

CREATe Public Lectures on the Proposed EU Right for Press Publishers

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☞ Communication to the public right; EU law; Germany; News reporting; Online services; Press; Reproduction right; Search engines; Spain

This article comprises edited transcripts from two public lectures on the topic of the proposed new EU right for press publishers, organised by CREATe, the RCUK Copyright Centre based at the University of Glasgow. The lectures were given by Professor Raquel Xalabarder (speaking against) and Professor Thomas Höppner (speaking in favour) in November 2016 and February 2017. The transcripts were edited and updated in June 2017, and in this published format are preceded by an introduction from Professor Martin Kretschmer, Director of the CREATe Centre.

The new right for press publishers under art.11 of the proposed Directive on Copyright in the Digital Single Market (COM(2016) 593 final, 14 September 2016) has received plenty of attention already. The proposal grants exclusive rights to “reproduction” and “making available to the public” for the “digital use” of “press publications” for a period of 20 years from publication. Similar initiatives in Germany (§§87f-h UrhG, 2013, Presseleistungsschutzrecht) and Spain (amendment to quotation right requiring the payment of equitable remuneration, art.32.2 TRLPI, 2014, the so-called “Google tax”) have proved highly controversial. Litigation is ongoing, including a reference from the Berlin Regional Court of 9 May 2017 to the Court of Justice of the EU (CJEU) whether the German ancillary right should have been notified to the European Commission under Directive 98/34 as containing “technical rules” targeting “information society services”.¹

This is a fast-moving and heavily lobbied site. We have had a change in the Commissioner responsible and in the European Parliament’s Rapporteur. At the time you read this, the Directive is likely to be in the complex triilogue procedure under which the European Council and European Parliament negotiate with the Commission when they cannot agree to the amendments proposed by the European Parliament. Triilogue meetings happen behind closed doors, and the draft text of legislation can disappear from sight altogether.² At the same time the news sector itself is changing rapidly, with advertising income moving to platforms but also new revenue streams being developed.

In this context, we thought it would be useful to publish lightly edited transcripts from two public lectures on the topic hosted by CREATe, the RCUK Copyright Centre based at the University of Glasgow, on 2 November 2016 and 16 February 2017. They were given by two of the best-informed voices in the debate, Professor Thomas Höppner (Partner at Hausfeld, Berlin, where he has represented press publishers, and Professor of Civil Law, Business Law and Intellectual Property Law at Wildau Technical University) and Professor Raquel Xalabarder (Chair of Intellectual Property at Universitat Oberta de Catalunya UOC, Barcelona). Professors Höppner and Xalabarder set out the arguments for and against the proposed new right very clearly, drawing on the German and Spanish experience.

There are technical arguments, such as if rights granted under art.2 (reproduction) and art.3(2) (making available to the public) of the InfoSoc Directive (2001/29) to broadcasters, phonogram or film producers should be available to press publishers, if the proposal is inconsistent with CJEU doctrine that linking to contents freely available online does not qualify as an act of communication to the public (*Svensson, Bestwater, C-More Entertainment, GS Media*), or if the proposal contravenes the mandatory quotation exception under art.10(1) of the Berne Convention. But at the core of both lectures are more principled positions that focus on the central role of the press in the democratic process. The treatment of news under copyright law is highly sensitive. While new rights may be argued to allow investment in quality journalism, and thus indirectly support the freedom of the press, licensing of new rights also may interfere with the right to freedom of expression and create hurdles to entry into the news business.

These positions do rely on empirical assumptions. Will the proposal lead to new revenues; would these revenues (in the words of Commissioner Oettinger, *Die Welt*, 21 October 2016) “stabilise the online value chain for news

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¹ See press release by the referring court: <https://www.berlin.de/gerichte/presse/pressemitteilungen-der-ordentlichen-gerichtsbarkeit/2017/pressemitteilung.589394.php> [Accessed 3 August 2017].

² CREATe is publishing regular updates on the progress of the EU Copyright Reform package: <http://www.create.ac.uk/policy-responses/eu-copyright-reform/> [Accessed 3 August 2017].

publishers”); and what will be the costs and informational effects of a new layer of licensing? Much more work needs to be done here.

Independent academic opinion is uniformly against the proposed new right, and my own views are on record. The burden of proof must lie with the *demandeurs*.³ Still the best arguments for and against additional protection for press publishers deserve a wide hearing.

Lecture 1: EU copyright reform—the case for a related right for press publishers, by Professor Thomas Höppner⁴

Thank you for the invitation to speak about the press publishers’ right today. As you pointed out in your introduction, I’m not entirely partial because in my position as a lawyer in a law firm, I was acting against Google; therefore in a way I’m a bit more on the publishers’ side than on Google’s side. However, I try to reflect this by focusing on the reasons today that have basically nothing to do with Google, but are in favour of this publishers’ right. I will try to keep Google out of the equation as far as that is possible.

What I want to talk about today: first I would like to give you a quick overview about this proposed right, then I will focus on the reasons for its proposal, the justification for such right, technical, economic reasons, and a bit of legal background. Then I would also like to address some of the counter-arguments, the myths, I call them. I happened to notice that in the introduction, it sounded as if there were just counter-arguments and no arguments in favour. We will see if that’s really the case.

So how did it all start? In the year 2016, the European Commission in its Impact Assessment, the assessment of the digital market, came to the conclusion that the current press plurality, press diversity as we all cherish it and enjoy it, is under threat in the digital economy because there is some disparity between those that produce the content and those that use it. To address that, the European Commission suggested several measures, including a proposal for a new press publishers’ right.

The proposal is rather straightforward: two articles from the existing directive, the InfoSoc Directive (2001/29) will be expanded to press publishers. The first is art.2, which concerns the reproduction right. This right is currently reserved to, *inter alia*, phonogram producers, broadcasters and music producers, which just like press publishers are engaging in the dissemination of works. So they are distributing works that are already copyright protected—let’s say the script for a film or some text for music, but nevertheless art.2 protects their disseminator,

which is in this case the phonogram or the film producer. So in this respect, press publishers would fit in quite nicely in the already existing art.2 of the InfoSoc-Directive because in a way press publishers are the only disseminators that are not currently enjoying this right.

The same is true for the second exclusive right that was suggested, which is the right to make press publications available to the public pursuant to art.3(2) InfoSoc-Directive. Here again, this right is currently enjoyed by similar media agents such as broadcasters, film and music producers.

What is the definition then of the protected item, the press publication? Currently it is rather wordy. Under art.2(4) of the proposed Directive on Copyright in the Digital Single Market (COM(2016) 593 final), press publication means

“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 the service provider”.

So a rather complex definition there, but probably we can see that it aims at specifying in particular who should be granted this right and who should not be granted this right. In a way it is rather narrow because to fulfil these specifics, you have to fulfil quite a few requirements.

So what is the justification for that right? Basically it’s a combination of technical and economic reasons. Technical reasons: some 20 years ago when the current InfoSoc Directive was drafted, no one really thought of the consequences that digitalisation may have on the copying of press publications. The only risk that was seen was the copying of films and music and that’s why the InfoSoc-Directive was drafted to protect film producers and music producers. Nowadays of course it’s a bit different because, and contrary to 20 years ago, it is very simple now to copy and distribute newspapers and magazines globally in the blink of an eye. So the risk is the same as for film and music due to digitalisation and one asks oneself why is this right then not also awarded to press publications?

Unfortunately, there are not just technical tools to easily copy and distribute press publishers’ content; there are also very strong economic incentives to do so. Ultimately you could even say that the incentive to copy press publications is inherent in the internet. This becomes apparent if you look at the basic business models of the

³ M. Kretschmer, S. Dusollier, Ch. Geiger and P.B. Hugenholtz, “The European Commission’s public consultation on the role of publishers in the copyright value chain: A response by the European Copyright Society” (2016) 36 E.I.P.R. 591.

⁴ This is an edited transcript of a public lecture given by Professor Thomas Höppner, Partner at Hausfeld, Berlin; Professor of Civil Law, Business Law and Intellectual Property Law, Wildau Technical University of Applied Sciences; and Visiting Professor at University of Strathclyde. This lecture was delivered as part of the CREATE Public Lecture Series on 16 February 2017 at the University of Glasgow. A video recording of the lecture and a working paper transcript that includes the question and answer session is available at <http://www.create.ac.uk/create-public-lecture-2017-the-case-for-a-related-right-for-press-publishers/> [Accessed 3 August 2017].

internet. The most basic business model is the advertisement based model where you have a website on which you put some attractive content, like a movie, a photo, music or text, in order to attract consumers, and to attract them you usually give this content to them for free, with the entire purpose of selling this attention of consumers to advertisers who pay for the whole platform. You will all be familiar with examples of that. Let's think of Amazon or Netflix for films, who of course produce their own content. Other platforms, however, focus more on content that they find online or that users upload. If you think of YouTube for instance, or Flickr or Google Images, they don't produce their own content. They basically crawl the internet for content or they let users upload that content to attract other consumers and then advertisers. The success of this business model, again which is at the core of the internet economy, depends on gathering and making available as much attractive content as possible, because the economics are rather simple. The more attractive content you can present to consumers, the more attractive this platform is to consumers. So more consumers will come to your site, and the more consumers you gather on your site, the more advertisers will come and the more they are willing to pay for being on your website. So the economic incentive for ad-financed websites to look out for content elsewhere that they can put on their website is there and you can't ignore it.

Unfortunately for press publishers, this business model hasn't stopped short of their content, given that press publications are also very attractive. So the corresponding business model came up, which is news aggregation. News aggregators basically gather the content from press publications on their website, make them available to readers, and try to attract those readers to then sell this audience to advertisers. These aggregators do not produce the content themselves. They just gather it and make it available. But of course they do compete with those press publishers for the same advertisers because it's the same online advertising market where they all try to get the best deal. This is basically the economic background. Press publishers are feeling that if these aggregators are just trying to do the same as what publishers do, which is to inform users, but they take their content for free, something is wrong and something has to be done.

Let me give you some examples. This is a typical aggregator and like many others it tries to convey the most important message with a catchy headline, which is of course copied from the original article, and it tries to catch the attention of the user. If you then press on one of those snippets, in many cases a longer text will come up and then the user is invited to comment on it or to rate this article. So the whole purpose of this aggregation is to make readers engage with the website and make them stay and digest the content and the information right there so that advertisers can be attracted, which then pay for the whole package.

Another example, Feedly, is based on the same structure. Again you've got short snippets with the most important information copied from the original articles.

It is all structured according to some subjects that either the aggregator determines or that you as a user can determine according to your own interests, so it's pretty much designed to look like a normal journal. It often takes the same topics as the traditional journals would use.

Google News, you know of course, is another example. We don't find any advertisements on Google News. However, Google News is a platform that attracts users to then feed them back to the general search service where search queries are entered and then advertisements can be displayed.

This is another example here, again trying to make all the information available in a short paragraph to attract users and convey the relevant information.

Considering the structured way aggregators present news, it comes as no surprise that the European Commission found out that nearly half of consumers that use those websites and services do not click any further. That means 47 per cent of users who go to these aggregators merely read through the headlines and through the extracts and that's enough for them. They've found what they wanted to find. The reason for that is the way we consume news today. Mainly we just want to know what's going on. We want to make sure we are not missing anything; we are not missing the earthquake that's happening, some big revolution that's going on. We just want to make sure we are on track, but for that it is sufficient to flick through the headlines and the main extracts that summarise the news. We don't have to read all the lengthy articles. We may click on a few that are really of interest to us, but to get an overview of what is currently happening, these extracts will be enough.

Now, coming back to this figure, if half of the users of such aggregators do not click through to the press publisher's website but actually stay on the aggregator's site, it is rather clear to me that this is not some sort of symbiosis, where the aggregator and the press publisher both benefit equally, or a complementary service where both benefit from it, or as someone even suggested a win-win situation. There is no winning for the press publication if the aggregator is taking away half of its audience. But we come back to that later.

While this is already happening, we should also see what the future may have ahead of us, and there's a quote from Google's chairman—I have to come back to Google unfortunately at this point. It is quite recent, 2014, and he basically says, well, the best search result would actually be if we give the information right away. Let me read this out for you:

“Speed and simplicity really matter. It's why the best answer is quite literally the answer. If you ask how do I get to Hamburg by train, you want the railway timetable right there on the screen, no extra effort required. That is what Google provides. Google Berlin weather and you will no longer get 10 links that you need to dig through; instead you will get the weather forecast for the next few days at the top, saving you time and effort. Google

bratwurst and at the top will be images, nutrition facts and the web page with the recipe. Another example, stand next to a historic monument and ask how high is the grand arcade and you will get your answer right there on your screen. The goal of a search engine is to deliver relevant results to the user as quickly as possible. Put simply, we create a search for users, not websites.”

Now, to get this straight, it's probably correct. Users would love this direct information, directly on the search results screen, but with this approach and with this thinking, it is rather obvious that the next step would be to provide the entire relevant information in the search engine's results page. You've seen beginnings of that already with longer extracts from Wikipedia, with images in full size, weather reports, cinema listings and so on. What would stop search engines from taking the most relevant paragraphs of every press article and also putting them directly on the search engine's results page? The fact that currently this is not happening doesn't mean that it couldn't in the future. The economic incentives are certainly there.

Against this background, what is the proposed publishers' right really all about? First and foremost, it creates an own right for the press publisher, own right meaning in contrast to the rights of the authors, like the journalists and photographers who enjoy a copyright protection for their works as well. The right is akin to the already existing rights of other media agents such as broadcasters, film and music producers, as I mentioned previously, and the right acknowledges the investments of press publishers that go beyond the individual contributions of the journalists and the photographers. In particular, it acknowledges the editorial responsibility of press publishers, and that is something that, for instance, differentiates press publications from fake news. You won't find fake news on press publishers' sites simply because they have an editorial responsibility, which corresponds with a legal responsibility, so they will be liable if they distribute fake news.

Who is the addressee? It is basically every commercial entity that is using press publications in an unauthorised way. Because of that it is false to say that the right is a “link tax” or even a “Google tax”. Google is not the one that the proposal has in mind. It has everyone in mind that reproduces and distributes press publications and unfortunately, as you have seen earlier on, there are many other companies out there that base their business model on that.

It is also important to note that this right is not compulsory. That means you don't have to hand it over to a collecting society that then has no choice but to enforce the right. You can actually waive the right, which is important because it means that press publishers can ultimately decide which platform is in their favour: with which platform do I want to co-operate and allow them to use my press publications, and which I don't agree with. And to those I will say that they require my consent.

So why do press publishers need this own right? Why is it not sufficient that the journalists and the photographers have a copyright? The first reason is that many modern press publishers work with a large variety of freelancers, and freelancers want to be free obviously to co-operate with many press publications and they are reluctant to grant exclusive licences to the press publisher. The norm is non-exclusive licences. But they are rather useless for press publishers when it comes to enforcing the rights of their journalists, because if another publication uses these articles, then the press publisher would have to show a complete chain of rights going back to every single journalist that has written an article in the paper to show that the publisher is also entitled now to enforce the journalist's right. This makes the whole process rather inefficient. In many cases, in several countries, after many years of litigation courts concluded that the publisher had failed to show a complete chain of rights and that's why their lawsuit was dismissed. That is quite unfortunate because you can't really expect the journalist to fight the fight for its employer, the press publisher. So basically, the journalists' right will not stop anyone from copying press publications.

What about technical means? Another strong argument that aggregators repeatedly bring up is that publishers don't really need legal protection because they can use technical means to block crawler software used for search engines from taking content from your website. What they refer to in this respect is the so-called Robots Exclusion Protocol with which websites can communicate with the search engine and tell it which web page it is allowed to index and which page the site does not want to be indexed. So the system is basically that: you program a certain file on your website and that tells the search engine that it is free to index all your sub-pages or that it is not, for instance, because there is some confidential or private information on it. Thus, the website is telling the search engine “please do not index that web page”. I would say, if this was a very sophisticated system, it would probably be good for everybody. It would be great if the website operator could actually communicate with those that crawl the content and distribute it. The operator could tell these distributors, “well, you have my content under this condition and you have to show it like this and like that”, all these things that you would usually put into a licence. Unfortunately, that's not how the system works today. Rather, it is very limited in the ways that you can communicate to the search engine. One of the commands you can communicate is “no snippet”, which instructs the search engine not to show any search results with a snippet for this page, but that is also basically it. You cannot instruct the search engine regarding the length of the search results or how the search results should be presented, on which page they can be presented and in which way it may not be displayed. This is just one of several issues with this standard.

Let me go through them one by one. The first general concern is that this Robots Exclusion Protocol was really drafted between and agreed between search engines, basically the ones that have their own commercial interests in taking as much content as possible and leaving the content providers behind. It is rather obvious that if you have a cartel of those using third-party content, the outcome will not really be in favour of those being used.

Another weakness is that this protocol, this technology, is not binding. It was agreed between these search engines, but there is no agency or anyone that could enforce it, so it's a rather weak tool; and since only some search engines agreed to it, many others simply ignore it. Then it is also interpreted by search engines in various ways, so to use this technology basically does not work.

For background reading I have included some specifics, why these terms that you can use to instruct the search engine are insufficient but I don't want to go into further details here.

Another point in any case is because there are only very limited instructions, you cannot fine-tune the communication. For instance, you cannot block Google News in such a way that you do not appear on Google News while still being displayed in the news universals, the special boxes for news results with general search results. You also cannot block Google News but still appear in Google Alerts, or prevent the display of snippets but still allow instant previews, and you cannot distinguish between Google's web search results and those search results presented on affiliates, partner sites that use Google's index. There are quite a few websites whose internal search is through Google but you cannot instruct them separately while you may actually like them. So this old technology unfortunately is not sophisticated enough.

Another big point is that Google itself is admitting that if you block content from your website, instructing Google with a "no snippet" instruction for instance, Google will value that content less. It's quite simple, because search engines determine the value of a web page by the content they can find; if they don't find any content, they cannot value it. So from the search engine's view, it's an empty page, and empty pages are less attractive than pages of their rival that allow Google to show the articles. So automatically, if you use these technologies, your web page will be downgraded because others who do not block the search engine will be ranked higher. Moreover, to quote an SEO expert, "if indexing of a considerable portion of the site is banned, this is likely to affect the non banned part as well because spiders will come less frequently". Thus, you are not just downgraded, crawlers will also come less frequently which is, of course, very detrimental for press publishers who depend on their news being up there in the search engines in a matter of minutes.

So let me then address some of those counter-arguments that have been mentioned in the beginning. The first myth, if you like, is that the right—and this has really been mentioned—would destroy

the internet as it makes it illegal to link or share publications. There's actually an anti-campaign that is called "Save the Link" and which is basically claiming that the publishers' rights have made it more difficult now to link to press publications. But that is not correct. The proposal makes it crystal clear that the link is safe. Recital 33 explains that the protection does not extend to acts of hyperlinking, and it could not extend to acts of hyperlinking because, under the jurisdiction of the European Court of Justice, such hyperlinking does not constitute making available because it's not a communication to a "new" public. So the European Court of Justice has already clarified that mere links, including frames, and so any linking technology, does not constitute making available to the public. Thus, it would not infringe the publisher's right. Consequently, to say that links are now illegal is simply false. Therefore, it can also not be called a "link tax" because the link is not protected.

The same is true for sharing. Some have argued the sharing of content will be more difficult for consumers and their freedom to express their views is limited. But if you look at it closer, that's also not correct. First of all, sharing technologies are most often based on framing or in-line linking. Again, acts of hyperlinking which are excluded from the right. Secondly, sharing is carried out by consumers like you and me, the readers, where quite obviously the whole right is not designed to fight against readers. Press publishers have a commercial interest in actually engaging with their audience and letting their audience co-operate and react to them, share their information, forward it to friends, recommend it and so on and so forth. They have no interest in suing any individual user. Why would they do that? They want to broaden their audience, not restrict it.

So if those press publishers actually allow the sharing of an article, for instance by a sharing button on the bottom of an article, what does this constitute? An implied consent for the consumer to share this article. So even if sharing constituted a communication to the public, it would not infringe the publisher's right.

What should not be forgotten is that some say it makes it more difficult to share because you cannot take entire articles now and put them in your own blog or whatever you want to use it for. However, such copying is already prohibited today. Obviously because of articles being protected by copyright law, you cannot simply take large excerpts from the article and use it the way you want. That already infringes copyright law so the press publishers' right would not expand the existing protection in this respect.

Let's turn to the second counter-argument: the right would harm consumers as it makes it more difficult to access and disseminate content. This is close to the argument of Mr Singh earlier on, that the right somehow limits the users' right to communicate freely and to express their opinions. But what has to be kept in mind is that the information is entirely still out there. It's still freely accessible on the press publisher's website, in most cases for free. That's the whole point, making content

available for free to consumers, and it remains free on this website and none of that information, none of the facts provided, none of the ideas provided are protected. So everyone remains free to comment on these facts, to use these facts and so on and so forth. Only the manner in which this is communicated is limited because you cannot simply copy and paste the way this information is provided, but that is a normal approach under copyright law.

We should also not forget that it is always easy to say “well it makes it more difficult for consumers now to get access to these press publications”, but this is always the case when it comes to copyright law. Of course, we would all be interested in enjoying lots of copies of every protected piece in the whole world—let’s have museums everywhere, in every city, with large copies of all the greatest images and pictures and whatever is copyright protected so we can enjoy them wherever we go. However, it doesn’t work like that, because, unfortunately, if you provide all the works for free to everyone everywhere in the world, then there are no incentives left to actually create these works. So the easier it is to simply copy works, the less incentives there are to create high quality works.

We should also have a look at the alternatives, and I think that is a very crucial point to keep in mind. If the press publishers are not protected, they have only a limited amount of possible reactions and these alternatives will not leave the consumers better off. The first alternative they have is to simply produce less quality content because it is commercially not attractive any more. Dissemination, distribution of content is much more lucrative. I exit this market of production of quality content. As a result, we all get less. The second alternative is to just put less digital content online. So publishers just keep the printed press but don’t enter the digital markets. Again, we consumers would not be better off because it just means we have to buy newspapers while we actually enjoy reading our news online. The third possibility that we are already seeing now is that press publishers basically hide the valuable content behind paywalls, subscription models, so that users have to pay, and they have to pay so much until the costs are amortised. So neither of these alternatives really leaves the consumer better off than the proposal which basically just blocks certain platforms from copying content that press publishers have made available for free in the interests of consumers on their websites.

Finally, if we talk about any possible limitation of the freedom to express your views by sharing third-party content, we should keep in mind that also this freedom that consumers may argue to have is not unlimited and there is certainly a high public interest in protecting a diverse, high quality press. This public interest in turn is capable of justifying any small limitation and it couldn’t be more than a small limitation of a freedom of information.

So to the next counter-argument: the right would harm journalists, some have argued, because journalists are increasingly dependent on maximum exposure. The argument is that we have got more and more freelancers and that freelancers are based on the engagement by many press publishers, but to be engaged you have to create your own profile, and to create your own profile you have to be exposed. You have to be on every platform; everyone has to know you.

To be honest, I find this a very bizarre argument, because ultimately the press publishers’ right is about making the press more sustainable. It is in the interest of the entire press, including all its elements such as journalists. If the press has no money left to pay journalists, journalists don’t benefit from visibility. Probably if you ask journalists what they would prefer, being well paid or being very visible but not paid, the answer is clear. So I don’t see how a right that is supposed to secure the financials of your employer could in any way make it harder for you as an employee. Plus, it is not true that journalists would get less of an exposure, because the overall consumption of news will not decline. It would be irrational to assume that you and I are reading less news just because the amount of platforms on which we can read them is somehow reduced and instead of having 20 aggregators where we can read these articles, we now only have let’s say five. Of course we all continue to consume news and we will read just as much, so the journalists will get the same exposure, only on a different platform. So I don’t find much in this argument at all.

The next argument that has been raised is that the proposed right could stifle innovation and harm start-ups. Of course that would be nothing that is of interest to press publishers. On the contrary, many of those press publishers have their own start-ups in the digital world and the last thing they would want to do is make it more difficult for their subsidiaries to compete online. But I don’t see that this will actually happen because, first of all, the proposed right creates legal certainty. Currently, every start-up has to think and analyse whether its business model infringes the copyright of journalists and photographers. So the risk that press publishers or journalists and photographers will come after them if they take too large articles is already there, but at the moment it is rather unclear what the limits are, whereas as a result of this new legislation, we would have more legal certainty and that is to the benefit of everyone, including start-ups. Plus we shouldn’t forget that press publishers are also companies; they are actually quite innovative. Who says they can’t be just as innovative when it comes to the distribution of their own content as others? I think they would probably be better positioned to innovate here than outsiders.

In turn, companies that are basing their business model entirely on the use of third-party content, well, I would say they act at their own risk. If you want to make money by taking someone else’s content, I think it’s rather obvious that there is always the risk that this someone will stand up at one point and say “sorry, that’s not the

deal, you simply can't do that". If you ask start-ups what they would value most in their own company, it is probably their own software, and their software is, of course, copyright protected. They would certainly also shout out loudly if you now say "well your business model is great but your software is now available to everyone else". So I think there is a bit of a misunderstanding of which start-ups need to be protected and what the actual risks for them are.

Moreover, what we need is innovation and investment across the entire value chain of the creation and distribution of content and not just in the area of distribution. If we just focus on innovation and investments in the segment of distribution of content, automatically the incentives to actually create high quality content will decrease and a dis-balance will be created. Ironically, those that distribute content don't benefit either if there is nothing left to distribute. You first have to have content to actually attract anyone with its aggregation and distribution.

The next myth: the whole right would be just about protecting the press publishers' old and some would even say outdated business models, trying to copy the print business model into digital business which works differently. But the truth is that press publishers were among the first that really engaged heavily with digital markets and they entered these markets at a very early stage. Many of them have subsidiaries that operate platforms that are very sophisticated and innovative, so it's not really true that they are just pursuing old business models. What is true, however, is that the publishers' right aims at creating a fair, level playing-field. It is simply counterproductive to have a situation where, on the market for online advertising, companies are competing with the same content that one has to produce at very high cost and the other one simply copies and uses at negligible costs. In this situation there is no fair level playing-field, but you have to create this level playing-field by telling these guys, "sorry, you can't just take our content to then compete with that very content, for the same readers and the same advertisers with the same advertising budget".

Of course we have seen some new models for press publishers as well. I mentioned already that there are new subscription based models, but leaving the question aside whether that should really be the future for us to read news, also these models depend on the protection of press publications because if press publications could be freely copied and made available anywhere, then obviously the value of subscribing to a website and paying a fee for the same content would not really be there. It's not very persuasive to say you have to pay for my content when you get it anywhere else for free.

The next counter-argument I would like to touch upon, and I think that's the last, is that it has been argued that equivalent publishers' rights have already failed in Germany and Spain. This has been mentioned in the introduction here too. It is true that similar rights have been enacted in Germany and Spain, but if you look at

the details, they were actually not identical. The Spanish model is ultimately only addressed at Google News and the German model only at search engines and similar aggregators. In contrast, the proposed right has a different approach. It is probably also not true to say that they have entirely failed. It is correct that, so far, we haven't seen large revenues following from this legislation, but I'm pretty sure that the landscape of aggregators would look different in these countries today, at least in Germany, if these laws did not come into force. There are so many companies that invested in start-ups that just do aggregation that it was only a matter of time that they all pop up and grow and grow and then there would be more and more aggregators and at some point press publishers' sites couldn't be found among them anymore. In Spain, for instance, once they had the legislation that basically said Google News would have to pay in place, Google News stopped its service, and what happened then? Well, more direct traffic came to press publishers' sites, direct traffic meaning consumers going straight to the websites of press publishers. But that's exactly what press publishers want. They want direct contact with their audience so that they can engage with the individual, provide more specific content to the audience and make the advertising more tailored. So it is probably not correct that these laws have failed entirely. Plus, there are still so many disputes pending regarding remuneration issues that the complete result of this legislation will probably only be determined in a couple of years.

Irrespective of that, even if this legislation has shortcomings, and I agree there are a few, would that really be a reason to say "let's leave it entirely" or would that not just create an incentive to say "let's make it better"? I would say that is the better approach. If you see that other countries have adopted the legislation, and it has had some effect already but some results have not been achieved, I would say, learn from these shortcomings and make a new proposal, a European proposal, that is better.

To sum the lecture up, these are the reasons why the press publishers' right is overdue. First of all, press publishers, to keep up their work, to play their part in a democratic society, are dependent on marketing their content, but for this marketing sovereignty they need their own rights. It is not enough to just depend on the derived individual rights of journalists and photographers. Publishers need their own rights.

Secondly, similar rights have already been granted to similar media agents such as film and music producers and broadcasters. There are no reasons that would justify not protecting press publishers. The decision on whether a press publisher is better off by co-operating with a platform, be it a social network, a search engine, or whatever it is, should be with the press publisher. They should have the right to determine, yes, this platform is helpful for me, or no, this platform is not helpful for me and that's why I will disallow the use of my content. Currently, publishers cannot do that. It's basically up to the aggregator to decide what content they want to use.

And I think we can also agree that in a time where fake news is increasing and everyone is dependent on reliable, trustworthy choices for information, the press plays a very significant part for a free society. To protect the basics, the economic foundations of the free press is therefore of high political relevance.

Now, I would also like to give you four reasons as a summary why no one really has to be afraid of the proposed right. First of all, as I outlined, the link is safe; acts of hyperlinking, including framing, are not covered by the law. Secondly, the press publisher is free to waive its rights so if a platform actually generates more traffic and therefore more advantages for a press publisher than it takes away, then it is up to the press publisher to say “okay”, I waive my right, you can have my content and you can even take a bit more content if you like. But this decision should be with the press publisher. Thirdly, the general exceptions that apply to copyright also apply to this new right, including the right to quote, so you can of course quote press publications or use them privately. Finally, the term “press publication”, what is actually protected, is defined rather narrowly. The threshold for that is high. This ensures that not every odd scribble online is protected, but that only those that actually pay a contribution to our democratic societies are granted this right.

Lecture 2: Why the proposed related right for press publishers is not a good idea, by Professor Raquel Xalabarder⁵

The consumption of press content is rapidly changing and so are its revenue streams, mostly from advertising. Press markets have been shifting from print to digital; news content that used to be printed, sold and read in single tangible units is now consumed through digital media and platforms, be it on open access or subscription models. All along this shift, newspapers are losing revenues, while social media platforms, online aggregators and search engines are increasing their profits by linking to news content available online. The “problem”—as portrayed by the EU Commission—is a complex one. Online platforms (social networks, aggregators and search engines) bring wider access to newspapers sites,⁶ but a combination of declining sales of print newspapers and declining revenues from advertising (which is controlled by online platforms) has

put the press publishing industry under pressure, a pressure that feels especially unfair when compared with rapidly growing and highly lucrative online platforms.

It may, indeed, be a serious problem, since the production of news comes neither easy nor cheap, and investment needs to pay off. The EU Commission has been asked to do something and its proposal is simple: more copyright! Copyright is indeed a handy tool to operate in the internal market—relying on the substantial EU *acquis* built on the subsidiarity principle—but it will hardly be the solution. Markets come and go, and so do advertising channels evolving with time and technology. If current copyright cannot help press publishers secure enough revenues in the new evolving markets, a related right (with the same scope as copyright, as proposed) will hardly make a difference.

The problem and the purported reasons

The Impact Assessment⁷ accompanying the proposed Directive on Copyright for the Digital Single Market (COM(2016) 593 final) explains that the shift from print to digital has enlarged audiences of newspapers, but made the exploitation and enforcement of their copyrights increasingly difficult. A few numbers gathered in the Impact Assessment show that from 2010 to 2014 print circulation of newspapers in eight Member States had declined 17 per cent, while, almost during the same period of time, digital access to news had almost doubled in 2016: 42 per cent of the population was reading news online and 66 per cent of visits to newspapers websites came from referral traffic through social media, news aggregators and search engines. Another important figure: 47 per cent of consumers only browse and read headlines and extracts (“snippets”) and fail to follow the link to the newspaper website, which means that they are not being counted for advertising revenues on the newspapers’ sites. Altogether, in the time period examined, newspapers had lost a net revenue of 13 per cent.

Recitals 31 and 32 of the proposed Directive explain that a free and pluralist press is essential to ensure the quality of journalism and the citizens’ access to information, and that the organisational and financial contribution of publishers must be recognised and rewarded so that the industry is sustainable. Let’s briefly comment on these reasonings. On the one hand, the fundamental right to access information used by the Commission to justify the need for a related right could also—and perhaps more easily—justify the opposite: a statutory limitation or a non-voluntary licence so that press publishers cannot exercise copyright to prevent

⁵ This is an edited transcript of a public lecture given by Professor Raquel Xalabarder, Chair of Intellectual Property, Universitat Oberta de Catalunya. This lecture was delivered as part of the CREATE Public Lecture Series on 2 November 2016 at the University of Glasgow. A video recording of the lecture and a working paper transcript that includes the question and answer session is available here: <http://www.create.ac.uk/blog/2016/10/31/public-lecture-press-publisher-rights-in-the-proposed-directive-on-copyright-in-the-digital-single-market/> [Accessed 4 August 2017].

⁶ It is no longer claimed that online platforms are “stealing” from newspapers as Mr Murdoch once put it: “Producing journalism is expensive. We invest tremendous resources in our project from technology to our salaries. To aggregate stories is not fair use. To be impolite, it is theft. Without us, the aggregators would have blank slides. Right now content producers have all the costs, and the aggregators enjoy [the benefits].” Source: <http://www.guardian.co.uk/media/2009/dec/01/rupert-murdoch-no-free-news> [Accessed 4 August 2017].

⁷ Commission Staff Working Document, Impact Assessment on the Modernisation of EU Copyright rules, accompanying the Proposal for a Directive on Copyright in the Digital Single Market and the Proposal for a Regulation 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)302 final (14 September 2016), p.156 and Annex 3A (Impact Assessment)].

platforms from linking to their press content. In fact, this fundamental right has justified the exception of press summaries and reviews mandated by art.10(1) Berne Convention (as well as in many national laws). On the other hand, the Commission believes that a harmonised new related right for press publishers will secure higher economic revenues, but no one seems to remember that all over the EU press publishers already own copyright in these publications (either by means of a transfer of rights, presumption of transfer in employment contracts, collective work structures or works made for hire doctrines), and they often own these rights on an exclusive basis.

The Impact Assessment gives two other reasons, perhaps less elegant, but probably more realistic. First, the need to strengthen the press publishers' bargaining position in front of the online platforms.⁸ The reasoning is as follows: press publishers make their contents available (and linkable) for free, but platforms—in control of new advertising channels—are in a position to set the terms for sharing advertising revenues with newspapers; the Commission acknowledges the failure of the German ancillary right to increase revenues for press publishers,⁹ but is confident that a harmonised related right, for a much longer term, will be more successful in improving the bargaining position of press publishers.

Another reason mentioned in the Impact Assessment refers to the need to facilitate licensing and fighting online infringement. It is hard to see how another layer of exclusive rights is going to help in either endeavour, unless—as we will see—the new related right intends precisely to reverse the status quo under current copyright law, and require that these digital uses be, from now on, subject to copyright (and related right) licences.

The proposed solution

The new related right proposed by the EU Commission in art.11¹⁰ states:

“Article 11 Protection of press publications concerning digital uses

1. Member States shall provide publishers of press publications with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the digital use of their press publications.
2. The rights referred to in paragraph 1 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. Such rights 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.

3. Articles 5 to 8 of Directive 2001/29/EC and Directive 2012/28/EU shall apply mutatis mutandis in respect of the rights referred to in paragraph 1.
4. The rights referred to in paragraph 1 shall expire 20 years after the publication of the press publication. This term shall be calculated from the first day of January of the year following the date of publication.”

The proposal consists of two exclusive rights: reproduction and making available to the public, limited to digital means of exploitation of “press publications”, and granted for a period of 20 years from publication. It is not an ancillary right (as granted in Germany), nor a compensation for a statutory limitation (as enacted in Spain); it is a full-bodied exclusive right and it is mandatory for Member States (“shall provide”).

These rights are granted “exactly with the same scope that these rights have been granted to the authors” under art.2 and art.3 InfoSoc Directive, and they will be subject mutatis mutandis to the same exceptions and limitations that apply to authors' rights. This parallel has important consequences: if linking to freely and lawfully available content online is not an act of communication to the public under copyright (as concluded by the CJEU in *Svensson* (C-466/12) and the like), then the same will apply to the new related right.

The definition of press publications shows an inherent contradiction when, on the one hand, referring broadly to “literary works of journalistic nature” (art.2.4) and, on the other, restricting it to “only journalistic publications, published by a service provider, periodically and regularly updated in any media, for the purpose of informing or entertaining” (Recital 33). As a result, the related right will apply only to publications of literary works (not photographs or recordings of any kind), but with a very broad spectrum: for the purpose of informing or entertaining; in short, not only news *stricto sensu*.

⁸ See Impact Assessment (2016), p.160: “[Differences in bargaining power] ... Online service providers often have a strong bargaining position and receive the majority of advertising revenues generated online (e.g. 40 % of total advertising investments in BE, according to publishers). This makes it difficult for press publishers to negotiate with them on an equal footing, including regarding the share of revenues related to the use of their content.”

⁹ See Impact Assessment (2016), p.160: “None of these two recent ‘ancillary rights’ solutions at national level [Germany and Spain] have proven effective to address publishers’ problems so far, in particular as they have not resulted in increased revenues for publishers from the major online service providers.”

¹⁰ Proposed Directive art.11 is paired with another proposal under Title IV, Ch.I, as “Measures to achieve a well-functioning marketplace for copyright — rights in publications” to allow publishers, in general, to share any compensation that authors receive from statutory limitations under national laws (art.12). Article 12 would basically cover compensation for private copying, reprography (where existing), teaching limitations, etc. Unlike art.11, it is optional: Member States “may” provide. The rationale behind this article is sound: although they are not owners of a related right under EU *acquis* (as confirmed by the CJEU in *Reprobel* (C-572/12), publishers make an investment and may have a claim to be compensated—together with authors—when the published work is being exploited under an exception or limitation. Each national legislator would decide whether publishers will share compensation with authors, on which accounts, and what would be the sharing percentages. In the long run, one cannot expect much harmonisation on this matter.

The proposal is now being examined by the Parliament, where art. 11 has received a lot of attention. In their initial drafts, all three Parliament Committees assessing the Directive were more than sceptical about the proposed related right and proposed to: restrict it only to “professional” press publications and to uses done for commercial purposes, and only for three years (CULT Committee)¹¹; delete it, because publishers are already protected by copyright and any challenges faced when enforcing licensed copyrights should be addressed by an enforcement regulation (IMCO Committee)¹²; or simply substitute the related right with a presumption of representation of authors that could help press publishers bring proceedings against infringers and strengthen their position without disrupting other industries (JURI Committee).¹³ The final opinions and reports from the Parliament will give a better picture of how the proposal is going to evolve.

Two false premises

Beyond the economic and political reasons for the proposal, a strict analysis of art. 11 under copyright law shows that the proposal is based on two false premises: that search engines and aggregators are involved in acts of copyright exploitation that need to be licensed, and that the scope of the new related right will not affect the scope of the authors’ copyright.

The linking “nightmare” ... If linking is out, what is left in?

Recital 33 explains that, since the scope is the same, the related right granted to press publishers will not extend to acts of hyperlinking which do not constitute communication to the public. Over the years, the CJEU has developed several criteria to distinguish between links that constitute an act of communication to the public and those which do not. With regard to content lawfully made available online (with the consent of the copyright owner) and without access restrictions, the CJEU has repeatedly concluded that linking to it does not constitute an act of communication to the public that requires licensing.¹⁴

A better, cleaner, solution might have been to dismiss—from the very beginning, in *Svensson*—the provision of links within the scope of exclusive rights (of communication to the public)¹⁵ and, instead, examine it from the perspective of unjust enrichment or secondary

(indirect) liability, as applicable (i.e. contributing to infringement, negligence, etc.). Of course, the provision of links had to be regarded as an act of exploitation under copyright (hence, EU *acquis*) in order for the CJEU to have any saying in that matter; however, the chain of subsequent entangled rulings that have derived from it¹⁶ do very little in favour of EU copyright and simply confirm the need to harmonise secondary liability rules within the EU *acquis* as soon as possible, so that the scope of exclusive rights can regain some inherent meaning and coherence.

Recital 33 expressly refers to communication to the public, while art. 11 only refers to making available to the public.¹⁷ However, this discrepancy may be understood because, on the one hand, the “making available to the public” is the only right granted to other related right owners under art. 3.2 InfoSoc Directive (only authors get the exclusive right of communication to the public, which includes the making available to the public, under art. 3.1 InfoSoc Directive); while, on the other hand, the CJEU rulings in this topic (referred to in Recital 33) have always addressed “linking” within the realm of authors’ right of communication to the public. In other words, the scope of the related right of making available to the public granted to press publishers should be, in theory, interpreted according to the scope of the communication to the public under the CJEU doctrine on linking.

So, if linking (to freely and lawfully available content) falls out of its scope, which uses will be covered by the new related right? We can think of two.

1. The scope of the related rights granted to press publishers would certainly cover the *acts of reproduction and making available of “snippets” (headline and fragments)* done by search engines, aggregators and social networks.¹⁸ However, these uses may be often exempted under several statutory limitations and exceptions. The reproduction and the making available to the public of “snippets” (*headlines and fragments*) of the linked work have never been formally assessed by the CJEU rulings on linking. When examining linking as an act of communication to the public, the court has focused on the exploitation of the work linked to, as a whole, rather than to the fragments reproduced and displayed as

¹¹ See Draft Opinion of the Committee on Culture and Education for the Committee on Legal Affairs (CULT), 2016/0280(COD) (6 February 2017), Amendments 68–69, p.51.

¹² See Draft Opinion of the Committee on the Internal Market and Consumer Protection (IMCO), 2016/0280(COD) (20 February 2017), Amendment 61, pp.38–39. The IMCO Draft Opinion also mentioned that “publishers have the full right to opt-out of the engines’ ecosystem any time using simple technical means” and that there are “potentially more effective ways of promoting high-quality journalism and publishing ... via tax incentives instead of adding an additional layer of copyright legislation”.

¹³ See Draft Report by the Committee of Legal Affairs (JURI), 2016/0280(COD) (10 March 2017), Amendment 52, p.38.

¹⁴ See CJEU in *Svensson* (C-466/12), *Bestwater* (C-348/13), *GS Media* (C-160/15).

¹⁵ See European Copyright Society, *Opinion on the Reference to the CJEU in Case C-466/12 Svensson*: an hyperlink is nothing more than a reference, a path leading users from one location to another; using basic information of the linked work does not amount to exploiting it. See <https://europeancopyrightsociety.org/opinion-on-the-reference-to-the-cjeu-in-case-c-466-12-svensson/> [Accessed 4 August 2017]. Similarly, the CULT Committee in Parliament sought to clarify the exclusion of hyperlinks, explaining that it refers to the direct technical link between two digital “locations”; See Draft Opinion of the Committee on Culture and Education for the Committee on Legal Affairs, 2016/0280(COD) (6 February 2017), Amendment 24, p.23.

¹⁶ Mostly concerning links to unlawfully posted content: see *CJEU GS Media* (C-160/15), *Ziggo* (C-619/15) and *Filmpeleer* (C-527/15) among the most recent examples.

¹⁷ Some scholars have already mentioned this discrepancy. See E. Rosati, “The proposed press publishers’ right: is it really worth all this noise?” (11 October 2016), *IPKat*, <http://ipkitten.blogspot.com.es/2016/10/the-proposed-press-publishers-right-is.html> [Accessed 4 August 2017].

¹⁸ In that sense, see Draft Opinion of February 2017, by the Committee on Culture & Education (CULT), Amendment 25, p.24.

listed search results and/or as pointers for the links to be activated. One may argue, *a maiore ad minus*, that if hyperlinking to the whole work is not an act of communication to the public, then a partial use (the headline or a fragment to display results and enable the link) will not be so, either. But copyright law is not always prone to flexible interpretations.

In fact, some of these “minor uses” might be exempted per se as temporary copies under art.5.1 InfoSoc Directive. Even under the requirements set in the *Infopaq* rulings by the CJEU,¹⁹ it could be easily argued that the fragments shown by search engines may be exempted as temporary copies.²⁰ Yet, this limitation would only exempt the copying (reproduction), not the displaying (communication to the public) done by search engines²¹; and it would hardly exempt the less passive, more editorial-like activity, done by news aggregation websites or social networks.²²

The reproduction and making available of fragments of the linked work, to locate and activate the link, may also be exempted under the *fair use* doctrine in the US²³ or even, beyond copyright laws, under general legal principles enshrined in natural law. A good example is the ruling by the Spanish Supreme Court deciding that the fragments shown (copied and made available) by the Google search engine were not only exempted as temporary copies, but also allowed under general principles of *ius usus inocui* and the prohibition of abuse of right.²⁴

A last, and fundamental, provision that can exempt the reproduction and display of fragments and headlines of news content lawfully available online is the quotation limitation—as mandated in art.10(1) BC—and which has a specific provision

for news content. We will examine it in the section “Contrary to art.10(1) Berne Convention” below.

2. Another field of activities that may be subject to the new related right would be any *digital, but non-linking related, uses* such as scanning, indexing, text and data mining, etc. These uses will be hardly covered by any exception or limitation.²⁵ Notice that this kind of activity is not done (only) by search engines, aggregators and social networks, as targeted by the proposal, but also by many other players: news monitoring services (of course), as well as libraries, universities, research institutions ... and any providers of new services online (*start-ups*). In other words, beyond the targeted online platforms,²⁶ the proposed related right will negatively affect many other sensitive players and the development of other online sectors.

In short, since it is virtually impossible to separate linking from copying/displaying snippets, even assuming that linking to freely and lawfully available content does not need a licence, the new related right will de facto require a licence from anyone linking to lawfully and freely available news contents.

Authors’ rights “shall in no way” be affected

The second false premise of the proposal is that the new related right will not affect the authors’ rights of works incorporated in the press publication. Authors’ rights will be inevitably affected, on two grounds: their copyright will be weakened and re-designed in scope.

1. Recital 35 states that “this is without prejudice to contractual arrangements concluded between the publishers of press publications, on the one side, and the authors and other rightholders, on the other side”.

¹⁹ The first ruling stated that the temporary copy limitation requires that the copy is automatically deleted without any human intervention, but this was reversed in the second ruling; see CJEU, 16 July 2009, *Infopaq-I* (C-5/08) and 17 January 2010 *Infopaq-II* (C-302/10). And let’s remember that these cases dealt with the scanning of printed press articles and turning them into digital text files that could be searched!

²⁰ They may often be an integral and essential part of a technological process to enable a transmission between third parties by an intermediary; they are transient (and incidental (and even automatically deleted once the search has been done) and, as long as the service is provided for free, they have no independent economic significance other than finding and locating the content sought.

²¹ Which shows the shortcoming of art.5.1 InfoSoc Directive to cover any technical acts (not only copies) necessary to allow networks transmissions by intermediaries and lawful acts of exploitation online.

²² Instead, what aggregators and social networks do is different from search engines, to the extent that rather than merely providing information (and easy access) to the contents searched by the user, they choose, decide and make some editorial choices as to how the content is listed and displayed.

²³ Providing links and showing fragments of the linked content by search engines has been accepted as fair use by US case law; see *Kelly v Arriba Soft Corp* 336 F. 3d 811 (9th Cir. 2003) and *Perfect 10, Inc v Amazon.com Inc* 508 F. 3d 1146 (9th Cir. 2007).

²⁴ See R. Xalabarder, “Spanish Supreme Court Rules in Favour of Google Search Engine ... and a Flexible Reading of Copyright Statutes?” (2012) 3 J.I.P.I.T.E.C., <https://www.jipitec.eu/issues/jipitec-3-2-2012/3445> [Accessed 4 August 2017].

²⁵ In fact, the exception for text and data mining in art.3 of the proposed Directive is built on the premise that a work is being exploited by simply converting its expression into any bytes of information that can be extracted from it; since the exception only benefits research institutions, the combination of a wide premise and a narrow exception will have very negative effects for the developing of new digital services and for the use of copyright for the advancement of knowledge and culture altogether.

²⁶ This can be added to the restrictive scope of the text and data mining exception proposed in art.3, and the implicit premise that any digital use is an act of exploitation subject to scope of the authors’ copyright and related rights.

As an example, let's take an article or a photograph, either done by an employee or by a freelancer: as soon as it is accepted for publication, the press publisher will acquire all rights (if it does not own them, already). Journalists and photographers seldom get to do an independent exploitation of their works; at least, one that matters in press markets. Safeguarding contractual agreements does very little to really protect the interests of journalists in front of the new related right granted to press publishers. In fact, journalists and photographers have already expressed their concern that by granting press publishers a related right, the independent exploitation of their contributions will be even more difficult to exercise.²⁷ This is a fair claim, supported by prior evidence from the phonogram and audiovisual industries. As soon as two set of exclusive rights accumulate, one must yield to the other. Once the producer is granted *ab origine* an exclusive right in the recording, the pressure to also secure any authors' (and performers') rights in it is too strong for authors (and performers) to resist. Despite the EU Commission's well-intended statements, granting press publishers a related right will de facto devalue the copyrights of journalists and photographers even more.

2. Far more surprising is the double (triple) denial made in the second paragraph of art.11: the two related rights "shall leave intact and shall in no way affect any rights provided for in Union law to authors" and "cannot deprive authors of the contributions which are incorporated in the press publication in the newspaper to be able to exploit their contribution independently". Such strong safeguards make it apparent that the opposite outcome is more than likely.

Once the relationship between the two "scopes" (copyright and related right) has been formally drawn it may well "backfire": the scope of communication to the public granted to authors may be re-defined according to the scope of the new making available to the public granted to press publishers. In fact, both the Commission and the Parliament show a clear intent that platforms be licensed for using news content.

The Impact Assessment expressly acknowledges that the main impact of the introduction of a related right (assessed as option 2) "would affect those online services

providers which are not concluding licences for the reuse of publishers' content *today* when they should *in principle* do so pursuant to Copyright Law"²⁸ (emphasis added). If this was indeed the case under current copyright law, no "in principle" should be necessary!

Similarly, the EU Parliament, in the IMCO Opinion of June 2017, affirms that the new related right for press publishers will not "extend to acts of a computation referencing or indexing system such as hyperlinking" (see Amendment 19 to Recital 33) but, at the same time, that

"some news aggregators and search engines use press publishers' content *without contracting license* agreements and without remunerating them fairly. This is mainly as Digital platforms such as new aggregators and search engines have developed their activities based on the investment by press publishers in the creation of content without contributing to its development. This poses a severe threat to the employment and fair remuneration of journalists and the future of media pluralism".²⁹

In other words, the Commission and the Parliament are determined to reverse—with respect to press content—the CJEU doctrine on linking to free and lawful content available online.

Far from "not affecting" copyright, the new related right seeks that news aggregators, search engines and social media obtain a double licence (copyright and related right) before linking to press-content available online. The EU legislator is, of course, competent to do so; but one should expect that this is done openly, rather than concealed behind misleading Recitals stating the opposite.

Contrary to art.10(1) Berne Convention

Article 10(1) of the Berne Convention (BC) provides for a mandatory quotation exception, which also expressly allows for the making of press summaries and reviews. The Commission's proposal of a related right for press publishers contravenes the Berne Convention to the extent that it requires a licence to show fragments of lawfully available news content by search engines, aggregators and social media.

Article 5(3)(d) InfoSoc Directive enacted a quotation limitation using basically the same language as art.10(1) BC, but it failed to state its mandatory nature. This, however, does not alter the fact that the mandate to exempt quotations is binding among BC and TRIPs Member States.

According to art.10(1) BC:

"It shall be permissible to make quotations from a work which has already been lawfully available to the public, provided that their making is compatible

²⁷ EU Commission, "Public consultation on the role of publishers in the copyright value chain and on the 'panorama exception'" (March 2016), <https://ec.europa.eu/digital-single-market/en/news/public-consultation-role-publishers-copyright-value-chain-and-panorama-exception> [Accessed 4 August 2017].

²⁸ See Impact Assessment (2016), p.169.

²⁹ See IMCO Opinion (June 2017), Amendment 17 to Recital 31.

with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.”

Article 10(1) BC covers any acts of exploitation (not only reproduction, but also communication to the public and translations) of all kind of works—provided that they have been “lawfully made available to the public” and for any kind of purposes: the limitation is clearly meant to cover quotations done for “scientific, critical, *informatory* or educational purposes”.³⁰

Accordingly, any news content that has been lawfully posted online may be quoted by anybody, also by search engines, provided that it is done to the “extent justified by the purpose” and in a manner that is “compatible with fair practice”.³¹ Copying the headline and a small fragment of the article may be easily justified to help the user *identify* the content linked and to *directly access* it on its original site; compatibility with fair practice will require a deeper and *in casu* analysis, including the amount of advertising revenues shared with the newspaper, the increase of traffic to its website, as well as any problems related to “unbundling”, ranking (controlled by platforms), and trade mark dilution, etc.

Thus, the quotation exception alone would suffice to exempt in most cases the fragments of works shown by these search engines and aggregation platforms.

But, in addition, art.10(1) BC expressly exempts “quotations from newspaper articles and periodicals in the form of press summaries”. At first sight, this inclusion makes little sense since making a *summary* is not the same as making a *quotation*.³² However, the French text of this provision (which prevails in case of the discrepancy between the French and English texts)³³ refers to “*revue de presse*”, which—also according to Prof. Ricketson—means

“a collection of quotations from a range of newspapers and periodicals, all concerning a single topic, with the purpose of illustrating how different publications report on, or express opinions about, the same issue. In consequence, the genre of ‘*revue de presse*’ necessarily includes quotations ...”.³⁴

Is there any better way to explain what online news aggregators and search engines do? Article 10(1) BC strikes a balance between copyright and the provision of information that is being blatantly disregarded by the EU proposal.

Copyright v information

A fortiori, we should always bear in mind that we are talking about news, and news has always had a very sensitive relation with copyright. Article 2(8) BC formally excluding the protection of the BC “to news of the day or to miscellaneous facts having the character of mere items of press information” reminds us that facts and data—no matter how precious and valuable—do not belong in copyright.³⁵ And art.10(1) BC allowing for the making of press summaries and reviews reminds us that access to information is more important than protecting copyright in the literary and artistic works conveying such information.

The line between information (facts) and copyrighted contents (news) is thin and elusive. It suffices to look at the Belgian *Copiepresse* ruling (2011),³⁶ concluding that the snippets shown on the Google search engine and aggregation websites could not be exempted as quotations: the court expressly based its judgment on the fact that users browse through the headlines and fragments of information displayed by the search engine, and do not click on the link to access the original websites. According to the court, this proves that aggregation and search engines “substitute” for the original news contents. In other words, the Belgian court failed to distinguish between work (expression) and information (facts). This is a basic distinction that remains paramount if we want copyright regimes to remain an instrument to foster further creation and access to culture.

Instead, the old French *Microfor* ruling (1980)³⁷ got it right when the French Cour de Cassation (en banc) concluded that reproduction in a database of headlines and basic information from published news was exempted as a quotation, because it was done for information purposes. Indexing, listing, aggregating, listing the results of a search online—all these uses are done for information purposes (regardless of the nature of the contents listed and indexed) and should, accordingly, remain exempted.

³⁰ See S. Ricketson and J. Ginsburg, *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (Oxford: Oxford University Press, 2006), para.13.41 (emphasis added).

³¹ To assess the element of fair practice, one must take into account not only the legitimate economic interests of authors and copyright owners, but also other public interests involved, such as—in our case—the fundamental freedom to provide and access information (art.11 EU Charter and art.10 ECHR) or the need for intellectual property law to contribute to the social and economic welfare (art.7 TRIPs). The same conclusion would result under the three-step test; furthermore, being a mandatory limitation, compliance with the three-step test could never result in a restriction of the scope exempted under art.10(1) BC or in a derogation of its mandatory nature.

³² See Ricketson and Ginsburg, *International Copyright and Neighbouring Rights* (2006), para.13.41.

³³ This rule was established under the Brussels Act (1948). See Ricketson and Ginsburg, *International Copyright and Neighbouring Rights* (2006), para.5.12.

³⁴ See Ricketson and Ginsburg, *International Copyright and Neighbouring Rights* (2006), para.13.41.

³⁵ See Ricketson and Ginsburg, *International Copyright and Neighbouring Rights* (2006), para.8.106. Article 7 of the original BC Act (1886) granted news a very distinctive treatment: newspaper and magazine articles published in any Berne Union country could be reproduced, in the original language or in translation, unless the authors or editors had expressly prohibited so. In subsequent Acts (Berlin, Rome and Brussels), this provision was included in art.9(3) as a restriction to the reproduction right, until it was moved and extensively amended to art.2(8) at the Stockholm Conference (1967). See also WIPO, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971)* (WIPO/PUB/615) (15 May 1986), http://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf [Accessed 4 August 2017].

³⁶ See *Copiepresse SCRL v Google Inc*, Tribunal de Première Instance de Bruxelles, 13 February 2007; confirmed by Cour d’Appel de Bruxelles (9e Ch.), 5 May 2011.

³⁷ See *Microfor v Le Monde*, Cour de Cassation, Ass. plén., 30 October 1987: JCP G 1988, II, 20932.

The German and Spanish precedents

Let's now look into the two national examples that precede the Commission's proposal which prove that "more copyright" may not be the right solution to satisfy the press publishers' expectations.

In 2013, an amendment to the German Copyright Act (UrhG §§87f-h) granted press publishers an exclusive right to make press content,³⁸ or parts of it, available to the public for any commercial purposes. The use of individual words or small text excerpts ("snippets") was exempted from it. This right was granted for a term of a year and authors were entitled to be "reasonably involved in compensation" with publishers. When compared with the Commission's proposal, the German related right was narrower, more focused (to target news aggregation) and did something more to protect the interests of authors. Despite that, it failed to achieve any of its goals.

Publishers mandated their rights to VG Media and set a fee of 6 per cent of aggregators' gross revenues. Google refused to obtain the licence and—after failed arbitration proceedings—VG Media sued Google for abuse of right. Google requested opt-in to be indexed on Google News. Most publishers granted permission to Google for free, but the VG Media members refused and traffic to their websites went down. Shortly after, they also licensed Google ... for free. VG Media and the press publishers sued Google for abuse of dominant position and anti-competitive conduct.³⁹ In short, the ancillary right failed to either improve the press publishers' bargaining position or increase their revenues. As many authors know, an exclusive right does not always translate into economic revenues: the price is set by market; it may be more or less than expected, and it may also be zero. The German precedent also shows that transaction costs (opt-in) are higher, to the competitive disadvantage of small platforms and start-ups.

The Spanish solution is, instead, the opposite. Rather than granting an exclusive right, art.32.2 TRLPI⁴⁰ provides for two limitations, "disguised" as quotations: a limitation to allow news aggregation in exchange for an equitable compensation and an exception that allows search engines to operate without any need for compensation.

Article 32.2 TRLPI came as a surprise, since it had not been included in any of the drafts of the bill amending the Spanish Copyright Act that had been circulated and assessed by perceptive advisory boards for over a year. Its timing could not have been worse: the provision was introduced into the Parliament the day after the CJEU's ruling on *Svensson* (C-466/12), thus strongly questioning

its opportunity and compliance with EU *acquis*. The provision is poorly drafted and its language offers multiple grounds for uncertainty⁴¹:

"Art.32.2 TRLPI: The making available to the public by providers of digital services of content aggregation of non-significant fragments 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, will not require any authorization, without prejudice of the right of the publisher or, as applicable, of other rights owners to receive an equitable compensation. This right will be unwaivable and will be effective through the collective management organizations of intellectual property rights. In any case, the making available to the public of photographic works or ordinary photographs on periodical publications or on periodically updated websites will be subject to authorization.

Without prejudice to what has been established in the previous paragraph, the making available to the public by the providers of services which facilitate search instruments of isolated words included in the content referred to in the previous paragraph will not be subject to neither authorization nor equitable compensation provided that such making available to the public is done without its own commercial purpose and is strictly circumscribed to what is indispensable to offer the search results in reply of the search queries previously formulated by a user to the search engine and provided that the making available to the public includes a link to the page of origin of the contents."

Aggregation services are allowed to make available to the public (nothing is said about reproduction) news content that is already available online. The definition of "news content" is very broad: "content, available in periodical publications or in periodically updated websites and which have an informative purpose, of creation of public opinion or of entertainment", thus casting serious doubts as to the kind of platforms that may end up subject to the payment of compensation (i.e. Feedly, Netvibes, Flipboard or Menéame, as well as Facebook pages or Wordpress blogs).

It is unclear whether the limitation authorises linking to the publication or displaying snippets (i.e. headlines) or both, and its language hardly makes sense. It allows the making available of "non-significant fragments" of

³⁸ German law refers to "press products" as the editorial or technical fixation of journalistic contributions (articles and images) in collections published periodically, on any media, and which are "overall typical press publications".

³⁹ These claims were denied both by the German Competition Authority and the Regional Court in Berlin based on the grounds that the opt-in request is justified in order to avoid liability, due to legal uncertainty regarding the linking activity, and that the deal offered by Google is a win-win for both parties since it enhances access to newspapers websites; most importantly, the court stated that the payment of a licence (as intended) would upset this balance. VG Media subsequently filed for a declaratory judgment that Google is infringing §87f since the Google News platform is not covered by the "snippets" exempted from the ancillary right. The case is still pending.

⁴⁰ The Spanish quotation limitation in art.32 TRLPI consists of three distinctive parts: the traditional quotation exception allowing for uses such as analysis and criticism, and which also includes an express reference to press summaries and press reviews; a limitation for "press clipping" services (i.e. news monitoring services) done for commercial purposes through digital means, and subject to compensation—unless press publishers prefer to expressly license this activity, which is the common practice in Spain; and the new limitation and exception for news aggregators and search engines.

⁴¹ Despite several attempts to modify its language and even delete it, the provision was passed exactly as introduced by the Government.

news content, but news aggregators and search engines either make available the whole work (by linking) or fragments (headline and fragment displayed) that are “significant”—at least, significant enough to allow the user to identify the contents; furthermore, if aggregators are indeed only allowed to display “non-significant” fragments, then the need for compensation can be hardly justified!

It is an equitable compensation (to compensate for a damage), not a remuneration. It is unwaivable, but nothing prevents its transfer, i.e. to publishers⁴² (as happened with the press-clipping limitation in art.32.1 TRLPI). It can only be managed collectively. Mandatory collective management makes sense to the extent that the compensation is unwaivable, but was it necessary? Mandatory collective management is justified when authors are not able to license their rights or manage their compensation, on an individual basis. But some newspaper publishers could be better off managing compensation on an individual basis.⁴³

Defying any logical explanation (other than successful lobbying), photographs are expressly excluded while documentaries and news recordings will be included (“any contents”).

The second provision allows search engines to do any acts of making available to the public of “news content” (as defined above), to the extent that is indispensable to offer search results requested by users and to include a link to them. Interestingly, the uses done by search engines must be “done without its own commercial purpose” (i.e. not in exchange for a price).

Last, but not least, the statutory limitation and exception in art.32.2 TRLPI are dangerous also for what they may imply. What happens with other linking and display of information by non-news aggregation websites or by general search engines? Does it mean, *a contrario*, that any other linking (or making available of snippets) not covered by art.32.2 TRLPI requires a licence? What happens when linking (or displaying information) is done to unlawfully posted contents—will the limitation still apply as a “laundering” statutory limitation to secure compensation also for links to infringing contents?

Google News closed in Spain a few weeks after the law was passed, but the Google search engine remained operational, allowing—under the statutory exception—linking to and displaying news contents available online. Traffic to news websites was negatively affected.⁴⁴ Article 32.2 TRLPI has been in force since 1 January 2015, but only recently CEDRO started to negotiate a licence fee for it.⁴⁵

Some final thoughts

Despite formally accepting that linking to lawful and freely available contents online is not an act of exploitation that requires a copyright (or related right) licence, the proposed related right clearly aims at search engines, aggregators and social networks obtaining a licence to, at least, show fragments of the linked news content. This licence will ultimately affect not only the new related right, but also any copyright in these publications, thus contravening the mandatory exception in art.10(1) BC, which expressly allows for the making of quotations as well as press reviews from any news contents, also that is lawfully available online.

Furthermore, as proven in Germany, a related right for press publishers to license online contents will be likely to fail to secure further revenues for press publishers or to strengthen their bargaining position; instead, it will certainly increase transaction costs and create entry barriers for new players, benefiting the platforms which are already established in the market.

In short, the proposal seeks an unlikely outcome, in exchange for a very likely detriment to online access to information.

Furthermore, the proposal seems to forget that an exclusive right—always meant to maximise profits—may be exercised by means of exclusive licences and discriminating terms and pricing. Press publishers might end up licensing the best positioned platforms, on an exclusive basis; platforms may end up requiring an exclusive licence in exchange for a larger share of ad revenues and traffic referral. All these scenarios, which are perfectly normal within other copyright markets, can be hardly justified when dealing with news content and access to information online:

“The interest of the public as well as of the producers of news is better served if the activity of linking and aggregation remains outside of copyright law in the realm of market competition.”⁴⁶

If anything good can be learned from the Spanish solution it is that it prohibits any chances of exclusive licensing or differential pricing by authorising “all” news aggregators and search engines to link to (and display fragments of) news content available online.

⁴² The provision loosely refers to “the publisher or, as applicable, the right owners,” but fails to mention authors.

⁴³ The mandatory collective management and the unwaivable nature of this compensation were the main criticisms raised by the Spanish Competition Authority: see Comisión Nacional de los Mercados y de la Competencia, PRO/CNMC/0002/14 (16 May 2014), http://todoscontraelcanon.org/docs/CNMC_Proposal.pdf [Accessed 4 August 2017].

⁴⁴ A 30% traffic decrease was reported to some sites: see NERA Economic Consulting, “Impacto del Nuevo Artículo 32.2 de la Ley de Propiedad Intelectual Informe para la Asociación Española de Editoriales de Publicaciones Periódicas (AEEPP)” (9 July 2015), <http://www.aepp.com/pdf/InformeNera.pdf> [Accessed 4 August 2017].

⁴⁵ CEDRO’s fee is 5 € cents per “effective user” per year. Apparently, this fee is exorbitant for some aggregation sites: Menéame, a peer-aggregation website with a yearly budget of some €100,000, should pay a licence of €2.4 million per year. See <http://www.bolsamania.com/noticias/tecnologia/meneame-amenazado-con-la-tasa-google-cedro-le-pide-26-millones-de-euros-al-ano--2514734.html> [Accessed 4 August 2017].

⁴⁶ See N. W. Netanel, “New Media in Old Bottles? Barron’s Contextual First Amendment and Copyright in the Digital Age” (July 2008), p.129, SSRN, <http://ssrn.com/abstract=1183167> [Accessed 4 August 2017].

Platforms share large amounts of advertising revenues for traffic referral with newspaper websites.⁴⁷ If these revenues are not enough, or not fair enough, neither copyright nor a related right should be the solution. Copyright is a property to be traded in the market; Copyright law is not meant to secure or redistribute⁴⁸ revenues or protect existing markets. This is even more so when what is being traded is not so much a copyright but its contents: information. The Commission's proposal fails to distinguish both issues, and its proposal—within the realm of copyright—will fail to achieve any benefit

for press publishers and is likely to impair online access to information, with a negative impact for the development of culture and markets in the EU.

Almost a hundred years ago, the US Supreme Court was presented with a similar problem and its solution was found somewhere beyond copyright: by designing the “hot news” doctrine, as a variant of the common law tort of misappropriation: a competitor cannot “free-ride” on another competitor's work and effort.⁴⁹ The “hot news” doctrine may not solve the current “problem” but it is indeed a good example of how copyright, per se, cannot conquer all.

⁴⁷ Facebook ad revenues split appears to be highly in favour of newspapers (30/70). Another example: in 2014, revenues were €746 million for four countries: France, Germany, Spain and the UK; see Impact Assessment (2016), p.157.

⁴⁸ See M. Senftleben et al., “New Rights or New Business Models, An Inquiry into the Future of Publishing in the Digital Era”, *IIC — International Review of Intellectual Property and Competition Law* (July 2017), p.13: “It is doubtful whether initiatives to amend the European Copyright framework should focus on the redistribution of revenue accruing from innovative online services instead of encouraging press publishers to develop these innovative online services themselves.” See <https://link.springer.com/article/10.1007/s40319-017-0605-y> [Accessed 4 August 2017].

⁴⁹ See *International News Service v Associated Press* 248 U.S. 215 (1918). The INS (owned by W.R. Hearst) and the AP were two competing agencies that provided news stories on national and international events to local newspapers throughout the US. During the First World War, the AP was best positioned to carry news from Europe; INS rewrote the AP news published in East Coast newspapers and sent them to the INS clients on the West Coast. INS was enjoined from taking facts from the AP's news until the commercial value of these facts “as news” had elapsed.