# The Press Publishers' Right under EU Law: Rewarding Investment through Intellectual Property

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The press publishers' right available under Article 15 of Directive (EU) 2019/790 on Copyright in the Digital Single Market (the "DSM Directive") is one of the most recent additions to investment-driven intellectual property rights under EU copyright law. The right was introduced with a view to address the dramatic changes in the creation, distribution and consumption of news online. With the advancement of digital technologies and the internet, news is no longer solely available directly from press publishers through their print editions and news websites but is increasingly accessed via other sources, such as news aggregators and social media platforms. The changes in news consumption trends have resulted in a drop of the revenues of press publishers since

2000, a progressive decline in the circulation of printed newspapers,[1] and a dramatic increase of consumption of online news content. Because of these changes, the revenues and advertising sales of press publishers have substantially dropped despite their efforts and investment in making news accessible. It is to reward these efforts and this investment that a sui generis press publishers' right was introduced initially at the level of EU Member States, such as Germany[2] and Spain,[3] and was later included in Article 15 of Directive (EU) 2019/790 on Copyright in the Digital Single Market. The right was envisaged as one that would improve the bargaining power of press publishers when negotiating licensing deals with online services and web platforms that re-use their content.

But is the press publishers' right necessary and, if so, appropriate towards stimulating and protecting the investments made by press publishers? This is a question that was heavily debated at the EU level and lobbying on the scope and effectiveness of

[1]Indicatively, between 2010-2014 it had declined by 17 % in 8 EU Member States. See 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, SWD(2016) 301 final, Vol. 1, 155 (Sept. 14, 2016). Also see Gareth Price, *Opportunities and Challenges for Journalism in the Digital Age: Asian and European Perspectives*, Chatham House, August 2015.

[2]Sections 87f, 87g and 87h of the Urheberrechtsgesetz (German Copyright Act). For a commentary see Igor Barabash, *Ancillary Copyright for Publishers: The End of Search Engines and News Aggregators in Germany?,* 35(5) EUROPEAN INTELLECTUAL PROPERTY REVIEW 243 (2013).

[3]Article 32 of the Ley de Propiedad Intelectual (Intellectual Property Law). For a commentary see Raquel Xalabarder, *Press Publisher Rights in the Proposed Directive on Copyright in the Digital Single Market*, CREATE WORKING PAPER 2015/16, Dec. 2016, 17 et seq, https://zenodo.org/record/183788/files/CREATe-Working-Paper-2016-15.pdf.

Article 15 continues at national level, with the implementation date of the DSM Directive, 7 June 2021, getting closer. Even before the proposed Directive was published,[4] the proposed press publishers' right received intense criticism from scholars across Europe,[5]

[4] See e.g. Martin Kretschmer, Severine Dusollier, Christophe Geiger & P. Bernt Hugenholtz, *The European Commission's Public Consultation on the Role of Publishers in the Copyright Value Chain: A Response by the European Copyright Society*, 38(10) EUROPEAN INTELLECTUAL PROPERTY REVIEW 591 (2016); Martin Senftleben, *Copyright Reform, GS Media and Innovation Climate in the EU – Euphonious Chord or Dissonant Cacophony?*, 5 TIJDSCHRIFT VOOR AUTEURS-, MEDIA- EN INFORMATIERECHT 130-133 (2016); Ana Ramalho, *Beyond the Cover Story - an Enquiry into the EU Competence to Introduce a Right for Publishers,* 48(1) INTERNATIONAL REVIEW OF INTELLECTUAL PROPERTY AND COMPETITION LAW 71 (2017); Reto M. Hilty, Kaya Köklü & Valentina Moscon, Po*sition Statement of the Max Planck Institute for Innovation and Competition on the 'Public Consultation on the Role of Publishers in the Copyright Value Chain' (*June 15, 2016), H

[5] See indicatively Lionel Bently et al, *Response to Article 11 of the Proposal for a Directive on Copyright in the Digital Single Market, entitled 'Protection of Press Publications concerning Digital Uses' on behalf of 37 Professors and Leading Scholars of Intellectual Property, Information Law and Digital Economy,* 1 (Dec. 5, 2016), https://www.cipil.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cipil.law.cam.ac.uk/docume nts/ipomodernisingipprofresponsepresspublishers.pdf (last access Nov. 8, 2017); also see P. Bernt Hugenholtz, *Say Nay to the Neighbouring Right*, KLUWER COPYRIGHT BLOG (Apr. 14, 2016), http://kluwercopyrightblog.com/2016/04/14/say-nay-to-the-neighbouring-right/ (last access Nov. 8, 2017); *Copyright Reform: Open Letter from European Research Centres* (Feb. 24, 2017), http://www.create.ac.uk/wp-content/uploads/2017/02/OpenLetter_EU_Copyright_Reform_24_02_2017.pdf; Raquel Xalabarder, *Press Publisher Rights in the Proposed Directive on Copyright in the Digital Single Market*, CREATE WORKING PAPER 2015/16, Dec. 2016, 17 et seq, https://zenodo.org/record/183788/files/CREATe-Working-Paper-2016-15.pdf; Matthew Karnitschnig & Chris Spillane, *Plan to make Google pay for News Hits Rocks, id.*; Christophe Geiger, Oleksandr Bulayenko & Giancarlo F. Frosio, *The Introduction of a Neighbouring Right for Press Publisher at EU Level: The Unneeded (and Unwanted) Reform*, 39(4) EUROPEAN INTELLECTUAL PROPERTY REVIEW 202 (2017); Martin Senftleben, Maximilian Kerk, Miriam Buiten & Klaus Heine, *New Rights or New Business Models? An Inquiry into the Future of Publishing in the Digital Era*, 48(5) INTERNATIONAL REVIEW OF INTELLECTUAL PROPERTY AND COMPETITION LAW 538 (2017); Stavroula Karapapa, *The Press Publishers' Right in the European Union: An Overreaching Proposal and the Future of News Online,* in E. Bonadio and N. Lucchi (eds.), Non-Conventional Copyright: Do New and Atypical Works Deserve Protection?, Edward Elgar (2018) 316- 339.

in that the right is unnecessary, undesirable, fundamentally misconceived, and unlikely to achieve anything apart from adding to the complexity and cost of operating in the copyright environment. Indeed, as I will explain below, there is no hard evidence that the right can achieve its stated objectives, notably to facilitate rights clearance and enforcement in the press publishing industry. Quite on the contrary, the national implementations of press publishers' rights before the launch of Article 15 were not as successful as expected. Still, Article 15 sets out to offer an additional to copyright form of legal protection to press publishers. I will initially introduce the right available under Article 15, outline its underpinning rationale, explain how it introduces an additional to copyright layer of protection, and elaborate on why the way in which the so-called "newspaper crisis" was addressed was not appropriate towards addressing issues of licensing and enforcement, which are the source of concerns on the future of press publishing.

## The press publishers right under Article 15 of the Digital Single Market Directive

The introduction of Article 15 was the outcome of a 2016 Commission public consultation on the role of publishers aiming to collect views on the desirability of a right for press publishers. The Impact Assessment on the Modernisation of EU Copyright Rules stated that:

> [t]he 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.[6]

To address this issue, the proposal for a Directive on Copyright in the Digital Single Market[7] included provisions for a related right for press publishers (Article 11) and a share in the authors compensation from remunerated copyright exceptions and limitations attributable to publishers in general (Article 12), even though other options were subject to consideration, such as an amendment of Article 5 of the Enforcement Directive,[8] with the effect of enabling press publishers to bring proceedings to enforce copyright in materials of which they are the identified publishers.[9] The result of these preliminary

[6] 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, SWD(2016) 301 final, Vol. 1, 155 (Sept. 14, 2016) at 5.3.1.

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[8] Directive 2004/48/EC of the European Parliament and of the Council of Apr. 29, 2004 on the Enforcement of Intellectual Property Rights, OJ L 157 (Apr. 30, 2004).

[9] See indicatively Lionel Bently et al, *Response to Article 11 of the Proposal for a Directive on Copyright in the Digital Single Market, entitled 'Protection of Press Publications concerning Digital Uses' on behalf of 37 Professors and Leading Scholars of Intellectual Property, Information Law and Digital Economy,* 1 (Dec. 5, 2016), https://www.cipil.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cipil.law.cam.ac.uk/docume nts/ipomodernisingipprofresponsepresspublishers.pdf, 2; *Copyright Reform: Open Letter from European Research Centres* (Feb. 24, 2017), http://www.create.ac.uk/wp-content/uploads/2017/02/OpenLetter_EU_Copyright_Reform_24_02_2017.pdf, 3.

A proposal echoing this approach was included in the draft Report of the JURI Committee:

Member States shall provide publishers of press publications with a presumption of representation of authors of literary works contained in those publications and the legal capacity

discussions was a single right for press publishers available under Article 15 of the Digital Single Market Directive.

Article 15 gives press publishers the exclusive right to authorise the reproduction and making available to the public, as described in the Information Society Directive 2001/29/EC (the "Information Society Directive") of their press publications for online uses carried out by information society service providers, such as search engines, news aggregators and media monitoring services. It is an ancillary or neighbouring right to copyright enabling press publishers to negotiate new or improved licensing terms with relevant information society service providers. Exclusions to the scope of the right apply. In particular, the right does not cover private or non-commercial uses of press publications by individual users. It also does not cover acts of hyperlinking and the use of individual words or very short extracts of a press publication.

The exclusion of private or non-commercial uses of press publications by individual users aligns with the copyright exception of Article 5(2)(b) of the Information Society Directive, which applies to the press publishers' right according to Recital 57 of the Digital Single Market Directive. Questions could emerge as to the private and non-commercial nature of relevant uses, especially such uses are carried out in social media,

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to sue in their own name when defending the rights of such authors for the digital use of their press publications.

See European Parliament (Rapporteur: Therese Comodini Cachia / Rapporteur for the opinion: Catherine Stihler), *Draft Report of 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,* COM (2016)0593 – C8-0383/2016 – 2016/0280(COD), PE 601.094v01-00, JURI_PR (2017)601094 (Mar. 10, 2017, amendment 52. According to amendment 53, the proposal specifies by way of a new Article 11(1a) that the presumption does not apply in criminal proceedings.

as is often the case with news items, e.g. reposting a news story on a social medium with ads appearing next to the post.

As acknowledged in Recital 58, parts of press publications have also gained economic relevance, however, the use of individual words or very short extracts of press publications by information society service providers should be one that does not undermine the investments made by publishers of press publications in the production of content. It is on the basis of this invenstment-driven rationale that it has been deemed appropriate to provide that the use of individual words or very short extracts of press publications should not fall within the scope of the rights provided for in the Directive. With regards to "individual words or very short extracts of a press publication", a number of questions are raised. Clearly all content is made up of individual words and short phrases. It is not clear how many words will be enough to be excluded from the scope of the right. Will it be extracts of no more than 11 words, i.e. the *Infopaq*[10] standard? What about "very short extracts"? These are questions that are likely to be subject to dispute between press publishers and information society service providers in the future, particularly with regards to headlines or concise headnotes of news stories, such as those attracting the readers' attention, that cannot squarely benefit from the quotation exception of Article 5(3)(d) of the Information Society Directive, which applies to the press publishers' right by virtue of Recital 57 of the Digital Single Market Directive.

In addition, the right of Article 15 does not cover "acts of hyperlinking". It is not clear how this exclusion shall work in practice, particularly because it seems to be

[10] Infopaq International A/S v Danske Dagblades Forening (Case C-5/08) [2009] ECR I-06569.

developing a differentiated approach to that applicable to substantive copyright law, whereby unauthorised hyperlinks can in certain circumstances amount to infringement. *Svensson*[11] and other cases that have reached the CJEU[12] have held that hyperlinking is not an act of exploitation only in cases where the communication of the work was not addressed to a new public.[13] Because in the online environment news is shared via hyperlinks, interpretative guidance on the meaning of this provision may be deemed necessary.

To qualify for protection under Article 15(1), several conditions need to be met. The right applies only to publishers of press publications. The Digital Single Market Directive offers a detailed definition of press publications in Article 2(4) and offers additional content to their meaning through relevant recitals. According to Article 2(4), 'press publications' are collections of literary works of a journalistic nature, and of other works or other subject matter, and which (a) constitute 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) have the purpose of providing the general public with information related to news or other topics; and (c) are published in any media under the initiative, editorial responsibility and control of a service provider. Scientific journals and blogs are specifically excluded. Effectively, the concept of 'press publication' covers

[11] *Nils Svensson and Others v. Retriever Sverige AB*, Case C-466/12, [2014] ECLI:EU:C:2014:76 (*Svensson*).

[12] *BestWater International GmbH v. Michael Mebes, Stefan Potsch,* Case C-348/13, [2014] ECLI:EU:C:2014:2315 (order of the Court) (*BestWater*); *GS Media BV v. Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker,* Case C-160/15, [2016] ECLI:EU:C:2016:644 (*GS Media*).

[13] See Stavroula Karapapa, *The requirement for a 'new public' in EU copyright law*, 1 EUROPEAN LAW REVIEW 63 (2017).

journalistic publications, published in any media, including on paper, and include, for instance, daily newspapers, weekly or monthly magazines of general or special interest, and news websites.

Recital 55 indicates that the publisher must be established in an EU Member State by having "their registered office, central administration or principal place of business within the Union." This seems to exclude EU-based correspondents. With the UK having confirmed that it will not be transposing the Digital Single Market Directive,[14] press publishers with offices only in the UK will not qualify for protection.

Although there was a considerable debate on the duration of the right, with suggestions having been made for a right that would last three,[15] eight,[16] and twenty years,[17] a more conservative approach was finally taken, with the right offering a two-year term of protection.

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[14] https://questions-statements.parliament.uk/written-questions/detail/2020-01-16/4371

[15] European Parliament (Rapporteur: Marc Joulaud), *Draft 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*, COM (2016)0593 – C8- 0383/2016 – 2016/0280(COD), PE595.591v01-00, CULT_PA (2017)595591 (Feb. 6, 2017), amendment 69.

[16] European Parliament (Rapporteur: Marc Joulaud), *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*, COM (2016)0593 – C8-0383/2016 – 2016/0280(COD), PE595.591v03-00, CULT_AD (2017)595591 (Sept. 4, 2017), amendment 78.

[17] That was the approach adopted by the proposed Directive on Copyright in the Digital Single Market. See Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, COM (2016) 593 final, 2016/0280(COD) (Sep. 14, 2016), Article 11(4).
For a criticism on the proposed duration of 20 years see Stavroula Karapapa, *The Press Publishers' Right in the European Union: An Overreaching Proposal and the Future of News Online,* in E. Bonadio and N. Lucchi (eds.), Non-Conventional Copyright: Do New and Atypical Works Deserve Protection?, Edward Elgar (2018) 316- 339.

## The press publishers' right as investment-driven intellectual property

Four broad objectives were put forward as justifications for the introduction of a press publishers' right, falling under the themes of harmonisation, investment, access, and competitiveness, particularly in comparison to the United States of America.

Early discussions on the rationale for the press publishers' rights would suggest that a principal rationale for the right is to be found on fundamental rights. As Recital 31 of the proposal for a Directive on Copyright in the Digital Single Market indicated, the publishers' need for a related right under Article 11 is justified on the basis of the right to access to information.[18] According to Recital 31 of the Directive, the right on access to information is--among others--the rationale underpinning the desirability of an ancillary right for press publishers:

> A free and pluralist press is essential to ensure quality journalism and citizens' access to information. It provides a fundamental contribution to public debate and the proper functioning of a democratic society. In the transition from print to digital, publishers of press publications are facing problems in licensing the online

[18] For an analysis of the justification of the proposed right see Mireille M.M. Van Eechoud, *A Publisher's Intellectual Property Right: Implications for Freedom of Expression, Authors and Open Content Policies*, OPEN FORUM EUROPE (Jan. 2017), http://www.openforumeurope.org/wp-content/uploads/2017/01/OFE-Academic- Paper-Implications-of-publishers-right_FINAL.pdf; Alexander Peukert, *An EU Related Right for Press Publishers Concerning Digital Uses, A Legal Analysis,* GOETHE UNIVERSITY FRANKFURT AM MAIN, Research Paper of the Faculty of Law No. 22/2016 (Dec. 16, 2016), https://www.eco.de/wp- content/blogs.dir/copyright_-legal-analysis.pdf; Richard Danbury, *Is an EU Publishers' Right a Good Idea? Final Report on the AHRC Project: Evaluating Potential Legal Responses to Threats to the Production of News in a Digital Era,* CAMBRIDGE: CENTRE FOR INTELLECTUAL PROPERTY AND INFORMATION LAW (June 15, 2016), https://www.cipil.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cipil.law.cam.ac.uk/docume nts/copyright_and_news/danbury_publishers_right_report.pdf.

use of their publications and recouping their investments. In the absence of recognition of publishers of press publications as rightholders, licensing and enforcement in the digital environment is often complex and inefficient.

The fundamental right on access to information has informed copyright law in other contexts too but not with the purpose of developing new exclusive rights. Instead, it formed the basis of the development of copyright exceptions and limitations, such as the exception for press summaries available in the Berne Convention.[19] It is for this reason that the expectation that such new rights will increase, rather than decrease, public access to information has been argued to be counter-intuitive.[20]

Besides a fundamental right underpinning, the rationale for the launch of Article 15 was largely investment-driven. The Commission's Impact Assessment justified the need to establish an exclusive right for publishers with a view to strengthen their bargaining position vis-à-vis online platforms, facilitate licensing, and help the development of new business models.[21] The investment-protective rationale of the press publishers' right is reiterated in Recital 54 of the Digital Single Market Directive

[19] Art 10(1) of the Berne Convention for the Protection of Literary and Artistic Works of Sept. 9, 1886 as last amended on Sept. 28, 1979.

[20] Julia Reda, Learning from Past Mistakes: Similarities in the European Commission's Justifications of the Sui Generis Database Right and the Data Producers' Right, in Stefan Lohsse, Reiner Schulze and Dirk Staudenmayer (eds), Trading Data in the Digital Economy: Legal Concepts and Tools, Münster Colloquia on EU Law and the Digital Economy III (Hart/Nomos, 2017) 295-304, 300.

[21] See 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, SWD(2016) 301 final, Vol. 1, 155 (Sept. 14, 2016).

which acknowledges the difficulties of press publishers' "to recoup their investments"[22] and aligns with broader objectives of EU copyright law, such as the 10th Recital of the Information Society Directive, according to which

> [t]he investment required to produce products such as phonograms, films or multimedia products … is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

Two further justifications for the press publishers' right were put forward, namely the objective of harmonisation and the objective of enhancing competitiveness. The objective of harmonisation is closely connected to the objective of fostering investment. As argued in "an uncoordinated approach risks creating fragmentation and would be detrimental to the development of the EU data economy and the operation of cross-border data services and technologies in the internal market".[23] However, it is not clear how a higher level of protection through intellectual property rights across the EU member states shall result in better protection and one that would translate in more trade and investment opportunities or enhanced competitiveness.[24]

**Was Article 15 an appropriate response to the "newspaper crisis"?**

[22] Also see Recital 55, which reads: "The organisational and financial contribution of publishers in producing press publications needs to be recognised and further encouraged to ensure the sustainability of the publishing industry and thereby foster the availability of reliable information."

[23] European Commission, 'Building a European Data Economy' COM (2017) 9 final, 11.

[24] The data economy communication remarks that "the European digital economy had been slow in embracing the data revolution compared with the USA". See European Commission, 'Building a European Data Economy' COM (2017) 9 final, 3.

The clear exposé of the need to reward press publishers for their investments and to enable them to negotiate licenses is not accompanied with evidence on how the launch of the press publishers' right would help overcome the "newspaper crisis" of recent years.[25] An explanation of what market mechanisms would contribute to the increase in investment as a result of the introduction of a new intellectual property right is missing and it was assumed new intellectual property rights will result in more investment. This assumption was not empirically tested. Evidence was offered only to the effect of substantiating the decline in sales and advertising revenues but not to explain how an ancillary right can offer a solution by facilitating the clearance of rights for online uses.[26]

National examples of press publishers' rights that preceded EU harmonisation efforts were also not effective towards establishing a connection between a press publishers' right and an improved position of press publishers.[27] The Commission itself

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[25]Stavroula Karapapa, *The Press Publishers' Right in the European Union: An Overreaching Proposal and the Future of News Online,* in E. Bonadio and N. Lucchi (eds.), Non-Conventional Copyright: Do New and Atypical Works Deserve Protection?, Edward Elgar (2018) 316- 339.

[26] Similarly, there is no evidence in the Impact Assessment and the Commission Communication. 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, SWD(2016) 301 final, (Sept. 14, 2016) Vol. 3, at 175-176, Annex 13; 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, COM(2016)592 (Sept. 14, 2016).

[27] Igor Barabash, Ancillary Copyright for Publishers: The End of Search Engines and News Aggregators in Germany?, 35(5) EUROPEAN INTELLECTUAL PROPERTY REVIEW 243 (2013); also see Silvia Scalzini, Is there Free-Riding? A Comparative Analysis of the Problem ofProtecting Publishing Materials in Europe, 10(6) J.I.P.L.P. 454, 461-463 (2015).

acknowledged in its Impact Assessment[28] that the initiatives in Germany and Spain have proved to be ineffective and attributed their failure to their domestic scope. A pan-European right, according to the Impact Assessment, would be a more effective and legally certain approach.[29]

Independent studies indicate that news aggregators and social media can increase web traffic to the websites of news publishers[30] and evidence from the national provisions of press publishers' rights, such as the right introduced in Spain,[31] indicate that the

[28] See 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, SWD(2016) 301 final, Vol. 1, 159-160 (Sept. 14, 2016).

[29] See 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, SWD(2016) 301 final, Vol. 1, 166-167 (Sept. 14, 2016); *contra*: Arsenio Escolar et al, *Ancillary Copyright: Group of Press Publishers Write Letter to the European Commission*, INTERNATIONAL FEDERATION OF REPRODUCTION RIGHTS ORGANISATION (Dec. 4, 2015), http://ifrro.org/content/ancillary-copyright-group-press-publishers-write-letter-european-commission; Maria Lillà Montagnani, T*he EU Consultation on Ancillary Rights for Publishers and the Panorama Exception: Modernising Copyright Through a 'One Step Forward and Two Steps Back' Approach,* KLUWER COPYRIGHT BLOG (Sept. 20, 2016), ttp://kluwercopyrightblog.com/2016/09/20/the-eu-consultation- on-ancillary-rights-for-publishers-and-the-panorama-exception-modernising-copyright-through-a-one-step- forward-and-two-steps-back-approach/.

[30] *See* Jason M.T. Roos, Carl F. Mela & Ron Sacher, *The Effect of Links and Excerpts on Internet News Consumption,* S.S.R.N. (Sept. 24, 2015), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2678938;

[31] In 2014, the Spanish Parliament areformed the quotation exception available under Article 32 of the Ley de Propiedad Intelectual (Intellectual Property Law) and made permissible quotations of 'non-significant fragments of content available to the public', particularly content available

introduction of the right caused publishers—particularly smaller ones—to lose as much as 14% of their web traffic, estimated to cost the Spanish news publishing industry €10 million a year.[32] In addition, just before the Spanish law came into force, Google announced that it would discontinue its News service in Spain;[33] the closing of news aggregation services, including Google News, resulted in a decline of internet traffic to Spanish newspapers of over 6%, with the decline having a stronger impact on small publications.[34]

Equally controversial was the situation in Germany. The German press publishers' right, also known as "Google tax", available in sections 87f, 87g and 87h of the Urheberrechtsgesetz (German Copyright Act) was also rendered meaningless as, on the very day that the right was statutorily introduced, Google decided to make its News service 'opt-in' instead of 'opt-out'.[35] The practical result was that Google News would

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from periodicals or regularly updated websites, and informatory content. The relevant provision comes in the form of a copyright limitation generating an entitlement to equitable remuneration that cannot be waived. For a critique see Raquel Xalabarder, *The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government - Its Compliance with International and EU Law*, INFOJUSTICE (Oct. 3, 2014), http://infojustice.org/archives/33346.

[32] *See Directive Copyright in the Digital Single Market: The Impact of Article 11 - Publisher Rights*, EDIMA & DIGITAL EUROPE, http://edima-eu.org/pdfs/latest_news/EDiMA%20DE%20Policy%20Brief%20on%20Publisher%20Rights.pdf.

[33] *An Update on Google News in Spain*, GOOGLE EUROPE BLOG (Dec. 11, 2014), https://europe.googleblog.com/2014/12/an-update-on-google-news-in-spain.html.

[34] See Pedro Posada de la Concha, Alberto Gutiérrez García & Hugo Hernández Cobos, Imp*acto del Nuevo Artículo 32.2 de la Ley de Propiedad Intelectual, In*forme para la Asociación Española de Editoriales de Publicaciones Periódicas, NERA (July 9, 2015), HYPERLwww.aeepp.com/pdf/InformeNera.pdf.

[35] Google News Bleibt Offene Plattform für Alle Deutschen Verlage, DER OFFIZIELLE GOOGLE PRODUKT-BLOG (June 21, 2013), https://germany.googleblog.com/2013/06/google-news-bleibt-offene-plattform-fuer- verlage.html.

only feature results from those press publishers that have expressly opted in, and hence consented to, Google's indexing and showing to the public of their data in its news aggregator. As a result, it would not be necessary to clear a licence or pay remuneration according to the new German law, which offers press publishers the right to exploit their publications at commercial level for one year, thereby preventing third parties from making excerpts from newspaper articles available without obtaining a licence.[36] Since the introduction of the right, many German press publishers have authorised Google to index their publications free of charge and to feature them in Google's News and Search services,[37] while smaller news aggregation services delisted press publishers or stopped using snippets.[38] More recently, the German right was subject to scrutiny by the Court of

[36] Art. 87f (1), Urheberrechtsgesetz (German Copyright Act).

Sections 87f, 87g and 87h of the Urheberrechtsgesetz (German Copyright Act) offer 36 Section 87f (2) of the Urheberrechtsgesetz defines press products as the technical, editorial determination of journalistic contributions that periodically appear under a title on any medium and include, in particular, articles and illustrations, which serve to convey information, opinion, or entertainment. It is only when individual words or very small text excerpts are copied that press publishers do not have a claim.37 This is an internal limit of the ancillary right, the scope of which has been clarified by the Arbitration Board of the German Patent and Trade Marks Office. On application of a collecting society, VG Media, for clarification on the press publisher tariff, the Board specified that the ancillary right covers only publications that are longer than seven words, excluding the search terms.38 The ancillary right lasts for one year only,39 it is transferrable,40 and it creates an entitlement to remuneration.41 This is a unique aspect of the right, in that authors too are provided with the right to participate in remuneration, according to section 87h: German law does not only compensate press publishers' investment, but it also ensures that authors have a reasonable participation in remuneration for the use of their press products on the internet.

[37] See Andreas Becker, German Publishers vs. Google, DEUTSCHE WELLE (Oct. 30, 2014), http://dw.com/p/1DeXc.

[38] Martin Kretschmer, Severine Dusollier, Christophe Geiger & P. Bernt Hugenholtz, *The European Commission's Public Consultation on the Role of Publishers in the Copyright Value Chain: A Response by the European Copyright Society*, 38(10) EUROPEAN INTELLECTUAL PROPERTY REVIEW 591, 594 (2016).

Justice of the European Union,[39] and was held to be in breach of Directive 98/34/EC (as amended by Directive 98/48/EC), according to which Member States ought to notify the Commission of 'technical regulations' they intend to adopt[40] to allow the Commission to assess the impact of such a right on the internal market.[41] The reason was that the Commission had not been notified before the adoption of the law.

It is not only the implementation of national rights that was troublesome, however; national implementations of Article 15 have faced challenges. The implementation of Article 15 in France, for instance, was problematic in its enforcement.[42] A month before the entry into force of Law number 2019-775 to create a neighbouring right for the benefit of press agencies and press publishers,[43] Google announced a major change to its services in France: it would no longer display previews of European press publishers' content in search results, unless a publisher opts into such display.[44] There would be no remuneration offered for the use of content. The explanation that was offered for this was that

[39] *VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH v. Google Inc*, C-299/17, ECLI:EU:C:2019:716

[40] See in this regard Bo Vesterdorf, The Effect of Failure to Notify the Spanish and German Ancillary Copyright Laws, 37(5) EUROPEAN INTELLECTUAL PROPERTY REVIEW 263 (2015).

[41] Antitrust questions regarding the abuse of market power by Google and the legality of its forced securing of consent are being considered in separate proceedings before the Berlin Court of Appeal and the European Commission. These issues play a subordinate role in the course of the copyright-related lawsuit.

[42] See Ula Furgal, The implementation of the press publishers' right in the CDSM Directive: lessons from France, Create, 31 March 2020, available at https://www.create.ac.uk/blog/2020/03/31/the-implementation-of-the-press-publishers-right-in-the-cdsm-directive-lesson-from-france/

[43] The full text is available at https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000038821358?r=XWaGw3REf1

[44] See in this regard Google's announcement: https://france.googleblog.com/2019/09/comment-nous-respectons-le-droit-dauteur.html

> 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.[45]

Google's position in France does not come as a surprise especially in the light of the approach it followed in Spain, where Google News was closed, and in Germany, where the opt-in system was introduced, and Google's repeated statements that it did not intend to pay press publishers for the display of previews of their content. Its position was heavily criticized both by the French culture minister[46] and the president of APIG, an alliance of national and regional press in France,[47] and resulted in complaints[48] before the French Competition Authority, by several unions representing press publishers (Syndicat des éditeurs de la presse magazine, Alliance de la presse d'information Générale – APIG and its members) and by AFP,[49] a news agency, alleging abuse of dominant position, contrary to Article 102 TEU, and requesting precautionary measures to secure application of the press publishers' right. The requests for an interim injunction were successful[50] and the Court of Appeal of Paris upheld the Competition Authority's decision, holding that

[45] See Richard Gingras, How Google Invests in News, Google Blog, 25 September 2019, available at https://blog.google/perspectives/richard-gingras/how-google-invests-news/

[46] See eg https://www.culture.gouv.fr/Presse/Communiques-de-presse/Reaction-de-Franck-Riester-ministre-de-la-Culture-suite-aux-declarations-de-Google-relatives-a-la-remuneration-des-editeurs-de-presse-en-ligne

[47] See https://www.france24.com/en/20191024-french-media-groups-to-take-google-copyright-fight-to-court

[48] https://www.actualitesdudroit.fr/browse/affaires/immateriel/24626/droit-voisin-la-presse-francaise-porte-plainte-contre-google-aupres-de-l-autorite-de-la-concurrence

[49] https://www.afp.com

[50] Decision 20-MC-01 of 9 April 2020, see https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2020-04/20mc01.pdf

Google's behaviour would likely constitute an abuse of a dominant position.[51] Just a few days before the Court of Appeal issued its ruling, Google announced a $1 billion investment in partnerships with news publishers.[52]

## An ancillary right: was a right for press publications, in addition to the protection afforded by copyright, necessary?

One of the arguments that were heard before the introduction of the press publishers' right in the Digital Single Market Directive was that press publications, such as newspapers and magazines, already attracted protection under copyright law. Indeed, press publishers have been derivative owners of the authors' exclusive rights for many years. However, copyright protection alone was not deemed appropriate. The reason is that whereas authors of the content of magazines or newspapers benefit from copyright in their works, that was an insufficient legal basis for press publishers to protect their content online and secure a return on their investment. Copyright belongs—unless assigned to press publishers—to *authors* but not to those that that commission, edit, format or publish their work. The right of Article 15 offers press publishers a right to protect the overall press publication as a distinct subject-matter of protection from the content that makes up the press publication.

[51] Société Google LLC et al v. SPEM et al, Court of Appeal of Paris, 8 October 2020, 20/08071, No Portalis https://www.autoritedelaconcurrence.fr/sites/default/files/appealsd/2020-10/ca_20mc01_oct20.pdf; for a comment see Brad Spitz, Press Publishers' Right: The Court of Appeal of Paris upholds the Competition Authority's order for Google to negotiate with the publishers, Kluwer Copyright Blog, 14 October 2020, available at http://copyrightblog.kluweriplaw.com/2020/10/14/press-publishers-right-the-court-of-appeal-of-paris-upholds-the-competition-authoritys-order-for-google-to-negotiate-with-the-publishers/

[52] See Sundar Pichai, Our $1 billion investment in partnerships with news publishers, Google Blog, 1 October 2020, https://blog.google/outreach-initiatives/google-news-initiative/google-news-showcase/

The overlap between copyright and the press publisher right entails the risk that Article 15 will not have a meaningful contribution towards empowering press publishers, who—in many cases—already acquire the copyright of authors by means of employment contracts or contracts with freelance journalists, hence are themselves owner of the relevant copyright protected articles. As indicated in Article 15(2),

> [t]he [reproduction and communication] rights … shall leave intact and shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject matter incorporated in a press publication. The rights … shall not be invoked against those authors and other rightholders and, in particular, shall not deprive them of their right to exploit their works and other subject matter independently from the press publication in which they are incorporated.

This stipulation, which departs from the optional character of the equivalent provision available in the proposal of the Digital Single Market,[53] establishes two layers of rights for overlapping subject matter[54] and is expected to duplicate existing entitlements, without

[53] Article 11(2) of the proposal stated that author's rights incorporated in the press publication" may not be invoked against those authors and other rightholders and, in particular, *may* not deprive them of their right to exploit their works and other subject matter independently from the press publication in which they are incorporated." (emphasis added)

[54] *Copyright Reform: Open Letter from European Research Centres* (Feb. 24, 2017), http://www.create.ac.uk/wp-content/uploads/2017/02/OpenLetter_EU_Copyright_Reform_24_02_2017.pdf; Stavroula Karapapa, *The Press Publishers' Right in the European Union: An Overreaching Proposal and the Future of News Online,* in E. Bonadio and N. Lucchi (eds.), Non-Conventional Copyright: Do New and Atypical Works Deserve Protection?, Edward Elgar (2018) 316- 339.

however making a meaningful addition to the publishers' portfolio of intellectual property protection.[55]

Relevant in this discussion is the consideration that press publications mainly involve news, which for a long time has remained outside the scope of copyright laws. An example is Article 2(8) of the Berne Convention, according to which "[t]he protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information." Although Recital 57 expressly indicates that the rights granted to press publishers should "not extend to mere facts reported in press publications", Article 15 does cover snippets, headlines incorporating links, and other digital uses, to the effect that the protection thereby afforded would be akin to protecting information.

This raises questions on the extent of legal protection that should be available. Should each digital use of the work be restricted by copyright and/or related rights? In addition, should each challenge to the interests of those investing in the creation of intellectual property be addressed through the development of new rights or by extending the scope of existing ones? Are existing rules fit for purpose, are they effective and appropriate in serving regulatory policies, or perhaps are new rules required? The response to this policy-driven questions, according to Article 15, seems to be answered through the launch of new intellectual property rules.

[55] Stavroula Karapapa, *The Press Publishers' Right in the European Union: An Overreaching Proposal and the Future of News Online,* in E. Bonadio and N. Lucchi (eds.), Non-Conventional Copyright: Do New and Atypical Works Deserve Protection?, Edward Elgar (2018) 316- 339.

Of course, this calls for an inquiry on whether any meaningful alternatives could be available. In the context of the press publishers' right, various solutions were put forward during the debates preceding the launch of Article 15. The JURI draft report and certain legal scholars suggested that the aim of simplifying enforcement could have been more effectively achieved by amending Article 5 of the Enforcement Directive with a view to creating a presumption that press publishers are entitled to enforce copyright in any item that they publish. A defendant would have to rebut such a presumption by demonstrating that the material was in the public domain or licensed by its author.[56] In addition, press publishers have the entitlement to rely on the database right[57] to prevent extraction and reutilisation of their protected content, to the extent that their online website qualifies as a database.

A more recently-suggested alternative approach comes from Australia, where the Australian government announced on 31 July 2020 the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Bill 2020.[58] Even though the objectives outlined in the Bill are very similar to those underpinning the introduction of Article 15 in Europe, including the enhancement of the bargaining power

[56] European Parliament (Rapporteur: Therese Comodini Cachia / Rapporteur for the opinion: Catherine Stihler), *Draft Report of 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,* COM(2016)0593 – C8-0383/2016 – 2016/0280(COD), PE 601.094v01-00, JURI_PR(2017)601094 (Mar. 10, 2017), amendment 52; also see Lionel Bently et al, *Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive*, Study for the JURI Committee, Policy Department for Citizens' Rights and Constitutional Affairs Directorate General for Internal Policies of the Union, PE 596.810 (Sept. 2017); Bently et al, *supra* note 17, at 22.

[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 (Mar. 27, 1996).

[58] https://www.accc.gov.au/focus-areas/digital-platforms/draft-news-media-bargaining-code

of Australian news media publishers (as they are referred to in Australia), the Australian government is in the process of adopteding a different approach. Its basis is not the inclusion of yet another right under copyright and related rights laws but to rely on competition law to. According to this approach, digital platforms are expected to negotiate with press publishers on relevant issues, including remuneration for the inclusion of news on their services. The draft code requires news media organisations to notify digital platforms, such as Google and Facebook, of their intention to bargain over content payments and other relevant issues and parties have three months to reach an agreement. If it is not possible to reach an agreement, an independent arbitration process will be initiated and after 45 days it will issue a binding agreement on the most reasonable offer. Lack of compliance with this agreement will result to a penalty of up to 10% of the digital platform's annual revenue.

In the light of the challenges that EU member states, such as Germany, France, and Spain have faced in the enforcement of the press publishers' right and the recent success of French press publishers and news agencies in relying on competition law to force Google to start negotiations with news publishers, the Australian approach may seem like an interesting alternative approach, which does not merely focus on remuneration but enables bargaining of broader issues, such as access to consumer data. In addition, the Australian approach includes safeguards ensuring that Australian press publishers would not be delisted from digital platforms as was—or was about to be—the case in Germany, Spain and France.

**Conclusion**

Article 15 of the Digital Single Market Directive is an investment-driven form of intellectual property. The preparatory discussions preceding the introduction of the right heavily focused on, and debated, the rationale of the—then proposed—right and, in relation to the underpinning justifications, the appropriateness and necessity of a press publishers' right as a response to the ongoing "newspaper crisis". Article 15 rests primarily on an investment-driven justification reflected on the desire to ensure sustainability of the press and simplify the clearance of licenses and rights' enforcement. However, many scholars and parliamentary committees criticised the necessity and additionally the scope of the right at its initial stages as being neither an adequate nor a proportionate measure to strengthen the position of press publishers and ensuring freedom and pluralism in the news sector.

Although more reasonable in terms of its duration, comparing to the Article provisionally included in the proposal for a Directive in the Digital Single Market, the introduction of Article 15 and its investment-driven rationale are not supported by adequate evidence or empirical testing. It is not clear why this right, as formulated, will indeed empower press publishers in licensing negotiation. Despite the lack of such evidence, it is important to ensure that press publishers shall have an empowered role in the online context and receive reward for their investments, through intellectual property or, additionally, through competition law, as this could ensure the plurality of news, freedom of opinion on the internet and quality journalism as gateways to citizens' access to information and the protection of democratic values.