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# **The New Related Right for Publishers according to the EU DSM Directive**

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## **ABSTRACT**

The present paper strives to illuminate how the new related right for publishers, as introduced by the Digital Single Market Directive, will affect the digital publishing world. Is it going to enhance the press market and protect its beneficiaries or will it harm journalism and decrease publishers' revenues?

This thesis is mainly based on researches and studies conducted by research centers, universities and relevant to Copyright stakeholders. Since the EU directive has not yet been applied, our resources are inter alia position papers, announcements and letters prepared from associations representing journalists, publishers etc. to express their opinion and arguments on it. We will also use documents drafted by the European Institutions during the preparatory stage of the directive.

On the first part, we will examine the newly introduced by the DSM Directive "related right for publishers" (Article 15) starting from indicating the inefficiency of the current situation and publishers' rights to protect their own interests. Subsequently, we will focus on the examination of the special characteristics of the right by analyzing each paragraph of the provision; we will explain how a similar right affected publishers in several member states and we will use a case analysis on how the first country implementing the EU Directive transposed it into national law. At the end, we will contrast the opinions expressed to battle the introduction of this right and the answers given to those arguments, which support the latter and after this comparison we will conclude with an evaluation of the nature and usefulness of the right.

Keywords: publishers, related right, DSM Directive, Article 15

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## **PREFACE**

Before you lies the dissertation “The New Related Right for Publishers according to the EU Digital Single Market Directive” which has been written in order for the MA in Art Law and Arts Management at the International Hellenic University to be fulfilled.

The idea of this thesis’ topic was a result of the continuous discussions we had with my supervisor, Ms. Irini Stamatoudi, who motivated me to address with this newly introduced by the Digital Single Market Directive right, despite any concerns I had at first due to the fact that the matter is still very much in its infancy. I truly thank her since without her guidance and support I would not have been able to present you this study. It was a true challenge for me to deal with a subject which became such a controversial one for its stakeholders and I was intrigued to examine the different aspects, its advantages and disadvantages and to further end up to a conclusion. I would also like to thank my family and friends for their encouragement and advice and the people at the International Federation of Reproduction Rights Organisation (IFRRO), especially Caroline Morgan (CEO and Secretary General), Catherine Starkie (Head of Legal Affairs) and Pierre Lesburguères (Manager, Policy and Regional Development) who I was lucky enough to work with during the conduct of this dissertation and of whose the professional perspective and debates I also benefitted from.

I hope you enjoy your reading.

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## **LIST OF ABBREVIATIONS**

Ar.=Article

B2B=Business to business

CJEU=Court of Justice of European Union

DSM=Digital Single Market

EC=European Commission

EU=European Union

IFRRO=International Federation of Reproduction Rights Organizations

InfoSoc=Information and Society

MEP=Member of the European Parliament

Par.=Paragraph

## INTRODUCTION

On March 26<sup>th</sup> 2019, the European Parliament voted for the adoption of a new EU Directive (Digital Single Market Directive) which regulates issues of copyright and related rights and amends Directives 96/9/EC and 2001/29/EC. The directive was subsequently approved by the Council of the European Union and was officially published in the Official Journal of the EU as “Directive (EU) 2019/790”<sup>1</sup>. The idea of moving to the adoption of a new legislature regulating all those issues had been launched quite earlier. The first draft of the Directive had been published by the European Commission on 14 September 2016 and after this introduction a few revisions took place when we reached the final version in May 2018, which was passed to the European Parliament. The latter reached its final version in June 2018 with the negotiations starting from that point and finishing eight months later, in February 2019. The Member States are obliged to transpose the aforementioned directive by June 2021<sup>2</sup>.

The DSM (2019/70) Directive focused, inter alia, on some important elements regarding Digital Preservation, Use of Copyright works for teaching reasons etc. while it also introduced a couple of articles whose content has become so far extremely controversial such as Article 17 (Ar. 13 on the Proposal) –Increased Liabilities of Content Sharing Platforms and Article 13 (Ar. 11 on the Proposal) – New Related Right for Publishers.

The Right introduced for Publishers, belonging to the “Related Rights” family, referred to as “ancillary right” by others, with the meaning that it is derived from or it is subordinate to copyright<sup>3</sup>, was provided for the first time by the new Directive. Until then,

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<sup>1</sup> “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”, <https://eur-lex.europa.eu/eli/dir/2019/790/oj> .

<sup>2</sup> European Commission, “*Copyright in the Digital Single Market*”, (Brochure), September 18, 2019), <https://ec.europa.eu/digital-single-market/en/news/copyright-digital-single-market-brochure> (Accessed on 21 September 2019).

<sup>3</sup> Mireille Van Eechoud, “*A Publisher’s Intellectual Property Right. Implications for Freedom of Expression, Authors and Open Content Policies*” (OpenForum Europe, January 2017), p. 9,

the publishers hadn't had an immediate right to claim any compensation alleging copyright infringement of their work caused damages by this violation. However, the new right introduced has been subject of intense disputes between academics and collective management organizations supporting publishers, with the first ones protesting against the implications that they estimate it will bring in multiple levels while the second ones are talking about a big step made by the E.U since press publishers will ultimately be vindicated.

It is worth pointing out that in the final version of the text many controversial elements in general and especially from the Article 15 (Ar. 11 in the Proposal) were amended when it reached the final form as we will see in the following chapters. An example given is the statute of limitation, which was initially set up for 20 years (Ar. 11 par. 4) while in the final version of the Directive, which was later adopted, the statute of limitation had been changed to 2 years (Ar. 15 par. 4), as it will be more thoroughly analyzed below .

The necessity for the adoption of a New Direction regulating Copyright was undoubted. Thus, the reality today required for the adoption of measures that will ensure press publishers' investments. Today, the biggest challenge for the press publishers are the collecting content websites – the so called aggregators- which collect content (news) from different online sources and display it in the form of snippets, brief extracts which sum up the news' content in a title and a few headlines. Aggregators do not produce their own original content, but they rather “curate” material coming from publishers through the use of a combination of human editorial judgment and computer algorithms<sup>4</sup>. At the same time a growing tendency of decline in print circulation is noted. More specifically, the way that the public reads and “consumes” news nowadays has completely changed since they prefer to only stick to the headlines of the news, rather than reading the full

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[http://www.openforumeurope.org/wp-content/uploads/2017/01/OFE-Academic-Paper-Implications-of-publishers-right\\_FINAL.pdf](http://www.openforumeurope.org/wp-content/uploads/2017/01/OFE-Academic-Paper-Implications-of-publishers-right_FINAL.pdf) (Accessed on 24 September 2019).

<sup>4</sup> Susan Athey and Mark Mobius, “*The Impact of News Aggregators on Internet News Consumption: The Case of Localization*” (Graduate School of Stanford Business, January 11, 2017), p. 2, <https://www.gsb.stanford.edu/faculty-research/working-papers/impact-news-aggregators-internet-news-consumption-case-localization> (Accessed on 2 December 2019).



article, in order to be sure that they won't miss anything important. Those articles being displayed do actually come from publishers who have never been asked to give their permission on this reproduction. Publishers have been exposed to this new digital exploitation of their investment and this jeopardy of their interest motivated the EU lawmaker to finally take action.



## CHAPTER 1: THE “STATUS QUO” OF THE PUBLISHERS RIGHTS TILL TODAY

Before indulging in the context and in the characteristics of the new Related Right introduced for press publishers by the Directive 2019/790, it is important to have a clear idea on the status that had prevailed (and that will still be prevailing until the DSM Directive be incorporated in each of the Member States’ legislation) for them. In other words, we will examine how the press publishers have been treated so far, how they can act and which measures/remedies they can take in order to protect their investment for the moment being. Since the publishers do not possess their own right in the majority of the European Countries<sup>5</sup>, they are forced to explore alternative solutions in order to assert their revenues.

### 1.1 *SUI GENERIS RIGHT*

One of the ways that a press publisher can use to protect their publication is the *Sui Generis right*, as it is provided in Ar. 7 par. 1 of the Directive 96/9/EC<sup>6</sup> for the protection of Databases. The so called “sui generis” right belongs to the ‘family’ of the related rights and it is granted to the maker of a database, which is defined as “*a collection of independent works, data or other materials arranged in a systematic or methodical way and are individually accessible by electronic or other means*”<sup>7</sup>, in order for them to protect *the content* of the database (neither its selection nor its structure). More specifically, the database maker can prevent extraction and/or re-utilization of the whole or of a substantial part of their database content, while the notion of substantiality can be interpreted both as qualitatively and/or quantitatively, of the contents of that database. A newspaper or a magazine, which both are characteristic samples of press publication,

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<sup>5</sup> The rule has always its exception: Germany, Spain and recently France have already introduced a related right for press publishers (the last country moved into this introduction *after* the adoption of the new Directive, as we will explain below in more detail).

<sup>6</sup>Ar. 7 par. 1 “Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases,” 1996 § (L 77/20), 96, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31996L0009&from=EN>.

<sup>7</sup>Ar. 1 par. 2 Ibid.

contain various articles and news and can be considered as databases. At first glance, anyone would conclude that the sui generis right therefore protects the press publishers in the same way that protects the database maker. However, this is hardly true since today's online aggregators content themselves on displaying only snippets, which can have catastrophic consequences for the publications of press publishers online, nonetheless, they cannot be considered to be a substantial extraction or reutilization of the original source's content<sup>8</sup>.

In addition, under the light of the CJEU case law, the sui generis right "does not cover the resources used for the creation of materials which make up the contents of a database"<sup>9</sup>. It is widely known that press publishers invest a lot of money, time and energy in finding the authors they collaborate with and carrying out a better cross check of their sources and information, an investment which is not covered by the subject matter of protection of the aforementioned right<sup>10</sup>.

Therefore, it becomes quite clear that the press publishers lack, under the current status, i.e. before the new directive, sufficient protection for their investment, since the "sui generis" right cannot fully secure them and their investment from the new forms of online distribution.

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<sup>8</sup> European Parliament-Committee of Legal Affairs, *"The Proposed Directive on Copyright in the Digital Single Market (Articles 11, 14 and 16) Strengthening the Press Through Copyright"*, (Briefing Study), December 2017, p. 3,

[http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/596835/IPOL\\_BRI\(2017\)596835\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/596835/IPOL_BRI(2017)596835_EN.pdf) (Accessed on 24 September 2019).

<sup>9</sup> *Fixtures Marketing Ltd v Svenska Spel AB*, C-338/02 ECLI:EU:C:2004:696 [24](CJEU November 9, 2004).

<sup>10</sup> Thomas Hoppner, *"EU Copyright Reform: The Case for a Publisher's Right"*, Intellectual Property Quarterly 1/2018, p. 7,

<https://www.sweetandmaxwell.co.uk/Catalogue/ProductDetails.aspx?productid=6791&recordid=380> (Accessed on 25 September 2019).

## 1.2 AUTHOR'S COPYRIGHT

The author of an article or of any other written text, falling into the category of literary works published in the press, has the indisputable right, to the extent that their work is original, which according to the European copyright criterion means that is it's author's own intellectual creation<sup>11</sup>, to prevent any illegal use of their work, whether that illegal use consists in an infringement of their distribution right, reproduction right or their right of communication to the public (which includes among other the right of making available to the public), according to Articles 2,3 and 4 of the InfoSoc Directive<sup>12</sup>. Hence, the authors themselves are able to exercise their right to judicial protection and ask for the appropriate compensation from the infringers. However, if we elaborate more on this way of protection, we will realize that the authors can only protect their own work, which is the written text published on the press, a subject matter completely different from the publisher's investment, which needs to be protected. They do not have legal interest in claiming a possible remuneration from the infringers that have exploited not the authors' work itself but the structure, the design and all the other elements contributing to the appearance of that text. The exercise of authors' rights is not efficient for the publishers and sometimes it is not efficient even for the authors themselves<sup>13</sup>. When the latter ones have to deal with giant enterprises and mass exploitation, they are not capable of going through that procedure all alone and defend their interests on their own. In this particular case it seems that a publisher's independent right would help to secure not only their own position but also strengthen the author's right to protect their work.

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<sup>11</sup> Infopaq International A/S v Danske Dagblades Forening, C-5/08 ECLI:EU:C:2009:465 (CJEU July 16, 2009) [51]; the CJEU ruled that a reuse of an extract consisting of 11 continuous words taken from a work falls within the scope of the reproduction right if those words reproduced are the expression of the intellectual creation of their author. Eva-Maria Painer v Standard VerlagsGmbH, C-145/10 ECLI:EU:C:2011:798 (CJEU December 1, 2011); Football Dataco Ltd v Yahoo! UK Ltd, C-604/10 ECLI:EU:C:2012:115 (CJEU March 1, 2012).

<sup>12</sup> Ar. 2,3,4 "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," 2001 § (167AD),

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001L0029>.

<sup>13</sup> Hoppner, "EU Copyright Reform", p. 5.

### **1.3 EXCLUSIVE LICENSES**

In order for the publishers to have a minimum level of guarantee to work with, they usually ask the journalists, with whom they collaborate and whose work is going to be published, for a transfer of license and ideally for an exclusive one, since granting exclusive licenses to the publishers is the only way for the latter to have a right in asking compensation for their damages. Yet, the majority of freelancers do not usually grant exclusive licenses<sup>14</sup> since by distributing their work to more than one publisher, they will obviously have higher profit margins. This results in publishers not being able to protect their investment and they end up being absolutely dependent on the authors' transferred licenses or rights. But even if we assume that the journalists have transferred to the publishers the economic rights of their work or even some exclusive rights, the barriers would not yet be overcome. The latter has the burden of proof in demonstrating that they are the right holders of each separate article they ask fair compensation for, which still makes it difficult, sometimes even impossible, for them to claim the revenues they are entitled to. A very characteristic example of that case is offered by the Impact assessment and it concerns a German publisher who had to provide 22,000 contracts with journalists and prove a complete chain of rights in order to file a law suit<sup>15</sup>.

### **1.4 UNFAIR COMPETITION PRACTICES**

One last solution for the press publishers that could be explored in order for them to claim the fair license fees when their investment seems to be in danger, is to resort to a legal action on the basis of unfair competition practices, as it is referred to the report

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<sup>14</sup> European Parliament-Committee of Legal Affairs, *"The Proposed Directive on Copyright in the Digital Single Market (Articles 11, 14 and 16) Strengthening the Press Through Copyright"*, p. 3, [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/596835/IPOL\\_BRI\(2017\)596835\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/596835/IPOL_BRI(2017)596835_EN.pdf) (Accessed on 24 September 2019).

<sup>15</sup> European Commission, *"Impact Assessment on the Modernisation of EU Copyright Rules"* (Brussels, September 14, 2016), p. 166, <https://ec.europa.eu/digital-single-market/en/news/impact-assessment-modernisation-eu-copyright-rules> (Accessed on 24 September 2019).

conducted for CEIPI<sup>16</sup>. The publisher can follow the path of suing their competitors for following unfair competition practices, as set by Ar. 5 of the Directive 2005/29/EC<sup>17</sup>. Unfair competition practices appear in quite a few forms including “free riding”, a notion which can better be explained as taking advantage of someone else’s work without giving them any credits and it is usually met in the Trademark Law. In addition, the competition law provisions could apply more appropriately in the printed versions, where the publisher might have seen a competitor of theirs to publish the same novel using the same colors on the cover etc<sup>18</sup>. It is not therefore certain that the publisher can benefit from this legal basis when it comes to the digital publication infringements. Even if we assume that the publisher can marginally be availing himself of the unfair competition law provisions, in the particular case we are interested in the publisher shall at first prove both other party’s competitive purpose and secondly all those elements and circumstances required for the act to be characterized as unfair practice (e.g misleading for the public, causing confusion etc). It is therefore the plaintiff publisher who bears the burden of proof to demonstrate to the court all the aforementioned while at the same time they have to prove that they are rightholders of the infringed part. We ultimately return to the difficulties occurring in proving all the above, as it has already been mentioned and accordingly it is obvious that nor is this solution sufficient for the press publisher defend their interests.

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<sup>16</sup> Christopher Geiger, Oleksandr Bulayenko, and Giancarlo 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*” (Centre for International Intellectual Property Studies [CEIPI], May 5, 2016), p. 13, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2921334](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2921334) (Accessed on 24 September 2019).

<sup>17</sup> Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’), Available on <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32005L0029&from=EN>

<sup>18</sup> Constantinos Christodoulou, *Copyright Law* (Athens Greece: Nomiki Vivliothiki S.A, 2018) §8 no. 480 et seq.





## CHAPTER 2: ANALYSIS OF THE RELATED RIGHT FOR PRESS PUBLISHERS

In this chapter, we will indicate the reasons why such a related right was deemed necessary to be introduced and we will examine the provision made into law, paragraph by paragraph.

### 2.1 THE DECISION ON ITS INTRODUCTION

As already mentioned, the fast technological advance in general and the rising of digital services have put the interests of press publishers in risk with them seeing their publications being exploited out of control on the internet without having previously granted their permission. The ethical issue arisen, which consisted a fundamental pillar for the introduction of the right, was the sense of unfairness for the fact that technology giant enterprises and online news aggregator services make profit from the advertisements and the users' subscriptions while at the same time they avoid compensate publishers, whose publications make use of and profit from<sup>19</sup>. Due to that platforms' policy, i.e the reproduction of publication content without paying any remuneration to the rightholders, the publishers have been faced with difficulties in licensing their content and even though their publications are reproduced by hundreds of platforms and gain more and more readers, their fees haven't noted a significant increase. On the contrary, despite the decline of printed press, up to 90% of revenues in most newspapers still come from it<sup>20</sup>. The entire above are specifically explained in the European Commission Impact Assessment<sup>21</sup>.

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<sup>19</sup> Pamela Samuelson, "Legally Speaking: Questioning A New Intellectual Property Right For Press Publishers", Kluwer Copyright Blog, November 19, 2018, <http://copyrightblog.kluweriplaw.com/2018/11/19/legally-speaking-questioning-a-new-intellectual-property-right-for-press-publishers/> (Accessed on 23 September 2019).

<sup>20</sup> European Commission, "Online News Aggregation and Neighbouring Rights for News Publishers", Draft Study, December 20, 2017, p. 3, <https://www.asktheeu.org/en/request/4776/response/15356/attach/6/Doc1.pdf> (Accessed on 26 September 2019).

<sup>21</sup> European Commission, "Impact Assessment on the Modernisation of EU Copyright Rules", p. 156

The European Commission, before moving into the proposal for the Directive on the Copyright, launched an Open Public Consultation back in 2016 in order to gather stakeholders' views and decide whether it was necessary an introduction of a related right for press publishers or not. It therefore proceeded with the introduction of the right since it was -well- considered that the existing framework for the traditional press publishers is outdated and new rules had to be adopted in order to capture the evolution of digital uses.

In order to further analyze the provision concerned, we will primarily have an overview of the full article.

## **2.2 THE RELATED RIGHT FOR PRESS PUBLISHERS**

### *"ARTICLE 15*

#### *Protection of press publications concerning online uses*

*1. Member States shall provide publishers of press publications established in a Member State with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the online use of their press publications by information society service providers.*

*The rights provided for in the first subparagraph shall not apply to private or non-commercial uses of press publications by individual users. The protection granted under the first subparagraph shall not apply to acts of hyperlinking.*

*The rights provided for in the first subparagraph shall not apply in respect of the use of individual words or very short extracts of a press publication.*

*2. The rights provided for in paragraph 1 shall leave intact and shall in no way affect any rights provided for in Union law to authors and other right holders, in respect of the works and other subject matter incorporated in a press publication. The rights provided for in paragraph 1 shall not be invoked against those authors and other rightholders and, in particular, shall not deprive them of their right to exploit their works and other subject matter independently from the press publication in which they are incorporated. When a work or other subject matter is incorporated in a press publication on the basis of*

*a non-exclusive licence, the rights provided for in paragraph 1 shall not be invoked to prohibit the use by other authorised users. The rights provided for in paragraph 1 shall not be invoked to prohibit the use of works or other subject matter for which protection has expired.*

*3. Articles 5 to 8 of Directive 2001/29/EC, Directive 2012/28/EU and Directive (EU) 2017/1564 of the European Parliament of the Council (19) shall apply mutatis mutandis in respect of the rights provided for in paragraph 1 of this Article.*

*4. The rights provided for in paragraph 1 shall expire two years after the press publication is published. That term shall be calculated from 1 January of the year following the date on which that press publication is published. Paragraph 1 shall not apply to press publications first published before 6 June 2019.*

*5. Member States shall provide that authors of works incorporated in a press publication receive an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers.”*

### **2.2.1 BENEFICIARIES AND SCOPE OF APPLICATION**

First of all, it is of high importance to emphasize that the new right is reserved *only* for press publishers, rather than any publisher in general, and news agencies<sup>22</sup> whose registered office and center of effective management is within the European Union. This arrangement may also contribute to the enhancement of the European media in the sense that publishers established outside the EU will be interested in founding subsidiaries within the EU in order to benefit from this protection<sup>23</sup>. This neighboring right is born immediately for the press publishers instead of them needing to have it transferred from the authors. It is therefore crucial to address what is defined as “press publication” in

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<sup>22</sup> Sandra Chastanet, “Directive of 17 April 2019 on Copyright and Related Rights in the DSM; Article 15 Press Publishers Neighbouring Right”, Presentation at IFRRO Mid-Year meetings in Dublin (European working Group) on June 5, 2019.

<sup>23</sup> Giannis Paramithiotis, “The New Online Publishers’ Right. An Initial Presentation, Interpretation and Evaluation of the Directive’s 2019/790 Article 15”, Media and Communication Law Magazine, No. 2/2019 (May-June-July) (2019), p. 148 et seq.

order to delimit provision's scope. In the Ar. 2 par. 4, the Directive sets the press publication's definition as "a collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matter". The main characteristics of that collection shall be its periodical circulation, its informative purpose and its publication in any media.

From the aforementioned definition both scientific and academic journals are excluded. The right as it has been described above is rather specific and narrow since it is not expanded to all publications but only to those fulfilling the aforementioned requirements cumulatively<sup>24</sup>, those publications that are jeopardized by the rising tendency of people to turn into the digital media to receive the daily news by declining at the same time the printed press<sup>25</sup>.

The second big question is which exactly the subject matter of the new right is. The protection granted by it extends over the "fixation" of the work, which is publisher's main task, contrary to the author's copyright protection, the protected item of which is the "original work"<sup>26,27</sup>. The related right is granted to the publishers for the entrepreneurial efforts they have made for the fixation to take place and the editorial responsibility they are charged with, which means that if any part of the protected fixation of the work has been used unlawfully by an aggregator, the publisher retains the right to proceed with a legal action, regardless whether that part fulfills the criterion of originality or not.

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<sup>24</sup> Thomas Hoppner, Martin Kretschmer, and Raquel Xalabarder, "CREATe Public Lectures on the Proposed EU Right for Press Publishers", October 10, 2017, p. 13, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3050575](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3050575) (Accessed on 24 September 2019).

<sup>25</sup> Remy Chavannes, "A Neighbouring Right for Press Publishers – the Wrong Solution to a Serious Problem", Kluwer Copyright Blog, June 13, 2016, <http://copyrightblog.kluweriplaw.com/2016/06/13/neighbouring-right-press-publishers-wrong-solution-serious-problem> (Accessed on 25 September 2019).

<sup>26</sup> Hoppner, "EU Copyright Reform", p.10

<sup>27</sup> Nils Svensson and Others v Retriever Sverige AB, C-466/12 ECLI:EU:C:2014:76 [32] (CJEU February 13, 2014); the CJEU had been called to answer whether hyperlinks put in a website, linking to a work freely accessible, by someone rather than the rightholder, constitute an act of communication to the public.

As it is described in par. 1, the publishers are given the rights to prohibit the “reproduction” and/or the “making available to the public”, as those are described in the InfoSoc Directive (Ar. 2 and Ar. 3), of their publications only when it comes to their digital use. For instance, a press publisher will be capable of preventing a website using their publications to allow their users to download them, since the latter falls under the scope of the communication to the public (in terms of “making available to the public” as the needed conditions for this characterizations are met<sup>28</sup>), according to the very recent decision of the CJEU on Tom Kabinet Case<sup>29</sup>. For the moment being, both previous rights are already reserved to phonogram producers, film producers and broadcasting organizations among others<sup>30</sup>. It is therefore evident that the new publishers’ right is identical to the one provided for the latter or narrower, we would suggest, since it covers only the acts of reproduction and making available to the public instead of the one granted to producers, which in addition to the aforementioned, covers the acts of distribution and fixation.

The Directive presents a “Business-to-business” (B2B) right, meaning that the scope of its application is restricted to the reproduction or the making available to the public when that is taking place for a commercial use on the online platforms and no private users’ actions are covered. Thus, an individual user can freely exploit a part of the

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<sup>28</sup> C More Entertainment AB v Linus Sandberg, C-279/13 ECLI:EU:C:2015:199 (CJEU March 26, 2015).

<sup>29</sup> Nederlands Uitgeversverbond, Groep Algemene Uitgevers v Tom Kabinet Internet BV, C-263/18 ECLI:EU:C:2019:1111 (CJEU December 19, 2019); in the present case, the main question referred to the Court was whether the downloading of an e-book falls into the right of distribution. The CJEU ruled in favor of that there is not such a thing called “digital exhaustion” for e-books and therefore the procedure of downloading them cannot be considered as “distribution”, but it constitutes an action of communication to the public, as the publishers’ association supported. This ruling results in the providers/sellers of such products being fully liable for the re-sale of digital books/music/videogames etc, since due to the lack of the exhaustion of the right, their responsibility does not “evaporate” after the first sale of the product.

<sup>30</sup> Ar. 2-3, 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.

publication protected by the new related right when they do not aim to make profit of that use.

In the introduced article, it is not mentioned whether the press publishers will be able to waive their related right or not. Since the E.U lawmaker hasn't tackled the issue of waivability, it has been suggested that it is up to the member states to decide whether they are going to provide their national publishers with a waivable right or not<sup>31</sup>. Given the above, the E.U states may transpose the Directive 790/2019 differently into their national systems. On the other hand, it is also held the belief that the nature of the right introduced is not compulsory and the press publishers cannot be forced to exercise it, which results that member states cannot provide an unwaivable right to their publishers<sup>32</sup>. In our view there is no element in the text showing European legislator's intention to prohibit publishers from deciding not to exercise their right. Nevertheless, it would probably serve the Directive's goals more efficiently for the publishers across the Europe to not be able to waive their right, otherwise Google and other big platforms would in the end "persuade" them to quit their right. It is important for publishers to keep a coherent position and under no circumstances shall they renounce their right since this is the only way for them to battle the abusive power of the giant electronic platforms, which would not be able to opt out from all European countries due to the huge financial loss they would suffer from.

By adding the third subparagraph to the paragraph 1 of Article 15, regarding the exclusion of hyperlinking from the scope of the provision, in fact the European legislator endorses the CJEU jurisprudence on that hyperlinks do not constitute an action of communication to the public and when the latter access those hyperlinks, it is not considered "new"<sup>33</sup>. For this reason, the introduced right does not cover any of these

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<sup>31</sup> Eleonora Rosati, "DSM Directive Series #2: Is the Press Publishers' Right Waivable?", The IPKat (blog), April 1, 2019, <http://ipkitten.blogspot.com/2019/04/dsm-directive-series-2-is-press.html> (Accessed on 23 September 2019) .

<sup>32</sup> Thomas Hoppner, Martin Kretschmer, and Raquel Xalabarder, "CREATe Public Lectures on the Proposed EU Right for Press Publishers," p. 6,

<sup>33</sup> GS Media BV v Sanoma Media Netherlands and others, C-160/15 ECLI:EU:C:2016:644 (CJEU September 8, 2016), Svensson and Others, C-466/12, EU:C:2014:76 (CJEU, February 13, 2014); the

actions.

From the provision's scope are also excluded the very short extracts of publication or individual words, since those are not efficient to threaten the investment of press publishers<sup>34</sup>. Therefore, for the excluded acts there still are applied the rules in *acquis*<sup>35</sup>.

### **2.2.2 PRESS PUBLISHER'S RIGHT ON THE AUTHOR'S COPYRIGHT**

It is rather clear that the introduced right will be exercised by the press publishers without any prejudice to the author's and right holders' copyright. In other words, the new publishers' right is granted to them additionally to the already existing rights reserved for the latter, without being able to prevent either of them to exploit their works as they wish to. Under no circumstances is a press publisher going to be able to exercise their right in works that were provided to them on the basis of a non-exclusive license and which subsequently were included in another publication, after the author or the rightholder had given their permission nor will they be able to use their right on already copyright-expired works. As it has already been mentioned, the new related right aims also to provide an extra layer of protection to the already existing author's copyright and to increase the presses' financial revenues, in order for them to be able to claim the remuneration they are entitled to in a more effective way<sup>36</sup>.

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existence of hyperlinks on a website to works freely available on another website does not constitute a 'communication to the public'

<sup>34</sup> Recital 57 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.

<sup>35</sup> João Pedro Quintais, "*The New Copyright in the Digital Single Market Directive: A Critical Look*" European Intellectual Property Review, October 14, 2019, p. 15, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3424770](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3424770) (Accessed on 17 October 2019).

<sup>36</sup> "*EU Copyright reform: the myths and the truths*", March 2019, Published on "A Publisher's Right for Free Press" website, <https://www.publishersright.eu/post/eu-copyright-reform-the-myths-and-the-truths> (Accessed on 15 October 2019)

### **2.2.3 EXCEPTIONS**

Ar. 15 par. 3 makes it plain that the introduced right will not be limitless but it is rather subject to the exceptions and limitations provided in Article 5 of the InfoSoc Directive, as well as the ones that were introduced for the first time with DSM Directive. Indicatively, the press publications can freely be quoted in order to be criticized or supported; they can also be reproduced to benefit people with disability or be used for teaching purposes without needing the rightholders' permission etc.

It is of great interest to note that the press publishers' right falls now also under the scope of the exception for reproduction for private use [Ar. 5(2b) of InfoSoc Directive]. In the past, the CJEU had ruled<sup>37</sup> that when national legislations provide that publishers are rightholders authorized to receive fair compensation when a reproduction for private use takes place, without having previously ensured the authors' compensation, they contradict to the European acquis, since publishers aren't indicated by Article 2 of the Infosoc Directive as beneficiaries of the compensation. It has also been repeatedly supported that the list of the persons entitled to receive equitable remuneration is restrictive and the publishers are not included. Only "original" beneficiaries and not those who obtain their rights from the author in a derivative way (such as publishers) shall be considered entitled to receive remuneration<sup>38</sup>, without the national or European courts being able to give a broader interpretation to those original beneficiaries. Hence, it is not prohibited for the member states to provide some benefits or rights to the publishers, nevertheless such a law providing for a distribution of the equitable remuneration received between authors and publishers is not accepted as such a benefit, since it restricts the original beneficiaries' profits<sup>39</sup>.

The aforementioned judgment was launched after the Court of Appeal in Brussels referred to the CJEU in order to examine the compatibility of the national provision to the

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<sup>37</sup> HP v Reibel, C-572/13 ECLI:EU:C:2015:750 (CJEU November 12, 2015).

<sup>38</sup> Soulier and Doke, C-301/15 ECLI:EU:C:2016:878 (CJEU November 16, 2016).

<sup>39</sup> Michail-Theodoros Marinos, "Investigation of the Compatibility of Art. 8 Par.3 Law 2121/1993 (Publisher's Right of Participation to Equitable Remuneration) with the EU Law," *Magazine Private Law*, No. 1/2019, p. 65–73.



European law. One year after the ruling, the Federal Supreme Court of Germany ended up that German publishers weren't entitled to receive copyright levies, since they shouldn't be considered as rightholders<sup>40</sup>. Such a provision exists also in the Greek Copyright Act, which provided for the publishers to receive half of the 4% coming from the enterprises importing reprographic machines in Greece as a fair compensation for the reprography exception<sup>41</sup>.

Given the above, the introduction of the new publishers' right, after its transposition and implementation into the Member States, will change the existing legal framework and will finally support the compensation received by the publishers according to provisions, as the ones mentioned.

## **2.2.4 STATUE OF LIMITATION**

The right granted to publishers lasts for two years after the publication has been launched, starting on 1 January of the year following the one of the publication and it has a non-retroactive effect. In the initial proposal for the Directive, the statute of limitation for the new right had been set up to 20 years, a term that many academics and associations characterized unjustified<sup>42</sup> and "a very long period" by the end of which the publication will have already lost its value as "news"<sup>43</sup>. In an attempt to strike a balance between the different interests of the stakeholders, the European Commission changed the duration of the right in order to appease their objections on the right's introduction.

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<sup>40</sup> RA Dr Urs Verweyen, "Interview on VG Wort-Ruling of the German Supreme Court w/ Urs Verweyen, for Bloomberg BNA – Intellectual Property Law Resource Center", KVLEGAL, May 18 2016, <https://www.kvlegal.de/geraeteabgaben-levies/interview-on-vg-wort-ruling-of-the-german-supreme-court-w-urs-verweyen-for-bloomberg-bna/> (Accessed on 4 October 2019).

<sup>41</sup> Dionisia Kallinikou, "The CJEU decision on Reprobel on the fair compensation for the private reproduction and the relationships between authors and publishers", Magazine Private Law, No. 5/2019, p. 321-328.

<sup>42</sup> European Research Centers, "EU Copyright Reform Proposals Unfit for the Digital Age – Copyright Reform: Open Letter from European Research Centres," February 22, 2017, p. 4, [https://www.create.ac.uk/wp-content/uploads/2017/02/OpenLetter\\_EU\\_Copyright\\_Reform\\_24\\_02\\_2017.pdf](https://www.create.ac.uk/wp-content/uploads/2017/02/OpenLetter_EU_Copyright_Reform_24_02_2017.pdf) (Accessed on 5 October 2019).

<sup>43</sup> "Academics Against Press Publishers' Right"

### ***2.2.5 REVENUES SHARE TO AUTHORS***

It is of high importance that the newly introduced article –Ar.15(5)- provides for a share of the revenues received from publishers to the authors of the works incorporated in the publications. The provision moved in the right direction since it ensures that authors will also be fairly remunerated and it further confirms for once more that the new right is granted without prejudice to authors' rights and interests.

## CHAPTER 3: PREVIOUS EXPERIENCE OF A PUBLISHER'S RIGHT

While the new neighboring right is granted for the first time to the publishers in the majority of the European countries, there were several EU member states such as Italy, Ireland, UK and Greece<sup>44</sup> which had already introduced similar related rights for their publishers to benefit them.

### 3.1 GREEK EXAMPLE

Starting with Greece, the publisher's right, as this is described in Article 51 of Law 2121/1993 on Copyright, Related Rights and Cultural Matters, is not identical to the one provided by Article 15 of the DSM directive, since it *only* protects the publisher's right of reproduction of the typesetting and pagination of the publication by reprographic, electronic or any other means. Thus, both rights share a common aim of prohibiting reproduction activities when it is made for commercial purposes. The former elements reproduced fall into the scope of the provision only if the content of the publication has been reproduced as well, according to the legal doctrine<sup>45</sup>. After all, such a provision seems unable to additionally cover press publishers' rights, since the news' content is constantly changing in a weekly basis. Therefore, it is rather straightforward that in order for this provision to protect the latter, the way of its interpretation shall be different and independent from the content of the publication. Publishers shall be able to exercise their right to prohibit reproduction of the typesetting and pagination only when this is related to the journalistic column, which is used in regular basis. The above described neighboring right for publishers has a duration of 50 years, starting from the date of the last publication of the work, as Article 52 par. g of the Greek Copyright Act.

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<sup>44</sup>K. Kiprouli, Article 51, Publishers' Right in L. Kotsiris/I. Stamatoudi, *Copyright Law; Interpretation of the Greek Copyright Act No 2121/1993* (Athens-Thessaloniki: Sakkoulas Publications, 2009), §1

<sup>45</sup> Ibid §3 et seq.

### 3.2 GERMAN EXPERIMENT

Except for the four aforementioned countries, there are two more EU member states, Germany and Spain, which during the last six years moved into the adoption of a related right called “ancillary right” or “link tax” in order to boost publishers’ position in the market and to contribute to their increase of revenues.

In 2013, Germany incorporated into her national law this new ancillary right, a provision which grants press publishers the right to license their publications’ content to the operators of search engines and aggregators against a pre-agreed fee<sup>46</sup>. VG Media, the German collecting society representing -among others- the press publishers, had been qualified as the competent association to negotiate and collect the revenues from the aggregators wanting to reproduce their content. However, the biggest news site, Google News, refused to comply with the new requirements and to pay German publishers in order to use their content in its aggregator page while subsequently chose to opt out all the German publishers’ articles from its pages. The result was a legal action brought by VG Media<sup>47</sup>, during whose proceedings the Regional Court of Berlin requested a preliminary ruling of the CJEU. This procedure having been set in motion notwithstanding, a significant number of German publishers were finally forced to allow Google to use its members’ content for free, since it had been noticed a tremendous decrease of approximately 40% on their traffic<sup>48</sup> and of 80% specifically for Axel Springer's, the largest digital publishing house in the EU, web traffic when it left Google news<sup>49</sup>.

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<sup>46</sup> LSR Actuell, “*The Ancillary Copyright for Press Publishers in Germany*” (Germany, February 2, 2017), p. 12,

[http://www.lsraktuell.de/sites/default/files/20170202\\_vg\\_media\\_lsr\\_broschuere\\_en.pdf](http://www.lsraktuell.de/sites/default/files/20170202_vg_media_lsr_broschuere_en.pdf)  
(Accessed on 13 October 2019).

<sup>47</sup> Tomasso Tani, “*The “Link tax” in the Experiences of Germany, Spain and the Article 11 of the EC Proposal for the New Copyright Directive*”, published on LinkedIn, February 6, 2018, <https://www.linkedin.com/pulse/link-tax-experiences-germany-spain-article-11-ec-proposal-tani>  
(Accessed on 13 October 2019).

<sup>48</sup> Ibid.

<sup>49</sup> Colin Lecher, “*German Publisher Caves to Google News after Massive Traffic Drop*,” The Verge, November 5, 2014, <https://www.theverge.com/2014/11/5/7160587/german-publisher-axel-springer-google-news> (Accessed on 24 November 2019).

On 12 September 2019, the Court issued its long-awaited decision<sup>50</sup> on the VG Media’s lawsuit, by which the company turned against Google and asked for 1 billion euros (\$1.1 billion) as compensation for their news snippets and other content reproduced by the tech giant’s platform<sup>51</sup>. The Court confirmed that the publishers’ right was unenforceable due to the fact that it constitutes a technical provision and therefore, German government should have notified European Commission on its introduction prior to its entry into force. In the VG Media’s answer to the aforementioned decision, it was emphasized that the CJEU judgment hadn’t taken into consideration the newly introduced similar right in the EU level and consequently it only covers the past without making any reference to the future<sup>52</sup>.

### **3.3 SPANISH EXPERIMENT**

The second country which had already passed a law to establish a related right for publishers was Spain, which in 2014 moved into the addition of article 32.2 to the national Intellectual Property Law, introducing a similar to German publishers’ right. However, this right had an additional peculiarity: in an effort to avoid the unpleasant situations taken place in Germany, the newly introduced right was unwaivable, meaning that the aggregators and the search engines were obliged to pay the association representing the publishers the designated license remuneration, even if the publishers wouldn’t demand payment and wished to quit from their right<sup>53</sup>. Google’s answer to this phenomenon did

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<sup>50</sup> VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH v Google LLC, successor in law to Google Inc., C-299/17 ECLI:EU:C:2019:716 (CJEU September 12, 2019).

<sup>51</sup> Foo Yun Chee and Klaus Lauer, “Google Wins Legal Battle with German Publishers over Fee Demands”, *Reuters*, September 13, 2019, <https://www.reuters.com/article/us-google-germany-publishers-idUSKCN1VXOR2> (Accessed on 24 November 2019).

<sup>52</sup> VG Media, “VG Media Response to the CJEU Ruling”, <https://www.vg-media.de/en/press/474-german-government-required-to-pass-new-european-press-publishers-right-immediately.html> (Accessed on 14 October 2019).

<sup>53</sup> Posada de la Concha, Pedro, Alberto Gutiérrez García, and Hugo Hernández Cobos, “Impacto Del Nuevo Artículo 32.2 de La Ley de Propiedad Intelectual Informe Para La Asociación Española de Editoriales de Publicaciones Periódicas (AEPP)” (NERA Economic Consulting, Madrid, Spain, July 9,

not differ at all from the one given to German publishers earlier, with its news services having stopped running in Spain since 2014. The giant technology enterprise preserved its hard line stating that it would not pay for such a service, since not only is it provided for free to its users but it also increases visibility to the referring publications<sup>54</sup>. After Google news shutting down, the traffic to Spanish news sites fell sharply approximately 6-30%<sup>55</sup>.

Given the above, a substantial portion of stakeholders and shareholders ended up to the conclusion that the experiment of introducing such a related right for publishers had already failed and it is therefore condemned to fail once more. Yet, the European Parliament's Committee on Legal Affairs<sup>56</sup> underlined that Germany's collecting society, VG Media's weakness was the fact that it wasn't authorized to represent the totality of press publishers and thus it couldn't have a very strong position on the negotiations table. On the other hand, regarding the Spanish case, the difference between the national right and the one introduced in a European Union level by the DSM Directive is profound with the latter one being more flexible since it can only be exercised with the publisher's consent<sup>57</sup>.

Ultimately, it follows that due to the adoption of a publishers' related right by only two member states, the fragmentation existing within EU couldn't benefit this

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2015), p. 2, <https://www.nera.com/publications/archive/2015/impact-of-the-new-article-322-of-the-spanish-intellectual-proper.html> (Accessed on 14 October 2019).

<sup>54</sup> Diego Acosta-González, *“Consideraciones En Torno a La Normativa Sobre Los Prestadores de Servicios En Línea y Editoriales de Prensa Propendida Por La Nueva Directiva Europea Sobre Derechos de Autor y Derechos Afines En El Mercado Único Digital (Considerations Regarding the Rules Concerning Online Service Providers and Publishers of Press Publications as Purported by the New European Directive on Copyright and Related Rights in the Digital Single Market),”* La Propiedad Inmaterial N° 27, Enero-Junio 2019, July 3, 2019, p. 108, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3413819](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3413819) (Accessed on 15 October 2019).

<sup>55</sup> Samuelson, *“Legally Speaking: Questioning A New Intellectual Property Right For Press Publishers.”*

<sup>56</sup> European Parliament-Committee of Legal Affairs, *“The Proposed Directive on Copyright in the Digital Single Market (Articles 11, 14 and 16) Strengthening the Press Through Copyright”*, p. 8

<sup>57</sup> Acosta-González, *“Consideraciones En Torno a La Normativa Sobre Los Prestadores de Servicios En Línea y Editoriales de Prensa Propendida Por La Nueva Directiva Europea Sobre Derechos de Autor y Derechos Afines En El Mercado Único Digital (Considerations Regarding the Rules Concerning Online Service Providers and Publishers of Press Publications as Purported by the New European Directive on Copyright and Related Rights in the Digital Single Market).”*, p. 14

enforcement, a situation which will be fixed by the time that all member states will have fulfilled the transposition of the new directive into their national laws and the implementation of the relevant article<sup>58</sup>.

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<sup>58</sup> European Commission, *“Impact Assessment on the Modernisation of EU Copyright Rules”*, p. 160





## CHAPTER 4: FRENCH CASE STUDY

In the legislative text, it is explicitly stressed that brief extracts of the publications do not fall under the scope of Article 15. At this point, it is of exceptional interest to see how the giant tech company, Google, has given its own arbitrary interpretation to this part of the provision in an effort to strongly avoid paying license fees to the publishers for the amount of content of theirs that it reproduces.

It should be primarily emphasized that France has been the first country –and the only one so far- which has transposed the DSM Directive into its national law by voting in favor of a national copyright reform<sup>59</sup> back in July 2019 and it was later entry into force on 24 October 2019<sup>60</sup>. In September of the same year, Google announced its abstaining from displaying news snippets coming from European publishers on search results for its users in France in order to “comply with the new French copyright law” after the latter would come into force<sup>61</sup>. It further stated that its service, Google News, will be limited to show only headlines, unless press publishers permit Google to display preview text and thumbnail images without being compensated.

Even though the news came unsurprisingly due to Google’s previous attitude in Germany and Spain, this announcement triggered a storm of protest from stakeholders not only in France but in the wider area of the EU. The French Ministry of Culture commented on Google’s position being in complete contrast to both the spirit and the text of the law<sup>62</sup> while various associations representing news publishers, journalists and

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<sup>59</sup> “Loi No 2019-775 Du 24 Juillet 2019 Tendant à Créer Un Droit Voisin Au Profit Des Agences de Presse et Des Éditeurs de Presse” (2019), <http://www.assemblee-nationale.fr/15/pdf/ta-commission/r2141-a0.pdf>.

<sup>60</sup> “French Parliament Adopts Copyright Reform after EU Law”, *Euractiv.Com* (blog), July 24, 2019, <https://www.euractiv.com/section/copyright/news/french-parliament-adopts-copyright-reform-after-eu-law/> (Accessed on 24 September 2019).

<sup>61</sup> “Google to Stop Showing News Snippets for French Users”, *Reuters*, September 25, 2019, <https://www.reuters.com/article/us-alphabet-google-france-idUSKBN1WA1FK> (Accessed on 4 October 2019).

<sup>62</sup> “Réaction de Franck Riester, Ministre de La Culture, Suite Aux Déclarations de Google Relatives à La Rémunération Des Éditeurs de Presse En Ligne”, *Ministère de La Culture* (Press Release), September 25, 2019, <https://www.culture.gouv.fr/Presse/Communiqués-de-presse/Reaction-de->

several stakeholders expressed their severe protest. As once mentioned before, Google stated that they strongly abstain of buying content, since the current model used by it is for results to be displayed to users by relevance to the key words rather than by the commercial partnerships<sup>63</sup>.

It is rather straightforward that Google refuses to remunerate the publishers and the reason why it reacts in this way is its belief that the article titles constitute “very short extracts” which fall outside the scope of the provision. On the contrary, it is willing to keep displaying news from European publishers’ websites provided that this will be given to the company for free. Publishers’ associations in France have already turned to the national competition authority, complaining that due to Google’s monopoly, the enterprise is abusing its dominant position in the market<sup>64</sup>.

Even though Google believes that it has found a loophole to escape from the new rules, there still are some questions arisen. For instance, when a user clicks on an article’s headline, will they be leaded to the original website publishing the article or will they be moved to a Google website? If the latter happens, the giant enterprise will still be liable to remunerate the publishers. Ultimately, it should be taken into consideration that publishers are currently trying to condense article’s content into the headline in the best possible way, which means that even this action requires hard intellectual work for which the publishers, according to Google, are not worth of any remuneration. It therefore remains to be answered if online search machines taking these headlines are actually infringing publishers’ right by harming their investment. The CJEU’s ruling on that issue in the –short terms as it seems- future will be of paramount importance.

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[Franck-Riester-ministre-de-la-Culture-suite-aux-declarations-de-Google-relatives-a-la-remuneration-des-editeurs-de-presse-en-ligne](#) (Accessed on 4 October 2019).

<sup>63</sup> Richard Gingras, “How Google Invests in News,” Google, September 25, 2019, <https://blog.google/perspectives/richard-gingras/how-google-invests-news> (Accessed on 4 October 2019).

<sup>64</sup> “French Media Launch Copyright Case over Google’s Refusal to Pay to Display Their Content”, The Japan Times, November 21, 2019 accessed January 14, 2020, <https://www.japantimes.co.jp/news/2019/11/21/business/french-media-launch-copyright-case-googles-refusal-pay-display-content/#.Xh2lTi4ueUk> (Accessed on 24 November 2019).

## CHAPTER 5: EXPRESSED WORRIES AND THEIR DISMISSAL

Further to our previous comment, Article 15 has been one of the most controversial provisions of the EU Directive's legislative text. Various academics and associations have expressed their strong opposition to its introduction claiming that its consequences will be detrimental for the market as well as for publishers too. In this section, we will make an attempt to collect all the claims expressed against the introduction of the neighboring right and try to address them properly.

### 5.1 WORRIES

First of all, it is of high importance to note that many of the initial worries of the opponents have been addressed in the final version of the text, since the European lawmakers amended quite a few points of the originally proposed provision and the recitals accompanying them. The amendments taken place in the final text can be interpreted as a goodwill gesture from the Commission's side and as an effort to compromise the difference interests expressed during the long process from the discussions to the final adoption of the new Copyright directive. As it was mentioned in the beginning of this paper, the duration of the publishers' protection granted to them with this right, was decreased from 20 years to 2. Furthermore, the fear of the users not being able to use the protected content or having the opportunity to do hyperlinking have been completely eliminated since the provision explicitly introduces a B2B right, which also secures the extracts' use of individuals and falls under the exceptions, as it has been described<sup>65</sup>.

A major question developed was how a new layer of related rights granted to publishers would be able to secure them. As particularly expressed in the CEIPI research<sup>66</sup>, it is in fact an introduction of 28 different rights that will take place in the EU, since

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<sup>65</sup> See chapters 2 paragraphs 2.2.1 and 2.2.3

<sup>66</sup> Geiger, Bulayenko, and 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", p. 8

copyright and related rights fall under the principle of territoriality, meaning that they are limited to the territory of the state granting them and the exclusive right only covers activities occurring within the respective<sup>67</sup>. Thus, 28 national related rights will co-exist and they will be responsible for the fragmentation of the European law instead of the introduction of a harmonized framework within the European Union. Hence, in the opinion expressed by the European Copyright Society<sup>68</sup> it is underlined that the new legislative text for copyright is rather unnecessary, since European copyright is currently run by more than 10 directives and the new legislative text will ultimately contradict the previous ones. It is also highlighted that publishers do already benefit from copyright licenses transferred to them by the authors and they therefore enjoy a robust copyright protection.

In a letter signed by 169 academics<sup>69</sup>, the latter add that the publishers are adequately secured since they already have the means to battle the unlawful exploitation of their works, which except for the transferring licenses to them is also the protection granted to them as database makers. In this argument several research Centers-Universities<sup>70</sup> within the EU, in a letter addressed to the Members of the European Parliament, underline that due to these tools provided to the publishers, there cannot be a comparison between them, phonogram producers and audiovisual producers, who do not have the same tools to be protected and therefore it is indeed needed for the latter to be granted with a related right.

The previous implementation of such rights in Germany and Spain, an example which is not considered successful by the opponents of their introduction, is usually met

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<sup>67</sup> Alexander Peukert, *“Territoriality and Extraterritoriality in Intellectual Property Law”*, Brill Academic Publishing, No. Leiden/Boston, 2012, (April 2010), p. 1 [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1592263](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1592263) (Accessed on 14 October 2019).

<sup>68</sup> *“General Opinion on the EU Copyright Reform Package,”* European Copyright Society (blog), January 24, 2017, p. 4, <https://europeancopyrightsocietydotorg.files.wordpress.com/2015/12/ecs-opinion-on-eu-copyright-reform-def.pdf> (Accessed on 26 September 2019).

<sup>69</sup> *“Academics Against Press Publishers’ Right.”*

<sup>70</sup> European Research Centers, *“EU Copyright Reform Proposals Unfit for the Digital Age – Copyright Reform: Open Letter from European Research Centres”*, February 22, 2017, p. 3.

as one of the most important reasons for which this introduction shouldn't have taken place. Max Planck Institute for Innovation and Competition<sup>71</sup> ends up that the newly introduced right will be similar to the aforementioned example leading to a market failure, since the traffic to European publishers' sight will rapidly decrease. Julia Reda, an ex MEP of the Pirate Party, characterized this provision as a "replica" of an already failed regime in Germany and Spain<sup>72</sup>, which is now trying to be imposed in an EU level. In any case, it has also been supported that each member state always had the possibility to create such neighboring rights in its national law and therefore it was not necessary for a uniform legislative process to take place<sup>73</sup>.

Another possible implication of the new right was brought by Alexander Peukert, professor of the Goethe University of Frankfurt, who is of the opinion that the new related right will ultimately harm journalism, since the licensing of content to the platforms will be more expensive and therefore it will reduce the demand for new content produced<sup>74</sup>. The decrease of this demand will result in the publishers not hiring journalists anymore, an argument which is closely connected to the circulation of fake news. Startups probably won't have the means to choose reliable sources for their news and cross check their information while many big platforms will not be willing to pay for licenses, as the earlier experience shows, a situation which will lead to the diminution of spreading of real news.

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<sup>71</sup> Max Plank Institute for Innovation and Competition, *"Position Statement of the Max Planck Institute for Innovation and Competition on the Proposed Modernisation of European Copyright Rules PART E Protection of Press Publications Concerning Digital Uses"*, September 2017, p. 9, [https://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/MPI\\_Position\\_Statement\\_PART\\_E\\_Publishers\\_2017\\_02\\_21\\_RMh\\_VM-def-1.pdf](https://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/MPI_Position_Statement_PART_E_Publishers_2017_02_21_RMh_VM-def-1.pdf) (Accessed on 14 October 2019).

<sup>72</sup> Julia Reda, *"Extra Copyright for News Sites ('Link Tax')"*, Julia Reda (blog), <https://juliareda.eu/eu-copyright-reform/extra-copyright-for-news-sites> (Accessed on 23 September 2019).

<sup>73</sup> Christopher Geiger, Oleksandr Bulayenko, and Giancarlo 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"*, p. 8.

<sup>74</sup> Alexander Peukert, *"An EU Related Right for Press Publishers Concerning Digital Uses. A Legal Analysis"*, SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, December 20, 2016), p. 5, <https://papers.ssrn.com/abstract=2888040> (Accessed on 24 October 2019).

The later will be replaced by the circulation of fake news and disinformation, as reported<sup>75</sup>.

The consequences on the startups are also presented as an argument, which had been raised in the copyright reform discussion. While it has been mainly identified with Article 17 of the new directive, where platforms shall be responsible for the content uploaded on them and ready to tackle any illegally uploaded copyright protected content, several challengers of the publishers' right do claim that the latter will also be detrimental for the SMEs and startups, which lack resources and they will neither be able to invest in their own content nor to pay the adequate remuneration to the publishers in order to license their content. Hence, the giant platforms and aggregators will have the monopoly and will run the digital environment. Only the "big players" will be finally favored resulting into the distort of competition<sup>76</sup>. As Martin Senftleben, professor of Intellectual Property at the University of Amsterdam explains in a report<sup>77</sup> he conducted, the current status of the new business models and online platforms is already considerably overburdened, since the CJEU, with its rulings on hyperlinking, has forced the platforms to conduct all the necessary audits on whether the hyperlinking detected is commercial or not. Accordingly, the new introduction is now creating even more barriers for the startups.

In addition, an argument which has been used so far by almost all the opponents of the related publishers' right was that the latter would be responsible for the decrease of free flow of information<sup>78</sup> and the limitation of the fundamental right of freedom of

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<sup>75</sup> Julia Reda, "Copyright Reform: 'Neighbouring Right' Will Get in the Way of Quality Journalism", The Parliament Magazine, September 12, 2017, <https://www.theparliamentmagazine.eu/articles/opinion/copyright-reform-neighbouring-right-will-get-way-quality-journalism> (Accessed on 26 September 2019).

<sup>76</sup> Eugénie Coche, "Copyright Reform: A New Right for Press Publishers – to Have or Not to Have?", Kluwer Copyright Blog, March 13, 2018, <http://copyrightblog.kluweriplaw.com/2018/03/13/copyright-reform-new-right-press-publishers-not> (Accessed on 24 September 2019).

<sup>77</sup> Martin Senftleben, "EU Copyright Reform and Startups – Shedding Light on Potential Threats in the Political Black Box", March 2017, p. 9, [https://drive.google.com/file/d/0B7NZMIL3kj5qQzN0RXd2Z0JaR1JmemxhNDd2VmgzSjhFQXdj/vie w?usp=embed\\_facebook](https://drive.google.com/file/d/0B7NZMIL3kj5qQzN0RXd2Z0JaR1JmemxhNDd2VmgzSjhFQXdj/vie w?usp=embed_facebook) (Accessed on 24 September 2019).

<sup>78</sup> "Academics Against Press Publishers' Right."

expression, both being crucial pillars for democracy. It is inconceivable for the news to be covered by an intellectual right, as they mention<sup>79</sup>. Professor Van Echoud<sup>80</sup> is of the opinion that all the actors in the online environment will be affected by the new neighboring right. Since internet promotes the public debate and serves the freedom of expression, there should not be a status where platforms and service providers will need to ask for publishers' permission in order to use their content and inform the internet users, he also underlines. The publisher's right, belonging to the family of Intellectual Property rights will further constitute a part of the right of property and it will be much more difficult in the future to be abolished after its introduction<sup>81</sup>.

Finally, we will indicate a commonly expressed belief<sup>82</sup> that the introduction of such a provision for a right could have been avoided since the introduction of a legal presumption would have been sufficient and it would confirm that the publishers are entitled to bring legal proceedings against anyone infringing the content of which they are the identified publishers. In this way, the presumption would reverse the burden of proof, meaning that in the absence of proof for the contrary the publisher could proceed with the infringement proceedings without any further barriers.

Despite the above remarkable arguments expressed in the public dialogue, there is always the other perspective of seeing such a legislative initiative, which in the present case seems to be the most persuasive one as we will analyze below.

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<sup>79</sup> Thomas Margoni, "Why the Incoming EU Copyright Law Will Undermine the Free Internet", The Conversation, March 7, 2018, <http://theconversation.com/why-the-incoming-eu-copyright-law-will-undermine-the-free-internet-99247> (Accessed on 24 November 2019).

<sup>80</sup> Van Echoud, "A Publisher's Intellectual Property Right. Implications for Freedom of Expression, Authors and Open Content Policies", p. 20.

<sup>81</sup> Ibid, p.22

<sup>82</sup> Peukert, "An EU Related Right for Press Publishers Concerning Digital Uses. A Legal Analysis." p.8; "Copyright Reform: Open Letter from European Research Members of the European Parliament and the Council of the European Union Centres,"p. 3.

## 5.2 DISMISSAL

No one can deny the fact that publishers are going through trying times with their publications being reproduced online in an uncontrollable way. This new right substantially returns to the publishers the control over the use of their investments<sup>83</sup>. The publishers will be able to claim their rights in their publications without being dependent on the authors of the work. It will also give solution to the current legal uncertainty for the publishers, since up to now the enforcement for the publishers was usually unbearable<sup>84</sup>. Their ability of receiving compensation often fell under the copyright exceptions and limitations due to the fact that the publishers were not considered as rightholders so far.

We consider it important at this point to refer to the argument that a presumption confirming that the publishers can bring legal proceedings against anyone infringing the content of which they are the identified publishers is sufficient enough to protect them from the unlawful exploitation of their work. However, even though this presumption would indeed facilitate publishers to claim their revenues, this would not be accurate and it would not resolve the problem. The publishers would still have the burden to prove the originality of the works published by them<sup>85</sup>. In fact, it would create a false and rebuttable presumption due to the fact that journalists, who mainly work as freelancers, do not usually transfer exclusive licenses to publishers and therefore the latter would not have the legalization to bring proceedings on their own name. Each time that a publisher would seek to go to court, they would have to demonstrate that the work at issue fulfills all the criteria of originality and consequently it should be protected by copyright. This would happen because the publishers would not have their own rights but they should be dependent on the authors, based on the licenses that they would be provided with. On the contrary, the “ancillary” right for publishers, as it has now been introduced, exempts

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<sup>83</sup> Thomas Hoppner, *“EU Copyright Reform: The Case for a Publisher’s Right”*, p. 13.

<sup>84</sup> European Commission, *“Impact Assessment on the Modernisation of EU Copyright Rules”*, p. 160.

<sup>85</sup> European Parliament-Committee of Legal Affairs, *“The Proposed Directive on Copyright in the Digital Single Market (Articles 11, 14 and 16) Strengthening the Press Through Copyright”*, p. 6.



publishers from the burden of proving that the work is copyright protected since it detaches the publishers' claims for compensation from the originality of the work.

As it has previously been explained, such a related right has been also granted to broadcasters, phonogram and film producers, by the Directive 2001/29, which means that the publishers did not ask for a special treatment rather than for an equal one<sup>86</sup>. Thus, it cannot be understood the argument as it has been phrased by the opponents, that broadcasters and producers differ from publishers so in the end the way of approaching them shall not be identical, in order to justify the fact that the former enjoy such a related right. In what sense they are different is not clearly defined. Publishers' role is not just about publishing content coming from journalists or photographers. It is them that they have the full responsibility of supervising the entire process from the checking the accuracy of the text to the financial investment, production and management of print or digital press publication. They are also responsible for making the necessary updates on the next publications. It is them who create an editorial brand<sup>87</sup>. Nonetheless, the new right for publishers "expires" only after 2 years, a period which is significantly shorter compared to the 50 years term of protection reserved for broadcasters and producers' rights. The major role of those provisions is to protect the economic, organizational and technical efforts by officially recognizing the investments that those persons do and their determining contribution to the final version of the original work.

When it comes to the objection of a portion of people concerning the fragmentation that this right will create in the European framework due to the potential introduction of 28 different rights, this argument also seems to fail. We consider the current status more problematic since up to now only a few member states had special provisions to protect publishers. This unfortunately ended up to a disharmonized framework in the EU and it would be particularly worse if the argument as expressed above, regarding the possibility of each Member State to have the free choice to introduce such a right, had been adopted. Taking also into consideration the current case

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<sup>86</sup> "EU Copyright Reform: The Myths and the Truths," Eupublishersright (blog).

<sup>87</sup> "A Publishers' Right for Free Press / FAQs," eupublishersright, <https://www.publishersright.eu/faq> (Accessed on 24 November 2019).

law as set by the CJEU, it would be much more difficult for each Member state to separately move into the introduction of related rights for publishers, since they should have found a way that would not harm the original beneficiaries. A provision set by a member state recognizing that publishers are included in the list of the beneficiaries of Art. 2 of the 2001/29 EU Directive and they are therefore entitled to receive compensation when their work is reproduced, would be inappropriate, as we explained above<sup>88</sup>. On the contrary, the new directive modifies the older one by adding them to that list. It is therefore the same EU lawmaker and not a separate member that provided for such a change.

Another extremely positive element that the new right will offer is that it will stabilize and even increase the number of jobs for the journalists. **Reporter** Sammy Ketz, (AFP Bagdad Bureau Chief, Bayeux Calvados-Normandy Prize for War Reporters 2003, Albert Londres Prize 1988), explains in a letter of his, supported also by several journalists and publishers across the EU, that journalism has become tougher and more expensive with the media being the main factors paying for their costs<sup>89</sup> (e.g. bulletproof jackets while the journalists have a mission in a war). However even though they do cover the journalists' needs economically, in order to receive the reliable and trustworthy content they will offer, it is not them who reap the benefits in the end but the big internet platforms. As he also reports, lots of journalists have lost their jobs due to the fact that their media organization couldn't survive or support paying them any longer. Since publishers will now have their economic rights secured, they will hire more employees to meet the constantly growing needs of people for information. Thus, they will be sure that their work will generate the appropriate profit and they will subsequently invest in people in order to have the job done. As in every sector, none of the publishers would be eager to finance content indefinitely with no reward and this related right offered aims to

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<sup>88</sup> See Chapter 2.2.3

<sup>89</sup> Sammy Ketz, *"Neighbouring Rights: A Question of Life or Death"* AFP, August 27, 2018, <https://www.afp.com/en/au-fil-de-lafp/tribune> (Accessed on 26 November 2019).

guarantee them the monetization of their own investments on their own sites, instead of leaving them watching the platforms' revenues grow<sup>90</sup>.

As far as the implementation of a similar right in Germany and in Spain to the one introduced by the directive is concerned, the objections of the challengers of it have been accordingly answered by the European Parliament and specifically by the Committee of Legal Affairs, as we have cited it earlier<sup>91</sup>. Those countries' rights may have been similar to the European one but they were not identical. It is not also absolutely true that the example set by them has failed. In Spain for instance, after Google News opted out its service, the local publishers had more direct traffic to their websites, without any intermediaries being involved<sup>92</sup>. Thus, the worry that publishers will lose traffic to their articles is not accurate. If this traffic leaves publishers with no revenues and the dilemma they have to face is between payment and visibility, journalists presumably prefer being paid than being visible<sup>93</sup>.

Freedom of expression, pluralism and reliable information are some of the core values in a democratic legal order. A trustworthy press is the one serving all the above principles, it is a hallmark of democracy itself and therefore it is of paramount importance for this to be protected. The neighboring right for publishers will help them foster a more qualitative press and remain competitive. Today, there is a huge augmentation of fake news and rumors which are used as substitutes in order to make the "article" more attractive and gain some extra clicks. If the professional journalism, which is nowadays needed more than ever, is paid adequately, the battle against fake news and disinformation will be strongly enhanced. The argument indicating that news cannot be protected, otherwise this would create a wound to our democracy, is absolutely

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<sup>90</sup> "No-One Can Finance Content Indefinitely with No Reward – Not Even When the Stakes Are as High as the Future of Our Free Press" Empower Democracy (blog), March 12, 2019, <http://www.empower-democracy.eu/blog/no-one-can-finance-content-indefinitely-with-no-reward-not-even-when-the-stakes-are-as-high-as-the-future-of-our-free-press> (Accessed on 26 November 2019).

<sup>91</sup> See Chapter 3

<sup>92</sup> Thomas Hoppner, Martin Kretschmer, and Raquel Xalabarder, "CREATe Public Lectures on the Proposed EU Right for Press Publishers", p. 12.

<sup>93</sup> Hoppner, "EU Copyright Reform", p. 19.

misleading. From none of the provision's paragraphs or phrases is arisen such an issue. The subject matter of the right is under no circumstances the news itself but the manner in which the news is presented, i.e. the fixation of the news. Hence, it is a fundamental principle of the Copyright Law that news information and simple facts are excluded from its protection. Consequently, democracy and free press will be enhanced rather than be harmed or destroyed by contributing to the fight of untrustworthy information and stories.

Last but not least, answering to the problematic of how start-ups will be affected, we shall say it is more likely that they won't be disadvantaged. On the contrary, the aim of the related right is to restore the existing asymmetry and to make it easier for all the publishers to negotiate terms not only with small players but even with giants, such as Google, Facebook etc. Publishers work with many start-ups on a daily basis and agree in terms which are mutually beneficial and so they will continue to do in order not to leave start-ups out of "game". Thus, it would be nothing that is of interest to press publishers to harm start-ups since in many cases even the publishers' themselves have some of their own. The key in this case is publishers' willingness to negotiate on their licenses and adapt the amount of their remuneration according to the dynamic of the other party. It is rather straightforward that they cannot license their content under the same terms both to Google and a startup.

Looking at all the opponents' arguments with greater clarity, we can draw the conclusion that all of them can actually be reversed and lead to a totally different result. The new right seems promising and capable of offering important benefits to the publishers and help press becoming more sustainable. After the implementation of the right to all the EU member states, which will also be accompanied by several guidelines of the European Commission to direct member states, the status will be finally uniform and harmonized. It is of paramount importance for the member states to follow a common approach in order for the result to be as positive as we expect it.

## CONCLUSIONS

Nowadays, the press is particularly endangered with publishers facing big difficulties in licensing their content due to the transition that has been made to digital publishing. As a result, lots of publishing organizations and houses are struggling to survive and some eventually end up shutting down. The status quo and the current rights reserved for publishers do not secure them properly. On the contrary, it became quite evident that there is a need for a 21<sup>st</sup> century level of protection, in order for them to keep offering their services to the society in the best possible way. Since press publishers bear full legal responsibility of what they publish and they make significant financial efforts to ensure verification of the published content, they should also be the ones receiving the benefits of this process instead of the big web platforms. It is therefore morally and democratically unjustifiable for big platforms to adopt practices where they make profit from publishers' work without asking the permission of using it or offering them remuneration for this extraction.

With the Directive 2019/790, the EU lawmaker set the foundations for a fairer environment for press publishers in terms of digitality and restored the legal certainty and their bargaining power while at the same time it promotes collective licensing as the ultimate tool for achieving that. Finally, it brings an end to the latest practices of technological giants taking advantage of publishers' work without compensating them.

It is a true relief for everyone to see that EU follows the developments and moves into regulating the new framework coming out by also securing the different stakeholders' interests while simultaneously it recognizes the contribution of publishers to a free, healthy and qualitative press, cornerstone of our democracy<sup>94</sup>. Thus, EU finally acknowledges that web platforms are now actively exploiting and deriving benefits from vast amounts of works are not the emerging passive platforms that they once were and

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<sup>94</sup> Andrew Hughes, "EU Legislation Offers Chance for Publishers 'to Extract a Fairer Settlement' from Platforms", Press Gazette (blog), August 16, 2019, <https://www.pressgazette.co.uk/eu-legislation-offers-chance-for-publishers-to-extract-a-fairer-settlement-from-platforms> (Accessed on 24 November 2019).

for this reason it decided to no longer treat them as such, as Marc Joulard, ex Parliament's culture committee opinion rapporteur on copyright in the digital single market reports<sup>95</sup>.

It is our understanding that the implementation of the legislative text at issue is a promising step and we look at it with an optimistic mood. We are inclined to believe that the new modernized initiative taken by the EU will reach the goals set by the latter and it is a common hope that all member states will develop dialogues and practical collaborations to apply it in the most harmonized way possible.

By summer of the next year, each country within the European Union will have transposed the Digital Single Market Directive into national law. Right now, it remains only to be seen until its full implementation takes place across the entire Europe.

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<sup>95</sup> Marc Joulard, *“EU Copyright Reform Is an Opportunity for Both Consumers and Creators”*, The Parliament Magazine, February 9, 2017, <https://www.theparliamentmagazine.eu/articles/opinion/eu-copyright-reform-opportunity-both-consumers-and-creators> (Accessed on 24 November 2019).

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