The New Press Publishers' Related Rights. Romanian Implementation and Comparative View

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On the 1st of April 2022, the Law no. 69/2022, implementing the Directive (EU) 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market, introduced in Romanian legislation new rights related to copyright for the reproduction and making available to the public of press publications of publishers established in a Member State in respect of online uses by information society service providers.

The introduction of the new press publishers rights at the level of the EU legislation was heavily opposed, having in view, *inter alia*, the negative experiences in enforcing similar national ancillary rights in Germany and Spain, prior the adoption of the EU Directive. This Study analysis the EU legal provision and its implementation in Romanian legislation, questioning if the purposes of the press publishers rights, as envisaged by the European legislator, may be attained by the new legal instrument.

The Study argues that a legal solution that tends to create sources of revenue for the publishers in order to ensure the freedom and pluralism of the press, allowing the effective exercise of the fundamental right to freedom to receive and impart information, in order to make sound decisions in all aspects of life deserves support.

In view of the lack of public debates in the Romanian society related to the proposed press publisher's rights, its framing, enforcement mechanisms and impact, the implemented legal provision needs detailed analysis and explanations, in order to understand what is at stake and, most importantly, how the right should be enforced in order to attain its legal purposes.

The first part of the Study will focus on the details of the boundaries of the new related rights for press publishers, granted for the online use of their press publications by information society service providers, namely, the exclusive right to authorise or prohibit the reproduction of their press publications and the exclusive right to authorise or prohibit the making available to the public of their press publication. The Study will examine who are the beneficiaries and the addressees of the rights, what is the object of protection, what is the scope of the related rights, in particular, the exceptions and limitations for citation and the reporting of current events, that ensure the exercise of the fundamental right to access to information. The Study argues that difficulties may arise in practice in delineanting the press publishing rights and the exceptions to it, in view of the fact that news and press information, simple facts and data are excluded from copyright protection and that the exception or limitation in case of reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or other subject-matter of the same character, to the extent justified by the informatory purpose, is also provided by the law.

The second part of the Study will question if the legal provision creates further uncertainties in the digital marketplace, due to possible overlaps and conflicts with other intellectual property rights already enjoyed by journalists and by press publishers, with competition law and unfair competition law provisions. The Study argues that the legal provision complicates further the process of rights cleareance, with the result of increasing costs for the involved rights holders and, subsequently, for the users.

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The third part of the Study will examine how the new related rights were implemented in other national legislations, how were they enforced and what were the achieved results. The experience in enforcing the press publishers rights in France reveals that legal instruments provided by competition law for sanctioning the abuse of a dominant position on the market are needed in order to enforce the publishers rights.

The last part of the Study opens the perspective on the proposals of the Digital Services Act which aims to regulate a digital space where the fundamental rights of users are protected and to establish a level playing field for businesses. The Study argues that European press publishers need to further adapt their business model to the predominant economy of online marketplaces, social networks and content-sharing platforms. The problems that remain unsolved are related to the role and responsabilities of the press in a democratic society, also, the fundamental education of users in the context of a platform-based economy, namely, their ability to think critically, to check and discern between real and fake news, also, their quest and need of solid and substantive, quality press information, which is the base of an informed and reasoned decision.

Introduction. The context of regulation of new press publishers related rights

The introduction in the European Law of new press publishers related rights was justified in the context of disruptive forces of digital technologies faced by press publishers[2].

The traditional press publishers' business model was challenged by the advertising industry, which shifted to the digital environment in order to generate more revenues using digital technologies. Advertisers increased their investments in online advertising, to the detriment of advertising in print press publications, which faced a severe decline.

Press publishers adapted their business models to the digital economy and gained revenues from online paid access, online subscriptions and online advertising. However, press publishers could not compete with business models conceived by social media platforms and dominant digital technology companies that receive revenues from allowing users to share and access a huge amount of online content indifferent to criteria such as quality, thruth, social impact.

Such business models are strange to press publishers, because press publishers are bound to perform with responsibility the role of "watchdogs"[3] in a democratic and free society. As stated by the

[2] V. Moscon, Neighbouring rights: in search of a dogmatic foundation.The press publishers' case (July 5, 2018). In: T. Pihlajarinne, J.T. Vesala, O. Honkkila (eds.), Online Distribution of Content, Cheltenham, Elgar, 2019, pp. 40-61, Max Planck Institute for Innovation & Competition Research Paper No. 18-17, available at: https://ssrn.com/abstract=3208601 (accessed 14 May 2022); M. Senftleben, M. Kerk, M. Buiten, K. Heine, New Rights or New Business Models? An Inquiry into the Future of Publishing in the Digital Era, IIC (2017) 48:538–561.

[3] European Court of Human Rights (ECHR), *Pentikäinen v. Finland* (application no. 11882/10), Judgement of 20 October 2015 [Grand Chamber], available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-158279%22]}; *Mándli and Others v. Hungary* (application no. 63164/16), Judgment of 26 May 2020 [Section IV], available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-202540%22]}; Thorgeir Thorgeirson v. Iceland (application no. 13778/88), Judgement of 25 June 1992 [Chamber], available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-57795%22]}; *Gsell v. Switzerland* (application no. 12675/05), Judgment of 8.10.2009 [Section V], available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-94865%22]} (accessed 15 May 2022).

European Court of Human Rights "the safeguard afforded by Article 10[4] (of the European Convention for the Protection of Human Rights and Fundamental Freedoms[5] - n.ns.) to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide reliable and precise information on accordance with the ethics of journalism"[6].

Press publishers faced competition from the business models of social media platforms (such as Facebook, that owns WhatsApp, Messenger, Instagram), that collect and use data on users' habits and preferences and so satisfy their need for information by accessing press publishers social media pages or links shared by publishers in order to read just the title and snippets of journalistic works, without accessing their webpage in order to read a full article.

In addition, press publishers faced competition from online services offered by search engines, media monitoring services and news aggregators, which provide users with a collection of links, text excerpts (snippets) and thumbnails from the online versions of newspapers (such as GoogleNews Service, Squidapp), that are also able to substitute the users' need for information[7].

News aggregators offer free or paid online services and generate revenue from advertising, subscriptions, while making available to the public works (content), that are, in most cases, protected by copyright, owned by press publishers, journalists, photographers, other authors.

Press publishers, press agencies and authors of journalistic works did not receive any remuneration or compensation from such internet service providers which made profits from free riding their copyright protected works and investments, while facing a dramatic decrease in revenues from online advertising on their own web pages and from subscriptions for online access to entire articles, news, interviews, investigations or other journalistic works.

In 2010, the Italian Competition Authority[8], concluded an investigation into possible abuse of dominant position by Google, by accepting the commitments of Google to give press publishers more control over the use of their content on the Google News service through the development of specific software (crawlers and robots.txt) and to ensure greater transparency in the terms and conditions of Google's advertising solicitation platform AdSense in order to determine the amount of the advertisement income due to Italian press publishers. The Competition Authority also submitted two Reports to the Italian Government and Parliament in which it suggested updating the Italian Copyright

[4] Article 11 of the Charter of Fundamental Rights of the European Union corresponds to Article 10 of the European Convention on Human Rights and is to be interpreted accordingly. The European Convention for the Protection of Human Rights and Fundamental Freedoms was reaffirmed by the Charter of Fundamental Rights of the European Union, OJ C 364/1, 18.12.2000. According to Article 52 (3) of the Charter, "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

[5] Accessible at https://www.echr.coe.int/Pages/home.aspx?p=basictexts&c.

[6] ECHR, Axel Springer AG v. Germany, (application no. 39954/08), Judgement of 7 February 2012 [Grand Chamber], available at https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-109034%22]} (accessed 15 May 2022).

[7] J. Calzada, R. Gil, What do News Aggregators Do? Evidence form Google News in Spain and Germany, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2837553 (accessed 10 May 2022).

[8] Autorità Garante della Concorrenza e del Mercato.

Act in order to promote forms of cooperation between rightholders and internet society service providers, without suggesting any specific way forward[9].

For the first time, in 2013, Germany introduced the exclusive related right of press publishers to make available a "press product" for commercial purposes, "unless it consists of individual words or very short text excerpts". Authors of works included in the press product were entitled to "an appropriate share of the remuneration"[10] (Sections 87f through 87h of the Copyright Act, in force since 1 August 2013).

The market response to the introduction of the related right was summarized by Professor Xalabarder as follows: "Publishers mandated their rights to [CMO] VG Media and set a fee of 6% 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. 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 judgement that Google is infringing Sec. 87f since the Google News platform is not covered by the "snippets" exempted from the ancillary right. [...]"[11].

Spain followed in 2014, by permitting the use of "non-significant fragments of content available to the public", without prior authorisation, where the source of the content were "periodicals or regularly updated websites" and where the material in question had "the purpose of informing, creating public opinion or entertainment", but subject to the payment of an equitable compensation[12] [Article 32 (2) of the Copyright Act, in force since 1 January 2015].

Google's reaction was to close the Google News service in Spain, with the consequence that Spanish press publishers disappeared from Google, with dramatic losses of readers and revenues for the press. Spanish press publishers began negotiating with Google. The Google search engine remained operational. Linking to and displaying news contents remained permitted under the statutory exception. Still, the traffic decline to online news publications remained significant.[13]

The regulation of the new European press publishers' related rights was inspired from previous German and Spanish copyright legislations.

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[9] S. Scalzini, The new related right for press publishers: what way forward?, (July 31, 2020), in E. Rosati (ed.), Handbook of European Copyright Law (Routledge, 2021), available at https://ssrn.com/abstract=3664847 (accessed 15 May 2022).

[10] Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive, Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI committee, PE 596.810, September 2017, p. 13.

[11] Xalabarder 2016 CREATe/ 2017 EIPR, cited in Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive, op. cit., p. 31; S. Scalzini, op. cit. supra.

[12] Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive, op. cit., p. 14.

[13] J. Calzada, R. Gil, op. cit. supra; Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive, op. cit., p. 32; S. Scalzini, op. cit. supra.

The academic community raised concerns such as lack of justification and coherence within the copyright system, overprotection of press publishers' rights and overlapping with other available rights, worthlessness, threats to freedom of information[14].

Despite the majority of negative assessments from the academic community and a few voices in favour of the press publishers' related rights[15], these were provided for in Article 15 of the Directive 2019/790 on copyright and related rights in the Digital Single Market[16].

The main purpose of the European legislator is to rebalance the bargaining power of press publishers vis-à-vis internet society service providers which reuse press publications for economic profit and, through that, indirectly support the freedom and the quality of the press[17].

I The boundaries of the new rights related to copyright for press publishers

The Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC[18] introduces in its Title IV, as part of the "measures to achieve a well-functioning marketplace for copyright" and related to "rights in publications", legal provisions for the "protection of press publications concerning online uses", in its Articles 15 and 16.

1. The rights granted to press publishers. For press publications first published after 6 June 2019 and only with regard to their online uses by information society service providers, press

[14] Some of the critical opinions: Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive, Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI committee, PE 596.810, September 2017; Academics Against the Press Publishers Right, Letter from Professor Marco Ricolfi, Professor Raquel Xalabarder and Professor Mireille van Eechoud to Members of the European Parliament, published on 25 April 2018, available at https://www.ivir.nl/academics-against-press-publishers-right/#sig08; Opinion on the Proposed Press Publishers Right of the European Copyright Society, available at https://europeancopyrightsociety.org/opinions/; Ch. Geiger, O. Bulayenko, and G. Frosio, Opinion of the CEIPI on the European Commission's copyright reform proposal, with a focus on the introduction of neighbouring rights for press publishers in EU law, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2921334; R.M. Hilty, V. Moscon (Editors), Modernisation of the EU Copyright Rules. Position Statement of the Max Planck Institute for Innovation and Competition (September 18, 2017), Max Planck Institute for Innovation & Competition Research Paper No. 17-12, available at https://ssrn.com/abstract=3036787 (accessed 15 May 2022); V. Moscon, op. cit. supra; A. Peukert, An EU Related Right for Press Publishers Concerning Digital Uses. A Legal Analysis, Research Paper of the Faculty of Law, Goethe University Frankfurt am Main no 22/2016, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888040 (accessed 15 May 2022).

[15] T. Höppner, EU copyright reform - the case for a related right for press publishers, in T. Höppner, M. Kretschmer, R. Xalabarder (2017) "CREATe public lectures on the proposed EU right for press publishers", European Intellectual Property Review [E.I.P.R.] 39(10), pp. 607-622, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3050575 (accessed 15 May 2022).

[16] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ *L 130, 17.5.2019, p. 92–125*, hereafter DSMD.

[17] S. Scalzini, op. cit. supra.

[18] Published in *OJ L 130, 17.5.2019, p. 92–125*, hereafter the "DSMD".

publishers **enjoy the rights related to copyright for the reproduction and making avalable to the public**, stipulated in Article 2 and Article 3 (2) of Directive 2001/29/EC [Article 15 (1) and (4) DSMD].

Press publishers have "the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part" of their press publications.

They also enjoy "the exclusive right to authorise or prohibit the making available to the public (of their press publications), by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them".

The right to make available to the public is not exhausted by any prior act of communication to the public [Article 3 (3) of the Directive 2001/29/EC].

2. The holders of the rights related to copyright are "publishers of press publications" or "press publishers" established in a Member State and having their registered office, central administration or principal place of business within the Union [par. (55), Preamble DSMD].

The concept of "press publishers" covers service providers such as news publishers and news agencies, when they publish "press publications" within the meaning of the Directive [par. (55) of the Preamble DSMS].

The legal concept "press publication" is defined by Article 2 (4) DSMD as:

"a collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matter, and which:

(a) constitutes an individual item within a periodical or regularly updated publication under a single title, such as a newspaper or a general or special interest magazine;

(b) has the purpose of providing the general public with information related to news or other topics; and

(c) is published in any media under the initiative, editorial responsibility and control of a service provider".

Online publications that provide updated information "as part of an activity that is not carried under the editorial responsibility and control of a service provider", such as blogs, are not press publications for the purposes of the DSMD.

"Periodicals that are published for scientific or academic purposes, such as scientific journals, are not press publications for the purposes of this Directive" [Article 2 (4) DSMD].

The crucial criteria to qualify as a "press publishers" are: the exercise of an economic activity (the provision of a service) and the assumption of the initiative, editorial responsibility and control of a publication which is periodically or regularly updated, aimed at the "general public".

Details on the legal concept "press publication" are found in the Preamble of the Directive, par. (56). "Press publications" cover "journalistic publications, published in any media, including on paper, in the context of an economic activity that constitutes a provision of services under Union law" and "should" include "daily newspapers, weekly or monthly magazines of general or special interest, including subscription-based magazines, and news websites".

Even if press publications as defined by the DSMD include printed press, the new related rights are granted only in relation to online uses by internet service providers.

Press publications contain "literary works", "other types of works and other subject matter", "in particular photographs and videos".

3. The addressees of the related rights are the information society service providers [Art. 15 (1) DSMD], as defined in Article 1 (1) (b) of Directive (EU) 2015/1535[19].

Such information society service providers are "news aggregators or media monitoring services", "for which the reuse of press publications constitutes an important part of their business models and a source of revenue" [par. (54), Preamble DSMD].

The DSMD does not distinguish between news aggregators and media monitoring services that use only algorithms for the collection of headlines and initial sentences of press articles and the ones which collect the same using human intervention[20].

The related rights shall not apply to "private or non-commercial uses" by "individual users" [Art. 15 (1) DSMD].

Per a contrario, reuses of press publications made by journalists as part of their professional activity for another online press publisher do not fall under the exclusion. In this case, another online press publisher would also qualify as an "information society service provider", in the sense of Art. 15 (1) DSMD.

If reuses of press publications may be prohibited to other press publications[21], the freedom to receive and impart information may be jeopardized, also, the aim of the DSMD "to foster the availability of reliable information" [par. (55), Preamble DSMD].

As a consequence, a crucial importance has to be placed on the interpretation of the exceptions to the related rights for the use of "works or other subject-matter in connection with the reporting of current events", "to the extent justified by the informatory purpose" [Article 15 (3) DSMD read in conjunction with Article 5 (3) (c) Directive 2001/29/EC[22]] and for quotations "for purposes such as criticism or review" [Article 15 (3) DSMD read in conjunction with Article 5 (3) (d) Directive 2001/29/EC], that we shall analyze further.

At the EU level, there is no harmonization of national implementations of Article 5 of Directive 2001/29/EC on exceptions to copyright and related rights, hence, no harmonization of the legal protection for press publications in respect of online uses, contrary to the goal of the DSMD.

In case "individual users" share press publications (titles, snippets, thumbnails) on social networks, enabling social platforms to make an economic profit from such uses, the question if social

[19] Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification), OJ L 241/1 of 17.9.2015.

[20] S. Ricketson, J. Ginsburg, Intellectual Property in News? Why Not?, in S. Ricketson, M. Richardson, eds., Research Handbook on Intellectual Property in Media and Entertainment (Edward Elgar 2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2773797 (accessed 11 May 2022).

[21] A. Lazarova, Re-use the news: between the EU press publishers' right's addressees and the informatory exceptions' beneficiaries, *Journal of Intellectual Property Law & Practice*, Volume 16, Issue 3, March 2021, Pages 236–246, https://doi.org/10.1093/jiplp/jpab049 (accessed 11 May 2022).

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

platforms would be bound by the obligations of information society service providers for the online uses of press publications emerges.

In the light of par. (54), Preamble DSMD, the reuse of the press publication has to be "an important part" of a business model, not only "a source of revenue". If social platforms develop and offer "news aggregators or media monitoring services", as part of their business model (what might be qualified as "important" part is an open question), they might fall under the obligation to conclude licence agreements with press publishers.

4. The object of protection of the related rights consists of "literary works of a journalistic nature", "other types of works", "other subject matter", included in "journalistic publications", such as "daily newspapers, weekly or monthly magazines of general or special interest, including subscription-based magazines, and news websites" [par. (56), Preamble and Art. 2 (4) DSMD].

An important question is how the concept **''other subject matter''** should be interpreted, in view of the fact that the related rights are of exclusive nature [Art. 15 (1) DSMD] and are granted with no requirement of investment (as is the case of the database right) and without imposing the criteria of originality of the "subject matter" (as in case of copyright).

In our opinion, press publishers' related rights do no cover "other subject matter" that do not qualify as "works", in the sense of "intellectual creations" protected under copyright[23], of which only human authors are capable of. This interpretation excludes contents created by the "artificial intelligence journalism" from the protection of the related rights[24]. In support of our opinion we have in view Article 15 (1) of DSMD, read in conjunction with Article 2 of Directive 2001/29/EC, as interpreted in the jurisprudence of the ECJ[25]:

> "Article 2(a) of Directive 2001/29 provides that authors have the exclusive right to authorise or prohibit reproduction, in whole or in part, of their works. It follows that protection of the author's right to authorise or prohibit reproduction is intended to cover 'work'.
>
> It is, moreover, apparent from the general scheme of the Berne Convention, in particular Article 2(5) and (8), that the protection of certain subject-matters as artistic or literary works presupposes that they are intellectual creations".

"**Hyperlinks''** and **''mere facts reported in press publications''** are excluded from related rights protection [par. (57), Preamble and Art. 15 (3) DSMD], also **''individual words''** or **''very short extracts''** of press publications [par. (58), Preamble and Art. 15 (3) DSMD].

The exclusion from protection of **''hyperlinks''** is consistent with the jurisprudence of the European Court of Justice, which stated that: "hyperlinks contribute to the sound operation of the internet, which is of particular importance to freedom of expression and of information, enshrined in

[23] See the German transposition of the DSMD, Section 87f of the Copyright Act, that clarifies that "other subject matter" is "protected under this Act" (under the copyright act).

[24] A. Trapova, P. Mezei, Robojournalism – A Copyright Study on the Use of Artificial Intelligence in the European News Industry, *GRUR International*, 2022;, ikac038, https://doi.org/10.1093/grurint/ikac038 (accessed 14 May 2022). The authors conclude that "the extent to which European journalism relies on assistive and generative technologies to produce written output does not justify, from a copyright perspective, the changing of the current anthropocentric copyright system".

[25] C-5/08 *Infopaq*, par. 33 and 34.

Article 11 of the Charter[26], as well as to the exchange of opinions and information in that network characterised by the availability of incalculable amounts of information"[27].

A hyperlink to a file which can be downloaded independently falls under the concept of "quotation", regulated as an exception to the press publishers' related rights[28].

''Mere facts reported in press publications'' may not be protected by exclusive rights.

The Romanian Law no. 8/1996 excludes from copyright protection "news and press information", per se [Art. 9 e) of Law no. 8/1996], which, if qualified as "mere facts", are also excluded from protection under the related rights.

Indeed, "news and press information", as such, may not be monopolized[29]. This interpretation ensures a proper balance within the copyright system, including rights related to copyright, as conceived by the Berne Convention for the Protection of Literary and Artistic Works[30], which, in Article 2 (8) states that:

> "The protection of this Convention shall not apply to *news of the day* or to *miscellaneous facts* having the character of mere *items of press information* (subl. ns.)".

In the light of the Infopaq judgment, **''individual words''**, "considered in isolation, are not as such an intellectual creation of the author who employs them. It is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation. Words as such do not, therefore, constitute elements covered by the protection."[31]

The concept **''very short extracts''** is to "be interpreted in such a way as not to affect the effectiveness of the rights provided for", having in view their "economic relevance" and the "investments made [...] in the production of content" [par. (58), Preamble DSMD].

A "very short extract" of a press publication is an extract that has little or no economic significance for the press publisher [par. (54) and (58), Preamble DSMD].

The Romanian transposition of Article 15 (3) DSMD in Article 94^1 (2) c) of the Law no. 8/1996 introduces a quantitative criteria of a maximum lenght of 120 characters (not words) of what might constitute a "very short extract" of a press publication, adding the alternative conditions that

> "it does not affect the effectiveness of the rights provided in par. (1) or does not lead to the replacement of the press publication or does not determine the public not to access the press publication".

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[26] Charter of Fundamental Rights of the European Union, *OJ C 326, 26.10.2012, p. 391–407.*

[27] C-516/17, *Spiegel Online GmbH v Volker Beck*, par. 81, citing C-160/15, *GS Media*, par. 45 and C-161/17, *Renckhoff*, par. 40.

[28] C-5/08 *Infopaq*, par. 87.

[29] S. Ricketson, J. Ginsburg, Intellectual Property in News? Why Not?, in S. Ricketson, M. Richardson, eds., Research Handbook on Intellectual Property in Media and Entertainment (Edward Elgar 2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2773797 (accessed 11 May 2022). The article presents the succesive efforts made at the intenational level to confer, under the unfair competition provisions, legal protection to news and press information, per se, as long as they presented a commercial value, against their unauthorised disclosure and without indication of the source.

[30] Berne Convention for the Protection of Literary and Artistic Works (Paris, 4 May 1896), entered into force 5 December 1887, as revised at Paris on 24 July 1971, as amended on 28 September 1979.

[31] C-5/08 *Infopaq*, par. 45 and 46.

This transposition is the result of a creative interpretation of the concept "very short extract".

If an extract does have only 120 characters, but, in the opinion of the press publisher, its use does affect the effectiveness of the rights, the press publisher may exercize the exclusive right to prohibit the use of that extract.

Also, if the quatitative criteria is respected, but, in the opinion of the press publisher, reading the "very short extract" has the effect to substitute the need of information, so that the user does not access the webpage of the press publisher, the press publisher has the right to prohibit the use of that extract.

Remains open the question if the press publisher is presumed to incur economic damages in the form of an unmade profit (*lucrum cessans*) in case an extract has maximum 120 characters, but one of the alternative conditions is not respected.

In an action for the enforcement of the related right to reproduction, such a presumption would exempt press publishers from the burden to prove that damages were indeed incurred in reality. The level of the presumed damages may not be proved in an objective way, it would have to be assessed by the judge, on criteria which are not established by the law. The presumption may not be reversed, in lack of any available means of proof.

In case an extract has maximum 120 characters and all the alternative conditions are respected, so that the press publishers' related rights are not infringed, the question is if copyright in the same extract is respected or not. The answer to the question has to be given in view of the ECJ judgement in Infopaq, where the ECJ ruled that a reproduction of "11 consecutive words" of a protected work may infringe copyright, "if the elements thus reproduced are the expression of the intellectual creation of their author"[32].

5. Limitations and exceptions to press publishers' related rights. The concept "very short extracts" of press publications has to be interpreted in relation to the **limitations and exceptions** applicable to copyright [Art. 15 (3) DSMD], in particular **the exception for reporting of current events** [Article 5 (3) (c) of Directive 2001/29/EC] and **the exception for quotation for criticism or review** [Article 5 (3) (d) of Directive 2001/29/EC].

5.1. Regarding **the exception for reporting of current events,** Article 5 (3) (c) of Directive 2001/29/EC stipulates that:

> "Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:
>
> (c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible".

[32] C-5/08 *Infopaq*, par. 48 - 51.

The purpose of the exception is "to contribute to the exercise of the freedom of information and the freedom of the media, enshrined in Article 11 of the Charter", "without restrictions other than those that are strictly necessary"[33].

The action of "reporting" means providing information on a "current event", in the sense of "an event that, at the time at which it is reported, is of informatory interest to the public"[34].

The exception is not limited to certain categories of beneficiaries, meaning that search engines, news aggregators, media monitoring services, other press publishers, journalists may invoke the exception in relation to subject matter of press publishers' related rights[35], but it is limited to certain topics: economic, political or religious.

There are no details on how such use might be "expressly reserved", if only a notice from the publisher is sufficient or not. In the digital context, the question is what technological measures would take to instruct algoritms of search engines and news aggregators not to reproduce and make available expressly reserved articles published on the publications' website[36].

The Romanian transposition of the exception in Article 35 (2) (a), in conjunction with Article 35 (1) first thesis and (4) of Law no. 8/1996 reads as follows:

> "(1) The following uses of a work previously made public are permitted, without the consent of the author and without the payment of any remuneration, provided that they are in accordance with good practice, do not contravene the normal operation of the work and do not harm the author or owners usage rights: [...]
>
> (2) a) Under the conditions provided in par. (1), the reproduction, distribution, broadcasting or communication to the public without direct or indirect commercial or economic advantage are permitted:
>
> a) of short extracts from press articles and radio or television reports, for the purpose of reporting of current events, except for those for which such use is expressly reserved; [...]
>
> (4) In all the cases provided [...] at par. (2), the source and name of the author must be indicated, unless this proves impossible".

The Romanian Law does not limit the beneficiaries, nor the topics to which the exception applies.

The exception has to be interpreted narrowly, but in a way that assures the respect of the fundamental right to freedom of expression and information, that includes the reporting of news and other matters of public interest, to the extent justified by the informatory purpose[37].

In order to rely on the exception, the extent of extract has to be justified by the informatory purpose. There are no quantitative limits imposed by the law.

In case an extract has more than 120 characters, as imposed by Article 94^1 (2) c) of the Law no. 8/1996, but its lenght is justified by the informatory purpose, the exception to related rights applies.

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[33] C-516/17, *Spiegel Online GmbH v Volker Beck*, par. 72.
[34] C-516/17, *Spiegel Online GmbH v Volker Beck*, par. 63.
[35] A. Lazarova, op. cit. supra.
[36] S. Ricketson, J. Ginsburg, op. cit., supra.
[37] International Instrument on Permitted Uses in Copyright Law, R.M. Hilty, K. Köklü, V. Moscon, C. Correa, S. Dusollier, Ch. Geiger, J. Griffiths, H.G. Ruse-Khan, A. Kur, X. Lin, R. Markiewics, S. Nérisson, A. Peukert, M. Senftleben, R. Xalabarder, IIC (2021) 52:62–67, available at https://doi.org/10.1007/s40319-020-00999-8 (accessed 11 May 2022).

The exception is applicable also if, due to the extent justified by the informatory purpose, the extract is able to affect the effectiveness of the related rights, or to substitute the press publication, or to determine users not to access the press publication from which the extract is taken.

5.2. Regarding **the exception for quotation for criticism or review**, as stated by Article 5 (3) (d) of Directive 2001/29/EC:

> "3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:
>
> (d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose".

The conditions set out in Article 5(3)(d) of Directive 2001/29 must be interpreted strictly, since that provision is a derogation from the general established rule, but in a way that "enable the effectiveness of the exception to be safeguarded and its purpose to be observed"[38].

In line with the ECJ judgement in *Spiegel Online* case[39], the essential characteristics of a quotation are the use of a work or of an extract for the purposes of illustration of an assertion, defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user.

Is is irrelevant if the quotation is included in a work protected by copyright or in a subject matter not protected by copyright.

In order to rely on the exception for quotation, the user must establish a direct and close link between the quoted work and his own reflections, allowing for an intellectual comparison to be made with the work of another. The use of the quoted work must be secondary in relation to the assertions of that user.

The source, including the author's name, has to be indicated.

Conflicting interpretations of the quotation exception persist in national jurisdictions. Under German law search results produced by search engines do not qualify as quotations, whereas under Dutch case law they do. In Spain, changes to the quotation exception were introduced so that search engine operators would have to pay compensation for displaying snippets[40].

The Romanian transposition of the exception in Article 35 (1) (b) of Law no. 8/1996 reads as follows: (1) The following uses of a work previously made public are permitted, without the consent of the author and without payment of any remuneration, provided that they are in accordance with good practice, do not contravene the normal operation of the work and do not harm the author or owners usage rights: [...] (b) the use of *short quotations* from a work, for the purpose of *analysis, commentary or criticism or as an example*, insofar as their use justifies the length of the quote; [...] (4) In all the cases provided in par. (1) lit. b), [...] the source and name of the author must be stated, unless this proves impossible".

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[38] C-145/10, *Painer*, par. 133.

[39] C-516/17, *Spiegel Online GmbH v Volker Beck*, par. 78 and 79; *Painer*, C-145/10, par. 136.

[40] Mireille M.M. van Eechoud, A publishers' intellectual property right. Implications for freedom of expression, authors and open content policies (Jan. 2017).

The national legislation allows the quotation to be made for analysis, commentary, criticism or as an example, in a way that establishes a "dialogue" between the quoted work and the own intellectual creation.

In order to rely on the exception, the lenght of the extract used for quotation shall not be limited to a precise number of characters, but has to be justified by the legitimate purpose of the use.

One may question if the exception to press publishers' related rights applies when the lenght of an extract is justified by a legitimate purpose, but the extract has more than 120 characters, as imposed by Article 94^1 (2) c) of the Law no. 8/1996 in oder to comply with press publishers related rights.

A similar question may be asked in relation to alternative conditions that the extract has to fulfil according to Article 94^1 (2) c) of the Law no. 8/1996, that is: not to affect the effectiveness of the related rights, or not to substitute the press publication, or not to determine users not to access the press publication.

In our opinion, the quotation exception should apply even if the extract does not comply with the conditions established in Article 94^1 (2) c). *Per a contrario*, the legal provisions establishing the exception for quotation to related rights being devoid of any legal effect.

6. The duration of press publishers rights is of two years, calculated from 1 January of the year following the date on which that press publication is published.

The duration of protection is limited, due to the ephemeral nature of journalistic works, but enables press publishers to control the exploitation of archives[41].

II The exercise of press publishers' related rights

1. The cumulation of related rights of the publishers in the press publication with copyrights of the publishers in the press publication as a collective work, with copyrights of the publishers in works included in the press publication (assigned or licensed exclusively or non-exclusively), with copyrights of the authors (journalists, photojournalists, etc.) in works included in the press publication and with the right of the authors to a share of the revenues received by the press publishers for the online uses of the publications

A "press publication" means a "collection of works" of journalistic nature, literary works (such as interviews, investigations, editorials, news, reports, stories), audiovisual works, photographs.

Copyright in the press publication as a collective work[42] is owned by the press publisher, under the initiative, responsibility and name of which the work was created, unless otherwise stated by agreement [Article 6 (2) of the Law 8/1996].

[41] C. Caron, op. cit., supra.

[42] According to Article 6 (1) of the Romanian Law no. 8/1996, a collective work means "a work in which the personal contributions of the co-authors form a whole, without it being possible, given the nature of the work, to assign a distinct right over the whole work to any of the co-authors".

In the exercise of copyright in the press publication as a collective work, press publishers are entitled to conclude licences for the use of the press publication.

The same press publication is protected under the **press publishers' related rights for the online uses** by information society service providers.

There is no overlap between the copyright and the new related rights in a press publication, because the related rights are granted without any requirement of originality and only for the online use by information society service providers.

1.1. Remuneration of press publishers by information society service providers for the online use of publications. In exercising their related rights, press publishers are entitled to licence their press publication in return of revenues from the information society service providers.

Press publishers' related rights are subject to extended collective management, according to Article 145^1 (1) d) and (2) of Law no. 8/1996, in force from 1 October 2022 [art. III (7) of Law no. 69/2022].

The Romanian transposition of the DSMD does not contain any other details on the exercise of press publishers' related rights.

In contrast, the laws implementing the DSMD in France, Germany, Italy and Spain stipulate the relevant criteria to calculate the revenues due to press publishers, the transparency and cooperation obligations of information society service providers, the procedures applicable in case press publishers and information society service providers fail to conclude an agreement (as we shall analyse in the next part of the study).

1.2. The right of the authors of the works included in the press publications to an "appropriate" share of the income received by the press publishers for the online uses of their publication. "Authors whose works are incorporated in a press publication should be entitled to an appropriate share of the revenues that press publishers receive" for the use by information society service providers. Press publishers are obliged to share the revenues from information society service providers with the authors of the works included in the press publication [par. 59, Preamble and Art. 15 (5) DSMD]. The "appropriate" share of revenues is due to authors of the works "without prejudice to national laws of ownership", meaning that ownership of copyright is indifferent and that the share of revenues may be added to the licence fee. The "appropriate" share of the revenues is due without prejudice to "exercise of rights in the context of employment contracts" [par. 59, Preamble, DSMD], meaning that the revenue is added to the salary.

The Romanian transposition of Art. 15 (5) DSMD, in Article 94^1 (6) and (7) of Law no. 8/1996 is contrary to the above provisions of the DSMD because it excludes the author's the right to an appropriate share of the revenues that press publishers receive in the context of employment contracts.

According to Article 94^1 (6):

> "Authors of works incorporated in a press publication shall be entitled to an appropriate share of the revenue received by the publishers of press publications from online uses by information society service providers, subject to the principle of freedom of contract and that of a fair balance between the rights and interests of the parties. Payment of a lump sum may constitute appropriate remuneration."

Article 94^1 (7) states that:

"The provisions of par. (6) do not apply in the case of publishers of press publications for the rights acquired in the context of labor relations [...]."

According to the above, in the context of an employment contract, authors are not entitled to an appropriate share of the revenue received by the publishers for the online uses by information society service providers. If an author receives a salary for the work included in the press publication, he/she shall not be entitled to a share of revenues for online uses of the work.

Moreover, even outside the context of a labour contract, authors may not receive an appropriate "share of the revenues" for online uses of the press publications, but only a lump sum. This risks to lead to the conclusion of the so called "**right-grabbing contract''**, **against which** the International Federation of Journalists has launched a worldwide campaign to demand fair payments to journalists[43].

The Romanian legal solution does not comply with the DSMD.

Contrary to the Romanian implementation of Article 15 (5) of the DSMD, the legal solutions adopted in France, Germany, Italy and Poland do allow authors to receive an appropriate share of revenues made by press publishers for online uses by the information society service providers (as examined in the next part of the study). The exercise of the right to an appropriate share of revenues is not excluded in the context of employment contracts by any of the mentioned national legislations.

The French law expressly states that such revenues have a "complementary" nature and may not be considered a "salary". Also, authors of works included in press publications have the right to receive information on the methods of calculating the share of the press publishers' remuneration.

Also, according to the German implementation, press publishers due to authors of works included in a press publication a minimum share of one third of the revenues received from internet service providers.

The Italian Law establishes that authors of works included in press publications are entitled to receive two to five per cent of the revenues received by press publishers from internet service providers.

The Polish Law states that authors of press publications have the right to a fifty percent of the revenues obtained by press publishers from the information society service providers.

1.3. The right of authors of works included in press publications to independently exploit their works. Each of the work included in the press publication (news, stories, articles, interviews, investigations, editorials, photographs, videos etc.) is protected by copyright, owned by each of the

[43] IFJ/EFJ is the world's largest organisation of journalists, representing 600.000 media professionals from 187 trade unions and associations in more than 140 countries. According to IFJ, a **''right-grabbing contract'' is** ''a contract where a media employer asks you to sign away all your authors' rights/copyright for an unlimited time, in any media, or on any platform, for a single payment - usually just the fee you are paid for writing the original story. This means that you will not get any extra remuneration if your article, photograph or broadcast is reproduced or sold elsewhere (e.g. to a database, other media in the same media group or externally). In addition, your contract may also insist that you waive your moral rights and thus prevent you from the right to be named as the author or to oppose any modification that threatens the integrity of your work. This can also imply that you are allowing your employer to sell your story to another media which you may not approve of". See https://www.ifj.org/actions/ifj-campaigns/fair-contracts-for-journalists.html (accessed 15 May 2022).

author(s) (journalists, photographers, illustrators, cartoonists etc.) of the work or by the press publisher, depending on contractual agreements concluded between the author(s) and the publisher.

In case authors own the copyright and the works may be exploited independently from the press publication, press publishers may not rely on their related rights in order to prohibit such exploitation. The same legal solution is provided for the benefit of other rightholders of subject matter included in press publications and of other authorised users [par. 59, Preamble and Art. 15 (2) DSMD].

The question if authors themselves, acting as freelancers, have the right to impede press publishers to license the press publications that include their copyrighted works may arise.

According to Article 5 (4) of the Law no. 8/1996, the answer to the question is negative, because the law imposes the condition that an independent exploitation of the work does not prejudice the use of the common work that is the press publication itself, nor the rights if other authors of works incorporated in the press publication.

In case there are several rightholders of the copyright (acting as freelancers) in the works included in press publications, one rightholder may not oppose the exploitation of the work by other rightholder, unless there is a contrary written agreement or the refuse to consent to the exploiation of the work is duly justified.

Where an author has transferred or licensed a right to a publisher, such a transfer or licence constitutes a sufficient legal basis for the publisher to be entitled to a share of the compensation for the use of the work made under an exception or limitation to the transferred or licensed right [par. 60, Preamble and Art. 16 DSMD]. The right to claim fair compensation is aimed at publishers in general, "including those of press publications, books or scientific publications and music publications". Article 16 of DSMD is a "legislative response to the *Reprobel* judgment[44], which had denied publishers a right of fair compensation under the reprography and private copying exceptions"[45].

1.4. The enforcement of press publishers' related rights. The DSMD does not establish any provision related to the enforcement of the press publishers' right. Press publishers' rights related to copyright fall under the general provisions of Directive 2004/48/EC on the enforcement of intellectual property rights[46], defined "as widely as possible in order to encompass all the intellectual property rights covered by Community provisions in this field and/or by the national law of the Member State concerned" [par. 13, preamble, Directive 2004/48/EC].

Press publishers and collective rights management bodies that have the right to represent press publishers are entitled to apply for the measures, procedures and remedies established by Directive 2004/48/EC.

Press publishers benefit from the protection granted by technical measures according to Article 6 and 7 of Directive 2001/29/EC, that permit press publishers to prevent or restrict the unauthorized use of their press publications through the application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism.

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[44] ECJ (Fourth Chamber), Case C-572/13, Hewlett-Packard Belgium SPRL v Reprobel SCRL, Judgment of 12 November 2015.

[45] João Quintais, The New Copyright in the Digital Single Market Directive: A Critical Look, 2020 42(1), EIPR 2020, 28, apud S. Scalzini, op. cit. supra.

[46] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157/45, 30.4.2004.

Article 8 (3) of Directive 2001/29/EC allows press publishers to file for injunctions against intermediaries whose services are used by a third party to infringe a copyright or related right.

2. The cumulation of the publisher's related rights in the press publication with the copyright of the publisher in press publication as a database and the publisher's *sui generis* database right in the press publication

The Directive 96/9/EC[47] provides for the legal protection of databases, defined as collections or "compilations", of works, data or other materials which are arranged, stored and accessed by electronic and non-electronic processes.

Databases may be protected by copyright, the criteria for protection being the originality of the selection or the arrangement of the contents of the database. A literary or musical work, as such, or a recording or an audiovisual work, as such, does not fall within the scope of the database right.

Databases may be protected by the *sui generis* database right, which covers the investment of considerable human, technical and financial resources in the making of databases against the unauthorized extraction and/or re-utilization of the contents of a database. "Extraction" means "the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form. "Re-utilization" means "any form of making available to the public all or a substantial part of the contents of a database by the distribution of copies, by renting, by on-line or other forms of transmission".

Press publications, as defined by Article 2 (4) of the Directive, are collections of works of different nature and may be qualified as databases.

Press publications may be protected under copyright in the selection and/or arrangement of the contents that fulfills the condition of originality and also under the sui generis database right for the investments in creating the press publication, as a collection of works of journalistic nature, data, other materials.

Such protection allows press publishers to oppose the reproduction of the arrangement of the contents and the unauthorized extraction and/or re-utilization of "all or a substantial part of the contents" of their press publication.

The protection by a database right does not overlap with the protection against the reproduction and making available to the public of works or extracts of the works included in a press publication, but which do not qualify as "a substantial part of the contents" of the same.

For example, the display of an extract of an article by online aggregators does not constitute a "substantial part of the content" of a press publication and so does not fall under the press publishers' database right, however, it may economically harm the publisher in case the extract has the effect to substitute the need of the user to access the entire article on the publisher's website.

Furthermore, the database protection of press publications does not confer authors of works included in the publication the right to receive an appropriate share of the revenues received by press publishers for the online uses made by internet service providers.

[47] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 077 27.3.1996, p. 20

The above legal regime applicable to rights in a press publication and in works included in the same press publication creates a complexity of multiple layers of rights.

The accumulations of rights in the same object are common in intellectual property law and do create difficulties in the exercise of rights.

In the case of online uses of press publications, the hurdles are stronger because different rights belonging to different right holders fall under different national laws establishing different rules for their exploitation, enforcement, collection and distribution of revenues.

The results are an increase of transaction costs due to uncertainties and complexities in rights negotiations and clearance and to the confusion created with respect to limitations and exceptions[48]. Other negative results may be a decrease in revenues for each right holder and difficulties in their distribution process.

III The implementation of press publishers' related rights in other EU Member States

The adoption of the DSMD was made in order to insure the proper functioning of the internal market, by achieving the harmonisation of national laws of the Member States on copyright.

A brief analysis of the content of national legal provisions transposing the DSMD reveals that this goal was not achieved. On the contrary, the transposition process created a further fragmentation of the copyright regime in the EU.

Even in cases where Member States made rather an ad litteram translation, than a coherent transposition of the Directive within their copyright laws, the goal of harminization was not yet achieved, because of the variety of national legal solutions regarding the exercise of the rights, or the exceptions and permitted uses.

The responsibility to harmonize copyright law seems to be transferred to the European Court of Justice.

1. The implementation and the enforcement of press publishers' related rights in France

1.1. The implementation of press publishers' related rights. The first country to introduce the press publishers' right was France, which amended its Intellectual Property Code with the law n° 2019–775 of 24 July 2019, coming into force on 25 October 2019.

The implementing law defines the terms "press agency" and "press publisher". A press agency[49] has as main activity the collection, processing and formatting, under its own responsibility, of journalistic content. The definition of a "press publisher" is narrow, as it only encompasses publishers and news agencies established in the territory of any Member State, as defined by national legislative acts governing media regulations.

The Law states that the prior consent of the press publisher or the press agency is required before any reproduction or communication to the public, in whole or in part, of its press publications

[48] Opinion on the Proposed Press Publishers Right of the European Copyright Society, op. cit. *supra*; Mireille M.M. van Eechoud, op. cit. *supra*.
[49] Ordonnance no. 45-2646 of the 2nd of November 1945, Article 1, available at www.legifrance.gouv.fr.

in digital form by an internet service provider (Article L 218-2). This requires a prior conclusion of a transfer or licencing agreement between the press publishers, press agencies and internet service providers.

The Law enumerates some of the relevant criteria to calculate the press publishers' remuneration: "the human, material and financial investments made by publishers and press agencies, the contribution of press publications to political and general information and the importance of the use of press publications made by the internet service providers" [Article L 218-4 (2)].

The use of a "very short extract" does not require a prior consent, because it would not impact the effectiveness of the related rights. However, the effectiveness of the right may be affected when such an use replaces the press publication itself or exempts the reader from referring to it. The key, essentially subjective criterion is whether or not the *extract* satisfies the users' need of information[50].

Press publishers may grant authorizations for the exercise of their rights through collective management mechanisms, but are not obliged to do so [Article L218-3 (2)]. The solution allows the publishers to decide whether they prefer to individually exercise their exclusive rights or through a collective management organization.

A useful legal provision is that imposing on internet service providers the transparency obligation. Internet service providers are requested to " provide press publishers and press agencies with all information relating to the use of press publications by their users as well as all other information necessary for a transparent evaluation of the remuneration [...] and its distribution" [Article L 218-4 (2)].

Authors of works and other subject matter included in press publications are entitled to an appropriate and equitable share of the press publishers' remuneration, which should be laid down in an agreement. The authors' appropriate share has a "complementary" nature and may not be considered a "salary" [Article L 218-5-I].

In the absence of the agreement, there is a possibility to refer the matter to a specially established committee comprising a representative of the State, as well as the representatives of publishers' and authors' professional organizations, to find a compromise solution with the concerned parties [Article L 218-5-II and III].

Authors of works and other subject matter included in press publications have the right to receive at least once a year, if necessary by an electronic communication process, updated, relevant and complete information on the methods of calculating the appropriate and fair share of the press publishers' remuneration [Article L218-5-IV].

1.2. The enforcement of press publishers' related rights. Faced with the newly implemented related rights, Google announced that it has no intention to pay any remuneration for displaying article extracts, photographs, infographics and videos within its various services (such as Google News) and that it would cease to display any such extracts until granted a free lincence by the press publishers.

In support of its actions Google argued that, in Europe alone, it allows more than 8 billion visits per month to the websites of press publishers, which represents more than 3000 visits every

[50] Z. Loutfi, Press publishers' right in France: a tale of Odyssean gods, *Journal of Intellectual Property Law & Practice*, 2022; jpac027, https://doi.org/10.1093/jiplp/jpac027 (accessed 13 May 2022).

second, so that, in reality, press publishers derive a profit from the services offered by Google because they reach and attract new audiences and increase their turnover.

Under the threat of being de-indexed from Google's services, press publishers' unions lodged a complaint before the French Competition Authority in November 2019 based on Article 102 of the TFEU[51] and Article L.420-2 of the French Commercial Code for abuse of dominant position and requested interim measures ordering Google to enter into good faith negotiations with them[52].

The French Competition Authority held that the display of the protected content allows Google to monetize the internet traffic by intermediating display advertisements on individual web pages when users visit only the search results, but also when they access a publisher's web page and are shown advertisements intermediated also by Google.

Press publishers were forced to allow Google to use their publications without any remuneration because of the irreplaceable nature of Google services (essential facility), of fear of loosing traffic to their web pages and of being downgraded in search-result listings. Google's position on the market allowed it to refuse paying any remuneration to all publishers irrespective if the used content was or not protected by copyright and to refuse any negotiations, that behaviour amounting to an abuse of a dominant position.

The French Competition Authority ordered Google to negotiate in good faith with press publishers based on transparent, objective and non-discriminatory criteria, within 3 months from their requests and to periodically report to the Authority on the developments of the negotiations. Google was also obliged to ensure that the indexing, classification and presentation of press publications used on its services is not affected by the negotiations.

Google appealed the decision of the Competition Authority. The Paris Court of Appeal rejected the appeal and upheld all the ordered measures, except for the one requiring Google to take the necessary measures to ensure that the indexing, classification and presentation of protected content are not affected by the negotiations, because its broad wording was able to jeopardise innovation for the performance of the search engine.

On 1 October 2020, only a few days before the ruling of the Court of Appeal was handed down, Google announced a $1 billion investment in partnerships with news publishers, to be paid globally within the framework of a 3-year programme called Google News Showcase. Through this global partnership, Google would seek to obtain a licence for all of the publishers' content, one for which the press publishers' right constituted an ancillary and accessory component with no specific financial value.

On 12 July 2021, the French Competition Authority found that Google did not comply with its previous decision, but unilaterally redefined the context of the negotiations with press publishers by creating the Showcase service, which is likely to further enhance its dominant position in the market. Google was imposed a penalty of 500 million Euros. In addition, Google was obliged to make press publishers a remuneration offer in line with provisions of Article L.218-4 of the French Code of Intellectual Property to any publisher who requests the reopening of negotiations. It was also obliged

[51] Treaty on the Functioning of the European Union, OJ *C 326, 26.10.2012, pp. 47–390.*

[52] Z. Loutfi, op. cit. *supra*; see also A. Lazarova, Re-use the news: between the EU press publishers' right's addressees and the informatory exceptions' beneficiaries, *Journal of Intellectual Property Law & Practice*, Volume 16, Issue 3, March 2021, Pages 236–246, https://doi.org/10.1093/jiplp/jpab049 (accessed 13 May 2022).

to communicate to press publishers all relevant information pertaining to the revenue generated by the use of their publications on Google's services. A periodic daily penalty payment of 300.000 Euros would be imposed upon expiry of the second month period from the request for reopening the negotiations.

On 3 March 2021, Google and *l'Alliance de la Presse d'Information* Générale reached an agreement in response to the measures *ordered by the French Competition Authority*[53]*. The agreement* set out the principles according to which Google will negotiate individual licensing agreements for the use of press publications by Google and the terms of their remuneration with Alliance members, based on transparent and non-discriminatory criteria. As a result of the agreement, the 300 press titles of the Alliance began to receive remunerations under the new neighboring rights.

Although, under Article 15 of the Directive, social media platforms are not obliged to conclude licences with press publishers, Facebook announced, on 21 October 2021, that it also reached an agreement with *l'Alliance de la presse de l'information*[54]*, in order to allow users in France to share news content.*

In January 2022, Facebook lauched a a new service in France, Facebook News, dedicated to sharing press publications.

2. The implementation of press publishers' related rights in Germany

The Law transposing the DSMD entered into force on the 1st of August 2021, amending the Act on Copyright and Related Rights[55].

With regard to the concept "other subject matter" protected under the press publishers' related rights, the law clearly states that it is any other subject matter "protected under this Act" (under the copyright act) [Section 87f (1)]. This provision excludes from protection subject matter which does not qualify as a "work" in the sense of an "intellectual creation" (by a human intelligence) and ensures the internal coherence of the copyright system.

Press publishers due to authors and holders of rights in other subject matter included in a press publication a minimum share of one third of the revenues received from internet service providers [Section 87k (1)]. The Law does not contain details on the exercise of the right to a share of revenues, it only specifies that the claim to this share of revenues may "only" be asserted by a collecting society [Section 87k (2)].

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[53] Z. Loutfi, op. cit. *supra*, citing the official Google blog in France, available at https://france.googleblog.com/2022/03/lalliance-de-la-presse-dinformation.html (accessed 13 May 2022).

[54] Z. Loutfi, op. cit. *supra*, citing J. Doub, 'Facebook France et l'Alliance de la presse de l'information s'associent pour renforcer l'expérience de l'actualité pour les utilisateurs et les éditeurs en France', available at https://about.fb.com/fr/news/2021/10/facebook-france-et-lalliance-de-la-presse-de-linformation-sassocient-pour-renforcer-lexperience-de-lactualite-pour-les-utilisateurs-et-les-editeurs-en-france/ (accessed 13 May 2022).

[55] Urheberrechtsgesetz – UrhG, Copyright Act of 9 September 1965 (Federal Law Gazette I, p. 1273), as last amended by Article 25 of the Act of 23 June 2021 (Federal Law Gazette I, p. 1858), accessible at http://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html#p0761 (accessed 14 May 2022).

3. The implementation of press publishers' related rights in Italy

The CDSMD was transposed through the Legislative Decree no. 177/2021[56], based on a delegation law from the Parliament, as an *amendment of the Copyright Law no. 633/1941*[57].

The legal term "internet service providers" expressly includes media monitoring and press review undertakings [Article 43 *bis* (1)].

A "very short extract from a press publication" is defined as "any extract of a press publication which does not exempt readers from the need to consult the journalistic article in its entirety" [Article 43 *bis* (7)]. The definition was criticized by the Italian Competition Authority which considered it subjective, too general, of no practical use and not contributing to ensure the adequate certainty of protection[58].

The choice of a qualitative definition and the avoidance of quantitative criteria, which could be verified through algorithms, was made to avoid rigidity in the application of the law (also by automated means) and the risk to deny protection in case an extract does not reach exactly the quantitative benchmark, regardless of the fact that it long enough to determine users not to access the press poublishers' website[59].

Any use of press publications by an internet service provider is subject to a "fair compensation" [Article 43 *bis* (8)]. The legal terminology suggests that the related rights are not of exclusive nature, but rights to an equitable remuneration. This interpretation is coherent with the provisions of Article 43 *bis* (9), which do not allow for the limitation of the visibility in search results of a press publication during the negotiation of the compensation and by the provisions of Article 43 bis (11), which runs against the principle of prior consent of press publishers[60].

The Italian Law introduces criteria to be taken into account for the calculation of the "fair compensation", such as: the number of online accesses of the article, the years of activity and the relevance on the market of the press publisher, the number of the journalists employed, as well as the costs incurred on both sides for investments in technology and infrastructure, the economic benefits deriving, to both parties, from the publication of the article as to visibility and advertising revenues, which have to be taken into account at negociations of the fair compensation. The criteria were adopted by the Italian Authority for Guarantees in the Communications[61].

If parties do not determine a fair compensation within thirty days from the start of the negotiations, each of them may request the Authority for Guarantees in the Communications to establish the level of the compensation, making explicit in the request an economic proposal. Within sixty days from the request, the Authority indicates which of the economic proposals is in conformity

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[56] Accesible at www.normattiva.it (accessed 13 May 2022).

[57] C. Sganga, M. Contardi, The new Italian press publishers' right: creative, fairness-oriented… and invalid?, *Journal of Intellectual Property Law & Practice*, 2022; jpac028, https://doi.org/10.1093/jiplp/jpac028 (accessed 6 May 2022); U. Furgal, G. Priora, Empowered to negotiate or obliged to contract? Lessons from the Italian implementation of the press publishers' right, available at: http://copyrightblog.kluweriplaw.com/2022/04/14/empowered-to-negotiate-or-obliged-to-contract-lessons-from-the-italian-implementation-of-the-press-publishers-right/ (accessed 15 May 2022).

[58] Autorita' Garante Della Concorrenza E Del Mercato, 2021, p. 29, available at https://www.agcm.it/dotcmsdoc/bollettini/2021/38-21.pdf (accessed 13 May 2022); M. Kowala, The Polish transposition of the press publishers' right: waiting for the miracle?, *Journal of Intellectual Property Law & Practice*, 2022; jpac037, https://doi.org/10.1093/jiplp/jpac037 (accessed 13 May 2022).

[59] C. Sganga, M. Contardi, op. cit. *supra*.

[60] C. Sganga, M. Contardi, op. cit. *supra*.

[61] Autorita' per le Garanzie nelle Comunicazioni.

with the legal criteria or, if it deems that none of the proposals is compliant, establishes *ex officio* the amount of the fair compensation.

If the Authority has determined the fair compensation, but the parties do not conclude an agreement, each party may introduce in front of the competent tribunal claims related to the abuse of economic dependence[62] [Article 43 *bis* (11)], to seek as remedy the imposition of a duty to contract, similar to a compulsory licence issued against both internet service providers and press publishers[63]. The field of abuse of economic dependence is not harmonized within the EU and it has to be distinguished from the filed of competition law sanctioning the abuse of dominant position by refusal to licence[64].

Internet service providers are under the obligation to provide all data necessary to calculate the fair compensation, at the request of the Authority for Guarantees in the Communications or of any interested party, including through collective management organizations or independent management entities. A breach of the duty to provide the data within thirty days from the request may result in an administrative sanction applied by the Authority, up to one per cent of the provider's yearly gross profit [Article 43 *bis* (12)].

Article 43 *bis* (8) - (12) were criticized by the Italian Competition Authority, which considered that the detailed intervention of public regulators is able to restrict competion on the market, to distort the licensing mechanisms provided by the Directive 2014/26/UE and to infringe the contractual freedom to negociate[65].

The Law establishes that authors of works included in press publications are entitled to receive two to five per cent of the revenues received by press publishers from internet service providers [Article 43 *bis* (13)].

4. The implementation of press publishers' related rights in Spain

The DSM Directive was transposed by way of the Real Decreto-Ley no. 24 of 2 November 2021[66].

The new Article 129 bis of the Spanish Intellectual Property Act[67] generally follows the language of Art. 15 of the DSM Directive.

Regarding the exception for the use of "very short extracts" of a press publication, the Law refers to extracts that are either very short or of little significance, both in quantitative and qualitative terms. It adds the condition that the use does not harm the investments made by press publishers and

[62] C. Sganga, M. Contardi, op. cit. *supra*.
[63] C. Sganga, M. Contardi, op. cit. *supra*, citing V. Meli, Diritto antitrust e libertà contrattuale: l'obbligo di contrarre e il problema dell'eterodeterminazione del prezzo in G.O.-A. Zoppini (ed) *Diritto antitrust e libertà contrattuale* (Laterza, Roma-Bari 2008), 1000; Michele Bertani, *Proprietà intellettuale, antitrust e rifiuto di licenze* (Giuffrè, Milano 2004) 52 ff.
[64] C. Sganga, M. Contardi, op. cit. *supra*, citing A. Renda et al., The Impact of National Rules on Unilateral Conduct that Diverge from Article 102 TFEU, Study for the European Commission, DG COMP (2012).
[65]Autorita' Garante Della Concorrenza E Del Mercato, 2021, p. 28, available at https://www.agcm.it/dotcmsdoc/bollettini/2021/38-21.pdf (accessed 13 May 2022).
[66] Royal Decree-law 24/2021. Available at https://www.boe.es/eli/es/rdl/2021/11/02/24/con.
[67] Available at https://www.boe.es/eli/es/rdlg/1996/04/12/1/con.

news agencies for publishing those contents, and does not affect the effectivity of their exclusive rights granted by that provision[68].

The Law establishes that the negotiations of licences between press publishers and internet service providers must be carried out under the principles of good faith, due diligence, transparency, and respect of the rules of a free competition.

The agreement must comply with the following legal requirements: the editorial independence of press publishers and news agencies must be respected; the authorized service provider should provide and update detailed and sufficient information about the main parameters determining content's ranking and their relative importance according to Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services; and the agreement may not include other contracts or obligations not related to the exploitation of press publications.

The law does not establish any sanctions or solutions in case the parties reach an agreement that does not respect these legal requirements.

Any disputes between the parties are of the competence of the First Section of the Intellectual Property Commission, an administrative body whose decisions may be appealed before the courts.

Press publishers may grant authorizations for the exercise of their rights through collective management mechanisms, but are not obliged to do so. Authorizations granted by means of collective management organizations must also fulfil the above mentioned legal requirements.

Besides implementing the press publishers' exclusive right for online uses by information society service providers in Aricle 129 bis, the Spanish law maintained the provisions of Article 32 (2) that already established the exception regarding uses of press publications by search engines (which are also information society service providers), by making available fragments of press publications in the search results[69]. According to Article 32 (2) such use does not require a prior authorization, or the payment of an equitable compensation, if the making available to the public is carried out without a commercial purpose on its own, is limited to what is strictly needed to offer search results in response to search queries and includes a link to the origin web page[70].

5. The implementation of press publishers' related rights in Poland

The Polish law does not define the concept "very short extract" from a press publication.

Authors of press publications have the right to a fifty percent of the revenues obtained by press publishers from the information society service providers[71].

The law does not provide any details on the criteria and methods of calculating the share of remuneration due to press publishers by the information society service providers, nor on the solutions in case parties do not conclude an agreement.

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[68] The Study relies on the article published by M. Peguera, Spanish transposition of Arts. 15 and 17 of the DSM Directive: overview of selected issues, *Journal of Intellectual Property Law & Practice*, Volume 17, Issue 5, May 2022, Pages 450–456, https://doi.org/10.1093/jiplp/jpac034

[69] Regarding the qualification of Google Discover as a news aggregator within the meaning of article 32 (2) of the Spanish Copyright Act, see V.J. Serrania, CEDRO vs. GOOGLE DISCOVER: Is GOOGLE DISCOVER a news aggregator?, available at http://copyrightblog.kluweriplaw.com/2022/05/05/cedro-vs-google-discover-is-google-discover-a-news-aggregator/ (accessed 15 May 2022)

[70] M. Peguera, op. cit. supra.

[71] M. Kowala, The Polish transposition of the press publishers' right: waiting for the miracle?, op. cit. supra.

The obligation to exercise the related rights through a collective management societies is not imposed by the law.

IV Furter steps for improving the legal framework applicable to press and media publishers

1. The proposal for a Regulation of Digital Services (The Digital Services Act). The European Commission addressed the problems created by the control of the digitalisation of economy and society by a few large platforms. Such platforms act as gatekeepers in digital markets and have the power to act as private rule-makers and to impose unfair conditions for businesses and less choice for consumers. Online platforms incur the risks of misuse of online services by manipulative algorithmic systems that spread disinformation or serve other harmful purposes. These new challenges and the way platforms address them have a significant impact on fundamental rights online.

Two legislative initiatives were proposed by the European Commission to upgrade rules governing digital services in the EU: the Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Services (Digital Services Act) and amending Directive 2000/31/EC[72] (hereafter, DSA) and the Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markeys in the digital sector (Digital Markets Act)[73] (hereafter, DMA). Both legal proposals are Regulations, directly applicable in national jurisdcitions, avoiding the risks of disparities due to national implementations of Directives. A political agreement was reached on the Digital Markets Act on 25 March 2022 and on the Digital Services Act on 23 April 2022.

The rules specified in the DSA should apply only to intermediary service providers, as defined in Art. 2 (f) of the DSA. The Regulation shall not apply to any information society service provider that is not an intermediary service, irrespective of whether the service is provided through the use of an intermediary service [Art. 1 (4) DSA]. Such intermediary services are social networks, defined as providers of hosting services that store information provided by the recipients of the service at their request and disseminate that information to the public, again at their request. DSA provides for special, additional obligations for very large online platforms to manage systemic risks related to the dissemination of illegal content, negative effects on users' fundamental rights, intentional manipulation of the service. Such very large online platforms (such as Google, Facekook, Instagram etc.) reach a significant percent of the EU citizens, currently set by the DSA at 45 million and more active recipients per month. Providers which are not established in the EU, but do provide services on the internal market are covered by the legal provisions.

The DSA stipulates that its rules do not affect the rules of Union law on copyright and related rights [Art. 1 (5) (c) DSA], which establish specific rules and procedures. The relationship would be one characteristic for a *lex specialis, lex generalis* rapport.

[72]COM/2020/825 final, available at https://eur-lex.europa.eu/legal-content/en/TXT/?qid=1608117147218&uri=COM%3A2020%3A825%3AFIN.
[73]COM/2020/842 final, at https://eur-lex.europa.eu/legal-content/en/TXT/?uri=COM%3A2020%3A842%3AFIN.

However, in practice, this simple principle would not be easy to apply[74], because the exercise and the enforcement of copyright and related rights on the internet does require the application of the DSA. For example, DSA does qualify the non-authorised use of copyright protected material on the internet as "illegal content", to which the DSA applies. Copyright enforcement requires often content removals from online platforms and search engines results lists, provisionary measures taken against non-infringing intermediary service providers (such as temporary removals of allegedly infringing content) and actions for infringement against liable third parties and/or liable intermediary service providers, the relevant applicable provisions being regulated by the DSA.

In spite of the intricate relationship between the EU copyright legislation, national copyright legislations and the DSA Regulation, the latter does not properly address crucial issues that may cause difficulties for the online enforcement of copyright and related rights[75].

In relation to the press publishers' related rights, the DSM specifies that on online newspaper may not be qualified as a hosting service based on its comments section, because the service offered for comments is ancillary to the main service represented by the publication of news under the editorial responsibility of the publisher. However, according to the DSA, where some of the services provided by a provider are covered by the DSA, whilst others are not, or where the services provided by a provider are covered by different sections of the DSA, the relevant provisions should apply only in respect of those services that fall within the scope of the DSA.

With regard to internet society service providers which reuse press publications as an important part of their business models and a source of revenue, thus falling under the scope of the DSMD, relevant provisions of the DSA are related to clear due-diligence obligations, including notice-and-action procedures for illegal content and the possibility to challenge the platforms' content moderation decisions, the duty to protect users' fundamental rights, the obligation to receive, store and partially verify and publish information on traders using their services.

Of particular significance are proposals which set for intermediary service providers a higher standard of transparency and accountability on how they moderate content, on advertising and on algorithmic processes they use and also obligations related to the use of manipulative techniques.

With regard to the liability exemption for internet society service providers, the DSA deletes Articles 12-15 in the Directive 2000/31/EC[76] and reproduces them in the Regulation, maintaining the liability exemptions of such providers, as interpreted by the ECJ.

The exemptions from liability should not apply where the provider of intermediary services plays an active role, for example, in respect of liability relating to information provided not by the recipient of the service but by the provider of intermediary service itself, including where the information has been developed under the editorial responsibility of that provider.

With regard to the strenghtening of users' fundamental rights in the digital environment, in particular the freedom of expression and information and the freedom to conduct a business, the

[74] J.P. Quintais, S.F. Schwemer, The Interplay between the Digital Services Act and Sector Regulation: How Special is Copyright? (January 28, 2022), forthcoming in European Journal of Risk Regulation 2022, Available at SSRN: https://ssrn.com/abstract=3841606 (accessed 15 May 2022).

[75] A. Peukert, M. Husovec, M. Kretschmer, P. Mezei, J.P. Quintais, Comment on Copyright and the Digital Services Act Proposal (17.01.2022), perpared on behalf of the European Copyright Society, https://europeancopyrightsociety.org/how-the-ecs-works/ecs-opinions/ (accessed 15 May 2022).

[76] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), *OJ L 178, 17.7.2000, p. 1–16.*

proposed DSA aims to reduce risks of erroneous or unjustified blocking speech, to stimulate the freedom to receive information and hold opinions, as well as reinforce users' redress possibilities[77].

The proposal will only require removal of illegal content and will impose mandatory safeguards when users' information is removed, including the provision of explanatory information to the user, complaint mechanisms supported by the service providers as well as external out-of-court dispute resolution mechanism.

Member States have the responsibility to supervise and enforce the DSA Regulation in their national jurisdictions and to cooperate to this end. National judicial or administrative authorities may order providers of intermediary services to remove illegal content, to disable the access to it, to

to prevent that illegal content reappears, in compliance with the prohibition of general monitoring.

EU authorities are competent to supervise and enforce the Regulation at Union level.

2. New business models for press publishers in the digital economy. The legal framework applicable to the EU digital economy opens business opportunities, facilitates cross-border provision of services and thus allows also press publishers to innovate their business models. New business models for online services of press publishers further adapted to social networks and content-sharing platforms would benefit from online advertising techniques, also from network effects characterising the platform economy, that enable publishers to reach a fast growing number of users in a short time.

A major challenge for press publishers' business on online platforms is the reconciliation of the role, social and legal responsabilities of the press in a democratic society[78], which impose the obligation to offer high quality journalism, reliable and accurate information, while complying with the ethical standars of the profession with the technical means employed by economically successful online platforms (in terms of number of users' and social impact and of revenues obtained from online advertising) and with the online users' demands and behaviour, in particular their online reading habits[79].

The problems are related to the huge differences between the reasons that are at the foundation of journalists and press publishers public missions in a democratic society and the logic behind the function of online platforms[80].

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[77] For a detailed, critical analysis, see A. Peukert, Five Reasons to be Skeptical About the DSA, in H. Richter, M. Straub, E. Tuchtfeld (Editors), To Break Up or Regulate Big Tech? Avenues to Constrain Private Power in the DSA/DMA Package (October 11, 2021), Max Planck Institute for Innovation & Competition Research Paper No. 21-25, available at SSRN: https://ssrn.com/abstract=3932809 (accessed 15 May 2022).

[78] The European Media Freedom Act is planned for adoption in the third quarter of 2022, as stated in the 2022 Commission Work Programme; see press release: European Media Freedom Act: Commission launches public consultation the https://ec.europa.eu/commission/presscorner/detail/en/ip_22_85 (accessed 15 May 2022).

[79] M. Kretschmer, EU copyright reform - the case for a related right for press publishers, in T. Höppner, M. Kretschmer, R. Xalabarder, CREATe Public Lectures on the Proposed EU Right for Press Publishers (October 01, 2017), European Intellectual Property Review 39(10): 607-622, available at SSRN: https://ssrn.com/abstract=3050575; R. Xalabarder, Press Publisher Rights in the New Copyright in the Digital Single Market Draft Directive, CREATe Working Paper 2016/15 (December 2016), available at DOI:10.5281/zenodo.183788 (accessed 15 May 2022).

[80] Which leads to the crucial question if the problems of the press, in particular, of online press publishers are able to be solved by means of copyright related rights; see R. Xalabarder, op. cit. supra; M. Rucz, K. Irion, M.

Contrary to the logic followed by online platforms in order to derive huge profits[81], what drives forward and motivates journalists and press publishers to make available to the public high quality journalistic works, such as risky investigations regarding high level cases of corruption and white collar crimes, or news reports during wars or from places affected by natural calamities are not (and should not ever become) the growing numbers of clicks on their web pages, that can be monetized because of advertising displayed with each click[82].

Shocking titles able to attract the attention, while distorting the very perception of the reported facts and news should also be avoided by journalists and press publishers as methods to attract more visitors on their web page.

Also, online platfoms use tracking and profiling techniques that allow them to satisfy the users' needs by keep providing (feeding) him/her the same types of information that he/she accessed, thus creating for an user an "information bubble", that does limit the perception and understanding of the reality, while disallowing the access to information and opinions that differ or contradict a particular mindset.

The question is if journalists and press publishers should be allowed to resort to such techniques[83], in view of the huge risks of manipulation of the public opinion and of creation of radical divisions in a society.

An even greater challenge is that related to the users' online behaviour, their need and demand for high quality journalism[84]. There is an incompatibility between high quality journalism, that implies often long articles, with many factual details, or a deep analysis of facts and so require a high level of attention, more dedicated time from the reader and the very short, light and superficial, easy to grasp, fun, abased to the level of entertainment of the information that economically successful online platforms offer.

In quest for higher advertising revenues in the digital economy, for the aim to support high quality journalism, it is essential that press publishers do not give up their fundamental role to educate their readers, by cultivating their ability to think critically, to check and discern between real and fake news, to analyse and understand information, to recognize and resist propaganda and manipulation.

This role of the press and media is shared with education institutions, which should ask themselves the crucial question on the human characteristics, behaviours and abilities that do deserve to be cultivated and encouraged in order to build a well balanced and well functioning human society.

Senftleben, Contribution to the public consultation on the European Media Freedom Act, available at https://www.ivir.nl/position-paper-european-media-freedom-act-consultation-2/ (accessed 15 May 2022).

[81] M. Kretschmer op. cit. supra.

[82] A. Peukert, An EU Related Right for Press Publishers Concerning Digital Uses. A Legal Analysis (December 20, 2016), research paper of the Faculty of Law, Goethe University Frankfurt am Main no. 22/2016, available at SSRN: https://ssrn.com/abstract=2888040 (accessed 15 May 2022).

[83] M. Senftleben, M. Kerk, M. Buiten, K. Heine, New Rights or New Business Models? An Inquiry into the Future of Publishing in the Digital Era, IIC (2017) 48:538–561.

[84] A. Peukert, op. cit. supra.