publishers: since the InfoSoc Directive does not list publishers among the right holders, they cannot be harmed by unauthorised uses.[903] The CJEU's decision in *Reprobel* reinforced one of the main narratives in the discussion on the press publishers' right, the equality narrative calling for equal treatment of press publishers and other content producers by granting them a new right.[904] Except for copyrights acquired on the basis of work for hire doctrine and concerning collective works, press publishers are derivative right holders with their entitlements to news items based on contracts concluded with journalists and other content creators.

B. A right holder: a bundle holder

Copyright and related rights provide their holders with a bundle of rights. Whereas the EU copyright framework mainly concerns economic rights, decisions on moral rights are left to the Member States. The harmonisation process has not been revolutionary, as the rights provided for copyright and related right holders reflect the minimum standards of the core international treaties: Berne, the Rome Convention, TRIPS, the WCT and the WTTP, and were often already a part of the MS legal orders. Crucial rights have been harmonised by the InfoSoc Directive: the right of reproduction, distribution and communication to the public. A reconstruction of the full rights' bundle at the right holders' disposal is, however, more complex, and requires the consultation of all the directives making up the EU copyright framework. The other rights in the bundle include the rights to broadcasting, lending, rental, resale, fixation, and making available. The MS differ in the implementation of the rights, however, unlike in the case of exceptions, they cannot choose which rights to implement, but need to guarantee the whole bundle to the right holders.

A general right of reproduction was introduced to the EU copyright framework by art. 2 of the InfoSoc Directive. Prior to that, reproduction rights were recognised by the specialised directives, the Software Directive or the Database Directive. In essence, the reproduction right is a right to authorise or prohibit direct or indirect, temporary or permanent, reproduction by any means, in any form, in whole or in part, of a work or a subject-matter of a related right.[905] The wording of the reproduction right embodies the principle of technological neutrality,

[902] *Reprobel* (n 498).
[903] ibid 47–48.
[904] 'Eupublishersright | MYTHBUSTER' (*eupublishersright*) ‹https://www.publishersright.eu/mythbuster› accessed 11 August 2017.
[905] InfoSoc Directive art. 2. The wording of reproduction right in other directives is nearly identical, with the only difference being inclusion of direct and indirect copying in the InfoSoc Directive's definition.

covering all acts of copying, regardless of the form and means used. As it is technologically-independent, analogue and digital copies are treated equally.[906] The right of reproduction is triggered whenever an unauthorised copy of a work is created: a copy does not need to have economic value or be distributed to the public. In the analogue world, the reproduction right lay at the heart of copyright and related rights.[907] Its significance may have changed in the digital age, but it remains valid in the online environment.

Closely related to the reproduction right is the right of distribution. Unlike the reproduction right, the distribution right is not relevant in the online environment, as it addresses only the exploitation of tangible copies. The wording of the general distribution right introduced in the InfoSoc Directive differs from the phrasing of the distribution right of related right holders included in the Rental and Lending Directive.[908] However, the essence of the rights is the same: it is the right to authorise or prohibit the distribution of tangible copies of works or the related rights' subject-matter, by sale or otherwise. What is important, is that the distribution involves the transfer of ownership, and that the principle of exhaustion applies.[909] Exhaustion of the distribution right means that, once a right holder has sold or otherwise transferred ownership of a copy of her work, she has exhausted her right in that copy, and no longer has power over its exploitation.[910]

The general right of communication to the public introduced in the InfoSoc Directive was designed as an implementation of art. 8 of the WCT, in response to the development of modern technologies, allowing for new forms of transmission of works.[911] The right of communication to the public is an equivalent of the distribution right in the digital environment. The right covers the authorisation or prohibition of any communication of works to the public, by wire or wireless means, when the public is not present at the place where the communication originated.[912] It is an umbrella solution, encompassing both the right of broadcasting and the right of making available.[913] The latter is crucial for the digital environment, as it applies to all

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[906] Alain Strowel, 'Reconstructing the Reproduction and Communication to the Public Rights: How to Align Copyright Nd Its Fundamentals', *Copyright Reconstructed. Rethinking Copyright's Economic Rights in a Time of Highly Dynamic Technological and Economic Change* (Kluwer Law International 2018) 206.
[907] Eechoud and others (n 8) 69.
[908] Compare InfoSoc Directive art. 2 and Rental and Lending Directive art. 9.
[909] Originally, some doubts existed about the application of the distribution right to online and coverage of acts not involving ownership transfer. However, they were resolved by the CJEU. See *Peek & Cloppenburg KG v Cassina SpA* [2008] Court of Justice of the European Union C-456/06, EU:C:2008:232 [36].
[910] For a detailed consideration of the exhaustion principle, see Chapter I sec III.G.
[911] Commission of the European Communities, 'Proposal for a European Parliament and Council Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society' (1997) 2–3.
[912] InfoSoc Directive art. 3(1).
[913] Eechoud and others (n 8) 71.

acts of making available to the public of works in such a way that individual members of the public may access them from a place and at a time individually chosen by them. It particularly concerns interactive on-demand transmission,[914] and is of particular importance in the context of linking. Unlike its analogue equivalent, the right of communication to the public, together with right of making available, is not subject to exhaustion.[915] Related right holders are not beneficiaries to the general right of communication to the public, but they do enjoy right of making available.[916] The right of communication to the public of performers and phonogram producers is included in the Rental and Lending Directive, but it is a remuneration rather than an exclusive right. Performers and phonogram producers are entitled to receive a single equitable remuneration for, among others, communication of the phonograms to the public.[917] Because the right of communication to the public and right of making available are formulated in a general manner, their application has caused considerable uncertainty. The CJEU took it upon itself to gradually create the criteria for rights application, which are discussed in detail below.

C. *The illusive press publisher*

Over the years, a variety of names for the regulatory responses benefitting press publishers were used. The list includes press publisher right,[918] neighbouring right for publishers,[919] publisher's intellectual property right,[920] and ancillary copyright for publishers.[921] What all these terms have in common, is that they put the figure of a press publisher at the centre. This focus on the press publisher created the impression that the new right is directed at an easily delineated group of beneficiaries. Both the German and Spanish press publishers' rights were designed to address the compensation problem faced by press publishers.[922] When the European Commission considered the issues created by news aggregation for the first time, it was concerned with the interests of two groups of stakeholders, one of which was

[914] Commission of the European Communities (n 911) 16.
[915] InfoSoc Directive art. 3(3).
[916] ibid art. 3(2).
[917] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property art. 8(2).
[918] Raquel Xalabarder, 'Press Publisher Rights in the New Copyright in the Digital Single Market Draft Directive' (Centre for Copyright and New Business Models in the Creative Economy (CREATe) 2016) Working Paper 2016/15.
[919] Ramalho (n 355).
[920] van Eechoud (n 353).
[921] Danbury (n 354); Barabash (n 708); 'Ancillary Copyright for Publishers. Taking Stock in Germany' (Bitkom 2015).
[922] For a detailed justification of national interventions, see Chapter III, section I.A of this thesis.

publishers.[923] Publishers were also central in the Public Consultation, which enquired about their role 'in the copyright value chain' and the impact of 'grant[ing] publishers a new neighbouring right'.[924] The Explanatory Memorandum accompanying the Proposal referred to press publishers as the beneficiaries of the new right, which was to bring the publishers legal certainty, and address their difficulties in licensing content.[925] The text of the Proposal itself referred to 'publishers of press publications', granted 'rights in publications', and defined a 'press publication' as a protected subject-matter. Therefore, the Proposal distanced itself from the publisher-centred approach, and followed the publication-centred approach instead. Accordingly, a press publishers' right holder was whoever created the relevant content, not necessarily the press publisher in the traditional intuitive sense. Since the Proposal, a press publication has remained key in determining the scope of press publishers' right.

The definition of press publication, from the Proposal to its final version in the CDSM Directive, has included a reference to a service provider who has initiative, editorial responsibility and control over the press publication.[926] The abandonment of the press-publisher vocabulary in the Proposal, and reference to an undefined service provider instead, has been confusing, especially considering that service providers were often named in the discussion as third parties using the press publishers' content without authorisation. During the legislative process, amendments to take account of the person of a press publisher were put forward, including a requirement that the press publication was a fixation exclusively made by (press) publisher or press agency.[927] On account of the fixation requirement having been removed, this EP amendment is not included in the final version of the CDSM Directive.

However, the CDSM Directive's recitals attempt to clarify who are publishers of press publications: they are service providers, such as news publishers or news agencies, publishing press publications under the meaning of the CDSM Directive.[928] The inclusion of this explanation does not change the fact that the CDSM Directive follows a press publication-

[923] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A Single Market for Intellectual Property Rights Boosting Creativity and Innovation to Provide Economic Growth, High Quality Jobs and First Class Products and Services in Europe' (2011) COM(2011) 287 final 9.
[924] 'Public Consultation on the Role of Publishers in the Copyright Value Chain and on the "Panorama Exception"' (n 344).
[925] European Commission, 'Explanatory Memorandum to the Proposal to the Directive of the European Parliament and of the Council on Copyright in the Digital Single Market' (n 349) 3.
[926] CDSM Directive art. 2(4).
[927] European Parliament, 'Copyright in the Digital Single Market Amendments Adopted by the European Parliament on 12 September 2018 on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market' (n 137).
[928] CDSM Directive para 55.

centred approach in defining the scope of the new right. What it does, is to attempt to limit the beneficiaries of the press publishers' right to the services producing press publications 'in the context of an economic activity that constitutes a provision of a service under Union law'.[929] As the recitals are not binding, but provide only interpretation guidelines, and the term 'service provider' remains unspecified in the final version of the CDSM Directive, it is difficult to agree on whether the attempt to limit the beneficiaries of the press publishers' right was successful. It seems that, as long as a service provider publishing a press publication has the initiative, editorial control and responsibility over this press publication, no matter its professional character, it would benefit from the new right. To that extent, the inclusion of a news agency as an example of a publisher of press publications does not change the personal scope of the right, but only incentivises the possibility of considering press agencies as potential right holders.

With the implementation process of the CDSM Directive just beginning, it remains to be seen how Member States will approach the issue of the press publishers' right beneficiaries. To date, only one Member State, France, has implemented the press publishers' right, and one, the Netherlands, has put forward its implementation proposal for public consultation.[930] Two different approaches were taken by these Member States. The Dutch proposal simply refers to publishers of press publications ('de uitgever van een perspublicatie'), and copies the definition of the press publication of the CDSM Directive.[931] In contrast, the French implementing act grants the new right only to press publishers ('des éditeurs de presse') and news agencies ('des agences de presse'), as defined by relevant acts of national law.[932] Creating a link between the press publishers' right and press law reflects the objective of limiting the new right's beneficiaries to the professional entities. However, considering the definition of a news agency, which requires it to be registered among other criteria,[933] and the definition of an online news service, requiring that it employs at least one professional journalist,[934] one may wonder whether the French implementation conveys the new right to an excessively narrow group of

[929] ibid 56.
[930] 'Consultatie Implementatiewetsvoorstel Richtlijn auteursrecht in de digitale eengemaakte markt' (*Overheid.nl*, 2 July 2019) ‹https://www.internetconsultatie.nl/auteursrecht› accessed 10 July 2019.
[931] Concept regeling Wetsvoorstel houdende wijziging van de Auteurswet, de Wet op de naburige rechten en de Databankenwet in verband met de implementatie van Richtlijn (EU) 2019/PM van het Europees parlement en de Raad van 17 april 2019 inzake auteursrechten en naburige rechten in de digitale eengemaakte markt en tot wijziging van de Richtlijnen 96/9/EG en 2001/29/EG (Implementatiewet richtlijn auteursrecht in de digitale eengemaakte markt), 2 July 2019.
[932] Loi n° 2019-775 du 24 juillet 2019 tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse.
[933] Ordonnance n° 45-2646 du 2 novembre 1945 portant réglementation provisoire des agences de presse art. 1.
[934] Loi n° 86-897 du 1 août 1986 portant réforme du régime juridique de la presse art. 1.

beneficiaries. What needs to remain decisive in determining whether a person or an entity benefits from the press publishers' right, is the question whether it produces a press publication in the sense envisioned in the CDSM Directive.

Additionally, the final text of the CDSM Directive states that only publishers established in a Member State, which have their registered office, central administration or principal place of business within the EU, are beneficiaries of the new right.[935] This is a similar geographical limitation of the right's beneficiaries as in the case of rights on a database. Similar to the database protection, the geographical limitation of the press publishers' right aims at the promotion and strengthening of the European press publishing sector, which needs support to stand up to American internet giants such as Google or Facebook.

One of the alternatives to the press publishers' right centring on a person of a press publisher, was the presumption of rights, considered by both the EP JURI Committee and the Council. The presumption of rights was included in the JURI draft report. According to the amendments put forward by the JURI rapporteur at the time, Therese Comodini Cachia MEP, a press publisher would be presumed to represent the authors of literary works included in a press publication, and would have a legal capacity to sue potential infringers in her own name.[936] In the rapporteur's opinion, this solution balanced the disadvantages and advantages brought to the press publishing sector by the technological development, while the press publishers' right was taking it a step too far, considering the diverse business models and varied users' patterns.[937] Following the change of the JURI rapporteur to Axel Voss MEP, the presumption of rights was abandoned.

At an early stage, the presumption of rights was considered by the Council as an alternative option to the press publishers' right. It described the publisher as a person entitled to conclude licenses and seek to introduce measures, procedures and remedies concerning the use of works and other subject-matter included in the press publication.[938] The presumption was rebuttable, and applied when the name of the press publisher was indicated on the press publication. At some point in the negotiations, the Dutch delegation proposed that the

[935] CDSM Directive para 55.
[936] European Parliament, 'JURI Draft Report' (n 130) 38 Amendment 52.
[937] Therese Comodini-Cachia during *Committee on Legal Affairs Meeting on 22 March 2017* ‹http://www.europarl.europa.eu/ep-live/en/committees/video?event=20170322-1500-COMMITTEE-JURI› accessed 26 July 2019.
[938] Council, 'Note from Presidency to Delegations on Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market - Discussion Paper on Article 11 and Article 13' (n 383) 7 Annex.

directive should leave the choice between a related right and a presumption to the Member States.[939] However, this approach was instantly rejected, and the press publishers' right remained the only option. The presumption of a right was also not included as one of the options for solving press publishers' issues in the Impact Assessment, with the high-ranking EC official stating that presumption was rejected as not providing sufficient legal certainty in the opinion of the German publishers.[940]

II. Copyright in the online news environment

The link is a basic communication tool, the heart of the web.[941] It acts as a connector, allowing internet users to refer to and share content in a simple, efficient way by providing information on its location. Links come in a plethora of forms, the simplest being the internet address of a website, which takes the user to a website's home page when clicked on.[942] Deep links take a step further, allowing the user to skip the home page and directly proceed to a relevant subpage. Neither simple nor deep links incorporate any content into a referring website, however, they are often accompanied by a preview. The preview provides a user with information on what she can expect to find after clicking through. As such, it allows her to make a swift decision on whether a referenced website is or is not of interest to her.

Originally a neutral communication tool, the link has become a central issue in the discussion on copyright in the digital environment. The structure of the web enables everyone to link to any content available online, cooperation of the content owner is not needed. This has been a deliberate choice to support the development of the web.[943] The freedom to link clashes with the exclusive rights, which require a prior consent of the right holder before a copyright-protected work is shared. Online, news and information are shared and distributed through a variety of channels. This includes outlets controlled by press publishers, such as official websites, dedicated mobile applications and newsletters, as well as third-party channels: news aggregators, search engines or social media. The core of the different modes of sharing and

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[939] Council, 'Note from Netherlands Delegation to Delegations on Proposal for a Directive If the European Parliament and of the Council on Copyright in the Digital Single Market - NL Proposal on Article 11 and Relevant Recitals' (n 388).
[940] Giuseppe Abbamonte, Director of Media Policy Directorate, DG CONNECT, European Commission during the Centre for Media Pluralism and Freedom 2019 Summer School for Journalists and Media Practitioners, European University Institute, 24-18 June 2019.
[941] Tim Berners-Lee, 'Tim Berners-Lee on the Web at 25: The Past, Present and Future' (*WIRED UK*) ‹http://www.wired.co.uk/article/tim-berners-lee› accessed 2 February 2017.
[942] The web address is commonly referred to as a URL. URL stands for a Unified Resource Locator.
[943] See Tim Berners-Lee, 'The World Wide Web: Past, Present and Future' (August 1996) ‹https://www.w3.org/People/Berners-Lee/1996/ppf.html› accessed 29 November 2017.

distributing is constant: a link, usually accompanied by a preview. The question on the copyright status of links is thus crucial for the online news environment.

The following section discusses the application of the right of communication to the public, and the right of reproduction to links. Firstly, it considers whether, and if so, under which conditions the provision of a link is an act of communication to the public. Secondly, it examines whether a preview accompanying the link is covered by the right of reproduction. The background for these considerations are links and previews provided by news aggregators and similar services, which direct users to news items made available by press publishers on their websites, absent the press publishers' consent. In its last part, the section considers the relationship between, and cumulation of different exclusive rights, when applied to a single act in the online news environment. In the light of little guidance offered by the InfoSoc Directive, the jurisprudence of the CJEU is crucial for untangling the scope of the right of communication to the public and the right of reproduction.

A. Link as an act of communication to the public

Svensson was the first case on linking referred to the CJEU, and the first time the Court was asked to assess whether the provision of a link falls under the right of communication to the public.[944] The *Svensson* case concerned an issue closely related to the press publishers' right: linking to press articles published on a press publisher's website by a third-party service. Göteborgs-Posten, a Swedish daily, published press articles on its website, without any access restrictions. An aggregation service of Retriever Sverige provided its clients with a list of clickable links to press articles available on other websites, including Göteborgs-Posten's site. After clicking on a link, a client was redirected to the website where the press article had been made available first.

A group of journalists whose articles were published by Göteborgs-Posten, including Mr Svensson, brought a legal action against Retriever Sverige, asking for compensation for unauthorised uses of their content. In the journalists' opinion, by offering its clients access to press articles through the provision of clickable links, Retriever Sverige infringed on their right of making available to the public. Retriever Sverige rejected this notion, indicating that it only directed clients to websites where press articles were available, and that it did not transmit any content. When considering the case on appeal, the Swedish court referred four questions to the CJEU, which started the saga of linking and communication to the public case law. In

[944] *Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v Retriever Sverige AB* [2014] Court of Justice of the European Union (Fourth Chamber) C-466/12, EU:C:2014:76.

essence, the questions asked whether the provision of a clickable link to a work published on another website constitutes an act of communication to the public, and whether the answer to this question is influenced by the fact that access to the work was not restricted; and whether Member States can provide authors with a broader protection than the one envisaged in art. 3(1) of the InfoSoc Directive.[945]

The *Svensson* case caused considerable discussion even before the delivery of the judgement, with contradictory opinions coming from such reputable institutions as the European Copyright Society (ECS)[946] and The International Literary and Artistic Association (ALAI).[947] The ECS rejected the idea of a link falling within the scope of the right of communication to the public, as a link serves only to provide information on the work's location, but not to communicate (transmit) the work itself.[948] Conversely, the ALAI made a distinction between links which provide access to specific works, such as deep links using a unique URL, and links which merely refer to a website where a work can be accessed, such as surface links. In the ALAI's opinion, only the former is a copyright-relevant act, as they make works available to the public.[949]

In delivering its judgement in *Svensson*, the CJEU followed neither the ECS's nor the ALAI's line of reasoning. Building on its previous case law, the CJEU singled out two cumulative criteria of the right of communication to the public: 1) the act of communication and 2) the direction of the communication to the public.[950] Only an act which fulfils both criteria is a copyright-relevant act. Whereas the CJEU concluded that a provision of a clickable link is an act of communication solely on the basis of the potential and direct character of access a link provides, to assess the second element, it employed a complementary criterion of new public.[951] Consequently, only a link directed to public which has not been originally taken into consideration by a right holder, is covered by the right of communication to the public.[952] Linking to content which is freely available on a referenced website, in the sense that no measures restricting the access have been applied, does not infringe the right of communication

[945] ibid 13.
[946] Lionel Bently and others, 'Opinion on the Reference to the CJEU in Case C-466/12 Svensson' (European Copyright Society 2013) 6/2013.
[947] The International Literary and Artistic Association, 'Report and Opinion on the Making Available and Communication to the Public in the Internet Environment - Focus on Linking Techniques on the Internet' (ALAI 2013).
[948] Bently and others (n 946) para 6.
[949] The International Literary and Artistic Association (n 947) 9.
[950] *Svensson* (n 82) para 16.
[951] The criterion of a 'new public' was first established in *SGAE* (n 72) para 40.
[952] *Svensson* (n 82) paras 18–24.

to the public.[953] When content is made available without any restrictive measures in place, it is assumed that the right holder consents to it being available to everybody.[954] The CJEU rejected the notion that a MS can grant an author a broader protection than the one afforded by the right of communication to the public in art 3(1) of the InfoSoc Directive.

Svensson was the first, but not the last CJEU judgement on linking. Shortly after the decision in *Svensson*, the Court delivered a reasoned order in *Bestwater*,[955] and a judgement in *C More Entertainment*.[956] Both cases follow the *Svensson*'s line of reasoning, with the referring court withdrawing a number of questions concerning the provision of clickable links in *C More Entertainment* because *Svensson* had already provided the required guidance.[957] Additionally, *Bestwater* confirmed that the type of linking technique does not matter where the right of communication to the public is concerned, and all links need to be treated in the same way. Thus, the use of a framing technique which could create the impression that content is placed on the website where the link can be found, even though it actually comes from a third-party site, should not influence the assessment of copyright infringement.[958]

Cases on communication to the public which came after 'linking trilogy'[959] have built upon *Svensson* reasoning, while adding further complementary criteria to be taken into consideration in addition to the new public. The first additional criterion is the linker's knowledge, or likely knowledge, of the infringing character of the referenced content.[960] The second is whether links are posted for profit. If they are, the presumption is that the linker was aware of the infringing character of the referred content.[961] The third criterion is the essential character of the role played by the linker, without whose intervention users would not be able or would be, but with difficulty, to access the content.[962] Also, alternatively to the new public criterion, a

[953] ibid 32.
[954] ibid 26.
[955] *BestWater International GmbH v Michael Mebes, Stefan Potsch* [2014] Court of Justice of the European Union C-348/13, EU:C:2014:2315.
[956] *C More Entertainment AB v Linus Sandberg* [2015] Cout of Justice of the European Union C-279/13, EU:C:2015:199 ECLI.
[957] ibid 20–21.
[958] *BestWater* (n 955) para 17.
[959] Gaetano Dimita, 'The WIPO Right of Making Available', *Research Handbook on Copyright Law* (Edward Elgar Publishing 2017) 148.
[960] *Stichting Brein v Ziggo BV and XS4All Internet BV* [2017] Court of Justice of the European Union C-610/15, EU:C:2017:456 [49].
[961] 'Case C-160/15 GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker Opinion of Advocate General Wathelet' (2016) EU:C:2016:221 para 51.
[962] *Stichting Brein v Jack Frederik Wullems* [2017] Court of Justice of the European Union C-527/15, EU:C:2017:300 [31 and 41].

criterion of technical means different from the ones used for initial communication is used.[963] However, this criterion is not relevant to linking, as the internet is a single medium in the CJEU's opinion.[964] The communication to the public criteria are interdependent, which means that they need to be assessed not only individually, but also in relation to one another.[965] Consequently, determining whether a link is or is not an act of communication to the public is quite complex,[966] and needs to be carried out on a case-by-case basis.[967] The criteria are not clearly explained. For instance, it is unclear whether the intervention of a linker needs to be indispensable for accessing works or whether it is sufficient that it facilitates access to works which are findable even without the linker's intervention.[968]

Commenting on the *Svensson* judgement directly after its delivery, Moir and others saw it as a reassurance for news aggregators which simply provide links to freely available content.[969] In their opinion, the activities of news aggregators and similar services are not covered by the right of communication to the public. Certainly, the application of the right of communication to the public is less complex in the context of sharing and distribution of the news online than in the case of other links. This is because news aggregators and similar services link to the press publications made available online with the consent of the right holders. Therefore, the knowledge or likely knowledge of the infringing character of the linked content, or the for-profit character of linking activities, are not relevant where the application of the right of communication to the public in the context of news aggregators and similar services is concerned.

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963 *ITV Broadcasting and Others v TVCatchup* [2013] Court of Justice of the European Union C-607/11, EU:C:2013:147 [26].
964 'Case C-160/15 GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker Opinion of Advocate General Wathelet' (n 961) para 42.
965 *Ziggo* (n 960) para 25.
966 Some tried to simplify the application of the right of communication to the public to linking by charting the CJEU-made criteria. See Eleonora Rosati, 'The Right of Communication to the Public … in a Chart' (*The IPKat*) ‹http://ipkitten.blogspot.com/2017/07/the-right-of-communication-to-public-in.html› accessed 15 July 2019; João Pedro Quintais, 'Untangling the Hyperlinking Web: In Search of the Online Right of Communication to the Public' (2018) 21 The Journal of World Intellectual Property 385, 397.
967 'Case C-160/15 GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker Opinion of Advocate General Wathelet' (n 961) para 33; *Filmspeler* (n 962) para 28; *Ziggo* (n 960) para 23.
968 Compare *Svensson* (n 82) para 31, where the CJEU refers to 'intervention without which those users would not be able to access the works transmitted'; with 'Case C-160/15 GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker Opinion of Advocate General Wathelet' (n 961) para 35 where an intervention is sufficient in the absence of which 'customers would not, in principle, be able to enjoy the broadcast work'; or *Filmspeler* (n 962) para 41 where users would 'find it difficult to benefit from those protected works' without intervention.
969 Andrew Moir, Rachel Montagnon and Heather Newton, 'Communication to the Public: The CJEU Finds Linking to Material Already "Freely Available" Cannot Be Restricted by Copyright Owners: Nils Svensson and Others v Retriever Sverige AB (C-466/12)' (2014) 36 European Intellectual Property Review 399, 400.

The CJEU's stance on the application of the right of communication to the public to linking has not met a general approval. Initial criticism thereof focused on two issues: the requirement of transmission and the new public criterion. Whereas the latter is still fiercely questioned, it seems that the calls to leave out links from the right of communication to the public's scope, simply because they do not involve a transmission of work, have toned down. Early in the discussion, AG Wathelet in his opinion in the *GS Media* case, called on the CJEU to reassess whether the provision of a link is an act of communication to the public, considering that the InfoSoc Directive's preamble requires that the right of communication to the public is understood in a broad sense, and covers any form of transmission and retransmission of work.[970] The prior-*Svensson* jurisprudence supported this call.[971] In *Circul Globus Bucureşti*, the Court explicitly stated that the right of communication does not cover any activity which does not involve a transmission or a retransmission of work.[972] However, requiring that communication involves a transmission of work could cause the right of communication to lose its significance, making it inapplicable to what it was designed to address: offering copyright-infringing works online.[973] Following *Svensson*, it is sufficient for a link to provide potential access to works, and it is a user's decision whether she will click through and access the work or not.[974]

When deciding on the application of the right of communication to the public to acts of linking, the Court built its reasoning around two internet-specific notions. Firstly, in the CJEU's opinion, the internet is a single technical medium. This means that the criterion of technical means different from the one used by the right holder making the original communication, is inapplicable to online communications. Considering the pace of technological development, this notion might prove precarious, and fail to account for the difference between desktop and mobile access, which is particularly important in the online news environment. Secondly, in CJEU's opinion when content is made available online without any access restrictions, the relevant public is composed of all internet users. This

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[970] 'Case C-160/15 GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker Opinion of Advocate General Wathelet' (n 961) paras 23 and 60.
[971] Jeremy de Beer, Mira Burri, Jeremy de Beer and Mira Burri, 'Transatlantic Copyright Comparisons: Making Available via Hyperlinks in the European Union and Canada' (2014) 36 European Intellectual Property Review 95, 101.
[972] *Circul Globus Bucureşti v Uniunea Compozitorilor şi Muzicologilor din România – Asociaţia pentru Drepturi de Autor (UCMR – ADA)* [2011] Court of Justice of the European Union C-283/10, EU:C:2011:772 [40].
[973] See for example Alexander Tsoutsanis, 'Why Copyright and Linking Can Tango' (2014) 9 Journal of Intellectual Property law and Practice 495, 499; Jane Ginsburg, 'Hyperlinking and "Making Available"' (2014) 36 European Intellectual Property Review 147, 147.
[974] *Svensson* (n 82) paras 18–20; *Filmspeler* (n 962) para 36.

means that no matter what the actual reach or intended audience of a website is, the recipients of the work which the right holder had in mind when making the work available, will always be all users of the internet. The two notions are relevant for the interpretation of the new public criterion and an understanding of access restrictions which can be applied to limit the public of works online.

The second criterion for the right of communication to the public to apply, identified by the CJEU in *Svensson*, is that a work needs to be communicated to the public. The term public is not defined in the InfoSoc Directive. According to the CJEU, it is an indeterminate and a fairly large group of persons.[975] As the right of communication targets the public which is not present at the place where the transmission originated, persons constituting the public do not need to be present in the same place at the same time.[976] What is important is the cumulative effect of making a work available, accounting for persons who have access to the work in succession.[977] According to the CJEU, as the criterion of different technical means does not apply to communications over the internet, relevant acts of communication to the public are acts which are aimed at the new public, a public different from the one a right holder had in mind when making the work available for the first time.[978] The term new public is a judge-made concept, which is not expressly mentioned in the texts of the InfoSoc Directive, the WCT or the Berne Convention.[979] It was first used by the CJEU in the *SGAE* case, concerning the distribution of a TV signal through television sets to customers in hotel rooms.[980] The new public was considered to be composed of viewers who, absent the hotel owner's intervention, would not have been able to enjoy the TV programs.[981] In case the public targeted by a subsequent act of communication is the same as the original public, the criterion of new public is not met. That was the case in *Svensson*. As the press articles were made available without any access restrictions by the right holders, the CJEU found that the public which they had in mind when publishing their work, were all the potential visitors of the website: all internet users.[982]

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[975] *SGAE* (n 72) paras 37–38; *TVCatchup* (n 963) para 32.
[976] Michel M Walter, Silke von Lewinski, *European Copyright Law: A Commentary* (Oxford University Press 2010) 988.
[977] *SGAE* (n 72) para 39.
[978] ibid 40; *Svensson* (n 82) para 24; 'Case C-160/15 GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker Opinion of Advocate General Wathelet' (n 961) para 37; *Filmspeler* (n 962) para 47.
[979] This lack of the term 'new public' led the ALAI to conclude that such a criterion is inconsistent with international norms. See 'Opinion on the Criterion "New Public", Developed by the Court of Justice of the European Union (CJEU), Put in the Context of Making Available and Communication to the Public' (ALAI 2014) 13.
[980] *SGAE* (n 72).
[981] ibid 40–41.
[982] *Svensson* (n 82) para 26.

The criterion of the new public is part of the settled case law on communication to the public. However, it continues to attract considerable criticism. It has been argued that the very notion of new public not only goes unmentioned in, but also is contrary to Berne, the WCT, and the InfoSoc Directive.[983] In the ALAI's opinion, the new public criterion creates a formality in the shape of a restriction, which the right holder needs to apply in order to enjoy a right of communication.[984] Such formalities are explicitly forbidden in the Berne Convention.[985] Reinbothe and von Lewinski reject the addition of any qualifiers to the term public, as it is in their opinion inconsistent with the broad understanding of the public championed by the WCT, and later implemented in the InfoSoc Directive.[986] Ficsor repeatedly argues that the creation of the new public criterion was based on the outdated WIPO guide, simply summarising its text without attention to the actual wording of the provisions of the WCT.[987] He considers that the creation of the new public criterion is a manifestation of the inadequacy of the regulation on the CJEU's preliminary rulings, a regulation which does not guarantee that judges are duly informed when making a decision.[988] In general, determining the scope of the new public in reference to what has or has not been taken into account by a right holder, introduces a subjective element to the exclusive right, which by definition should operate in precise and objective terms.[989]

What is, however, crucial in the context of the distribution and sharing of news online, is not the new public, but its opposite: the original public, a public which the right holder had in mind when publishing a news item for the first time. As explained in the previous paragraphs, in case of works made freely available online, without any access restrictions, the relevant public consists of all internet users.[990] Considering the high percentage of internet penetration

[983] See 'Opinion on the Criterion "New Public", Developed by the Court of Justice of the European Union (CJEU), Put in the Context of Making Available and Communication to the Public' (n 979).
[984] ibid 2.
[985] Berne Convention art. 5(2); For in-depth analysis the issue of formalities in the digital environment see Jane C Ginsburg, 'Berne-Forbidden Formalities and Mass Digitalization' (2016) 96 Boston University Law Review 745.
[986] Jörg Reinbothe and Silke von Lewinski, *The WIPO Treaties on Copyright: A Commentary on the WCT, the WPPT, and the BTAP* (Oxford University Press 2015) 132.
[987] See Ficsor, 'Svensson: Honest Attempt at Establishing Due Balance Concerning the Use of Hyperlinks – Spoiled by the Erroneous "New Public" Theory' (n 84) 4–12.
[988] Mihály Ficsor, 'Short Review of the Evolution of CJEU's Case Law on the Concept and Right of Communication to the Public: From SGAE - through TvCatchup, Svensson and BestWater – to GS Media and Soulier' 1 ‹http://www.copyrightseesaw.net/en/papers›.
[989] Bernt Hugenholtz, Sam C. van Velze Bernt Hugenholtz and Sam C Velze van, 'Communicating to a New Public? Three Reasons Why EU Copyright Law Can Do Without a "New Public"' (2016) 47 International Review of Intellectual Property and Competition Law 797, 809–810.
[990] *BestWater* (n 955) para 18 The original German text reads: 'dass die Inhaber des Urheberrechts, als sie diese Wiedergabe erlaubt haben, an alle Internetnutzer als Publikum gedacht haben.'.

in the EU, this is nearly everyone, an almost universal public.[991] The CJEU's understanding of original public in the internet context, builds on the assumption that a right holder understands how the internet works, and that anyone can search and access her work unless she makes use of restrictions. Another assumption is that the audience of each internet website, absent restrictions, is the same. And if websites share a single monolithic public, the posting of a link to freely available content cannot attract new audiences.[992] Some doubts about compatibility of these notions with the online reality were visible in the *GS Media* reference, where the referring court observed that, even though the disputed photographs were freely available, they were not easily findable, and it was the subsequent linking which brought them to the general public's attention.[993]

Some of the freely available websites have narrower audiences than all internet users. In the online news environment, there are press publications such as the Guardian, which target and reach the general public. There are also other, smaller outlets, which champion niche content, and whose audiences are specialised. Consider Kluwer Copyright Blog, which is a freely accessible source of information about recent developments in copyright.[994] Its audience are lawyers and academics interested in copyright issues, which is reflected in the style of writing which, to some extent, assumes prior knowledge on the subject of its readers. If Kluwer Copyright Blog would be linked by an Instagram influencer having copyright troubles, such a link would inevitably bring new readers, who would ordinarily not visit the blog. Should the whole population of the internet not be treated as one, homogenous group, it would be possible to distinguish niche audiences, and respective new publics.[995]

The original public can be limited by the use of restrictive measures. Works which are not freely available, are not intended for all internet users.[996] For such works, it is possible to use the new public criterion in the linking context. To date, the CJEU has not explicitly addressed what can be considered as a restrictive measure. From the outset, the core question has been whether restrictions could only be of a technical nature, or could also be imposed through a

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[991] According to Eurostat, 89% of households in the EU had access to the internet in 2018. See 'Broadband and Connectivity - Households' (*Eurostat*, 3 July 2019) ‹http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=isoc_bde15b_h&lang=en› accessed 16 July 2019.
[992] Mihály Ficsor, 'GS Media and Soulier - May the Hyperlink Conundrum Be Solved and the "New Public", "Specific Technical Means" and "Restricted Access" Theories Be Neutralized through the Application of the Implied Licence Doctrone and the Innocent Infringement Defense?' (2017) 1 Auteurs & média : AM 18, 8.
[993] 'Case C-160/15 GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker Opinion of Advocate General Wathelet' (n 961) paras 22–24.
[994] 'Kluwer Copyright Blog' (*Kluwer Copyright Blog*) ‹http://copyrightblog.kluweriplaw.com/› accessed 16 July 2019.
[995] Ficsor, 'Short Review of the Evolution of CJEU's Case Law on the Concept and Right of Communication to the Public: From SGAE - through TvCatchup, Svensson and BestWater – to GS Media and Soulier' (n 988) 2.
[996] *Svensson* (n 82) para 26.

websites' rules and regulations.[997] Whereas some were hesitant to reject registration requirements written in the website's terms,[998] others simply assumed that only technical access restrictions are relevant.[999] Although the Court does not provide comprehensive guidance, it seems to favour the technical character of restrictions in its judgements. A first indication is the language used in *Svensson*, where the Court required a link to 'circumvent the restrictions'.[1000] In the InfoSoc Directive, the word circumvention is used exclusively in relation to technological protection measures, designed to prevent unauthorised acts concerning copyrightable works.[1001] A second indication is that, in *GS Media*, the Court referred to the circumvention of restrictions which 'restrict the public's access to its own subscribers'.[1002] This indicates that there needs to be some technical system in place which recognises whether a user is a subscriber, and blocks access in case she is not. Following the *GS Media* decision, it became 'obvious' for Ficsor that restrictions need to be of a technical nature.[1003] The third indication is that the CJEU explicitly referred to the technical measures in *Soulier*, where it stated that the author has given her authorisation to publish works 'without making use of technological measures restricting access to those works'.[1004]

Accepting that the restrictive measures can only be of technical nature, may reduce the ambiguity, but does not entirely answer the question of what an acceptable restrictive measure is exactly. An obvious contender in the context of the online news environment is a paywall.[1005] In case of hard paywalls, access to all content is restricted to paying subscribers alone. Therefore, a link which circumvents such a paywall, will always be an infringing act of communication to the public. The case is more complicated for metered paywalls, as they allow free access to some of the press publisher's content, and the scope of this free access differs between non-paying readers. Accordingly, it is difficult to determine what public the right

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[997] An interesting example is a regulation adopted by the Polish Press Publishers' Institute (Polski Instytut Wydawców Prasy) on the rules on press dissemination by third parties, which can be used by Polish publilshers See 'Regulamin Korzystania z Artykułów Prasowych (WZÓR)' ‹http://www.press.pl/newsy/prasa/pokaz/47642,Regulamin-korzystania-z-artykulow-prasowych-_WZOR_› accessed 10 May 2016.

[998] Moir, Montagnon and Newton (n 969) 400.

[999] Toby Headdon, 'An Epilogue to Svensson: The Same Old New Public and the Worms That Didn't Turn' (2014) 9 Journal of Intellectual Property Law & Practice 662, 665.

[1000] *Svensson* (n 82) para 31.

[1001] InfoSoc Directive art. 6.

[1002] 'Case C-160/15 GS Media BV v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker Opinion of Advocate General Wathelet' (n 961) para 50.

[1003] Ficsor, 'Short Review of the Evolution of CJEU's Case Law on the Concept and Right of Communication to the Public: From SGAE - through TvCatchup, Svensson and BestWater – to GS Media and Soulier' (n 988) 2.

[1004] *Marc Soulier, Sara Doke v Premier ministre, Ministre de la Culture et de la Communication* [2016] Court of Justice of the European Union C-301/15, EU:C:2016:878 [36].

[1005] For a detailed explanation of the types of paywalls used in the online news environment, see Chapter II section V.B Paywall model.

holder had in mind when making the work available for the first time. Was it only paying subscribers, or was the right holder aware of the flexibility of the paywall, which meant that all internet users could potentially access her content? While the second option better fits the logic of the CJEU's decisions, it would mean that the provision of a link circumventing a paywall, and allowing users to access news items which were not freely accessible to these particular users, would not be an act of communication. Including some of the circumventing acts but not the others, is not a consistent approach. In any case, if a user is still required to pay a subscription fee when she arrives at the publisher's website after clicking on a link, there is no circumvention of a restriction, and therefore no infringement.[1006]

References to the use or lack of restrictions when making a work available, have prompted numerous scholars and the CJEU itself, to consider a doctrine of implied license in the context of linking.[1007] The doctrine means that, in certain situations, absent an explicit consent of the right holder, the use of a work is permitted as the consent can be inferred from the right holder's behaviour.[1008] Applied to the online environment, the doctrine means that, by uploading her work online and making it freely available, the copyright holder gives tacit consent to the work's online reuse, including sharing it via link. It assumes that the right holder is aware of the basic features of the internet, and with this knowledge, still chooses to upload her work. Although the Court does not explicitly mention the doctrine of implied license in *Svensson*, its reasoning behind the acceptance that the public for works uploaded absent any access restrictions is composed of all internet users, follows the rationale of implied license.[1009] In its later judgement in *Soulier*, the CJEU referred to *Svensson* as an example of an implicit consent of the author to use her work.[1010] The Court noted that, even though the InfoSoc

[1006] When commenting on links which lead to content no longer available, Arezzo argues that even potential access to content enlarges the original public. I do not agree. There can be no 'new public' if the members of the public who would like to access a work, cannot do so because the work is at no point in time available via the link provided. See Emanuela Arezzo, 'Hyperlinks and Making Available Right in the European Union - What Future for the Internet after Svensson?' (2014) 45 International Review of Intellectual Property and Competition Law 524, 543.

[1007] See Pekka Savola, 'EU Copyright Liability for Internet Linking' (2017) 8 Journal of Intellectual Property, Information Technology and Electronic Commerce Law 139, 149; Arezzo (n 438) 542; Taina Pihlajarinne, 'Linking and Copyright - a Problem Solvable by Functional-Technical Concepts?', *Online Distribution of Content in the EU* (Edward Elgar 2019) 34; Ernesto Rengifo, 'Copyright in Works Reproduced and Published Online by Search Engines', *Research Handbook on Copyright Law* (Edward Elgar Publishing 2017) 399; Ficsor, 'GS Media and Soulier - May the Hyperlink Conundrum b Solved and the "New Public", "Specific Technical Means" and "Restricted Access" Theories Be Neutralized through the Application of the Implied Licence Doctrone and the Innocent Infringement Defense?' (n 424) 10–12.

[1008] Taina Pihlajarinne, 'Setting the Limits for the Implied License in Copyright and Linking Discourse - the European Perspective' (2012) 43 European Intellectual Property Review 700, 700.

[1009] See Pihlajarinne, 'Linking and Copyright - a Problem Solvable by Functional-Technical Concepts?' (n 1007) 34.

[1010] *Soulier* (n 1004) paras 35 and 36.

Directive requires prior consent of the author for the reproduction and communication of her work, it is written nowhere how this consent should be expressed, which means it does not necessarily need to be explicit. However, according to the Court, the conditions for admitting implicit consent must be strictly defined, and an author needs to be informed of a third-party's use of her work and the ways in which she can object to it.[1011] Accepting an implied consent, should not make the requirement of author's prior consent ineffective. The conditions specified by the CJEU, make the Court's reference to *Svensson* in the *Soulier* judgement questionable, as the authors were in no way informed about the reuse of their works, and thereby had no opportunity to object to it. Guaranteeing the notification of a reuse of work, with the multitude of links being created every day, seems unrealistic.

Additionally, the application of the doctrine of implied license to linking could be problematic because there is no one commonly recognised interpretation of implied license, because it has not been subject to harmonisation in the EU. As a result, implied license is not a generally-accepted solution.[1012] A consequence of following the implied license doctrine would also be having to accept that the right of communication to the public can be exhausted, which is explicitly excluded in the InfoSoc Directive.[1013] A right holder who puts her work on the internet without any restrictions, would have no say over subsequent uses of her work, meaning in practice that her right is exhausted by the initial act of communication.[1014]

Even though a part of the communication to the public test sharing of infringing content is not relevant for the online news environment, there is still no certainty on the copyright status of links used for sharing and distributing news online. It seems that, for press publishers who do not restrict access to their content, the right of communication to the public is not relevant. However, with the growing number of paywalls, metered paywalls in particular, whether a particular link is infringing and circumventing the paywall still needs to be assessed on a case-by-case basis. Attention needs to be paid here to the means which users themselves put in place so that they can use links to content hidden behind paywalls, such as anonymous browsing. The right of communication to the public is able to restrict the activities of third-party services sharing press publishers' content in those cases where such sharing circumvents the existing

[1011] ibid 37–40.
[1012] 'Report and Opinion on a Berne-Compatible Reconciliation of Hyperlinking and the Communication to the Public Right on the Internet' (ALAI 2015) 2–3.
[1013] InfoSoc Directive art. 3(3).
[1014] Ficsor, 'Svensson: Honest Attempt at Establishing Due Balance Concerning the Use of Hyperlinks – Spoiled by the Erroneous "New Public" Theory' (n 84) 6; 'Opinion on the Criterion "New Public", Developed by the Court of Justice of the European Union (CJEU), Put in the Context of Making Available and Communication to the Public' (n 979) 15.

restrictions. However, as long as press publications are freely available online, their sharing via links by third parties, private users and content aggregation services alike, is not a copyright-relevant act.

B. Previews: the case for partial reproduction

Unlike the right of communication to the public, which was created in response to technological development, the right of reproduction laid at the copyright's core from the outset. In the analogue world, the reproduction right regarded tangible copies of protected works. In the digital age, the application of reproduction right is more complex, with the right likely to capture electronic copies created as a part of different technological processes. Even though the discussion on the copyright status of links centres around the right of communication to the public, the reproduction right remains relevant. Reproduction covers copying of a work in whole or in part. Therefore, what the reproduction right is likely to grasp, is content accompanying links: headlines and snippets providing a preview of the content links lead to.[1015]

Unlike the right of communication to the public, the reproduction right does not include a list of requirements which need to be fulfilled for the right to apply. A copy of a work does not need to be presented to the public or have its own economic significance.[1016] The only condition for the right of reproduction to apply, is that what is being copied, is protected by copyright. There is no obstacle for the original news items to be protected by copyright. However, it is not the full texts of news items which accompany links, but only their small parts. Traditionally, short literary forms, including headlines and text fragments, were seen as too trivial to attract copyright protection. That is why the creation of news aggregators and similar services had been possible in the first place.[1017] Everything changed following the CJEU's decision in the *Infopaq* case.[1018] Not only did the Court establish *de facto* harmonisation of the originality requirement, but it also determined what a partial reproduction of work stands for.

In *Infopaq*, the Court was asked whether eleven-words extracts of newspaper articles could be subject to reproduction right. Due to the lack of provisions to the contrary in the InfoSoc

[1015] Pihlajarinne notes that the provision of an embedded link itself can be considered an act of reproduction. See Taina Pihlajarinne, 'Should We Bury the Concept of Reproduction - Towards Principle-Based Assessment in Copyright Law?' (2017) 48 International Review of Intellectual Property and Competition Law 953, 961–962.
[1016] The latter gave rise to considerable criticism in the digital age, as the right of reproduction is likely to capture also copies which are devoid of any economic significance, giving the right holders the false impression that each digital copy equals an analogue copy, promising an increase of their revenues. See Strowel (n 906) 206.
[1017] Thomas Höppner, 'Reproduction in Part of Online Articles in the Aftermath of Infopaq (C-5/08): Newspaper Licensing Agency Ltd v Meltwater Holding BV' (2011) 33 European Intellectual Property Review 331, 331.
[1018] The facts of the *Infopaq* case are discussed in detail in Chapter IV, section II.A.2 of this thesis.

Directive, the CJEU noted that in order to be protected, such small parts of works need to fulfil the same criteria as the work as a whole.[1019] This means that a part of a work is not copyrightable simply because the work it comes from is original. Only the part of work containing an original element itself, an author's own intellectual creation, is copyrightable.[1020] While a single word is as such incapable of attracting copyright protection in the Court's opinion, a sentence or part thereof is able to convey originality of publication, and to receive copyright protection.[1021] In the context of literary works, such as headlines and snippets, an original element is a combination of 'form, the manner in which the subject is presented, and the linguistic expression'.[1022] The assessment of whether a part of a work contains an element which is the author's own intellectual creation, needs to be performed on case-by-case basis.[1023]

As previously explained, the creative choice of journalists and other news items' authors, might be limited by the editorial statute (the mission) of a particular publisher, or by requirements of a particular genre of content, news reports in particular.[1024] News reports require that a standard set of facts is covered, and a particular structure is followed. The creative choice of the author is thus restricted from the outset, as the number of ways in which a particular fact can be expressed, is limited. The freedom in selection of words and their phrasing is further restricted in the context of snippets and headlines. This is simply because a short literary form automatically limits the available options for the combination of words and phrasing, especially when the words need to report a certain fact in an accurate manner. In *Infopaq*, the Court itself hinted that the longer the fragments are, the more likely it is that they include an original element.[1025] Moreover, the role played by headlines and snippets is not irrelevant where creative restraints are concerned. Headlines and snippets need to be informative enough and reflect the news item content well enough to provide readers with the link's context and encourage them to click through to the full text of the news item. Therefore, it might not be that simple for a headline and a snippet to include an element of the author's own intellectual creation and to attract copyright protection.

The principle formulated in *Infopaq* that, in order to be protected, a part of a work needs to fulfil the same requirements as a work in whole, has been applied in the context of news aggregation

[1019] *Infopaq* (n 75) para 38.
[1020] ibid 47.
[1021] ibid 46.
[1022] ibid 44.
[1023] ibid 51.
[1024] van Gompel (n 652) 116.
[1025] *Infopaq* (n 75) para 50.

in the famous *Copiepresse* case. In *Copiepresse*, the Belgian court was asked to assess whether Google infringed the right of reproduction by providing titles and short extracts of newspaper articles in their Google News service. In 2006, the case was brought before the Court by Copiepresse, a Belgian copyright management organisation for French and German-language newspapers, who claimed that Google reproduces significant parts of press articles absent prior authorisation of the right holders. Both an order[1026] and a judgement issued by the Court of First Instance in Brussels, found in favour of Copiepresse, ordering Google to remove references to the articles published by Copiepresse members from the Google News service.[1027] The Brussels Court of Appeal upheld the judgement, noting that the Google News service performs a 'slavish reproduction' of the most important sections of press articles.[1028] Citing the CJEU's findings in *Infopaq*, the court found that these excerpts contain elements which are authors' own intellectual creation, as they include essential information which a publisher and a journalist wanted to communicate in a particular press article.[1029]

The reasoning of the Court of Appeal is confusing. Whereas the court refers to *Infopaq*, it fails to consider 'the form, the manner in which the subject is presented and the linguistic expression', which pursuant to *Infopaq* determine the originality of literary works. What the court focuses on instead, is the content of news items and their parts: the facts which an author and publisher has judged to be crucial. Thus, for a part of a work to be original, and for the reproduction right to apply, an excerpt needs to include essential information conveyed by the news item's full text. Although this conclusion reflects the extracts' aim, it seems contrary to the idea-expression dichotomy, a basic principle of copyright. The Court of First Instance in Brussels, even though it made its judgement prior to *Infopaq*, was more considerate of the linguistic form of extracts. It noted that a short fragment of the text might be original, especially where press articles are concerned, because the first sentences of an article, often form the 'catchphrase' of the article.[1030] The court focused on the phrasing of an extract rather than on the message it conveys, which is more fitting for the *Infopaq* principle. The fact that the decision of the Court of First Instance was reached before the *Infopaq* judgement, and that the Court of Appeal did not follow its line of reasoning, however, weakens its precedential value.

[1026] *Google Inc v Copiepresse SCRL* [2006] Court of First Instance in Brussels 2006/9099/A.
[1027] *Google Inc v Copiepresse SCRL* [2007] Court of First Instance in Brussels 06/10.928/C.
[1028] *Google Inc v Copiepresse* [2011] Court of Appeal of Brussels 9th Chamber 2007/AR/1730 [28].
[1029] ibid 28–29.
[1030] *Copiepresse First Instance* (n 1027) 27.

Another famous case applying the *Infopaq* principle in the context of the online news environment, is the UK case of *Meltwater*.[1031] Meltwater is a media monitoring company which offered a Meltwater News service. The service involved the delivery of monitoring reports including a selection of news articles pursuant to the keywords chosen by a client. The monitoring reports were composed of a link, a headline, the opening words following the headline, and an excerpt of the news article including keywords.[1032] The Newspaper Licensing Agency (NLA) brought an action against Meltwater, claiming that it requires a license to display the monitoring reports to its clients.[1033] The crucial issue in this case was whether headlines and excerpts of news articles are original and copyright-protected, as only reproduction of protected works or their parts is copyright-relevant.[1034] Following what it called '*Infopaq* test', the court assessed the copyrightability of headlines and excerpts separately.

When discussing the protection of headlines, the High Court of Justice drew attention to the process of their creation: the skill involved, and the fact that a headline is often created by the editorial staff, and not the author of a news article herself.[1035] This skill and the informative role played by a headline, is to encourage the user to read the whole article, making headlines copyright-protected literary works.[1036] According to the court, a headline can be protected as either an independent work or a part of a news article.[1037] The court refused, however, to make a general statement that all headlines are protected, as each headline requires an individual assessment.[1038] The assessment of the headline's copyrightability was maintained on appeal.[1039] Not everyone agreed with the reading of the *Infopaq* decision allowing for headlines of news articles to be protected as independent works. Liu argued that the fact that the CJEU recognised eleven words as a potentially protected part of a work, does not mean that eleven words can be a protected work themselves.[1040] Similar doubts were formulated by Stranganelli, who saw the lack of the CJEU's explicit consideration of headlines' originality as a chance for

[1031] *The Newspaper Licensing Agency Ltd & Ors v Meltwater Holding BV & Ors* [2010] England and Wales High Court (Chancery Division) HC10C01718, 3099 (Ch) EWHC; And following it appeal *The Newspaper Licensing Agency v Meltwater* [2011] Court of Appeal (Civil Division) A3/2010/2888/CHANF, EWCA Civ 890.
[1032] *Meltwater First Instance* (n 1031) para 26.
[1033] Meltwater had a license to carry out its monitoring activities. However, this license did not cover the displaying of the effects of its monitoring activities to the clients.
[1034] *Meltwater First Instance* (n 1031) para 56.
[1035] ibid 58.
[1036] ibid 70.
[1037] ibid 71.
[1038] ibid.
[1039] *Meltwater Appeal* (n 1031) para 22.
[1040] Deming Liu, 'Meltwater Melts Not Water but Principle! The Danger of the Court Adjudicating an Issue Outwith the Ambit of Referral' (2013) 35 European Intellectual Property Review 327, 331.

Meltwater, Google News and similar services, to remain functional by limiting the content accompanying the link to a headline.[1041]

It is true that the CJEU did not make a direct statement on copyrightability of headlines in *Infopaq*. However, it did determine that sentences or their parts can be the subject of copyright protection when they include an element of the author's own intellectual creation. If copyright protection is granted to an original sentence as a part of a work, the copyrightability of such an original sentence should be accepted all the more when it is a work in itself. This is required by the consistency of the copyright system in which parts of works and works in whole need to fulfil the same requirements to attract copyright protection. Whether a headline is protected as a part of a work or as an independent work is not a pivotal distinction in the context of the online news environment. What is important, is the mere fact that it might be subject to copyright protection. The reasoning behind the protectability of headlines makes the *Meltwater* conclusions questionable. The courts' focus is on the skill involved in the preparation of headlines, which brings to mind the UK standard of originality based on the skill, labour and judgement involved in the creation of a work.[1042] It does not, however, reflect the author's own intellectual creation standard of *Infopaq*. Absent a solid reasoning for its conclusion on headline copyrightability, the effects of *Meltwater* should not be overestimated to indicate the copyrightability of all headlines and titles, also when they are included in the text of a hyperlink.[1043]

When discussing the copyright protection of news articles' extracts, the High Court of Justice noted that, pursuant to the *Infopaq* test, they are, in principle, copyrightable. Whether a particular excerpt reflects the author's own intellectual creation is a question of fact and degree, and needs to be decided separately for each case.[1044] On appeal, the court further specified that there actually is no need to establish that each extract used by Meltwater was original. It is sufficient to find that there was a substantial probability of infringement occurring on a regular basis.[1045] This specification is case-specific and concerns the need to acquire a license for services such as Meltwater News. However, it does not remove the requirement of individual assessment of extracts for copyright infringement to actually occur.

[1041] Maryanne Stanganelli, 'Spreading the News Online: A Fine Balance of Copyright and Freedom of Expression in News Aggregation' (2012) 34 European Intellectual Property Review 745, 749.
[1042] See Andreas Rahmatian, 'Originality in UK Copyright Law: The Old "Skill and Labour" Doctrine Under Pressure' (2013) 44 International Review of Intellectual Property and Competition Law 4.
[1043] Headdon (n 999) 667.
[1044] *Meltwater First Instance* (n 1031) para 83.
[1045] *Meltwater Appeal* (n 1031) paras 28–29.

When considering the factors contributing to the originality of excerpts, the High Court of Justice, as in the case of headlines, emphasised the skill and labour involved in their preparation, as well as their function in drawing the reader to the full text of a news article.[1046] Consequently, what is important for the court, is whether extracts include features of an article which are original by virtue of the skill and labour involved in their preparation. Similar as in the case of headlines, these considerations are in line with the skill, labour and judgement originality standard in the UK, and not with the EU standard of originality finding author's intellectual creation in form, manner and linguistic expression.

Current European case law, at both the national and the EU level, looks favourably upon the copyright protection of very short, literary forms of expression. However, like in the case of the right of communication to the public, the copyrightability of each headline and snippet should be assessed on case-by-case basis. Finding copyright in headlines or snippets as categories of works is not possible. Therefore, it is not always the case that their use falls within the scope of the right of reproduction. The judgements in *Copiepresse* and *Meltwater* show that national courts have problems with applying *Infopaq* principle. Looking favourably upon the protection of text excerpts and headlines, the courts do not search for originality in the literary form of the text, but rather in the contents of the excerpt or the skill involved in the preparation of a headline. It may be true that formulating a captivating headline or a snippet requires certain degree of literary ability, but the reproduction right infringement in the provision of excerpts and titles of news items need not be assumed considering the *Infopaq* requirements and the constraints which the small number of words involved imposes.

C. Multiplicity of rights

As the case of links shows, more than one exclusive right can be relevant for a single online activity. At the same time, the application of one right does not exclude the application of the other, which inevitably leads to a rights cumulation. Because of the nature of online activities, the right of communication to the public, and especially the right of making available included in it, is omnipresent. It has replaced the reproduction right as the key exclusive right of copyright holders.[1047] *Renckhoff*, a recent case of the CJEU, clearly illustrates that the right of communication to the public is also relevant in situations where the right of reproduction would intuitively play a primary role.[1048] In *Renckhoff*, a pupil had copied a photograph which

[1046] *Meltwater First Instance* (n 1031) paras 83 and 85.
[1047] Dimita (n 390) 136; Irini A Stamatoudi, '"Linking" and "Browsing" in the Light of the EU Court of Justice's Case Law', *Intellectual Property Perspectives on the Regulation of New Technologies* (Edward Elgar Publishing 2018) 179.
[1048] *Land Nordrhein-Westfalen v Dirk Renckhoff* [2018] Court of Justice of the European Union C-161/17, EU:C:2018:634.

she found in an online travel portal, and used it in her presentation for a language workshop. The presentation was later published on the school's website. Mr Renckhoff, the author of the copied photograph, filed a legal action against the school claiming that the posting of a pupil's presentation on the school's website was infringing on his copyright. Although the court of first instance found an infringement of Mr Renckhoff's reproduction right and right of making available of, the appeal court decided to refer the case to the CJEU. The latter inquired about the application of the new public criterion, when the work was copied onto a different server, and only from that server was made available on another person's website. Even though the finding of a copyright infringement of the reproduction right would be sufficient to support Mr Renckhoff's claim, the case centred around the right of communication to the public, as a basic right of the right holders to oppose online uses of their content.

The general right of communication to the public has been granted to the authors only in respect of uses of their works.[1049] Related right holders enjoy the right of making available, a component of the right of communication to the public relevant for the online environment. Depending on the subject-matter used, related rights can be applicable to the online distribution and sharing of content, including linking, the same as copyright. In general, copyright and related right exist alongside each other. A guarantee that the related rights do not prejudice the rights of the authors was important from the outset. Even before the Rome Convention was drafted, authors' organisations had asked for assurances that the new instrument would not impact the situation of authors and other copyright holders.[1050] The Rome Convention provides two such guarantees. Firstly, it explicitly states that protection which it grants 'shall in no way affect the protection of copyright in literary and artistic works'.[1051] Secondly, only the countries-parties to the Berne Convention or the Universal Copyright Convention,[1052] that is, the countries which meet certain standards of authors' rights protection, are able to access to the Rome Convention.[1053] A statement of non-interference, identical to the first guarantee of the Rome Convention, is included in art. 1(2) of the WPPT.[1054] An agreed statement of contracting parties on art. 1(2) of the WPPT further specifies that, when the authorisation of a phonogram producer and a performer is needed to

[1049] InfoSoc Directive art. 3(1).
[1050] Gillian Davies, 'The 50th Anniversary of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations: Reflections on the Background and Importance of the Convention' (2012) 2 Queen Mary Journal of Intellectual Property 206, 211.
[1051] Rome Convention art. 1.
[1052] Universal Copyright Convention (6 September 1952) 13444 UNTS 943, as revised on 24 July 1971 and including Protocols 1 and 2.
[1053] Rome Convention art. 24(2).
[1054] WPPT art. 1(2).

use a phonogram, the authorisation by the author of works embodied in a phonogram is also required. A statement of non-interference, identical to the one in the Rome Convention and the WPPT, also found its place in the Beijing Treaty, making it a common standard for all key related rights treaties.[1055]

An analogous statement of non-interference is also present in the EU copyright framework. Both the Rental and Lending Directive and the CabSat Directive stipulate that the provided protection shall leave intact, and shall in no way affect the protection of copyright.[1056] A complimentary provision is included in the InfoSoc Directive: rights provided by the InfoSoc Directive to authors and related right holders are not to interfere with, and leave intact the rental right, lending right and certain rights related to copyright in the field of intellectual property, as well as copyright and related rights applicable to broadcasting of programmes by satellite and cable retransmission.[1057] Related rights are thus connected to copyright, and vice versa, but they remain independent from one another. When the copyright-protected works are contributions to the subject-matter of a related right, consent of all right holders is needed for the use of this subject-matter.

III. The press publishers' right and linking: circumventing copyright

The press publishers' right, a related right, introduced in the CDSM Directive, does not replace copyright, instead adds another layer of regulation to the online distribution and sharing of news and information. Like copyright and other related rights, the press publishers' right grants its beneficiaries a bundle of rights: the right of making available and the right of reproduction, as applied to online uses of press publications. Even though the content of the bundle awarded to publishers of press publications in the CDSM Directive is modest, it is broader in scope than what the national press publishers' rights offer. In Germany, producers of press products only enjoy the making available right. The Spanish solution does not offer its beneficiaries any rights as it takes the form of a copyright exception, and it applies exclusively to the right of making available. As a result, the EU press publishers' right is the only solution going further than the making available right. The contents of the rights bundle awarded to the publishers was not contested during the legislative process.

[1055] Beijing Treaty on Audiovisual Performances was adopted on 24 June 2012 art. 1(2).
[1056] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property art. 12; 1992 Rental and Lending Directive art. 14; CabSat Directive art. 5.
[1057] InfoSoc Directive art. 1(2).

With the CDSM Directive explicitly requiring Member States to give press publishers 'the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC',[1058] there should be no doubt that the jurisprudence of the CJEU on the rights of making available and reproduction is relevant for the determination of the scope of the press publishers' right. With the CJEU finding that the requirements of unity and coherence of the EU legal order demand that the concept of communication to the public used in the InfoSoc Directive and the Rental and Lending Directive have the same meaning,[1059] the same exclusive right of making available provided by the InfoSoc Directive should be interpreted the same for all its beneficiaries all the more. The notion cannot be accepted that vast differences between the subject-matter of copyright and the press publishers' right justify the rejection of the CJEU jurisprudence on the reproduction right in the copyright context.[1060] As demonstrated in Chapter IV of this thesis, distinguishing between press publications and copyright protected news items is difficult, and sometimes impossible. To give the concept of reproduction a different meaning in the context of copyright and the press publishers' right would be illogical. Accordingly, the reflections on the application of right of making available and right of reproduction in the previous section are applicable in the context of the press publishers' right.

Although the recitals to the CDSM Directive stipulate that the rights awarded to the publishers of press publications 'should have the same scope as the rights of reproduction and making available to the public provided for in Directive 2001/29/EC',[1061] the CDSM Directive includes multiple cut-outs from the press publishers' right's scope. First, the right applies to the online uses of press publications but excludes acts of hyperlinking. Secondly, only uses by 'information society service providers' are relevant. Thirdly, the right does not apply to non-commercial or private uses of press publications by individual users. Fourthly, uses of individual words or very short extracts of press publications are excluded from the rights' scope. Last, but not least, the press publishers' right can be limited by the application of the copyright exceptions and limitations envisaged in the InfoSoc Directive, the Orphan Works Directive and the Marrakesh Directive. All in all, determining the scope of the press publishers' right and its relationship with copyright and other related rights is quite complex.

[1058] CDSM Directive art. 15(1).
[1059] *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV (GEMA)* [2016] Court of Justice of the European Union C-117/15, EU:C:2016:379 [28].
[1060] Höppner, 'EU Copyright Reform: The Case for Publisher's Right' (n 757) 11.
[1061] CDSM Directive recital 57.

Regardless of multiple cut-outs, the rights awarded to publishers of press publications remain of a significant scope, affecting the online news environment, and the EU copyright framework in general. The section reconstructs the scope of the press publishers' right and explains how its introduction into the EU copyright framework leads to the double-layering of entitlements, and the circumvention of copyright provisions. Firstly, the section describes how a link, originally the core issue for the press publishers' right, was completely removed from the new right's scope. Secondly, it examines the consequences of including the reproduction right in the press publishers' rights bundle, arguing that the press publishers' right can effectively limit linking by removing links' context due to the restriction of the use of previews. In its final part, the section examines the limited effectiveness of the press publishers' right, which is to apply to the activities of information society service providers alone.

A. The link in the press publishers' right narrative

As links remain a main tool for the distribution and sharing of news in the online news environment, the press publishers' right aimed to tackle them from the outset. Publishers began to voice their concerns about linking as early as 2009, when they opposed a free reuse of press publications in the Hamburg Declaration, and called for increased protection of their intellectual property on the web.[1062] Initially, the publishers' goal was to clarify the legal status of links, so that they could exercise control over third-party services, such as news aggregators, using their content. The claim for control over the use of links has earned the press publishers' right the name link tax, and brought the issue of the new right to the public's attention, with internet users strongly opposing any restrictions of their online activities. The issue of curtailing the linking freedom has become the heart of the freedom of the internet narrative and gave rise to The Save The Link Campaign.[1063]

Possibly because of the controversy caused by the idea of limiting the linking freedom, when considering the introduction of the press publishers' right at the EU level, the European Commission was very careful to avoid using the word link or hyperlink in any of its official communications issued prior to the Proposal. What the Public Consultation document enquired about, were online uses of publishers' content.[1064] The questions on the effects of the press publishers' rights already enacted in some Member States used the slightly different, but

[1062] 'Hamburg Declaration Regarding Intellectual Property Rights' (*Hamburg Declaration regarding intellectual property rights*) ‹http://www.encourage-creativity.org/› accessed 22 October 2015.
[1063] For a detailed description of the internet freedom narrative, see Chapter III, section III.G of this thesis.
[1064] 'Public Consultation on the Role of Publishers in the Copyright Value Chain and on the "Panorama Exception"' (n 344).

no less general, term 'specific types of online uses', without direct reference to the actual scope of the relevant national provisions.[1065] Nowhere did the Consultation document explain the term online uses, leaving the respondents to determine the meaning themselves. With linking being a common communication tool on the web, it was only natural for the respondents to assume that the term online uses covers linking as well.

Following the Public Consultation, it was the term online use which made it into the Proposal. However, digital use was used to determine the material scope of the press publishers' right.[1066] Like the Consultation, the Proposal refrained from providing definitions of these terms. Digital use has a broader reach than online use, as it covers not only uses involving the web, but all uses engaging digital technologies, with or without involvement of the internet.[1067] Limiting the uses covered by the press publishers' right to digital uses, was almost meaningless because of the omnipresence of digital technology, with nearly all uses being digital.[1068] The process of newspaper printing itself has undergone digitalisation, and even photocopying or scanning of a newspaper using a digital photocopier could be considered a digital use.

Hyperlinking was referred to only once in the Proposal, in its recital 33, explicitly excluding links which 'do not constitute communication to the public' from the scope of the press publishers' right.[1069] This simple reference did little to clarify the relationship between the right of communication to the public and linking. It was a simple statement that some links fall within the scope of the right of communication to the public, and some do not, following the CJEU's jurisprudence requiring a case-by-case assessment of each link. The statement in recital 33 of the Proposal, brought additional confusion about the already vague provision on the press publishers' right, as it referred to the right of communication to the public, even though the proposed press publishers' right covered only the right of making available. Neither the supporters nor the opponents of the new right were satisfied with the text of the recital, and its vague wording on the relationship between the proposed press publishers' right and linking. The recital made some of the supporters of the press publishers' right call for an explicit statement that each act of linking to press publication is an act of communication to

[1065] ibid question 15.
[1066] Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (n 375) rec. 31.
[1067] CIPIL to UK Intellectual Property Office (n 568).
[1068] Taina Pihlajarinne and Juha Vesala, 'Proposed Right of Press Publishers: A Workable Solution?' (2018) 13 Journal of Intellectual Property Law and Practice 220, 225.
[1069] Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (n 375) rec. 33.

the public, and when performed without prior consent amounts to copyright infringement.[1070] In contrast, the opponents of the new right were disappointed that, instead of clearly stating that a link does not amount to an act of making available, the new right simply echoed the jurisprudence of the CJEU, failing to provide a simple answer on the legal status links.[1071]

The relationship between the press publishers' right and linking was discussed during the legislative process. First, whereas the Council opted for the use of the narrower term online uses for defining the new right's scope, the EP left the term digital uses included in the Proposal unchanged. In its final version, the CDSM Directive follows the Council's stance, with the rights of making available and reproduction being awarded to the publishers solely in respect to the online uses of their publications. Secondly, where the links themselves are concerned, the Council did not propose a new solution, simply moving the exclusion of 'hyperlinks which are not acts of communication to the public' to recital 34, concerning the scope of the new right.[1072] Conversely, the European Parliament considered a variety of solutions on the matter of links, and finally settled on the complete exclusion of hyperlinks from the scope of the new right.[1073] The position of the EP made its way into the final text of the CDSM Directive, which expressly excludes the application of the right to acts of hyperlinking.[1074] This ban applies not only to the right of making available, but also to the right of reproduction. Additionally, even though the ban explicitly refers to only one type of links, hyperlinks, it is safe to assume that all types of links are excluded from the press publishers' right scope. Following the CJEU decision in *Bestwater*, the type of linking technique used does not matter as regards the right of communication to the public, and all links need to be treated in the same way.[1075] Consequently, the exclusion should apply to all forms of links, from simple links to framing.

The changes to the press publishers' right included in the Proposal, limiting the application of the right to online uses and excluding hyperlinks from the right's scope, were welcomed by the

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[1070] Instytut Wydawców Prasy (IWP) *Position of Publishers on the consultation launched by Ministry of Culture and National Heritage on documents published by the European Commission on 14 September the current year concerning modernisation of copyright (Stanowisko Wydawców wobec konsultacji ogłoszonych przez MKiDN w sprawie dokumentów opublikowanych 14 września br. Przez Komisję Europejską i dotyczących modernizacji prawa autorskiego)* 12 October 2016, 12.
[1071] Till Kreutzer, 'Opinion on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market of 14th September 2016 COM (2016) 593 / F1' (IGEL – Initiative against an Ancillary Copyright for Press Publishers 2016) 6 ‹http://ancillarycopyright.eu/news/2016-12-05/our-statement-commissions-proposal-regarding-european-ancillary-copyright-press-publishers›.
[1072] Council, 'Note from Presidency to Delegations on Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market - Discussion Paper on Article 11 and Article 13' (n 383) 3.
[1073] European Parliament, 'Copyright in the Digital Single Market Amendments Adopted by the European Parliament on 12 September 2018 on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market' (n 137) art. 11(2a).
[1074] CDSM Directive para 57 and art. 15(1).
[1075] *BestWater* (n 955) para 17.

public and public policy advocates. The changes significantly narrowed the new right's reach, making it impossible to follow the CDSM Directive's requirement that the rights awarded by Member States should have the same scope as the rights envisaged in the InfoSoc Directive. When applied in the online news environment, the right of making available will never have the same scope if the core practice of sharing and distributing the content, linking, is removed from the ambit of the press publishers' right yet remains in the copyright's scope. Thus, one might be tempted to conclude that the right of making available awarded to the publishers of press publications is not the same right of making available as included in the InfoSoc Directive. Nevertheless, the concept of making available should remain the same, and follow the same criteria formulated by the CJEU, regardless of the rights' divergent scope.

As noted at the beginning of this section, the press publishers' right is actually applicable alongside copyright. Therefore, the exclusion of hyperlinks from the new right's scope means that a single act of linking might be considered infringing on the right of making available of a copyright holder, but not infringing on the press publishers' right. Consequently, the legal uncertainty of persons and entities linking to the press publications will continue, with links still requiring a case-by-case assessment. The exclusion of hyperlinks from the scope of the new right, even though welcomed, has no practical significance. What it does, is to bring additional inconsistency to the EU copyright framework. Although the exclusion of links which do not constitute acts of communication to the public from the scope of press publishers' right in the Proposal's recitals had its own redundancy problems, it was consistent with the copyright *acquis*. Since links are not covered by the new right, it is questionable whether the granting a right of making available to press publishers has any practical significance.

B. Tackling linking by removing context

Even though hyperlinks remain excluded from the scope of the press publishers' right, this does not mean that the new right has no effect on the acts of linking. The control over the use of previews accompanying links, which press publishers enjoy thanks to the reproduction right, can greatly limit linking. With the scope of the reproduction right granted to press publishers determined by art. 2 of the InfoSoc Directive, the publishers have the right to 'authorise or prohibit direct or indirect, temporary or permanent reproduction [of press publications] by any means and in any form, in whole or in part'.[1076] Similar to copyright, what is being copied needs to be a protected subject-matter. Unlike copyright, the protected

[1076] InfoSoc Directive art. 2.

subject-matter, or its part, does not need to be original. When asked about the scope of partial reproduction in the context of related rights of phonogram producers in the *Pelham* case, the CJEU indicated that the taking of a sound sample, even a very short one, needs to be considered as a partial reproduction of a phonogram.[1077] In consequence, the inclusion of a reproduction right in the bundle of rights granted to press publishers means that any preview accompanying the link could potentially be subject to the press publishers' right.

Previews are crucial for linking, especially in the online news environment. One of the Public Consultation's respondents simply wrote that linking without snippets is useless.[1078] The reason is that snippets provide context for links, without which a user would not be able to assess whether the referenced website is or is not of any interest to her.[1079] The previews make links an efficient communication tool on the web. The link accompanied by a preview provides sufficient means and information for the user to decide whether to click through, without needing to seek additional information about the referred website. Considering this crucial role of previews, Nexa Centre for Internet and Society noticed that the press publishers' right does not need to explicitly aim at restricting linking in order to effectively limit the ability to link. It would be enough for the publishers' right to limit the possibility to display the previews of the referenced content.[1080] Such a restriction would result in a link losing its function as a communication tool, as it would no longer be able to create efficient connections between websites.

When adopting the press publishers' right in Germany, the legislator excluded 'individual words or the smallest of text excerpts' from its scope.[1081] This exclusion was incorporated even though the German press publishers' right does not involve the reproduction right. The amendments to the German Copyright Act which introduced the press publishers' right, provide no explanation of what smallest of excerpts are. During the arbitration proceedings between VG Media, a German collective society representing press publishers, and Google, the Copyright Arbitration Board of the German Patent and Trade Mark Office (DPMA) recommended an upper limit of seven words, excluding the search terms.[1082] This

[1077] *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* [2019] Court of Justice of the European Union C-476/17, EU:C:2019:624 [29 and 39].
[1078] OpenForum Europe (n 541) q 13, 15.
[1079] Saida El Ramly (Director General, EDiMA), 'Ancillary copyright and internet freedom', European Parliament, 28.09.2016.
[1080] Nexa (n 431) q 12, 16.
[1081] German Copyright Act s 87(f)(1).
[1082] 'DPMA Entscheidet Zum Leistungsschutzrecht Für Presseverleger' (*Institut für Urheberrecht und Medienrecht*, 25 September 2015) ‹http://www.urheberrecht.org/news/5468/› accessed 5 August 2019.

recommendation is not binding. The parties to the proceedings rejected the DPMA's settlement proposal. The case was halted in anticipation of the judgement of the CJEU on the legality of the German press publishers' right.[1083] Nevertheless, following the non-binding recommendation of the DPMA, when informing press publishers about the scope of their new right, VG Media indicates that only excerpts of less than seven words are excluded from the scope of the right.[1084] One of the German publishers is even more restrictive, stating that the use of as little as three words triggers a licensing obligation.[1085] In sum, to date no commonly accepted guideline on the length of exempted excerpts coming from Germany exists.

An exemption of single words and excerpts, similar to the German one, did not find its way into the Proposal. The scope of the reproduction right awarded to the press publishers remained unrestricted. Consequently, the contextualisation of a link by the provision of a headline and snippet would always be an intervention into the scope of the exclusive right of a press publisher, regardless of their length and whether they were original or not. In this way, the link tax became a snippet tax.[1086] This situation was partially amended during the legislative process. However, the discussion in the EP and the Council focused not on the preservation of the link, an efficient communication tool, or the functioning of the internet itself, but on the need to secure press publishers' control over the use of extracts of their content. The exclusion proposed by the European Parliament was rather modest in nature, as it was limited to single words accompanying the links.[1087] Conversely, the Council was more generous in shaping the exclusion, deeming it non-applicable to insubstantial parts of press publications.[1088] There was, however, a problem with reaching an agreement on how this insubstantial part should be determined. The first proposed compromise envisaged an originality criterion, excluding only those excerpts which were not an author's own

[1083] 'Request for a Preliminary Ruling from the Landgericht Berlin (Germany) Lodged on 23 May 2017 — VG Media Gesellschaft Zur Verwertung Der Urheber- Und Leistungsschutzrechte von Medienunternehmen MbH v Google Inc. C-299/17' 1.
[1084] 'Wie Das Presse-LSR Funktioniert' (*LSR Aktuell*) ‹http://lsr-aktuell.de/h%C3%A4ufige-fragen/wie-das-presse-lsr-funktioniert› accessed 5 August 2019.
[1085] Eduard Hüffer (Managing Director of Aschendorff-Verlag) See 'Leistungsschutzrecht: Verleger fordern weiter Millionen von Google' (*heise online*, 4 September 2018) ‹https://www.heise.de/newsticker/meldung/Leistungsschutzrecht-Verleger-fordern-weiter-Millionen-von-Google-4154749.html› accessed 5 August 2019.
[1086] CILIP response to the Public Consultation q 9, 3.
[1087] European Parliament, 'Copyright in the Digital Single Market Amendments Adopted by the European Parliament on 12 September 2018 on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market' (n 137) art. 11(2a).
[1088] Council, 'Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market - Agreed Negotiating Mandate' (n 138) art. 11(1).

intellectual creation.[1089] This would align the press publishers' right with copyright. In later stages, the Council also considered the criterion of the length of the exempted extracts.[1090] Absent an agreement, the Council's final compromise left it to the Member States to decide whether originality, size or both criteria should be applied with respect to exempted insubstantial parts of press publications.[1091]

In its final version, the CDSM Directive excludes 'single words and very short extracts' of press publications from the scope of the press publishers' right.[1092] The wording is similar to the German exemption, and as in Germany, the EU legislator did not include an explanation of what counts as a very short extract. According to the CDSM Directive's recitals, the reason for extending press publishers' right protection to parts of press publications in the first place was their economic relevance.[1093] This justification reflects the press publishers' argument of news aggregators and similar services causing them economic harm by systematic provision of small parts of press publishers' publications. In the publishers' opinion, such parts of press publications often provide a sufficient amount of content to satisfy readers' information needs. Consequently, a reader no longer needs to visit a press publishers' website to receive her news, which drives web traffic, and respective revenues, away from the press publishers.[1094] Seeing as copyright requires that the parts of news items are original for the reproduction right to apply, press publishers were always interested in having the press publishers' right embrace systematic use of short excerpts of press publications, also the unoriginal ones.

Following the economic rationale, the CDSM Directive exempts uses of single words and very short extracts because they do not undermine the investments made by press publishers in production of their content.[1095] Simultaneously, the CDSM Directive warns that this exemption cannot be read in such a way as to influence the effectiveness of the press publishers' right. That is, the exception calls for a narrow interpretation. Interestingly, the EC declared the exclusion of single words and very short extracts to cover uses of snippets in general in the Frequently Asked Questions on Copyright Reform, a short explainer published online on the

[1089] Council, 'Note from Presidency to Delegations on Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market - Presidency Compromise Proposal (Consolidated Version) and State of Play' (n 139) 71 Annex II.
[1090] Council, 'Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market - Presidency Questions Regarding Articles 3a, 11 and 13' (2018) 7914/18 3.
[1091] Council, 'Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market - Agreed Negotiating Mandate' (n 138) art. 11(1).
[1092] CDSM Directive art. 15(1).
[1093] ibid recital 58.
[1094] The substitution effect of news aggregators is discussed in Chapter II, section IV of this thesis.
[1095] CDSM Directive recital 58.

European Commission website.[1096] If the press publishers' right did not apply to snippets, considering that it already does not apply to links, this would undoubtfully influence the effectiveness of the press publishers' right, which the CDSM Directive warns about. As a result, the general statement on the preservation of all snippets under the press publishers' right made by the Commission, should simply be treated as an oversimplification when providing an easily-understandable explainer to the public.

Although the CDSM Directive does not simply indicate the number of words which can be used without any restrictions, by linking the exception to the economic effect on publishers, it guides towards an important benchmark: the previews of news items provided by the press publishers via third-party services. It seems safe to assume that a press publisher posting a snippet of her content is unlikely to act against her own economic interests. Thus, it is only logical to look at what press publishers themselves consider acceptable, and incapable of replacing a full text of a news item. By posting a link and a preview of their news item on a third-party service, press publishers aim to attract attention and users clicks to their websites. This means that the amount of content a press publisher includes needs to be sufficient to provide a user with enough information to make a decision on whether a particular news item is of interest to her or not, but not so much information that a user no longer has a need to click through to see the whole news item.

As described in Chapter II, press publishers have accounts on social media such as Facebook or Twitter, through which they promote their press publications. Facebook generates previews automatically, but business users can adjust their content or remove previews completely.[1097] Twitter on the other hand, only generates previews for pages which set up Twitter Cards, a multi-media add-ons to tweets.[1098] Thus, in both cases, press publishers posting links on their accounts have control over previews.

One of the press publishers using social media to promote its content is Verlag Der Tagesspiegel GmbH, which publishes Der Tagesspiegel, a German daily newspaper.[1099] Der

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[1096] 'Frequently Asked Questions on Copyright Reform' (*Digital Single Market - European Commission*, 22 June 2018) ‹https://ec.europa.eu/digital-single-market/en/faq/frequently-asked-questions-copyright-reform› accessed 5 August 2019.

[1097] 'Reference Guide for Link Preview Editing' (*Facebook Ads Help Centre*) ‹https://en-gb.facebook.com/business/help/247886969033572› accessed 6 August 2019.

[1098] 'Posting Links on Twitter' (*Twitter Help Center*) ‹https://support.twitter.com/articles/78124#›; Rebekah Carter, 'Twitter Cards: Everything You Need to Know' (*Sprout Social*, 12 2018) ‹https://sproutsocial.com/insights/twitter-cards-guide/› accessed 6 August 2019.

[1099] Der Tagesspiegel is one of the newspapers which has published an open letter by Sammy Ketz, arguing that the introduction of the press publishers' right is a matter of life and death for journalists working in war zones. Verlag Der Tagesspiegel GmbH is thus one of the publishers openly supporting the press publishers' right.

Tagesspiegel has accounts on both Facebook and Twitter, where it regularly posts links and previews to its news items. To show how much content of news items press publishers make available on third-party services, Figure 9 includes a preview of Der Tagesspiegel's article 'Brasiliens Präsident feuert den Wächter des Regenwaldes'[1100] published on Der Tagesspiegel's Facebook page, and Figure 10 presents a preview of the same article on Der Tagesspiegel's twitter account.

Figure 9: Der Tagesspiegel Facebook page on 5 August 2019

Figure 10: Der Tagesspiegel Twitter account on 5 August 2019

The previews included in Figures 9 and 10 follow the same structure, and include a photo, a headline, and in case of Twitter, a snippet. For Facebook, the snippet is not directly included in the preview, but in the post of Der Tagesspiegel instead. The text of the snippet on Twitter includes 17 words and is additionally accompanied by a tweet of 20 words. The text of Facebook post is 24 words. In both cases, the word count needs to be topped-up by 7 words of the title.

Apart from promoting its content via social media, press publishers maintain their own RSS channels to which users can subscribe in order to discover publishers' content through feed readers, mobile or desktop. Der Tagesspiegel offers a variety of RSS channels, each focusing on a different topic.[1101] The publisher itself decides what type, and how much of its content is included in the RSS channel. Figure 11 shows a preview of the same press article of Der

[1100] Philipp Lichterbeck, 'Brasiliens Präsident feuert den Wächter des Regenwaldes' (*Der Tagesspiegel*, 5 August 2019) ‹https://www.tagesspiegel.de/politik/abholzung-der-amazonas-region-brasiliens-praesident-feuert-den-waechter-des-regenwaldes/24869640.html› accessed 6 August 2019.
[1101] 'Newsfeeds von Tagesspiegel Online' (*Der Tagesspiegel*) ‹https://www.tagesspiegel.de/service/rss/› accessed 5 August 2019.

Tagesspiegel on the actions of the Brazilian president, provided by one of Der Tagesspiegel's RSS channels, tagesspiegel.de: News, as displayed in the desktop version of Feedly, a popular feed reader.

Figure 11: Der Tagesspiegel RSS feed tagesspiegel.de: News as displayed in mobile feed reader Feedly on 5 August 2019

The preview provided via Der Tagesspiegel's RSS channel includes the same elements as the social media previews: a headline, a snippet and a photograph. In total, it contains 26 words. Consequently, all three previews well exceed the 7-word limit recommended by the DPMA. Even though the previews of Der Tagesspiegel only serve as an example, they clearly show that press publishers are eager to make some of their content available via third-party services, to promote their publications and encourage readers to visit their websites. There are publishers who make the full text of a news item available via RSS channels, including Politico and The Verge. However, they are more of an exception than a rule.

At this point, it is beneficial to make a comparison with the amount of content used in the previews by third-party services linking to press publishers' content. As Google is considered the main beneficiary of the press publishers' content, it is justified to look at the services it offers, Google Search and Google News. Figure 12 presents a preview of the discussed Der Tagesspiegel article in Google Search, and Figure 13 shows a preview included in Google News.

Figure 12: search result in Google Search on 5 August 2019; keyword searched was 'Brasiliens Präsident feuert den Wächter des Regenwaldes' (title of Der Tagesspiegel article).

Figure 13: search result in Google News (desktop) on 5 August 2019; keyword searched was 'Brasiliens Präsident feuert den Wächter des Regenwaldes' (title of Der Tagesspiegel article).

The previews included in Google Search and Google News differ. Google Search's preview includes only part of the headline, and an extract composed of two fragments, 25 words in total. Google News' preview covers the full title and a photograph, but does not include a snippet. It contains only 11 words, nearly meeting the limit recommended by the DPMA. Like was the case for the previous snippets, these are only examples, with Google Search's previews often including photographs. The previews currently displayed in the Google News no longer include snippets but are often displayed alongside previews of other news items concerning the same topic. The amount of content displayed by Google in the search engine and news aggregator is either more limited than, or similar to that provided by press publishers themselves on social media and via RSS feeds.

The previews of the article by Der Tagesspiegel are only exemplary, yet they show that press publishers themselves see the need to contextualise links. The previews which they provide, are more than single words or very short extracts. At the same time, press publishers oppose the use of previews of comparable length by third parties, seeing them as economically detrimental. It appears that a discrepancy exists between the scope of the exemption of single words and very short extracts, and its justification. If the reproduction right of press publishers were to apply to parts of press publications because of their economic significance, and only small parts without economic impact were to be exempted, the exemption should be broader in scope to cover all fragments whose use would be economically acceptable for press publishers. What is economically acceptable can be deduced from the behaviour of press publishers themselves. Additionally, the exemption exclusively concerns literary forms included in a press publication, overlooking other types of content, especially photographs and videos. This means, that in any case where a photograph, a video, or even a still of a video from a press publication are reproduced, this reproduction is infringing on the press publishers' right. Most of the previews of the exemplary article in Der Tagesspiegel included a picture. In consequence, whatever the length of the text accompanying a picture, such a preview is infringing.

As the right of reproduction provided to publishers of press publications is preventive in nature, publishers are free to make press publications freely available, in full or in part, to the public. The fact that they provide previews longer than single words or very short extracts in principle does not impact their ability to limit others in reproducing the same, or smaller parts of press publications. It is unlikely that the exemption of single words and very short extracts included in art. 15(1) of the CDSM Directive is capable of covering previews similar in length to the ones provided by Der Tagesspiegel for the exemplary article on Facebook and Twitter, and it certainly is not able to exempt uses of contents other than literary. As a result, the context provided by exempted previews will be very limited, impairing the link's function of an efficient connector on the web.

The exemption of single words and very short extracts shifts the focus of the press publishers' right from the press publication as a whole to its extracts, which are practically parts of contributions to a press publication. The partial reproduction of a press publication is effectively a reproduction in part of news items, and other subject-matter, included in the press publication. Such an interpretation of partial reproduction further supports the claim that it is difficult, if not impossible, to distinguish between news items as contributions to a press publication, and press publication itself. However, the partial reproduction of a press publication is broader in its scope than the right of reproduction under copyright, as it also restricts the copying of parts which are not original. As the press publisher' right does not cancel the application of copyright, this means that there are two reproduction rights, with varying scopes, applicable to the same works, simultaneously considered as parts of press publications and independent works. Unoriginal parts of works are excluded from copyright's scope, and their originality needs to be assessed on a case-by-case basis. Conversely, the press publishers' right covers all parts of a press publication, only excluding single words and very short extracts, a threshold which is most likely going to be determined in a general manner, without taking account of the particularities of each case.

C. Exclusive rights? The limited applicability of the press publishers' right in the EU

From the outset, the discussion on press publishers' right focused on the activities of certain types of online services: search engines, news aggregators and media monitoring services. A common feature of these services is the use of press publishers' content without their prior consent. With press publishers opposing such uses, the new right was to remedy the situation and curb the activities of third-party services. Both the wording and the justification of the national press publishers' rights in Germany and Spain, confirm the new rights' role in battling

third-party services using press publishers' content. In Germany, the new right was designed to address the lack of press publishers' compensation for the systematic online uses of their content.[1102] To achieve this aim, press publishers were granted rights exclusively covering the uses by commercial providers of search engines and commercial providers of services which process the content accordingly.[1103] In Westkamp's opinion, the German press publishers' right is 'visibly tailored to the Google News service'.[1104] The limitation of the rights' scope to the activities of particular commercial services led to a referral to the CJEU, questioning whether the German government had failed to notify the EC of the new technical regulation specifically aimed at a particular information society service prior to its enactment.[1105] The Spanish press publishers' right was designed to address the lack of compensation for the use of creative content by search engines and content aggregation services.[1106] Therefore, the exception for uses of press publishers' content only applies to the uses by providers of digital services of content aggregation. Uses by providers of services which facilitate search instruments of isolated words are exempted, but do not require remuneration.

Initially, the solution considered by the European Commission did not focus on a particular type of services. The Public Consultation enquired about the ability of press publishers to license and be paid for their content in general, without naming potential licensees. The press publishers' right included in the Proposal covered all digital uses of press publications, regardless of the identity of the user. However, the communication accompanying the Proposal saw the new right as a means to put press publishers in a better negotiating position with 'online services using and enabling access to their content'.[1107] Both the EP and the Council narrowed the scope of the press publishers' right in their respective positions. Pursuant to the amendments adopted by the European Parliament, the new right was to apply exclusively to the uses by information society service providers.[1108] The term 'information society service

[1102] 'Referentenentwurf Des Bundesministeriums Der Justiz. Entwurf Eines Siebenten Gesetzes Zur Änderung Des Urheberrechtsgesetzes' (n 336) 6.
[1103] German Copyright Act s 87g(4).
[1104] Westkamp (n 782) 243.
[1105] Request for a preliminary ruling from the Landgericht Berlin (Germany) lodged on 23 May 2017 — VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH v Google Inc. C-299/17.
[1106] Law No. 21/2014 of November 4, 2014, amending the Consolidated Text of the Law on Intellectual Property, approved by Royal Legislative Decree No. 1/1996 of April 12, 1996, and Law No. 1/2000 of January 7, 2000, on Civil Procedure art 32.2.
[1107] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Promoting a Fair, Efficient and Competitive European Copyright-Based Economy in the Digital Single Market' (n 107) 7.
[1108] European Parliament, 'Copyright in the Digital Single Market Amendments Adopted by the European Parliament on 12 September 2018 on the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market' (n 137) amendment 151-155.

provider' was not explained. The EP's amendments also excluded legitimate private and non-commercial uses of press publications by individual users from the new right's scope. A similar solution was adopted by the Council. The exclusion of uses by individual persons for non-commercial purposes from the right's scope was one of the three key elements considered by the Council at the beginning of the negotiation process.[1109] Later on, the Council opted for restricting the scope of press publishers' right to uses by information society service providers alone, within meaning of Directive 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on information society services (Provision of Information Directive).[1110] News aggregators and media monitoring companies were indicated as examples of such services.[1111] According to the Council, limiting the effect of the right to service providers aligned the press publishers' right with the overall aim of the legislative intervention: the strengthening of the position of press publishers in relation to third-party services using their content, without impairing the users' position.[1112]

In its final version, the CDSM Directive limits the scope of the press publishers' right to online uses by the information society service providers.[1113] Consequently, the press publishers' right is not a right effective erga omnes. This limited effectiveness is unprecedented in the EU copyright framework, as no other exclusive right of copyright and related right holders is restricted in its effect to a particular category of users. In granting the right of communication to the public, the right of making available and the right of reproduction, the InfoSoc Directive indicates the rights' beneficiaries and respective subject-matters. However, it does not limit in relation to whom they can exercise their rights. The case of press publishers' right is different. In order to untangle the scope of the right fully, not only its subject matter (a press publication) and a right holder (publisher of a press publication) needs to be considered, but also the person who carries out acts restricted by the exhaustive rights of the right holder (an information society service provider). Thus, the CDSM Directive's statement that press publishers shall enjoy the same scope of the right of making available and reproduction as included in the InfoSoc Directive, is not accurate.

[1109] Council, 'Note from the Presidency to Permanent Representatives Committee on Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market - Orientation Debate on Articles 11 and 13' (2018) 5284/18 4.
[1110] Council, 'Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market - Agreed Negotiating Mandate' (n 138) art. 11(1).
[1111] Council, 'Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market - Consolidated Presidency Compromise Proposal' (2018) 7450/18 recitals 31-32.
[1112] Council, 'Note from Presidency to Delegations on Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market - Discussion Paper on Article 11 and Article 13' (n 383) 3.
[1113] CDSM Directive art. 15(1), recital 55.

The EU copyright framework includes exceptions and limitations which only certain categories of users can enjoy, or which require that the exempted use is of a certain character. Therefore, cut-outs from exclusive rights of the copyright holders can be associated with a particular category of users. Some examples include: exceptions for libraries, educational establishments, museums and archives;[1114] the exception for reproductions of broadcasts for social institutions such as prisons and hospitals;[1115] the exception for ephemeral fixation for broadcasting organisations;[1116] the recently introduced text and data mining exception for research organisations and cultural heritage institutions.[1117] Accordingly, right holders can be limited in exercising their rights towards particular categories of users, but their rights remain effective erga omnes.

The CDSM Directive itself does not define who the information society service providers are, whose uses the press publishers' right covers. However, the recitals of the Directive refer to the Directive on Provision of Information.[1118] Pursuant to this directive, an information society service is a service normally provided for remuneration, at a distance, by electronic means, and at the individual request of the recipient of the services.[1119] The provision at a distance means that the service provider and the recipient of its service are neither physically nor simultaneously present. Use of electronic means implies that all essential elements of the service are transmitted, communicated and received via an electronic network. The provision at an individual request assumes that the service is interactive, with the data being transmitted following an individual query. The Directive on Provision of Information does not belong to the EU copyright framework. It is a technical regulation, aimed at preventing barriers to the freedom of the establishment and the free movement of information society service providers.[1120] Therefore, its provisions are far removed from the issues of the press publishing sector and their troubles.

Some of the examples of information society service providers within the meaning of the Provision of Information Directive include online newspapers and databases, distance monitoring activities, electronic mail, interactive teleshopping, and online professional

[1114] InfoSoc Directive5(2)(c).
[1115] ibid art. 5(2)(e).
[1116] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property art. 10(1)(c) .
[1117] CDSM Directive art. 3(1).
[1118] Directive on Provision of Information.
[1119] ibid art. 1(1)(b).
[1120] European Commission, 'An Instrument of Co-Operation between Institutions and Enterprises to Ensure the Smooth Functioning of the Internal Market : A Guide to the Procedure for the Provision of Information in the Field of Technical Standards and Regulations and of Rules on Information Society Services' (2005) 13.

services.[1121] In the opinion of AG Hogan in *VG Media*, this definition also covers commercial providers of search engines and commercial providers of services which process content accordingly, to which the German press publishers' right applies.[1122] It seems that the meaning of information society service providers within the Provision of Information Directive encompasses all services relevant to the online news environment: news aggregators, media monitoring services and search engines.

Alongside the limitation of the press publishers' right to online uses by information society service providers, the CDSM Directive excludes private or non-commercial uses by individual users from the right's scope.[1123] Consequently, the law applicable to such uses remains unaffected by the press publishers' right.[1124] Seeing that the scope of the right itself is limited to uses by information society service providers, which offer their services for remuneration, it seems that the exclusion of uses by individuals is redundant. There is no common denominator between private and non-commercial uses and the services of information society service providers, making individuals' uses not covered by the new right in the first place. The language used in the phrasing of the exclusion is similar to that of a private use exception of the InfoSoc Directive.[1125] However, unlike the private use exception, the exclusion of individuals' uses from the press publishers' right does not guarantee the reception of fair compensation for press publishers. Its inclusion in the CDSM Directive is thus superfluous.

The exclusion of the individuals' uses brings attention to the multiplicity of regimes created by the introduction of the press publishers' right. Rather than two regimes, applicable to two separate groups, a special regime is created for online uses of press publications by informational society service providers and a general regime applicable to all uses of press publications, including those by information society service providers. The law applicable to individuals' uses of a private and non-commercial nature is the same as that applicable to individuals' uses of a commercial nature or uses by entities acting without a remuneration goal. The press publishers' right introduced more complexity, creating unprecedented rights effective erga omnes, but failed to solve the issues with the application of copyright to the online uses of press publications.

[1121] ibid 18.
[1122] 'Opinion of Advocate General Hogan Delivered on 13 December 2018 Case C-299/17 VG Media Gesellschaft Zur Verwertung Der Urheber- Und Leistungsschutzrechte von Medienunternehmen MbH v Google LLC' paras 38–39.
[1123] CDSM Directive art. 15(1).
[1124] ibid recital 55.
[1125] InfoSoc Directive art. 5(2)(b).

IV. Exceptions and limitations: a way out?

The monopoly of copyright and related rights' holders is not unrestricted. The EU copyright framework includes a number of exceptions and limitations confining the exclusive rights' scope. Some of the acts of sharing and distribution of the news online, which would normally be infringing, can be exempted in accordance with the exceptions and limitations. Therefore, exceptions and limitations add an additional layer to the regulation of online news environment. While their main catalogue is included in the InfoSoc Directive, provisions on exceptions and limitations are also present in other directives, including the Database Directive, the Software Directive, the Rental and Lending Directive, as well as the new CDSM Directive, the Orphan Works Directive and the Marrakesh Directive. Relevant for the related rights, the Rental and Lending Directive lists four limitations, including private use and use of short excerpts in connection with the reporting of current events.[1126] Relevant for some press publications, the Database Directive provides three exceptions for the sui generis database right, including the private use exception, but only for non-electronic databases.[1127] As for press publishers' right, the CDSM Directive states that exceptions included in the InfoSoc Directive, as well as provisions of the Orphan Works Directive and the Marrakesh Directive, each including obligatory exceptions, should be applied *mutatis mutandis* to press publications.[1128]

The limitations and exceptions listed in the InfoSoc Directive have the broadest scope, as they apply not only to copyrighted works, but also to all subject-matter protected by related rights, with the exception of computer programs and databases.[1129] Regardless of the InfoSoc Directive's aim of fostering the development of the information society, its proposed exceptions were not innovative, simply reflecting the limitations of Berne and MS national laws.[1130] Article 5 of the InfoSoc Directive offers an exhaustive catalogue of exceptions which can be adopted by the Member States.[1131] The list includes twenty exceptions, five applicable to the reproduction right, and fifteen applicable to both the reproduction and communication to the public rights. Additionally, a Member State might decide on adopting some of the listed exceptions to the right of distribution.[1132] Among the enumerated exceptions, there are exceptions for private use, teaching and research, quotation, reporting on current events,

[1126] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property art. 10(1).
[1127] Database Directive art. 9.
[1128] CDSM Directive art. 15(3).
[1129] Eechoud and others (n 8) 98.
[1130] ibid 99.
[1131] The exhaustive character of the list has been confirmed by the CJEU. See *Spiegel Online GmbH v Volker Beck* [2019] Court of Justice of the European Union C-516/17, EU:C:2019:625 [41]; *Soulier* (n 1004) para 34.
[1132] InfoSoc Directive art. 5(4).

caricature and parody, as well as for the benefit of public libraries, archives and museums. The Member States are not obliged to adopt all of the limitations listed by the InfoSoc Directive, but can make a choice on which exceptions they want to transpose into their legal orders. The only exception to this is a provision on temporary acts of reproduction included in art. 5(1) of the InfoSoc Directive, all Member States are obliged to implement it.

Because of the freedom left to the Member States to pick and choose the exceptions they would like to adopt, the InfoSoc Directive did not remove the discrepancies between national laws.[1133] The fact that each of the Member States can champion a different catalogue of exceptions, does not provide a high level of legal certainty. Additionally, a question on the closed character of the InfoSoc Directive's list persists, especially since art. 5(3)(o) includes a so-called 'grandfather clause', allowing the preservation of exceptions for analogue uses of minor importance preceding the InfoSoc Directive.[1134] However, considering the manner in which the CJEU recently rejected the possibility for Member States to adopt further derogations from the author's rights justified by freedom of information and freedom of the press, it seems that the catalogue of exceptions included in the InfoSoc Directive is indeed closed.[1135]

The effect of the varying exception catalogues is further enhanced by the Member States' discretion in implementing the exceptions. Although the scope of exceptions cannot be expanded,[1136] exceptions adopted by the Member States are often narrower than what the InfoSoc Directive recommends. Guibault considers that this is the case because national legislators show a 'homing' tendency, trying to retain national provisions, while adding the InfoSoc Directive's requirements.[1137] The interpretation of the exceptions by the MS courts might also vary, especially if the CJEU did not yet have the chance to provide guidance on a particular exception. However, the implementation and interpretation of the exceptions is governed by the three-step test included in art. 5(5) of the InfoSoc Directive. Exceptions are only to be applied in certain special cases which do not conflict with the normal exploitation

[1133] According to Hugenholtz, the non-obligatory character of exceptions included in art. 5 of the InfoSoc Directive, makes the directive a 'total failure, in terms of harmonisation'. See Bernt Hugenholtz, 'Why the Copyright Directive Is Unimportant, and Possibly Invalid' (2000) 22 European Intellectual Property Review 499, 501.
[1134] Christophe Geiger and Franciska Schönherr, 'Defining the Scope of Protection of Copyright in the EU: The Need to Reconsider the Acquis Regarding Limitations and Exceptions', *Codification of European copyright law : challenges and perspectives* (Kluwer Law International 2012) 137; Lucie Guibault, 'Why Cherry-Picking Never Leads to Harmonisation: The Cease of the Limitations on Copyright under Directive 2001/29/EC' (2010) 2 JIPITEC 55, 56.
[1135] *Spiegel Online* (n 1131) paras 47–49.
[1136] ibid 48.
[1137] Guibault, 'Why Cherry-Picking Never Leads to Harmonisation: The Cease of the Limitations on Copyright under Directive 2001/29/EC' (n 1134) 58.

of works or other subject-matter, and do not unreasonably prejudice the legitimate interests of the right holder, including her economic interests.[1138] Moreover, the application of copyright exceptions is often excluded by contract, a wide-spread practice in mass market consumer agreements, common for online services.[1139] The fact that the new press publishers' right is limited by the InfoSoc Directive exceptions, applied *mutatis mutandis*, does not guarantee legal certainty in itself. The repetition of a solution which does not provide legal certainty to users in the context of copyright, to a related right, which introduces an additional layer of regulation, further adds to the complexity of the assessment of the legality of acts of sharing and distributing the news online.

A. Quoting and reporting on current events

Two of the limitations and exceptions are of particular importance in the context of sharing and distribution of news in the online news environment, especially when news aggregators and similar services are considered: the exception for quotation purposes and the exception for reporting on current events.[1140] Both exceptions serve to realise freedom of opinion and freedom of the press.[1141] Neither underwent a full harmonisation.[1142]

Under Berne, quotation is a mandatory exception which needs to be adopted by all contracting parties, including all EU Member States.[1143] The InfoSoc Directive states that it shall be permissible to make quotations for such purposes as criticism or review, when a quotation relates to a work which has been lawfully made available to the public, and when it indicates the source including the author's name, provided that the quotation is used in accordance with fair practice and to the extent required by the specific purpose.[1144] Unlike the InfoSoc Directive, Berne does not list any quotation purposes. Drawing up a list of purposes justifying the use of quotation was considered. This idea was eventually rejected, as Berne-contracting parties felt it would be impossible to create an exhaustive account of valid quotation purposes.[1145] Another difference between Berne and the InfoSoc Directive is that the former points at press summaries as a specific type of quotation. As Ricketson and Ginsburg explain, press summary is a rather unfortunate translation of the French term *revue de presse*, and needs to be understood

[1138] On the inclusion of economic interest see *Painer* (n 642) para 214.
[1139] For a thorough analysis of contracting-out of copyright exceptions see Lucie Guibault, *Copyright Limitations and Contracts: An Analysis of the Contractual Overridability of Limitations on Copyright* (Kluwer Law International 2002).
[1140] See 'Report and Opinion on a Berne-Compatible Reconciliation of Hyperlinking and the Communication to the Public Right on the Internet' (n 1012) 5–8.
[1141] *Painer* (n 642) para 186.
[1142] *Spiegel Online* (n 1131) para 27.
[1143] Ricketson and Ginsburg (n 577) 788.
[1144] InfoSoc Directive art. 5(3)(d).
[1145] Ricketson and Ginsburg (n 577) 786.

as a collection of quotations from different newspapers and periodicals, which purpose is to illustrate how these different publications report on the same issue.[1146] In Xalabarder's opinion, this definition of *revue de presse* perfectly describes what news aggregators do.[1147]

In general, the literature looks favourably upon the application of the quotation exception to activities of news aggregators and similar services.[1148] Xalabarder and Danbury even question the compatibility of the press publishers' right with Berne, because it jeopardises a mandatory quotation exception.[1149] Nevertheless, *Copiepresse*, a Belgian case which examined the quotation exception in the context of Google News, found it inapplicable.[1150] The CJEU did not yet have a chance to express its opinion on the matter. Only recently, when delivering its judgements in the *Pelham*[1151] and *Spiegel Online* cases,[1152] it has provided more detailed guidelines on the application of the quotation exception in general. Of particular significance is the CJEU's finding that a hyperlink can be considered a quotation.[1153] Therefore, the quotation exception is theoretically capable of covering both links and previews of the news items accompanying them. Nevertheless, it seems unlikely that news aggregators and similar services can benefit from the exception. The CJEU seems to require a direct link between quoted work and user's reflections, which implies the provision of additional content by a user or service using a quotation. When the restricted quotation purposes and the requirement to include the name of the quoted work's author are additionally considered, an individual user referring to the news item can benefit from the exception, but a service which automatically gathers links and previews of news items will likely not.

Following the CJEU's decision in *Painer*, quotation purposes are crucial for the quotation exception.[1154] The use of words 'such as' in art. 5(3)(d) of the InfoSoc Directive demonstrates that the listed purposes of criticism and review are only exemplary.[1155] In *Pelham*, the Court

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[1146] ibid 787.
[1147] Raquel Xalabarder, 'The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government - Its Compliance with International and EU Law' (Universitat Oberta de Catalunya Internet Interdisciplinary Institute 2014) WP14-004 40.
[1148] van Eechoud (n 353) 29–30; Stavroula Karapapa, 'The Press Publishers' Right in the European Union: An Overreaching Proposal and the Future of News Online', *Non-Conventional Copyright Do New and Atypical Works Deserve Protection?* (Edward Elgar 2018) 84; Tsoutsanis, Alexander (n 973) 496; Headdon (n 999) 667.
[1149] Xalabarder (n 1147) 37; Danbury (n 354) 81.
[1150] *Copiepresse* (n 1028) para 35.
[1151] *Pelham* (n 1077).
[1152] *Spiegel Online* (n 1131).
[1153] ibid 84.
[1154] *Painer* (n 642) para 209.
[1155] See Martin Senftleben, 'Internet Search Results – A Permissible Quotation?' 6–7 ‹https://papers.ssrn.com/abstract=2331634› accessed 7 August 2019; Later confirmed by the CJEU in *Spiegel Online* (n 1131) para 28.

further specified that, because the InfoSoc Directive does not give any definition of quotation, its meaning and scope needs to be defined in reference to its meaning in everyday language.[1156] Thus, a quotation can be used for illustrating an assertion, defining an opinion or making a comparison with the quoted work.[1157] A similar view was adopted by the Belgian court in *Copiepresse*, in which the aim of using a quotation was perceived to be in illustrating a suggestion, defending an opinion or making a summary on a specific topic.[1158] In the court's view, the links and previews provided by Google News had neither of these aims, being simply partial reproductions of works generated through an automated process. For the court, Google News provides a round up but not a review, as it lacks the required analysis of the quoted work.[1159] It seems difficult to accept that a service, which automatically generates links and previews of content published in a wide array of websites, is making a review. However, if a service selects and groups links and previews according to particular topics, this could be considered a summary of these topics, which would be a purpose similar to that of criticism and review under the *Copiepresse* judgement. Additionally, there are also specialised services, such as speciality aggregators, which aim specifically at making a selection and a comparison between news items on a focus topic or area.[1160] Therefore, it cannot be completely excluded that some news aggregators and similar services fulfil the quotation purposes.

Building further on the everyday language meaning of quotation, the CJEU requires 'a material reference back to the quoted work in a form of a description, commentary or analysis'.[1161] When making a quotation, one needs to have an intention to enter into a discussion, reflect on the referred work.[1162] The quotation is only secondary to these reflections, which means it cannot be an end in itself.[1163] As the Belgian court described it in *Copiepresse*, quotation is only incidental to a work or other subject-matter in which it is used.[1164] It seems that the Court requires a person or a service using a quotation to provide additional content, because description, commentary or analysis would otherwise not be possible. A general news aggregator, such as Google News, list links and previews, without any comment, which disqualifies it as a beneficiary of the quotation exception. However, this does not mean that an aggregation or

[1156] *Pelham* (n 1077) para 70.
[1157] ibid 71.
[1158] *Copiepresse* (n 1028) para 32.
[1159] ibid.
[1160] Ginsburg and Ricketson (n 590) 40.
[1161] *Painer* (n 642) para 210; Later confirmed in *Pelham* (n 1077) para 72; *Spiegel Online* (n 1131) para 78.
[1162] *Pelham* (n 1077) para 71.
[1163] *Spiegel Online* (n 1131) para 79.
[1164] *Copiepresse* (n 1028) para 32.

similar service, which engages with quoted works, cannot benefit from the quotation exception.

One of the less emphasised requirements of the quotation exception is the need to indicate the source and the author of a quoted work. Naming of the author is not required if it is impossible to identify who the author is. This exemption applies only in exceptional cases, when a further investigation performed by a person using a quotation proved unsuccessful.[1165] In case of links and snippets, the name of the source website is usually indicated. However, the name of an author is not commonly displayed. What is also required from a quotation, is that it is used in accordance with fair practice and to the extent required by the specific purpose. The fulfilment of this requirement by news aggregators and similar services might be impossible should the substitution effect caused by such services be emphasised, and the detriment that their functioning brings to the press publishers. In Höppner's opinion, services which built their business models on quoting from other works, cannot benefit from the quotation exception.[1166] If the benefits news aggregators and similar services, such as the expansion of audiences of press publications are taken into account, it is possible that activities of such services are fair for the purposes of the quotation exception. In any case, a quotation of a news item cannot be used beyond what is necessary to achieve the informatory purpose.[1167] As the discussion on the length of exempted snippets shows, there is no agreement on how much content is needed to provide the user with sufficient information on the referenced news items.

The news reporting exception is included in art. 5(3)(c) of the InfoSoc Directive, which reflects the contents of art. 10*bis* of Berne. Pursuant to the news reporting exception, press can reproduce, communicate or make available to the public published articles, broadcasts and other subject-matter of the same character, which concerns current economic, political or religious topics, when the source, including the name of an author, are indicated, and no reservation was made excluding such use.[1168] The exception is quite narrow, as it specifies both its beneficiaries (press), and the contents which can be used (press articles, broadcasts concerning current economic, political and religious topics). The thematic limitation of contents was sufficient for Ginsburg and Ricketson to conclude that activities of news aggregators which systematically scrape all headlines and previews, also concerning other

[1165] *Painer* (n 642) para 199.
[1166] Höppner, 'EU Copyright Reform: The Case for Publisher's Right' (n 757) 12.
[1167] *Spiegel Online* (n 1131) para 68.
[1168] InfoSoc Directive art. 5(3)(c).

topics, cannot be covered by the news reporting exception.[1169] Services failing to include the name of an author cannot invoke the exception either, as there is no derogation from this requirement, unlike in the case of quotations.

Guibault noted that even though the text of the news reporting exception is straightforward, there are significant differences in its implementation by the Member States, for example with regard to payment of fair compensation to the right holder.[1170] To date, CJEU has not yet had the opportunity fully to reflect on the news reporting exception. Only recently, in the *Spiegel Online* case, it had a chance to express its opinion on art. 5(3)(c) of the InfoSoc Directive. However, the Court was concerned with the second part of the news reporting exception on the use of works in connection with the reporting of current events, and not the use of works on current events, which is relevant for this section.

The main obstacle in applying the news reporting exception to news aggregators and similar services, is the limitation of the exception's beneficiaries to press. As chapter IV of this thesis shows, there are major difficulties in determining what the press is, and whether it includes online services. Member States approach the issue in a varying manner. However, the rule is that press needs to produce its own content. Additionally, two of the MS, which have explicitly addressed online publishing, excluded services like news aggregators from its scope. Italy does so explicitly,[1171] and France implicitly, by requiring an online press service to provide professionally edited content.[1172] Some of the Member States provide the exception not only to the press, but also to other media, such as radio and television,[1173] or simply to media in general.[1174] Conversely, some MS limit the group of exception beneficiaries. In Finland, the news reporting exception can only be invoked by newspapers or periodicals.[1175]

It is difficult to include news aggregators and similar services among the beneficiaries of the news reporting exception. Peukert strongly criticises the restriction of the news reporting exception beneficiaries to the press. He argues that, considering the pace and vast amounts of news available online, only automated processes and structured overviews provided by search engines and news aggregators are capable of capturing the variety of sources and keep users

[1169] Ginsburg and Ricketson (n 590) 34.
[1170] Lucie Guibault, 'The Press Exception in the Dutch Copyright Act', *A Century of Dutch Copyright Law: Auteurswet 1912-2012* (DeLex 2012). On payment of fair compensation see art. 25(2) of Polish Copyright Act.
[1171] New Italian Press Law art. 1 comma 3bis.
[1172] French Press Law art. 1.
[1173] Polish Copyright Act art. 25(1).
[1174] Spanish IP Act art. 33(1).
[1175] Tekijänoikeuslaki 8.7.1961/404 (sellaisena kuin se on muutettuna laissa 18.11.2016/972) (Finnish Copyright Act) art. 23(1).

informed.[1176] Accordingly, news overviews prepared by the press and other services should be treated equally. An argument to the contrary is that of reciprocity: as news aggregators and similar services do not produce their own content, they have nothing to offer in exchange for the free use of content produced by the press. However, this argument does lose its merit in the light of the fair remuneration requirement added to news reporting exception by some of the Member States.

B. The diverging catalogues of exceptions

Like copyright and other related rights, the scope of the press publishers' right is limited by exceptions and limitations. The CDSM Directive requires that arts. 5 to 8 of the InfoSoc Directive, as well as the provisions of the Orphan Works Directive and the Marrakesh Directive apply *mutatis mutandis* to the right of reproduction and the right of making available enjoyed by publishers of press publications.[1177] Additionally, all of the exceptions introduced by the CDSM Directive apply to the press publishers' right: two exceptions for text and data mining, the exception for use of works in digital and cross-border teaching activities, and that for culture heritage institutions.[1178] All the CDSM Directive's exceptions are obligatory, and need to be implemented by the Member States. The exceptions of the Orphan Works Directive[1179] and the Marrakesh Directive,[1180] as well as the exception for temporary acts of reproduction of the InfoSoc Directive, are also compulsory. The remaining exceptions and limitation of the InfoSoc Directive are however not.

The recitals to the CDSM Directive explain that the press publishers' right is subject to the same provisions on exceptions and limitations as those applicable to the rights provided for in the InfoSoc Directive.[1181] The application of the same provisions, with the necessary alterations to accommodate the subject-matter of the press publishers' right, does not necessarily mean that Member States are required to adopt the same exceptions to the rights of press publishers, as they did to the rights of other right holders. The Member States need to apply art. 5 of the InfoSoc *mutatis mutandis*. This means that they need to make a selection of applicable exceptions and limitations from the same catalogue which exceptions to the InfoSoc Directive's exclusive rights come from. The choice, however, does not need to be the same. Therefore, there is no guarantee that all exceptions applying to copyright will also apply to the press publishers'

[1176] Peukert (n 752) paras 181–182.
[1177] CDSM Directive art. 15(3).
[1178] ibid art. 3(1), 4(1), 5(1) and 6.
[1179] Orphan Works Directive art. 6(1).
[1180] Marrakesh Directive art. 3(1).
[1181] CDSM Directive recital 57.

right.[1182] The only exception explicitly mentioned by the CDSM Directive is quotation for the purposes of criticism and review. All of the Member States have adopted the quotation exception into their national legal orders, following the Berne Convention's requirement. However, this requirement exclusively applies to copyright and copyrightable works, as Berne does not concern itself with related rights. This means that the MS are under no obligation to extend the quotation exception to acts concerning press publications.

Absent an explicit obligation for Member States to make the same selection of exceptions listed in art. 5 of the InfoSoc Directive in respect of the press publishers' right as they made in respect of right of reproduction and right of making available of other right holders, the catalogues of exceptions will differ. Considering that the catalogues of exceptions already considerably vary between the MS, introducing another set of catalogues, simultaneously applicable to a single act of sharing and distributing of the news online, creates further legal uncertainties in the online news environment. Additionally, even if a Member State decides to make the same selection of exceptions for the press publishers' right as it has for copyright, uncertainties associated with the application of the quotation exception to copyright will continue under the press publishers' right, because it is the same exception which applies.[1183]

V. Conclusions

The application of the right of communication to the public in the online environment has been subject to a number of judgements by the CJEU. The criteria developed by the Court do not provide clear-cut answers on the legal status of links, requiring a case-by-case assessment. Although the provision of links to press publications available online without any restrictions is not a copyright-relevant act, a considerable level of uncertainty remains about how to tackle the content hidden behind metered paywalls. If we assume that the right holder's knowledge about the flexibility of the paywall included awareness that all internet users could potentially access her content, the provision of a link circumventing a metered paywall would not infringe copyright. However, this would mean that some of the acts providing users with access to news items which were not freely accessible to them, would be infringing and some would not. Additionally, the legal fiction that the audience of websites available without any restrictions consists of all internet users, clashes with the market expansion effect which services such as news aggregators and search engines have on the small and local media outlets.

[1182] For an opposing opinon see Höppner, 'EU Copyright Reform: The Case for Publisher's Right' (n 757) 12.
[1183] van Eechoud (n 353) 29.

The press publishers' right introduced by the CDSM Directive is a unique solution, which requires the consideration of the subject-matter (press publication), a right holder (a publisher of a press publication) and a user (information society service provider), to reconstruct the right's scope fully. The introduction of the press publishers' right does not solve any of the issues associated with copyright status of links, and activities of news aggregators. As a related right, the press publishers' right will exist alongside copyright, adding additional layer of regulation in the online news environment. The immediate consequence of the introduction of the press publishers' right to the EU copyright framework is the creation of two overlapping regulatory regimes. Firstly, there is the special regime based on the press publishers' right applicable to online uses by the information society service providers. Secondly, there is the general regime based on copyright, applicable to all uses of press publications, including those by information society service providers. The law applicable to individuals' uses of a private and non-commercial nature is the same as the law applicable to individuals' uses of a commercial nature or uses by entities acting without a remuneration goal. Thus, what the press publishers' right does is to introduce more complexity to the EU copyright framework by creating unprecedented rights which are not effective erga omnes. A single act of providing a link to press publishers' website by an information society service provider is relevant for the right of communication to the public and right of reproduction of the copyright holder, and the right of making available and reproduction right of the press publishers' right holder. The assessment of a single act of linking is likely to differ under these rights.

The press publishers' right provides an alternative answer to the linking conundrum, not connected to the right of communication to the public. Whereas the press publishers' right does not apply to hyperlinks, it significantly influences linking by tackling previews of content accompanying links. The right of reproduction of a copyright holder applies only when a part of the work copied is original. Considering the limited length of previews, and the authors' creative constraints, it is difficult for previews to fulfil the originality requirement. The press publishers' right does not include a protection threshold, based on either a criterion of originality or investment. Similar to other related rights, the partial reproduction covered by the press publishers' right occurs whenever a part of any subject-matter is copied, even the smallest one. Thus, the right of reproduction of the press publishers' right holder applies to any preview accompanying a link, no matter its length or contents. Limiting or entirely removing previews would deprive links of their essential context, which is what makes them an efficient communication tool on the web.

The negative influence of the press publishers' right on links could be mitigated by the exclusion of single words and very short extracts from the scope of the press publishers' right. However, the modest scope of the exclusion does not reflect the justification for its introduction. The press publishers' right protects parts of press publications because of their economic significance, and the detrimental effect of systematic uses of insubstantial parts of contents on publishers' revenues. Thus, the exclusion of single words and very short extracts was intended to apply exclusively to economically-insignificant parts of content. At the same time, press publishers themselves make parts of their press publications, longer than the exempted single words and very short extracts, freely available on third-party services. Considering that press publishers are unlikely to act against their own economic interests, there seems to be a discrepancy between the reasoning behind, and the actual scope of the exclusion.

The form of partial reproduction, which means the reproduction of a part of a contribution to a press publication in practice, further reinforces the conclusion that there is no sufficient distinction between the press publication as the subject-matter of the press publishers' right, and copyright protected works which are included in a press publication. For the right of reproduction of the copyright holder to apply, the part of work copied needs to be original. Yet, when the same work is included in a press publication, and then copied, the right of reproduction of the press publisher applies no matter the originality of a copied part. As such, the press publishers' right extends to acts of reproduction of copyright-protected works, which are otherwise copyright-irrelevant.

Whereas the recitals to the CDSM Directive state that the right of making available and right of reproduction of press publishers should have the same scope as the rights included in the InfoSoc Directive, the number of cut-outs from the press publishers' right's scope undermines this declaration. The right applies only to online uses, not including linking, an essential online activity. It is not a right effective erga omnes, but only against information society service providers, which leaves activities by individuals, commercial or not, outside of the right's scope. The scope of the press publishers' right is further limited by exceptions and limitations. The catalogue of applicable exceptions does not need to be the same as in the case of copyright, which leads to further complexity of the online news environment, removing it further from the legal certainty which the press publishers' right was to bring.

Conclusions

The press publishers right…

Initially, the problem addressed by the press publishers' right was the lack of press publishers' compensation for online uses of their content. Over time, compensation became only the means to a more significant end: the creation of a sustainable press sector, able to fulfil its role in modern democratic societies through the provision of quality journalistic content. The copyright derived from journalists was seen as insufficient to shield press publishers from the exploitation by digital intermediaries. First, press publishers were to have difficulties with proving ownership of rights in news items they publish, since the InfoSoc Directive does not explicitly recognise them as right holders. Secondly, links shared by digital intermediaries, as long as they were not circumventing the restrictions put in place by the publishers, were not captured by the right of communication to the public. And thirdly, the right of reproduction did not apply when a part of a news item copied by a digital intermediary, was not original. In the publishers' and the EU legislator's opinion, the EU copyright framework, prior to the enactment of the CDSM Directive, was not sufficient to guarantee that press publishers' receive compensation for online uses of their content. The presumption behind this belief, which was not eagerly verbalised, is that copyright also applies to acts of news aggregators and search engines.

…creates two overlapping regulatory regimes

The EU legislator could bring more certainty to the EU copyright framework by clarifying the framework's provisions. For example, the application of the right of communication to the public is presently determined by a set of criteria established by the CJEU. If the EU legislator believes that these criteria do not provide a sufficiently clear answer on which acts of linking to the press publishers' content are copyright-relevant, it could amend the provision of the InfoSoc Directive on the right of communication to the public. Indeed, a legislative clarification of the right of communication to the public was initially considered. The EU legislator decided to grant to press publishers a distinct right of making available instead, even though a right to this effect is an element of the broader right of communication to the public.

This choice is highly questionable. In fact, it creates two rights of making available, with diverging scopes. The two rights have diverging scopes, since the right of making available based on copyright applies to unauthorised links when they meet the criteria specified by the CJEU, while the press publishers' right does not cover links. Additionally, the right of making available based on copyright is an erga omnes right, whereas the press publishers' right is

effective only against information society service providers. The two rights of making available will exist alongside each other, as the press publishers' right is a related right. A press publisher will usually have both rights: the right of making available based on the copyright derived from the author, and the press publishers' right in addition.

Thus, the immediate result of the introduction of the press publishers' right is the creation of two overlapping regulatory regimes, where the sharing of news and information online is concerned: a general regime based on copyright, applicable to all uses of press publications, and the special regime based on the press publishers' right, only applicable to online uses by information society service providers.

...circumvents the originality requirement

The press publishers' right introduces further inconsistency into the EU copyright framework, as it comes with no threshold of protection. Since the bundle of exclusive rights granted to press publishers covers the right of reproduction, including partial reproduction, the press publishers right involves the prohibition of copying of any part of a press publication, with the only exclusion of the reproduction of single words and very short extracts. The excessive extension of the exclusive right of press publishers is proved by the fact that press publishers themselves make previews of their content freely available in order to encourage readers to visit their websites. Publishers post links and previews via their Twitter and Facebook accounts, curate RSS feeds, and send newsletters to their readers. Press publishers would not act in this way if making available of links and previews was economically detrimental.

The exception for single words and very short extracts is supposed to apply only to parts of press publications whose copying does not economically detriment press publishers. Since the phrasing of the exception is vague, and does not indicate the number of words whose use is acceptable, it is only through litigation that we will see how much content can be used by digital intermediaries without triggering the obligation to license and pay for the use of press publications. It is highly unlikely that the excused short extracts will be as long as those made available by the press publishers themselves. Until the amount of content which can be freely used by digital intermediaries is specified, such intermediaries will most likely err on the side of caution, and not display parts of press publications they do not have a license for. Limiting the length of, or completely eliminating, previews will have a negative effect on the links' efficiency, since they require context to be an efficient communication tool online, and this context is provided by previews.

It could be argued that the press publishers' right is not really in conflict with the copyright principles since other related rights also do not include an originality requirement. However, there is a fundamental difference between the subject-matter of these rights and a press publication, a difference which is particularly clear in the context of partial reproduction. When contributions to a phonogram or a film are fixed together, a new object is created. Contributions acquire a new meaning. Partial copying of a phonogram or a film involves simultaneous partial copying of most, if not all, contributions to this phonogram or film. In this case, it is the financial and organisational contribution of content producers which justifies the protection, and the reproduction involves the subject-matter as a whole, rather than the components of it. Different is the case of a press publication. When contributions to a press publication are brought together, each of them remains the same, since a press publication is simply a collection of these contributions. Thus, the partial copying of a press publication can be limited to a single contribution, or even a part of a contribution. Therefore, there is no difference between partial copying of a contribution as a self-sufficient copyright protected work, and as a part of a press publication. If the subject of reproduction is practically the same, there is no reason for abandoning the requirement of originality when a news item is copied as a part of a press publication. The investment in the creation of a copyrightable contribution is the same, whether it is a stand-alone news item, or is incorporated in a press publication. Dropping the requirement of originality for the partial reproduction of press publications is inconsistent with the EU copyright framework.

...is incapable of, and should not be limited to protection of quality journalism

The goal of protection of quality journalism and guaranteeing that the press sector is sustainable, is noble and should not be questioned. What is, however, unfitting, is the choice of copyright as means to achieve this goal. Both copyright and related rights are egalitarian in their nature. Copyright does not distinguish between different categories of protected works and it is indifferent towards the quality of these works. Provided that a work is expressed, and that it is its author's own intellectual creation, the work is protected by copyright. The same applies to related rights. Provided that an object fits the definition of the related right's subject-matter, protection is granted. Hence, the domain of copyright and related rights is free from value judgements. Even though the CDSM Directive's provision on the press publishers' right does not explicitly speak about limiting protection to quality content alone, the goal of the promotion of quality journalism is clearly visible in the justification for the press publishers' right provided by the EU bodies, and in the discussion on the introduction of the press

publishers' right to the EU copyright framework. Therefore, the press publishers' right's scope should be, at least indirectly, limited to quality press publications.

Apart from copyright's and related rights' inherent egalitarianism, another problem with using the press publishers' right as a tool to promote quality journalism is the difficulty (or even impossibility) of defining what quality journalism actually is. Even the meaning of journalism itself is not easy to capture. The regulation of press and media has not been subject to harmonisation, which means that there is no commonly accepted definition of press, press publisher, or journalism in the EU. Member States champion a variety of solutions, also concerning online publications, and their qualification as press. The qualification of a piece of content as quality journalism would likely require a consideration of external factors, such as the process of publication, and possibly a comparison between different press publications. By requiring an analysis of external factors, the press publishers' right would deviate from the ordinary test of copyright and related rights: when assessing whether particular content is protected, copyright and related rights focus on the object itself rather than its broader context, and they do not engage in comparative judgements. A requirement of editorial initiative, control and responsibility built into the definition of a press publication is likely to bring some objectivity to the subjective understanding of a press publication. The fact that a standard of editorial oversight needs to be met, does not guarantee that this standard is going to be high.

The press publishers' right also does not adopt the sui generis database right's threshold of substantial investment, since the press publishers' right applies to any press publication, regardless of the input in its production. The absence of the investment threshold clashes with the goal of promotion of quality journalism. If protection is granted to all press publications, the new right is likely to incentivise the volume of production, but not its quality. Claims made during the public discussion, by press publishers' and other new right supporters, that revenues created by virtue of the press publishers' right would directly translate into higher quality of content, remain unsubstantiated. There is no data to support the claim that higher revenues of press publishers will automatically generate a higher quality of content. If all press publications are protected, press publishers' right will also benefit producers of news content not meeting general standards of credibility, such as fake news.

...does not contribute to the creation of the Digital Single Market

From the outset, the harmonisation of copyright and related rights has been linked to the creation and facilitation of the single market. This rationale remains valid in the digital age,

where creation of the Single Digital Market has become a goal. Even though the EU copyright framework is set to guarantee a high level of protection, the expansion of copyright and related rights cannot be an aim in itself. The press publishers' right should not be introduced to the EU copyright framework simply because press publishers are not explicitly recognised as right holders in the InfoSoc Directive. The equality rationale invoked by press publishers cannot be a self-standing argument for the extension of the copyright framework. The remaining drivers of the EU intervention in the area of copyright and related rights are the enhancement of the EU competitiveness, and a desire to grasp the benefits of the technological development. Looking at these aims, two issues related to the press publishers' right need to be pointed out.

Firstly, the press publishers' right benefits only publishers of press publications established in the EU. This means that digital intermediaries only need to license and pay for the content of European publishers. Therefore, it might be easier and economically beneficial for digital intermediaries to use content of non-EU publishers in their services. This could put EU publishers in a disadvantaged position. By not being included in search engines and news aggregators, they would not benefit from referential traffic, and the revenues which it brings. Secondly, when making the sustainability of the press sector a goal of the press publishers' right, the EU legislator focuses on the financial fitness of legacy news organisations. This approach ignores the complexity of the online news environment. The sustainability of the press sector should not be interpreted exclusively in reference to legacy news organisations. A number of other actors is active in the online news environment, and their economic well-being, as well as the financing models they follow, should be taken into consideration. The funding of journalism is currently in flux. Legacy news organisation and digital-born brands alike are actively searching for efficient way to finance their activities. Traditional press publishers gradually move away from free models, supported by advertising revenues, and experiment with subscription schemes. These experiments aim at changing users' attitudes towards paying for news content, which they used to get for free in the early days of the internet. As changing readers' attitudes is a gradual process, traditional press publishers need time, not necessarily a legislative intervention aimed to support their analogue business models.

...is not coherent with the EU copyright framework

The press publishers' right introduced into the EU copyright framework by the CDSM Directive, is a novel solution for European and global copyright alike. However, it is not truly innovative. As has been shown above, this right simply duplicates the existing copyright

provisions, granting press publishers a set of exclusive entitlements that mostly correspond to those included in copyright. While replicating solutions which are already a part of the EU copyright framework, the press publishers' right fails to be consistent with that framework and to meet the need of the news sector in the internet age.

First of all, the press publishers' right creates an additional layer of protection for news items included in a collection which meets the press publication definition. Those copyright requirements which are difficult for the news content to fulfil are abandoned to help press publishers seek compensation for the online uses of their content. When the news content produced by a press publisher meets the requirements of the press publication definition, it is protected regardless of its originality and the scale of investment made into its production. It is true that links are excluded from the scope of the press publishers' right. However, this exclusion lacks practical relevance, since press publishers can easily restrict linking indirectly by banning use of any part of their publications as previews, pursuant to the reproduction right of the press publishers' right holders. Absent previews, not knowing what a link leads to, users will be unlikely to click through.

Secondly, the press publishers' right does not pay sufficient attention to the complexity of the online news environment, and the mutually beneficial relationship between press publishers and digital intermediaries. Copyright and related rights are concerned with the protection of creative works, and the organisational and financial contributions made by producers. Neither should be used as a tool to regulate markets, absent proof of a market failure. Finally, no empirical evidence was presented to support the claim that the right is capable of generating additional revenues.

Thus, one might be tempted to ask whether a press publishers' right is simply a political measure, meant to express the attitude towards the difficulties of struggling EU publishers rather than to provide real solutions. The chaos it brings to the EU copyright framework is only a collateral effect. Copyright and related rights, with the exclusive rights they provide, were seen as the most beneficial by press publishers. However, by focusing on the profits of the press publishers, the CDSM Directive lost sight of digital-born actors and users. The assumption that everyone will be better off, when press publishers are better off, does not excuse the EU legislator from finding a balanced solution.

Annex

Annex I: Documents issued by the actors during the discussion on introduction of the press publishers right to the EU

Date	What	Who	To Whom	Full Title	Main issues	Position	Key words
18.07.2014	Letter	ENPA	Jean-Claude Juncker	ENPA request for a strong Commissioner with specific responsibility for media	Call for appropriate economic and legislative conditions for press to develop ('free and pluralistic press sector'). Three points: copyright reform, competition investigation against Google, VAT for print and digital press.	No mention of the new right. Call for caution in introduction of the new exceptions, especially text and data mining, so they are not exploit by aggregators and unlicensed media monitoring services. Copyright reform should not undermine the incentives to produce quality content by lowering copyright protection.	quality content, aggregation
30.09.2014	Position Paper	ENPA		10 Action Points For a free, independent and sustainable press sector in Europe	Outline of 10 priority issues affecting newspaper and news media sector.	No mention of the new right. Document points out the need to respect copyright by service providers (including search engines and news aggregators, priority 4), with the emphasis on the enforcement mechanisms and procedures to combat piracy.	enforcement, aggregation
20.03.2015	Letter	ENPA, EMMA	Jean-Claude Juncker	Press publishers' key concerns ahead of discussion in the College of Commissioners on the Digital Single Market Strategy	Contribution to debate on the DSM Strategy, before its presentation in May 2015. Five themes: 1) digitalisation and need for copyright protection; 2) lower VAT for digital press; 3) fair competition and transparency in digital world; 4) data protection rules not to hamper free press; 5) maintaining press exception in the new AVMS Directive.	Pro new right. Copyright protection needs to ensure that publishers are remunerated for their investments, otherwise there will be no quality content. Exception for text and data mining would devastate the current licensing system for press review and other services. Rights of press publishers should be equal to the one held by other content producers (equality, enforcement). Call to maintain editorial press content out of AVMS Directive's scope.	independent journalism, democracy, quality content, piracy, parasitism, aggregators, equality

10.12.2015	Statement	Authors' Group		Statement from the Authors' Group on: EU Communication 'Towards a Modern, more European Copyright Framework'	Follow-up to the EC Communication. General comments on the issues signalled by the EC: authors and contracts; making available and communication to the public; enforcement; principle of territoriality introduction of new exceptions.	No mention of the new right. Focus on the author and her position in the value chain. Postulate to cautiously consider introduction of the new right and base it on the empirical data. Portability yes, but respecting principle of territoriality of copyright.	communication to the public, making available
23.03.2016	Press release	EPC, ENPA, EMMA, NME		European Newspaper and Magazine Publishers Welcome European Commission's Launch Of Consultation on Publishers' Rights	Reaction to the launch of Public Consultation on the role of publishers. Text limited to the issue of press publishers' right.	Pro new right. Argument of equality: press publishers' right as 'nothing new'. New right not to have any impact on contractual relationships with journalists and users' possibility to link and share articles. New right will not prejudice national rights (explicit mention of Spain and Germany).	link, equality, national ancillary rights, high quality journalistic content
07.04.2016	Open letter	NGOs	EC	A Digital Single Market for Creativity and Innovation: Reforming Copyright Law without curtailing Internet Freedoms	Acclaim for copyright modernisation plans, and an outline of goals the reform should pursue.	No mention of the new right. Copyright reform seen as a unique opportunity to adopt the rules to technological development. Need to uphold fundamental principles such as the limitation of intermediaries' liability, rights of citizens to freedom of communication and access to knowledge. Need to foster cross-border activities of users and businesses.	link, users, cross-border activities

05.2016	Report	CCIA Europe		The Ancillary Copyright for News Publishers: Why it's unjustified and harmful	Analysis of the press publishers' right from the online environment perspective. Outline of political, social, economic and legal concerns connected to the introduction of the right at the EU level.	Against new right. Emphasis on the symbiotic relationship between press publishers and online platforms, and the lack of economic evidence to support the right. The new right to have a negative repercussion in the social, political and economic dimension, and to go against Berne, fundamental rights and European copyright framework.	Spain, Germany, link, snippet, market expansion, Berne, pluralism, quotation, innovation, creative commons, fundamental rights
13.08.2016	Press briefing	EPC, ENPA, EMMA, NME		Publishers in the Digital Age. Adequate legal protection is needed to ensure the diversity of the press and the future of quality Journalism in Europe	Reaction to the leak of the Proposal. Authors welcome the inclusion of the press publishers' right in the Proposal, and express the need for legal certainty for publishers.	Pro new right. Strong advocacy. Includes a list of 10 myths about the new right. New right should be equal to the ones enjoyed by other content producers, both in scope and in length. The right would not affect users' ability to link, or contracts with journalists. There should be no discrimination between analogue and digital uses. Opponents of the right called 'anti-copyright campaigners'.	equality, link; link tax, Google tax, digital use
9.09.2016	Open letter	NGOs	Juncker, Ansip, Timmermans, Oettinger, Jurova, Bienkowska, Navracsics	No title	Outline of expectations towards copyright reform. Issues addressed: press publishers' right, intermediary liability, TDM exception.	Against new right. Press publishers' right to go against citizens right to freedom of information, access to knowledge and limits of intermediary liability. Direct reference to national provisions failure. Call to publish responses to the Public Consultation.	freedom of information, consultation, Spain, Germany
14.09.2016	Press release	STM		STM response to Directive on Copyright in the Digital Single Market	Comment on the Proposal from the perspective of scientific, technical and medical publishers.	Pro new right. Criticism of the exclusion of STM publishers from the right's scope, as it does not account their investments into content creation. Exclusion called 'discriminatory'. Criticism of TDM exception, and lack of 'lawful access' definition. Lack of 'exception hopping' exclusion noted.	equality, discrimination, scientific and technical publishers, investment

19.09.2016	Manifest (Press release)	IWP		Manifest	Comment on Proposal limited to the press publishers' right.	Pro new right. New right to fill the current regulatory gap, provide legal certainty and recover the publishers' investments. New right to restore economic balance between publishers and platforms using content for free and taking over the ad revenue.	plurality, democracy, link
27.09.2016	Press release	EMMA		Press publishers join forces to safeguard democratic values in Europe by making the case for a stronger European copyright	Announcement of the launch of Empower democracy campaign	Pro new right. Campaign to raise awareness about the crucial democratic role of the press, the need for a free, independent, pluralistic and vibrant press sector. Press publishers' right to equal publishers with other content producers.	equality, pluralism, democracy
13.10.2016	Open letter	Creative Commons		No title	Comment on the Proposal. Emphasis on press publishers' right, education exception, TDM exception, use of out-of-commerce works, value gap. Call for freedom of panorama and general exceptions.	Against new right. Press publishers' right addressed as the first point. The right to have negative impact on all stakeholders and undermine creative commons licenses.	Spain, Germany, link tax, search engines, creative commons license
16.11.2016	Position Paper	NME		News Media Europe Copyright Position Paper	Comment on the Proposal. Focus on the press publishers' right, freedom of panorama and TDM exceptions.	Pro new right. Right to give 'our sector' tools to remain competitive and independently financed. New right to provide legal certainty which fosters innovation. New right to strengthen publisher's bargaining power in asymmetrical relations with the platforms. Pro panorama exception. Against TDM exception for commercial uses.	link, investment, bargaining power, quality press

5.12.2016	Opinion	IGEL		Opinion on the Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market of 14th September 2016	Comment on art. 11 of the Proposal.	Against new right. Emphasis on the experts rejecting the right. Symbiotic relationship between publishers, search engines and aggregators, which can be stopped by publishers at any time (robot.txt). Lack of scale effect: solution not working in MS unlikely to work at the EU level. Emphasis on the issue of snippets: importance for links, uncertainty regarding length (lack of trigger point for right to apply; for the efficiency of the right even smallest texts). Big players will be able to adopt, smaller no, which stifles innovation. Presumption of the right sufficient for enforcement. The *Reprobel* judgement does not to support the right.	snippet, link, Germany, Spain, symbiotic relationship, enforcement, aggregators, effect of scale, enforcement, Reprobel
14.12.2016	Position Paper	Communia Association		Position paper: New Rights for Press Publishers	Comment on art. 11 of the Proposal.	Against new right. Explicit call to remove art. 11 from the Proposal. Criticism under following headings: 1) increased protection fails to increase publishers' revenue; 2) restricts access to information; 3) applies even when publishers don't want it; 4) rights creep. Art. 11 does not properly consider linking. New right to be a static answer to an actively developing sector. Possibility to change the IPRED to include publishers.	link, Spain, Germany, news aggregator, market power, access to information
09.02.2017	Statement	European University Association (EUA)		Updated EUA response to the European Commission proposal for a Directive on copyright in the Digital Single Market	Call for clarifications of some aspects of the Proposal to provide more legal certainty for students, researchers and educators. Focus on TDM exception.	Against new right. The right is to damage universities and curtail academic freedom, making it difficult to share findings and refer to the scholarship.	academic freedom, research

15.02.2017	Press release	BDZV, SPQN		No title	Comment on art. 11 of the Proposal from the perspective of French and German publishers' associations.	Pro new right. Three goals of the new right set: 1) equality with other content producers, 2) protection from exploitation by third parties, 3) creation of level-playing field. Strengthening of legal framework key to ensure high quality independent journalism.	quality journalism, equality, level-playing field
24.02.2017	Open Letter	Academia (CIPIL, CEIPI, CREATe, Humboldt, IViR, Max Planck, Nexa, UOC, UvT)	MEPs, Council	EU Copyright Reform Proposals Unfit for the Digital Age. Open Letter to Members of the European Parliament and the Council of the European Union	Comment on arts. 11 and 13 of the Proposal as contrary to the public interest. Letter supplemented by two appendices, on art each devoted to one article.	Against new right. New right to influence freedom to communicate information online. The EC provides no evidence that the new right will generate new revenues for publishers. Publishers already acquire relevant rights via contracts. The focus of the new solution should be on enforcement (art. 5 of the IPRED) and licensing. Authors' share in revenues likely to decline due to increased number of rights to be taken under consideration. New right covering digital uses other than linking, touches upon multitude of activities, endangering open data and open access policies.	freedom of expression, ancillary right, enforcement, link, licensing, pie theory
28.02.2017	Position Statement	Publishers (News Now)		Common Position Statement on the proposed EU Directive on Copyright in the Single Market	Comment on arts. 11 of the Proposal.	Against new right. Emphasis on the positive effects of digitalisation on the news sector and their mitigation by the new right. Argument in six points: 1) unclear definition of press publication; 2) smaller publications prejudiced by deals between aggregators and publishers with larger online traffic; 3) no definition of "digital use" leaves it for courts and CMOs to determine the meaning; 4) smaller publishers disadvantaged; 5) press publishers' right is disproportionate to aims set.	SMEs, traffic, press publication, aggregator

8.03.2017	Press release	EPC, ENPA, EMMA, NME		Newspaper and magazine publishers slam European Parliament report for dismissing proposal for Publisher's Right and prioritising litigation over licensing and cooperation	Reaction to the JURI Committee draft report prepared by Comodini Cachia MEP.	Pro new right. Criticism of the report and the fact that it abandons the publishers' right in favour of presumption. Strong language used: 'theft', 'diversion of revenue-earning potential'. Presumption to encourage litigation instead of fostering licensing and innovation in making content available. Report to fail to address the relationship between publishers and news aggregators and search engines.	search engine, aggregator, presumption, link
29.05.2017	Open Letter	Civil society and trade associations (64 signatories)	Competitiveness Council (Ministers, MEP Comodini Cachia, MEPs)	Message in the light of the Competitiveness Council - 29 May 2017	Comment on the Proposal. Emphasis on arts. 3-9, 11 and 13.	Against new right. Art. 11 singled out as one of the most damaging in the Proposal. Introduction of press publishers' right is bad for the EU credibility and competitiveness of the EU business on the international arena (especially SMEs). Call to delete art. 11 from the Proposal.	SME, competitiveness
10.07.2017	Letter	Polish NGOs	MEPs	Open Letter to Members of the European Parliament by Polish Digital Rights Organisations	Comment on arts. 11 and 13 of the Proposal.	Against new right. Both provisions to pose a threat to innovation and progress in Europe. Four points on ancillary right: 1) the right harms smaller companies, as demonstrated by Spanish and German examples; 2) the right might cover linking to non-copyrightable content and disadvantage innovative initiatives; 3) the right halts innovation by protecting 'analogue' business models; 4) by restricting links art. 11 endangers core internet functionality.	link, SME, innovation, internet freedom

5.09.2017	Open Letter	SPARC	JURI Committee	EU copyright reform threatens Open Access and Open Science Open letter to the members of the Legal Affairs Committee in the European Parliament	Comment on arts. 11 and 13 of the Proposal from the perspective of European academic, library, education, research and digital rights communities.	Against new right. Call to remove art. 11 from the Proposal. The press publishers' right restricts access to scientific works and is harmful to freedom of information. The new right contrary to art. 2(8) of Berne. Extension of rights' scope to academic publications (ITRE opinion) provides additional tools to academic publishers to restrict access and is contrary to Berne's quotation exception. No evidence on right extended to academic publications. Publishers already acquire relevant rights through contracts.	ancillary right, academic publishers, Berne, link, freedom of information
25.09.2017	Open Letter	European Innovation Media Publishers	MEPs, Council	Open letter to Members of the European Parliament and the Council of the European Union on the introduction of a new neighbouring right under art. 11 of the Copyright Directive	Comment on art. 11 of the Proposal.	Against new right. Art. 11 does not take into account interests of all publishers and would negatively affect online publishers, quality of the press, freedom of opinion and expression. It limits the communication channels available to publishers and creates barriers to entry for startups. Call for finding the balance between interests of different publishers.	online publishers, quality of press, pluralism, SME
30.11.2017	Open letter	NGOs	Junker, Tajani, Ratas, Borrisov, Ministers, MEPs	Open Letter in light of the Competitiveness Council on 30 November 2017	Expression of concern over the Proposal and enumeration of previous open letters, statements and studies.	Against new right. General statement that the CDSM Directive will bring damage to fundamental rights and freedoms, economy and competitiveness, education and research, innovation and competition, creativity and our culture.	competitiveness, innovation, creativity

8.12.2017	Open letter	News agencies AFP, DPA, PA, EFE, Ansa, EANA, APA, ANP, Belga]		En matière d'information la gratuité est un mythe	Comment on the debate on art. 11 of the Proposal.	Pro new right. Art. 11 is ground-breaking as it obliges big internet players to pay compensation. Internet giants capture most of advertising revenues, which has detrimental effect on the position of publishers producing content. Press publishers' right called an innovative solution. The new right to secure the revenues necessary for publishers and news agencies to produce quality pluralistic content, which is essential for democracy.	link, news agency, pluralism, quality content, democracy, Google, Facebook
22.12.2017	Blog post	Carlos Astiz (Chairman and spokespers on of IMP)		Small publishers: Take 'neighbouring right' out of EU copyright reform	Reply to the news agencies' open letter of 8 December 2017, and a comment on the debate on art. 11 of the Proposal.	Against new right. Perspective of small digital publishers. Small independent family publishers to ultimately pay the price for the new right aimed at Facebook and Google. The right will not result in (re)distribution of revenues, but restrict linking and sharing. Devastating effects of national ancillary rights. The new right goes against access to fair, balanced and reliable information. Large publishers and wire services abuse their position when advocating for the press publishers' right.	link, neighbouring right, Germany, Spain, large publishers, news agencies, quality news, SMEs
19.01.2018	Position Statement	CCIA, DIGITAL EUROPE, EDiMA, EuroISPA	Council	Joint Industry Answers to the Orientation Debate on Articles 11 and 13 of the Proposal for a Directive of the EU Parliament and of the Council on copyright in the Digital Single Market	Answer to the questions in Bulgarian Presidency's note on Orientation debate on arts. 11 and 13 of the Proposal (5284/20018, 16 January 2018).	Against new right. Postulate to base Council works on Option B of the compromise (presumption of rights). Snippets should not be covered by copyright. Carving out individual non-commercial uses of works unworkable and ineffective. Shortening the term of protection in the online environment called 'cosmetic' change.	snippet, term, users, commercial character, presumption

20.02.2018	Email	SPARC	Intellectual Property Working Group of the European Council	Position on Article 11	Comment on article 11 of the Proposal.	Against new right. New right to 'potentially threaten access to European research'. Three reasons for objecting the new right: 1) essential not to include scientific publications and elaborate on the scope ('press'); 2) 20 years of press publications remain in public domain; 3) new right needs to be compliant with the Berne Convention.	scientific publications, Berne, quotation, public domain
12.03.2018	Email	Struan Barlett, (Founder and CEO of NewsNow)	MEP	Publishers against Article 11 of the EU Directive on Copyright in the Single Market	Comment on art. 11 of the Proposal.	Against new right. The right to have negative impact on the publishers who rely on news aggregation services to reach their audiences. News aggregators to compliment publishers websites and boost their visits. Lack of economic evidence to the contrary. News aggregators as means to fight fake news.	news aggregators, fake news, market expansion effect
24.03.2018	Open Letter	Communia Association et al.	MEP Axel Voss	Your proposal from March 28 2018 concerning the EU Commission's proposal for an Art. 11 in the Draft Directive on Copyright in the Digital Single Market	Reaction to the proposed compromise on art. 11 of the Proposal by Axel Voss MEP, JURI Committee rapporteur.	Against new right. Call to delete art. 11, and to consider presumption of rights. Available studies, as well as academia are in agreement on negative effects of the new right. The new right will have detrimental impact on media pluralism, competitiveness, fundamental communication methods on the internet (linking and sharing). The right would not produce new revenues, and instead of fighting misinformation, it would grant its producers a new right.	pluralism, linking, competitiveness, revenues, misinformation, presumption, Germany, Spain, communication to the public, news agencies

24.04.2018	Statement	Academia (169 signatories)		Academics against Press Publishers' Right: 169 European Academics warn against it	Comment on art. 11 of the Proposal, initial phrasing and compromise proposed by Axel Voss MEP on 28 March 2018.	Against new right. The Proposal called 'a bad piece of legislation'. The new right likely to: impede free flow of information; raise transaction costs; harm journalists and other authors; enforce power asymmetries in media markets. Press publishers already have significant rights: copyright (contract and collective works) and database right. Right limiting sharing of quality publications likely to favour fake news. New right would double protection, complicating rights' clearance. Amendments by Voss MEP make press publishers' right more harmful.	link, fake news, journalist, revenue, share, database right, quality journalism, right to information
25.04.2018	Statement	Organized Crime and Corruption Reporting Project (OCCRP)		OCCRP's Position on the proposed Directive on Copyright in the Digital Single Market	Comment on art. 11 of the Proposal and its effect on linking and investigative journalism.	Against introduction. Investigative independent journalism requires transparency and citing sources in a form of quoting and linking. Right limiting linking would undermine open web. New right to endanger the ability of independent media organisations to provide fair and accurate reporting and to reach widest audiences possible.	link, independent media, journalism, investigative journalism
26.04.2018	Open letter	NGOs	COREPER	Open letter in light of the 27 April 2018 COREPER I meeting	Comment on the Bulgarian presidency's compromise on the Proposal.	Against new right. Bulgarian compromise as a major threat to freedoms of citizens and businesses in EU. Criticism of the complete lack of consideration of alternatives to press publishers' right, including presumption of right.	presumption, freedoms, balance

30.05.2018	Letter	Local and regional publishers	MEPs	All Publishers united for a Publishers' Right	Comment on art. 11 of the Proposal before the plenary vote in the EP from the perspective of local and regional publishers.	Pro new right. The new right to strengthen position of regional and local publishers towards big internet platforms and search engines. New right will give publishers and equal standing to that of music industries when they fight misuse of content. Key in fighting misinformation and fake news is production of quality information. Local and regional press plays a key role in the democratic discourse.	small publishers, fake news, misinformation, democracy, quality journalism, equality
07.06.2018	Open letter	Digital Agenda Intergroup (DAI)	Axel Voss MEP	More than a hundred MEPs oppose new publishers right	Call upon JURI rapporteur Voss MEP to consider deletion of art. 11 of the Proposal.	Against new right. A less invasive, alternative solution to support quality press should be considered. Call to listen to the voices of consumer groups, NGOs, small publishers and academia who oppose the right, who warn about right's impact on access to information. Call to consider the buried study of EP, which doubts right's abilities to aid sustainable press.	quality journalism, right to information, sustainability of press
20.06.2018	News release	ENPA, EMMA, EPC, NME		Publishers Applaud MEP's Support as Leas European Parliament Committee Votes in Favour of a Publisher's Right in key Copyright Reform	Comment on the vote in JURI Committee on the report on the Proposal.	Pro new right. Praises for the positive vote in JURI, and personally for the Rapporteur Axel Voss MEP. Art. 11 is a fair solution, since business will pay for the use of the content and users will link to content for free.	free press, democracy, link,
28.06.2018	Press release	ENPA, EMMA, EPC, NME		Future of Press Freedom and Professional Journalism put in hands of MEPs: Full EP Plenary Expected to Vote Next Week on Crucial EU Copyright Reform	Comment on art. 11 of the Proposal before the plenary vote in the EP.	Pro new right. Outline of positive features of publishers' right: equality, share for journalists, leaving hyperlinks unchanged, support for small publishers and startups, security of jobs, support for European cultural heritage.	link, equality, freedom of press, small publishers, lobbying

29.06.2018	Statement	Academia		Statement from European Academics to Members of the European Parliament in advance of the Plenary Vote on the Copyright Directive on 5 July 2018	Comment on arts. 11 and art. 13 of the Proposal before the vote in the EP. Reference to previous academic open letters.	Against new right. Explicit call for the EP to reject JURI report and re-open the file to amendments. Comment on the discussion and lobbying activities surrounding the vote, and negative assessment of academic unfavourable comments, qualified as solicited by Google and other internet giants. Observation of polarisation of the discussion. List of six claims concerning substantive points of the Proposal: legal (un)certainty, filtering, freedom of expression, memes, redress mechanism, and share of authors.	lobby, bias, meme, freedom of expression, academia, filters, legal uncertainty, authors
02.07.2018	Open letter	NGOs	MEPs	Call to Members of the European Parliament – Europe's citizens, startups, human rights organisations, publishers, creators, educators, cultural heritage professionals, librarians, and researchers ask for your support	Call to vote against JURI report in the plenary vote in the EP and the fast-tracking the Proposal.	No mention of the new right. General call to vote against JURI report, accompanied by an outline of groups represented by letter signatories.	startups, innovation, fundamental rights
02.07.2018	Open letter	Eurodoc	MEPs	Eurodoc Open Letter to European Parliament on Copyright Directive	Call to MEPs to vote against JURI report in the plenary vote. Comment on arts. 3, 11 and 13 of the Proposal.	Against new right. The CDSM Directive to hinder open science and innovation in Europe. The new right to negatively affect freedom of expression and information and competition in the news market. Publishers already acquire rights from authors. Exception for academic and scientific publications and hyperlinking are unsatisfactory. Art. 11 should be deleted.	innovation, freedom of expression, freedom of information, scientific publishers, link

26.08.2018	Open letter	Sammy Ketz and 78 journalists		Grant the press "neighboring rights" online: a question of life and death (Le Monde title)	Professional journalist comment on press publishers right.	Pro new right. Enactment of the right as be-or-not-to-be of professional journalism and democracy. Condemnation of platforms from democratic and ethical point. Google and Facebook seen as villains and liars: free internet not a matter of discussion in this context, free press is.	journalism, free press, democracy, moral argument
27.08.2018	Statement	EFJ, IFJ, EMMA, ENPA, EPC, NME		Statement on publishers' right from journalists and publishers ahead of the 12 September pleanry on the EU Directive on copyright in the Digital Single Market	Comment on art. 11 of the Proposal before the vote in the EP.	Pro new right. Call to maintain the wording of art. 11 as proposed in the JURI report. Authors claim to speak in the name of the 'entire press ecosystem'. Applause for protecting investment, democracy and ensuring the quality of content.	democracy, link, quality content, investment, journalists, fair share, legal standing
10.09.2018	Statement	EPIP (academics)	MEPs	Vote for a balanced European copyright law	Comment on the key amendments to the Report on the Proposal made by Voss MEP before the plenary vote in the EP and recommendations for the MEPs.	Against new right. Recommendation to delate art. 11, or alternatively to accept presumption of right. Press publishers' right to introduce a new layer of licensing. Exclusion of single words accompanying the link only a reassurance, not removing the core of the problem.	link, presumption, single words, context, double-layering of rights
12.09.2018	Press release	Federation of European Publishers (FEP)		FEP Press Release Copyright in the DSM vote	Reaction to the final vote on the JURI report in the EP.	No explicit mention of the new right. Appraisal for adoption of the EP compromise. The vote was a 'historical decision to support culture, innovation, access to knowledge and creativity which are at the heart of the European Union' and to bring clarity copyright to the users (students, librarians, teachers). No explicit mention of art. 11.	legal certainty

23.10.2018	Open letter	Electronic Frontier Foundation (Cory Doctorow)		EFF's Letter to the EU's Copyright Directive Negotiators	Comment on arts. 11 and 13 of the Proposal in the context of ongoing trilogue.	Against new right. Includes a list of flaws of art. 11. Issues discussed: need to specify the length of permitted quotation; safe harbour for users; newspapers' ability to opt-out from licenses; clarification of non-commercial personal linking; safeguards against tech giants.	link, quotation, personal use, big tech
29.10.2018	Open letter	IMP	Axel Voss MEP, Austrian Presidency	Open letter to the Austrian Presidency of the European Council and rapporteur Axel Voss MEP on Article 11 and Recital 32 of the proposed Copyright Directive	Comment on art. 11(1) and recital 32 of the Proposal in the context of the ongoing trialogue.	Against new right. Call to adopt measures mitigating negative effects of art. 11 on small and medium-sized publishers. Abandonment of obligatory reimbursement, leaving publishers possibility to decide whether they want to make their content available without licenses. Call to limit the freedom of implementation of the new right.	mandatory, waivable compensation, search engine, small and medium publishers, implementation
19.11.2018	Letter	NGOs	Council	No title	Call to refuse a negotiation mandate ahead of COREPER on 23 November 2018. Comment on arts. 11 and 13 of the Proposal.	Against new right. Together with art. 13, press publishers' right would impede functioning of the internet and freedom of expression. New right not needed, user-shared links will be devoid of snippets and its context. It will have a negative influence on plurality of the press, with new sources not treated equally. Lack of harmonisation of quotation exception. Call to listen to academics warning against the right.	link, quotation, snippet, freedom of expression, media plurality, academic research
28.11.2018	Blog post	Reddit		The EU Copyright Directive	Comment on the Proposal, with the emphasis on arts. 11 and 13.	Against new right. Arts. 11 and 13 endanger the core functionality of sites like Reddit, removing the safe harbours and benefit of doubt for user-uploaded content (linking to press articles directly mentioned). Reference to the 'Don't wreck the Internet' campaign.	SMEs, link

06.12.2018	Blog post	Google (Richard Gingras, VP News)		Proposed copyright rules: bad for small publishers, European consumers and online services	Comment on art. 11 of the Proposal.	Against new right. Yes, to support of journalism and its role for the democratic society, but art. 11 of the Proposal not the way. It is not possible to conclude a commercial license with all publishers, services would need to make a choice (pick 'winners and losers'). In consequence only a limited number of news sources would be available to readers and the small publishers would be harmed. Publishers need to be able to make a choice how to make their content available.	SMEs, link, snippets, journalism, pluralism, Google
09.01.2019	Op-ed	Christian Van Thillo (Chairman, EPC)		Loopholes the size of a double-decker bus would make a mockery of the Copyright Reform	Comment on art. 11 of the Proposal and ongoing trilogue.	Pro new right. Support for the EP's compromise on art. 11 of the Proposal. Requirement of originality for snippets as a loophole for the tech giants. Claims of right distorting the web are unfounded. The new right is needed to secure revenues for publishers. Google's threats concerning ceasing to link and refusing licenses are an abuse of dominant position.	link, originality, snippets, business model, revenues, big tech
14.01.2019	Op-ed	Richard Gingras (VP News, Google)		Updating copyright rules for news: There's a better way	Reaction to op-ed by Van Thillo published by EurActiv on 9 January 2019.	Against new right. Art. 11 of the Proposal to lock all publishers in one business model. Call for flexibility for new innovative publishers. Obligation to license would force a choice between publishers, and benefit the big players represented by the EPC. Google News business model not built on publishers' content (no ads). Google delivers traffic to publishers and money it generates.	SMEs, business model, revenues, licenses

18.01.2019	Op-ed	Carlos Astiz (Chairman and spokespers on, IMP)		Protecting journalism is not synonymous with protecting the interests of big press publishers	Reaction to op-ed by Van Thillo published by EurActiv on 9 January 2019.	Against new right. Disagreement with the EPC's op-ed. Call for recognition of differences between big, and small and local publishers, and the crucial role of the traffic from web aggregators for the latter. Call for introduction of 'originality principle': a right covering individual words and short extracts to chill freedom of information. Publishers should be able to opt-out from the new right if they wish so. Under the op-ed of Astiz, Van Thillo, an author of the original op-ed left a comment.	originality, SMEs, local publishers, regional publishers, waivability, SME,
18.01.2019	Blog post	EFJ, IFJ		We call on the EU to protect author's rights and deliver on fairer Europe	Call from EFJ and IFJ on the EU to stand up for journalists and authors rights in the last part of negotiations on the CDSM Directive.	Pro new right. Call for a fairer distribution of revenues in the digital world. Criticism of lobbying of big companies and 'self-styled freedom defenders'. Art. 11 among the measures to protect authors.	journalists, revenues, remuneration, lobbying
22.01.2019	Statement	Andrus Ansip		Statement by Vice-President Ansip on copyright reform	Call to reach compromise on the copyright reform.	No explicit mention of the new right. Outline of positive effects of the reform. Possibility to reach a compromise, also on the discussed issue of carve-outs for SMEs and user-generated content (art. 13). Call to leave one's non-conformist stance.	SMEs, UGC
29.01.2019	Open letter	NGOs	Romanian Presidency, Vice-President Ansip, selected MEPs	Open Letter calling for the deletion of Articles 11 and 13 in the copyright Directive proposal	Position on the ongoing negotiations on the CDSM Directive following the cancellation of the last trilogue.	Against new right. Call for deletion of art. 11 and 13 from the Proposal. Articles to have major flaws, and to make it impossible to strike a balanced compromise on the future of copyright in the EU.	balance

07.02.2019	Open letter	IMP	H.E. Ambassador Cosmin Boiangiu, Andrus Ansip, Mariya Gabriel and Axel Voss MEP	Waivability of Article 11 of the proposed Copyright Directive	Call for introduction of measures to mitigate effects of art. 11 of the Proposal on local, regional and innovative publishers.	Against new right. Measures proposed to mitigate effects of art. 11 of the Proposal on local, regional and innovative publishers: 1) guarantee of waivability of art. 11 and ability to issue free licenses by publishers; 2) exclusion from the scope of the right headlines and short previews.	SMEs, local press, regional press, free license, snippets, linking
08.02.2019	Press release	IFJ, EFJ		Copyright Directive: IFJ/EFJ reject the Romanian compromise	Call for rejection of the Romanian presidency compromise on CDSM Directive provisions concerning remuneration of journalists.	Pro new right. Romanian presidency compromise proposing restriction of fair share in remuneration for journalists in case of contractual agreements to be unacceptable. It would create two compensation regimes, for journalists and other authors. Contractual arrangements and employment agreements cannot to restrict fair share of revenue.	journalists, revenues, remuneration, fair share, contracts, democracy
12.02.2019	Blog post	Sammy Ketz		Sammy Ketz on Copyright Directive Trilogue	Call for the adoption of the CDSM Directive during trilogue.	Pro new right. Call not to 'gut' current text of the CDSM Directive. Reference to laying off journalists, spread of fake news and disinformation, as well as ads income mostly for internet giants.	disinformation, fake news, internet giants
13.02.2019	Statement	European University Association (EUA)		Copyright Directive: EUA position ahead of a final agreement	Comment on the trilogue compromise on the CDSM Directive.	No mention of the new right. Compromise is a step in a right direction, but exceptions for educational institutions should be further strengthened. EUA welcomes limiting the scope of definition of press publication (excl. academic journals) and excluding private uses from the right's scope. Call to exclude all the uses by education, research and cultural heritage institutions.	research institutions, academic journals

13.02.2019	Press release	EMMA, ENPA, EPC, NME		EU Regulators Give Vote Of Confidence For Future Of Europe's Independent Press And Professional Journalism: EU Publisher's Right Makes Copyright Fit for The Digital Age	Comment on the final trilogue compromise on the CDSM Directive.	Pro new right. Acclaim for art. 11 and call for the quick approval by the EP and the Council. New right to improve publishers bargaining position, allow for value exchange and to support quality journalism, which is at the heart of democracies.	quality journalism, bargaining position, value share, democracy
14.02.2019	Press release	IFJ		New copyright directive makes a mockery of journalists' authors' rights	Comment on the final trilogue compromise on the CDSM Directive	Pro new right. Acclaim for art. 14 and transparency obligations. Criticism of art. 11: guarantee of fair share of revenues mitigated by possibility of its circumvention by 'contractual arrangements' and 'laws on ownership'. Read as promotion of buy-out contracts and journalists losing all revenues from the online use of their content.	Remuneration, fair share, journalists, contracting
26.02.2019	News Release	EMMA, ENPA, EPC, NME		MEPs take a democratic step closer to a fair and sustainable internet	Expression of support for the JURI Committee decision to back the trilogue compromise on the CDSM Directive.	Pro new right. Call on the EP plenary to support the compromise. The CDSM Directive to support cultural and media landscape in Europe.	innovation, media
28.02.2019	Blog post	Wikimedia Foundation (Allison Davenport)		We do not support the EU Copyright Directive in its current form. Here's why you shouldn't either.	Statement of lack of support for the CDSM Directive before the EP vote and a general comment on the CDSM Directive.	Against new right. Directive does not represent a balanced approach and carve-outs do not amend this situation. Art. 11 and 13 called the most harmful provisions of the directive ('toxic provisions'). Art. 11 will make it harder to find and use information. This will make a work of Wikipedia contributors more difficult. Prise for private use exception.	access to information, balance, internet
11.03.2019	Statement	Creative organisatio ns		#YES2COPYRIGHT Joint statement on the copyright directive	Call on the Council and the EP to adopt the CDSM Directive.	Pro new right. Directive to create a level-playing field and guarantee better access to wider array of content.	level playing field

13.03.2019	Open letter	Creators	MEPs	No title	Call on the MEPs to adopt the CDSM Directive.	Pro new right. Support for the CDSM Directive. Directive is essential for people to enjoy culture and for creators to be remunerated. It creates a level-playing field between creators and platforms. Sustainability of creators' activities as a guarantee of pluralism. Adoption of Directive not about creators only, but about 'the future of Europe's culture'.	level playing field, sustainability, plurality, creators, fairness, remuneration, culture
19.03.2019	Statement	Polish NGOs & business organisations		Stanowisko Koalicji polskich przedsiębiorców, organizacji pozarządowych, studentów i konsumentów w sprawie unijnej reformy prawa autorskiego przed ostatecznym głosowaniem w Parlamencie Europejskim	Call on the Polish MEPs to reject the CDSM Directive and to reach a new compromise on copyright.	Against new right. The CDSM Directive will negatively impact development of Polish economy, education, science and civil society. A feasible alternative to art. 11 is a presumption of ownership, proposed by the Polish government. The CDSM Directive should be rejected but works on copyright reform should continue during new EP term, and take all relevant interests into account.	economy, presumption, balance
19.03.2019	News Release	#Yes2Copyright		More than 270 national, European and international organisations from the entire cultural sector call for adoption of Copyright Directive	Call on the EP to adopt the CDSM Directive.	Pro new right. Press publishers' right as a key to encourage investment in 'professional, diverse, fact-checked content for the enrichment and enjoyment of everyone, everywhere'.	professional journalism, fact checking, fake news

19.03.2019	Open letter	Business organisations	MEPs	No title	Call on the EP to vote against art. 11 and 13 of the Proposal.	Against new right. The CDSM Directive to harm European economy and competition against the US internet giants. Support for the provisions' goals, but they are inadequate to support them. Art. 11 to create additional layer of exclusive rights, complicate licensing and make new businesses less likely to launch. Startups based on content aggregation to disappear. Lack of valid exception for startups.	double layering of rights, licensing, startups, Spain, Germany
21.03.2019	Open letter	European journalists and photo journalists		Fight for free, diversified press for internet users	Call upon EP to adopt the CDSM Directive.	Pro new right. Adoption of the CDSM Directive a 'matter of life and death for the media and for the survival of many artists and authors'. New right will simply require tech giants to compensate publishers. Action on the EU level justified by rights of scale. Threat of censorship, campaigns as Savetheinternet or Wikipedia blackout, are unfounded.	journalists, compensation, freedom of press, big tech
24.03.2019	Statement	Academia		The Copyright Directive: Articles 11 and 13 must go. Statement from European Academics in advance of the Plenary Vote on 26 March 2019	Call to delete art. 11 and 13 of the CDSM during the upcoming plenary vote in the EP.	Against new right. The CDSM Directive supports narrow sectoral interests. On art. 11 of the Proposal reference to the previous open letter of academics (27 February 2017), pointing that the provision will deter communication of news, obstruct online licensing and negatively influence authors. Explicit call to delete art. 11.	lobby, authors, licensing
24.03.2019	Open letter	Artists, creative and cultural workers	MEPs	Open letter from artists, creative and cultural workers	Call on the MEPs to vote against adoption of the CDSM Directive.	Against new right. CDSM Directive is against interests of creative sector (authors). Art. 11 and 13 singled out. List of general reservation against the CDSM Directive includes censorship on the internet and containment of creative exchange.	creative sector

25.03.2019	Blog post (open letter)	EPC	MEPs	As you prepare to vote for the EU Copyright Reform this week, whose side are you on?	Call on the MEPs to adopt the CDSM Directive.	Pro new right. Rejection of the CDSM Directive seen as support of abusive monopolies, whose business model is based on the free-of-charge use of content produced by others. All publishers to benefit; memes and gifs, as well as short extracts for commercial purposes can be used.	professional journalism, sustainable press, internet giants, memes, legal certainty
25.03.2019	Statement	Association of European Journalists (AEJ)		Statement of the Association of the European Journalists regarding the proposed Directive on Copyright in the Digital Market	Call to continue works on the CDSM Directive, especially arts. 11 and 13.	No firm stand on the new right. Support of the general aims of the CDSM Directive but questioning if art. 11 and 13 are the best solutions. Need for guarantees for freedom of expression, services run by individuals and small companies. Fear of the negative effect on small and independent media, including independent journalists. Need to learn from German example.	SMEs, independent journalism, freedom of expression, Germany
26.03.2019	Press release	EFJ, IFJ		IFJ/EFJ hail adoption of Copyright Directive and urge EU Member States to adopt laws that ensure fair and proportionate remuneration for journalists	Comment on the adoption of the CDSM Directive by the EP.	Pro new right. Focus on the journalists receiving an appropriate share of the remuneration received by publishers. Share to be separate from salary received by journalists. Strong position of authors in the directive as an effect of IFJ/EFJ campaign.	journalists, fair share, remuneration
15.04.2019	Press release	EMMA, ENPA, EPC, NME		EU copyright reform adopted by Member States: publishers call for quick and appropriate implementation into national laws	Comment on the adoption of the final text of the CDSM Directive and call for its implementation.	Pro new right. Praises for the CDSM Directive. The directive to better negotiation position of publishers; enhance innovation and recognises the value of the press for the society. Press publishers right as an essential condition for media pluralism.	bargaining position (of publishers), pluralism, innovation, democracy, remuneration

Annex II: Reponses to the Public Consultation on the role of publishers in the copyright value chain.

Responses available at https://ec.europa.eu/digital-single-market/en/news/synopsis-reports-and-contributions-public-consultation-role-publishers-copyright-value-chain

Respondent's name	Respondent's type	Position towards new right	Response mentions				
			Link	Com. to public	Pluralism	Snippet	Aggregator
300polityka	Press publisher	Against	No	No	No	No	No
AEEPP	Press publisher	Against	Yes	Yes	Yes	Yes	Yes
AHVV VerlagsGmbH	Press publisher	Against	No	No	No	No	No
Aikakauslehtien liitto ry (Finnish Periodical Publishers' Association)	Press publisher	Pro	No	No	No	No	No
AKKA LAA	CMO	Pro	No	No	No	No	No
Allied for Startups	Other	Against	No	No	No	No	No
Altroconsumo	End user/consumer/citizen	Neutral	Yes	No	Yes	Yes	Yes
AMEC FIBEP	Other service provider	Against	Yes	No	No	No	Yes
Associação Portuguesa de Imprensa	Press publisher	Pro	No	No	No	No	No
Association of Greek Publishers and Booksellers (ENELVI)	Book Publisher	Pro	No	No	No	No	Yes
Associazione Italiana Editori	Book Publisher	Pro	No	No	No	No	Yes
Authors Licensing and Collecting Society (ALCS)	CMO	Against	No	No	No	No	Yes
Axel Springer España S.A.	Press publisher	Pro	Yes	No	No	No	No
Axel Springer SE	Press publisher	Pro	No	No	No	Yes	Yes

BEUC	End user/consumer/citizen	Against	Yes	No	Yes	Yes	Yes
BONO	CMO	Against	Yes	Yes	No	Yes	No
Budrich UniPress Ltd.	Scientific publisher	Against	No	No	No	No	No
CCIA Europe	Other service provider	Against	Yes	No	Yes	Yes	Yes
Center for Democracy & Technology	Other (NGO)	Against	Yes	Yes	No	Yes	Yes
Centrum Cyfrowe	Other (think tank)	Against	Yes	No	No	No	Yes
Copyright for Creativity (C4C)	Other (descriptive, NGO, coallition)	Against	Yes	No	Yes	Yes	Yes
Creativity Industry Forum	Other (creative industries association)	Against	No	Yes	No	No	Yes
Creators' Rights Alliance	Writer	Neutral	No	No	No	No	No
Danske Forlag	No specification	Neutral	No	No	No	No	Yes
Deutscher Journalisten-Verband	Journalist	Against	No	No	No	No	Yes
Digital Society	Educational or research institution	Against	No	No	No	No	Yes
Dom Wydawniczy KRUSZONA	Press publisher	Pro	No	No	Yes	No	No
EBLIDA	Library/Cultural heritage institution	Against	Yes	No	No	Yes	Yes
Ecointeligencia Editorial SL	Press publisher	Against	No	No	No	No	No
EDiMA	Other service provider	Against	Yes	Yes	Yes	Yes	Yes
Editions Actes Sud	Book Publisher	Pro	No	Yes	No	No	Yes
edition tommen e.k.	Book Publisher	Against	No	No	No	No	No
Editora Codigopro Edicao	Press publisher	Pro	No	No	No	No	No
Edi.pro	Book Publisher	Pro	No	No	No	No	No

Europapress Holding	Press publisher	Pro	No	Yes	No	No	Yes
European Alliance of News Agencies (EANA)	Other (Organisation of European news agencies)	Pro	No	No	No	No	No
European Copyright Society (ECS)	Other (Association of copyright scholars in European Union)	Against	No	No	No	No	Yes
European Digital Rights	End user/consumer/citizen	Against	Yes	No	No	Yes	Yes
European Federation of Journalists (EFJ)	Journalist	Against	No	Yes	No	No	No
European Publishers Council	Press publisher	Pro	Yes	Yes	Yes	Yes	Yes
European Writers Council	Writer	Pro	No	No	No	No	No
Federation des Entreprises de Villie Media (FEVEM)	Other service provider	Against	Yes	No	No	No	Yes
Finnish Newspapers Association	Press publisher	Pro	No	No	No	No	No
Flemish Book Publishers Association (Vlaamse Uitgevers Vereniging)	Book Publisher	Pro	No	No	No	No	Yes
French Publishers Association (SNE)	Book Publisher	Pro	No	Yes	No	No	Yes
Fundacja Nowoczesna Polska	Other	Against	Yes	No	No	No	No
GESAC (The European Grouping of Societies of Authors and Composers)	CMO	Against	No	Yes	No	No	No

Getty Images	Professional photographer	Against	Yes	Yes	No	No	No
Google	Search engine	Against	Yes	Yes	Yes	Yes	Yes
Hachette Livre	Book Publisher	Pro	No	Yes	No	No	Yes
IAML (The International Association of Music Libraries, Archives and Documentation)	Library/Cultural heritage institution	Against	Yes	No	No	No	Yes
IGEL	Other	Against	No	No	No	Yes	Yes
Il Rottamore	Press publisher	Against	No	No	No	No	No
Impresa	Press publisher	Pro	No	No	Yes	No	No
International Federation of Reproduction Rights Organisations (IFRRO)	CMO	Neutral	No	No	No	No	No
Izba Wydawców Prasy	Press publisher	Pro	Yes	Yes	No	Yes	Yes
Japan Book Publishers Association	Book Publisher	Pro	No	No	No	No	No
Kennisland	Other	Against	Yes	No	No	Yes	Yes
LACA (The Libraries and Archives Copyright Alliance)	Other	Against	Yes	No	No	Yes	No
Les Editions du Rouergue	Book Publisher	Pro	No	Yes	No	No	Yes
LIBER (Association of European Research Libraries)	Library/Cultural heritage institution	Against	Yes	No	No	Yes	Yes
Local Ireland	Press publisher	Pro	No	No	No	No	No
Magazines Ireland	Press publisher	Pro	No	No	No	No	No
Microsoft Corporation	Book Publisher	Against	Yes	Yes	No	Yes	No
Mozilla	Other	Against	Yes	No	No	Yes	Yes

Music Publishers Association	Other	Against	No	Yes	No	No	No
netzwelt GmbH	Press publisher	Against	No	No	No	No	No
Nexa Center for Internet & Society	Educational or research institution	Against	Yes	Yes	No	Yes	Yes
News Media Association	Other	Pro	No	No	No	No	Yes
OpenForum Europe	Other	Against	Yes	Yes	No	Yes	Yes
OpenMedia	Other	Against	Yes	No	No	Yes	Yes
Österreichischer Journalisten Club (ÖJC)	Journalist	Against	No	No	No	No	No
Professional Publishers Association	Press publisher	Pro	No	Yes	No	No	No
Publishers Licensing Society Limited	CMO	Neutral	No	No	No	No	No
PWR	Author	Against	No	No	No	No	No
Ringier Axel Springer Slovakia a.s.	Press publisher	Pro	Yes	No	No	No	No
Ringier Romania	Press publisher	Pro	No	No	No	No	No
Romanian Library Association	Library/Cultural heritage institution	Against	No	No	No	No	No
SACEM (Société des Auteurs, Compositeurs et Editeurs de Musique)	CMO	Against	No	No	No	No	No
Schattauer GmbH	Scientific publisher	Against	No	No	No	No	No
Serge Plantureux eurl	Book Publisher	Against	No	No	No	No	No
Seznam.cz	Search engine	Neutral	Yes	No	No	No	No
Spain (Ministry of Education, Culture and Sport)	Public authority	Pro	No	Yes	No	No	No
Springer Nature	Scientific publisher	Pro	No	Yes	No	No	Yes

STM (International Association of Sceintific, Technical and Medical Publishers)	Scientific publisher	Pro	Yes	No	No	No	Yes
Stowarzyszenie Kreatywna Polska	Other	Pro	Yes	Yes	Yes	Yes	Yes
Stowarzyszenie Wydawców REPROPOL	CMO	Pro	No	Yes	Yes	No	No
Styria medijski servisi d.o.o.	Press publisher	Pro	No	Yes	No	No	Yes
Suomen Kirjailijaliitto ry (Union of Finnish Writers)	Writer	Against	No	No	No	No	No
The Publishers Association	Book Publisher	Pro	No	No	No	No	No
Union de la Presse en Région	Press publisher	Pro	No	No	No	No	No
Union of Journalists in Finland	Journalist	Neutral	No	No	No	No	No
Union of Publishers in Bulgaria	Press publisher	Pro	No	Yes	Yes	No	No
Verlag C.H. Beck	Book Publisher	Against	No	No	Yes	No	Yes
Wydawnictwo Sztafeta	Press publisher	Pro	No	No	Yes	No	No
yeebase media GmbH	Press publisher	Against	No	No	No	Yes	No

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