Stanford – Vienna
Transatlantic Technology Law Forum

A joint initiative of
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European Union Law Working Papers

No. 49

An Analysis of Articles 15 and 17 of the EU Directive on Copyright in the Digital Single Market: a boost for the creative industries or the death of the internet?

Diana Passinke

2020

European Union Law Working Papers

Editors: Siegfried Fina and Roland Vogl

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General Note about the Content

Suggested Citation

This European Union Law Working Paper should be cited as:
Diana Passinke, An Analysis of Articles 15 and 17 of the EU Directive on Copyright in the Digital Single Market: a boost for the creative industries or the death of the internet?, Stanford-Vienna European Union Law Working Paper No. 49, http://ttlf.stanford.edu.

Copyright

Abstract

The digital revolution has had a strong impact on copyright-intensive industries. The ease of removing rightholders' information from their works and distributing content in the online environment contributes to the difficulties faced by rightholders seeking to effectively license their rights and obtain remuneration for the online distribution of their works. This has allegedly become a threat to the future production of creative content.

While some studies demonstrate that within the copyright industries the sky is rising rather than falling, the emergence of a growing value gap is indisputable. With online platforms gaining more revenue as a result of digitalisation *en masse*, the European Commission decided that the right step forward is to improve the position of rightholders by placing additional burdens on those that allowed them to thrive. The European Commission introduced the Digital Single Market Copyright Directive with a hope of ensuring that consumers and creators can make the most of the digital world. However, the introduction of Articles 15 and 17 might achieve something quite the opposite.

As demonstrated by the French attempt of implementing Article 15 into its national legislation, the press publishers' right is unlikely to be effective. Instead, it might have inadvertent consequences for smaller press publishers and consumers by limiting their market exposure and the available choices on the market. It is also likely to have an overall negative effect on press pluralism and innovation.

While Article 17 has been significantly improved since the initial proposal, the difficulties faced by press publishers in concluding a satisfactory license with Google in France, demonstrate that a new licensing obligation will not always culminate in increased revenues for the content creator. The lack of clear resultant benefits that this provision seeks to achieve might not be worth the chaotic disruption it could leave in its wake.

Instead of disrupting the market to resemble the structures of the past, the European Union needs to embrace the new digitalised world. It should seek progressive solutions that would align with the actual objective of the Digital Single Market Copyright Directive: the enhancement of the ability for consumers and creators to make the most of this digital world. Perhaps then, it would be more likely to deliver the promised boost to the creative industries.

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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 [2019] OJ L130/92

Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L119/1

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Code de la propriété intellectuelle (Version consolidée au 1 juillet 2020) (French Intellectual Property Code (as amended))

La Ley de Propiedad Intelectual 1996 (Spanish Copyright Act (as amended))

Urheberrechtsgesetz, UrhG 1965 (German Copyright Act 1965 (as amended))

LIST OF ABBREVIATIONS

ACR	Automatic content recognition
AMP	Accelerated Mobile Page
CDT	Center for Democracy and Technology
CJEU	Court of Justice of the European Union
DSM	Digital Single Market
ECHR	European Court of Human Rights
EU	European Union
IP	Intellectual property
ISP	Internet Service Provider
MEP	Member of the European Parliament
OCSSP	Online content Sharing Service Provider
OECD	Organisation for Economic Co-operation and Development
P2B	Platform-to-business
SMP	Small and Medium-sized Businesses
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
WIPO	World Intellectual Property Organization

INTRODUCTION

Technological progress has led to the emergence of new business models and the unprecedented growth of the internet. This digital revolution has had a particularly strong impact on copyright-intensive industries.[1] While it has brought many benefits to rightholders, such as providing a convenient way of delivering content to consumers in return for new sources of revenue, it has allegedly become a threat to the actual production of creative content. The ease of removing rightholders' information from their works[2] and distributing their content in the online environment[3] contributes to the difficulties faced by rightholders seeking to license their rights and obtain remuneration for the online publication of their works. The European Commission (the "Commission") recognised this issue in its communication 'Towards a modern, more European copyright framework'[4] and addressed the need to reform copyright law.

On 14 September 2016, the Commission published a proposal for a Directive on Copyright in the Digital Single Market (the "DSM Copyright Directive Proposal"),[5] accompanied by an impact assessment 'on the modernisation of EU copyright rules' (the "Impact Assessment")[6] and a communication 'Promoting a fair, efficient and competitive European

[1] Organisation for Economic Co-operation and Development (OECD), 'Measuring the Internet Economy: A Contribution to the Research Agenda' (OECD Digital Economy Papers, No. 226, OECD Publishing 2013) 27 <https://read.oecd-ilibrary.org/science-and-technology/measuring-the-internet-economy_5k43gjg6r8jf-en#page1> accessed 1 July 2019.
[2] OECD, 'Enquiries into Intellectual Property's Economic Impact' (2015) 17 <www.oecd.org/sti/ieconomy/intellectual-property-economic-impact.htm> accessed 1 July 2019.
[3] ibid.
[4] Commission, 'Towards a modern, more European copyright framework' (Communication) COM(2015) 626 final <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2015%3A626%3AFIN> accessed 1 July 2019.
[5] Commission, 'Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market' (Proposal) COM(2016) 593 final (DSM Copyright Directive Proposal) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0593> accessed 1 July 2019.
[6] Commission, 'Impact Assessment on the modernisation of EU copyright rules' SWD(2016) 301 final (Impact Assessment) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=SWD:2016:0301:FIN> accessed 1 July 2019.

copyright-based economy in the Digital Single Market',[7] aimed at making EU copyright rules fit for the digital age. The DSM Copyright Directive Proposal, *inter alia,* foresees the introduction of (i) neighbouring rights for press publishers relating to the digital uses of their publications[8] and (ii) a mandatory obligation for certain platforms, which mainly feature user generated and uploaded content, to implement automatic copyright filters that detect unlicensed content.[9] While being widely supported by the European cultural and creative sectors, the Commission's proposal also rapidly produced a spate of comments, criticism, and protests under the slogan 'Save the Internet'.[10] Julia Reda, an MEP from the Pirate Party, has vocally opposed the decision throughout the debate, chastising the outcome as a 'dark day for internet freedom'[11] within the EU. The Chief executive of Open Knowledge International, Catherine Stihler, agreed with Reda's position, stating that we now 'risk the creation of a more closed society at the very time we should be using digital advances to build a more open world where knowledge creates power for the many, not the few'.[12]

Following a few amendments, the Council adopted the new EU Directive on Copyright in the Digital Single Market (the "DSM Copyright Directive") on 15 April 2019. The DSM Copyright Directive was published in the EU Official Journal on 17 May 2019, and entered

[7] Commission, 'Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market' (Communication) COM(2016) 592 final <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016DC0592> accessed 1 July 2019.
[8] DSM Copyright Directive Proposal, art 13.
[9] DSM Copyright Directive Proposal, art 15.
[10] Deutsche Welle, 'EU copyright bill: Protests across Europe highlight rifts over reform plans' (*DW,* 23 March 2019) <www.dw.com/en/eu-copyright-bill-protests-across-europe-highlight-rifts-over-reform-plans/a-48037133> accessed 1 July 2019.
[11] Emma Woollacott, 'EU Copyright Directive Passed – Upload Filters and All' (*Forbes,* 26 March 2019) <www.forbes.com/sites/emmawoollacott/2019/03/26/eu-copyright-directive-passed-upload-filters-and-all/#113dd12f4c0f> accessed 1 July 2019.
[12] Zoe Kleinman, 'Article 13: Memes exempt as EU backs controversial copyright law' (*BBC News,* 26 March 2019) <www.bbc.co.uk/news/technology-47708144> accessed 1 July 2019.

into force 20 days from publication, on 6 June 2019. As such, member states will have until 7 June 2021 to transpose the Directive into national law.[13]

This paper will focus on the controversies surrounding Articles 15 and 17 (previously known as Articles 11 and 13 respectively) of the Directive.

Chapter I will outline the EU's response to the rapid digitalisation of the global economy, the creation of the Digital Single Market, and the growing need for a modernisation of the copyright regime. It will refer to an existing 'value gap' between rightholders and online platforms and emphasise the importance of fair remuneration. Finally, it will explain the principle of fair balance and describe the level of controversy caused by the DSM Copyright Directive.

Chapter II will focus on the press publishers' right included within Article 15 of the DSM Copyright Directive. It will provide a brief introduction to the current state of the press publisher market, explain the perceived need for the press publishers' right, and outline the scope of the proposed Article 15 (formerly Article 11). It will then refer to the criticisms of the proposed provision and the EU's response to these raised criticisms. Finally, it will offer an alternative solution to the press publishers' right: a creation of a new sector authority which would regulate the interaction of the press publisher sector with online intermediary services.

Chapter III will focus on the filtering system which automatically detects copyrighted work included within Article 17 of the DSM Copyright Directive. It will outline the legal developments in respect of the liability of intermediaries and refer to their increasingly active role in the promotion of copyrighted content. It will then assess the validity of the criticism

[13] 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 [2019] OJ L130/92 (DSM Copyright Directive), art 29.

directed at the DSM Copyright Directive Proposal and explain the response from the EU institutions to the resulting controversy. Finally, it will offer an alternative solution to the obligation to use content-filtering systems a variation of the private copying levy, that would apply to platforms that heavily rely on user generated content that makes use of copyrighted works.

The paper will conclude that by introducing Articles 15 and 17 of the DSM Copyright Directive, the Commission risks fragmenting the digital market, which is ultimately detrimental to all stakeholders involved. It will explain that the Commission has failed to fully comprehend the digital market's ecosystem and propose that it would be better to consider alternative methods, in particular, those that take advantage of the ease in which copyrighted content is communicated to the public online and does not attempt to impede it. These options are not only more proportionate in their restricted interference with fundamental rights, but they also offer the best chance at actually increasing the revenue received by creators and subsequently closing the value gap.

CHAPTER I: THE DIGITAL SINGLE MARKET AND THE PURPOSE OF THE DSM COPYRIGHT DIRECTIVE

'Europe will now have clear rules that guarantee fair remuneration for creators, strong rights for users and responsibility for platforms. When it comes to completing Europe's digital single market, the copyright reform is the missing piece of the puzzle' – Jean-Claude Juncker

1. The Digital Single Market

In 2014, the European Commission identified the creation of a connected digital single market as a top priority.[14] The idea of an integrated single market across all member states is not a new one. Already in 1982, the European Court of Justice emphasised that it required 'the elimination of all obstacles to intra-Community trade in order to merge the national markets into a single market bringing about conditions as close as possible to those of a genuine internal market'.[15]

The current desire to create a digital single market ("DSM") reflects the fact that the global economy is rapidly becoming digital. The Commission hopes that creating a market where:

> the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence (…) will ensure that

[14] Eurostat, 'Digital economy and Society in the EU' (2018) <https://ec.europa.eu/eurostat/cache/infographs/ict/bloc-4.html> accessed 1 July 2019; Etienne Bassot, Wolfgang Hiller, 'The Juncker Commission's ten priorities: State of play in autumn 2018' (2018) 10 <www.europarl.europa.eu/RegData/etudes/STUD/2018/625176/EPRS_STU(2018)625176_EN.pdf> accessed 1 July 2019.

[15] Case 15/81, *Gaston Schul Douane Expediteur BV v Inspecteur der Invoerrechten en Accijnzen, Roosendaal* EU:C:1982:135, [1982] ECR 1409, para 33.

> Europe maintains its position as a world leader in the digital economy, helping European companies to grow globally.[16]

The DSM is not a single piece of legislation, but a multitude of legislative and administrative measures. In fact, over the last five years, more than 30 legislative DSM initiatives were put in motion.[17]

With digital technologies radically changing the way creative content is distributed and copyright-intensive sectors accounting directly for over 7 million jobs in the EU,[18] modernising a copyright regime became one of the top priorities for the Commission. While limitations to cross-border access to digital content are often credited to the territoriality of copyright law,[19] the Commission pursued a 'small steps' approach toward the gradual harmonisation of copyright law. Therefore, the Commission proposed the DSM Copyright Directive, as opposed to a regulation mandating complete harmonisation.[20]

The DSM Copyright Directive aims to create a fairer marketplace for online content and ensure that 'consumers and creators can make the most of the digital world'[21] by addressing the perceived 'value gap' between rightholders and online platforms. While many support making online intermediaries explicitly liable for the content on their platforms, acknowledging their increasingly active role in allowing unlicensed content to be shared

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[16] Commission, 'A Digital Single Market Strategy for Europe' (Communication) COM(2015) 192 final, 3 <https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52015DC0192> accessed 1 July 2019.
[17] Hein Hobbelen, Francine Cunningham, Baptist Vleeshouwers, 'EU Regulatory Initiatives and Competition Policy in the Digital Era: What has been completed and what to expect in the next mandate' (*Bird&Bird,* June 2019) <www.twobirds.com/en/news/articles/2019/global/eu-regulatory-initiatives-and-competition-policy-in-the-digital-era> accessed 1 July 2019.
[18] Commission, 'Shaping Europe's digital future' <https://ec.europa.eu/digital-single-market/en/copyright> accessed 1 July 2019.
[19] Read more about territoriality in Paul Torremans, 'Questioning the principles of territoriality: the determination of territorial mechanisms of commercialisation' in *Copyright Law: A Handbook of Contemporary Research* (Research Handbooks in Intellectual Property Series 2009).
[20] Bernd Justin Jutte, *Reconstructing European Copyright Law for the Digital Single Market: between old paradigms and digital challenges* (1st edn, Hart Publishing 2017) 92.
[21] Commission 'Shaping Europe's digital future: Modernisation of the EU copyright rules' <https://ec.europa.eu/digital-single-market/en/modernisation-eu-copyright-rules> accessed 10 July 2019.

online for their own profit-making purposes, the proposed expansion of intermediary liability is also seen as a significant threat to the internet.

2. The Value Gap

The impetus driving the adoption of the Copyright Directive was the effort to harmonise copyright law across the EU and close the 'value gap' between rightholders and online platforms.[22] The concept of the value gap refers to a discrepancy between the revenues allocated to the rightholders and the value obtained by online intermediaries from the publication of copyright protected content.

Jean-Claude Juncker emphasised that journalists, publishers, and authors should receive fair remuneration for their work, 'whether it is made in studios or living rooms, whether it is disseminated offline or online, whether it is published via a copying machine or commercially hyperlinked on the web'.[23] In its Impact Assessment, the Commission emphasised that 'rightholders face difficulties when seeking to monetise and control the distribution of their content online'.[24] However, the Commission did not offer any scientific evidence relating to the scale or effects of copyright infringement in the digital environment. While the internet is presented as a digital threat to creators, the digital opportunities it offers might have already significantly enhanced the amount of remuneration creators receive. In fact, some empirical studies have shown that as far as creative industries are concerned, 'the sky is rising'.[25]

It cannot be disputed that fair remuneration is essential to maintaining the continued creation of content, which ultimately enriches European society. However, it also needs to be

[22] DSM Copyright Directive Proposal, Explanatory Memorandum, para 3.
[23] Commission, 'State of the Union 2016: Commission Proposes Modern EU Copyright Rules for European Culture to Flourish and Circulate' (Press Release) 14 September 2016 <http://europa.eu/rapid/press-release_IP-16-3010_en.htm> accessed 10 July 2019.
[24] Impact Assessment, para 5.1.1.
[25] Michael Masnick, Michael Ho, 'The Sky Is Rising: A Detailed Look At The State Of The Entertainment Industry' (*Floor 64*, 2012) 3 <www.techdirt.com/skyisrising/> accessed 12 July 2019.

recognised that intermediaries/online platforms may become hesitant to offer their services, if the law does not achieve a satisfactory and fair balance between the interests of rightholders and intermediaries.

3. The Fair Balance and the Controversy Surrounding the DSM Copyright Directive

The principle of a fair balance refers to the need to achieve a compromise between competing interests and fundamental rights. While directives leave room for member states to transpose the provisions into national law, and it is during this process that member states should interpret the directive in a way which allows for a fair balance to be struck between different fundamental rights,[26] the CJEU explicitly noted that competing fundamental rights should initially be balanced within the relevant directive itself.[27]

The DSM Copyright Directive seeks to achieve a fair balance between 'the rights and interests of authors and other rightholders, on the one hand, and of users on the other'.[28] However, the level of controversy that has been generated perhaps speaks of the failure to strike such a balance between them.

The proposed Copyright Directive has been one of the most controversial reforms in recent memory. Tens of thousands of protestors took to the streets across Europe to demonstrate their opposition to the proposed reforms, with over 40 rallies taking place in Germany alone.[29] Protestors claimed that the reforms threatened to rob them of their freedom and so many converged under the banner of 'saving the internet'.[30] The phrase 'death of the internet' has been closely associated with the proposed reforms in online discourse, to the

[26] Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* EU:C:2008:54, [2008] ECR I-00271, paras 69-70.
[27] ibid 66.
[28] DSM Copyright Directive, recital 6.
[29] Deutsche Welle, 'EU copyright bill: Protests across Europe highlight rifts over reform plans' (*DW,* 23 March 2019) <https://www.dw.com/en/eu-copyright-bill-protests-across-europe-highlight-rifts-over-reform-plans/a-48037133> accessed 12 July 2019.
[30] ibid.

point that if one was to use Google Search with this phrase combined with the term 'Europe', the results page is dominated with articles discussing the potential impacts of the proposed Directive. The prevalence of the phrase 'death of the internet' within a European context demonstrates the fears that lay at the heart of the opposition of this reform. The DSM Copyright Directive Proposal, similarly to the repeal of net neutrality in the United States, has been theorised to restrict or remove the open discussion and the sharing of ideas across the internet. It is this freedom to share and create content that is the essence of what the internet has come to represent for millions of users, to the extent that any restriction of this freedom is treated akin to denying users access to the internet altogether. This sentiment is encouraged by popular website operators, such as Wikipedia, YouTube, and Reddit, which disabled large portions of their website, stating that these conditions would be their normal operations if they were forced to comply with the proposed Directive.[31] These businesses claim that the responsibility placed upon them under the new Directive would mean that they would have to drastically scale back their operations, going so far as to threaten to cease all operations within the EU.[32] Their arguments are based on the fact that their current operations are too large in scope to comply with the strict monitoring requirements that were proposed by the Directive, meaning that in order to avoid liability, they would only operate on a reduced scale that can be monitored effectively to prevent the infringement of the interests of copyright holders.

The two most controversial articles, Articles 15 and 17, demonstrate the pitfalls of a superficial analysis of the issue at hand. Both articles are motivated by the principle that the

[31] Már Másson Maack, 'Here's why you're having issues with Reddit and Wikipedia in the EU' (*TNW,* 21 March 2019) <https://thenextweb.com/eu/2019/03/21/reddit-wikipedia-protest-eu-copyright-reform/> accessed 12 July 2019; Susan Wojcicki, 'The Potential Unintended Consequences of Article 13' (*Google Official Blog,* 12 November 2018) <https://youtube-creators.googleblog.com/2018/11/i-support-goals-of-article-13-i-also.html> accessed 12 July 2019.

[32] Joshua Benton, 'Google is threatening to kill Google News in Europe if the EU goes ahead with its "snippet tax"' (*NiemenLab,* 22 January 2019) <https://www.niemanlab.org/2019/01/google-is-threatening-to-kill-google-news-in-europe-if-the-eu-goes-ahead-with-its-snippet-tax/> accessed 12 July 2019.

creators of content should benefit from a share of the revenue which online platforms earn from users sharing the rightholders' content. However, both articles also suffer in terms of a failure to accurately identify the appropriate means to achieve their goal. Their current implementation disrupts the main online distribution network, leading to the counterproductive result of diminished revenue for creators. This paper will explore alternative ways of 'closing the value gap' that are not as disruptive and may lead to creators and rightholders benefiting from the promised additional revenue.

CHAPTER II: ARTICLE 15 – THE PRESS PUBLISHERS' RIGHT

'Everyone knows that Google is killing the news business' – James Fallows

1. The Background

The rise of online news aggregators, such as Google News, has become a notable phenomenon during the digital age.[33] News aggregation includes gathering information from multiple news sites and adjusting it for the purpose of presenting it on a single site.[34] The global leader in this market is Google News, which uses an algorithm to provide an overview of headings and snippets, along with the hyperlinks to the original content.[35]

Undeniably, the news aggregators provide many benefits to consumers. Firstly, consumers can save time by accessing a variety of news stories through a single page.[36] Secondly, the news aggregators expand the market, with consumers discovering new websites[37] and being able to read more articles.[38] Digitalisation of news in the form of news aggregation might also mean that the number of consumers who regularly read news increases.[39] As a result, the news aggregators are beneficial to news outlets by expanding their outreach in terms of potential readers.

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[33] Angela M. Lee, Hsiang Iris Chyi, 'The Rise of Online News Aggregators: Consumption and Competition' (2015) 17(1) International Journal on Media Management 3, 3 <10.1080/14241277.2014.997383> accessed 22 May 2019; Susan Athey, Markus Mobius, Jeno Pal, 'The Impact of Aggregators on Internet News Consumption' (2017) Stanford Institute for Economic Policy Research (SIEPR) Working Paper 17-034, 2 <https://siepr.stanford.edu/sites/default/files/publications/17-034_0.pdf> accessed 22 May 2019.

[34] Hsiang Iris Chyi, Seth C. Lewis, Nan Zheng, 'Parasite or Partner? Coverage of Google News in an Era of News Aggregation' (2016) 93(4) Journalism & Mass Communication Quarterly 789, 791 <https://journals.sagepub.com/doi/10.1177/1077699016629370> accessed 22 May 2019.

[35] ibid.

[36] Joan Calzada, Ricard Gil, 'What Do News Aggregators Do? Evidence from Google News in Spain and Germany' (2018) 1, 2 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2837553> accessed 22 May 2019.

[37] ibid.

[38] Doh-Shin Jeon, Nikrooz Nasr, 'News Aggregators and Competition among Newspapers on the Internet' (2016) 8(4) American Economic Journal: Microeconomics 91, 94 <www.aeaweb.org/articles?id=10.1257/mic.20140151> accessed 22 May 2019.

[39] Chrysanthos Dellarocas, Zsolt Katona and William Rand, 'Media, Aggregators, and the Link Economy: Strategic Hyperlink Formation in Content Networks' (2013) 59(10) Management Science 2360, 2362 <www.jstor.org/stable/42919477?seq=1> accessed 22 May 2019.

Nonetheless, the prevailing view is that rather than creating a 'market-expansion effect', news aggregators create a 'substitution effect'.[40] Due to the information provided by the news aggregator being sufficiently detailed, consumers might not be inclined to read the full news articles.[41] As such, the presence of news aggregators might also reduce the number of consumers who visit the news outlets' websites. The tension between shoe-leather journalism and online news aggregation has been widely debated at the EU-level since the introduction of certain copyright reforms in Germany[42] and Spain[43], which allowed newspapers to charge news aggregators for linking to news snippets.

Due to the evolution of digital technologies, press publishers face difficulties when seeking to license their rights and obtain remuneration for the online distribution of their work. From the perspective of the EU institutions, these difficulties might halt the production of creative content,[44] and therefore negatively affect citizens' access to content. A free and pluralist press is essential to safeguard 'quality journalism, citizens' access to information and contribution to public debate'.[45] To ensure the sustainability of the publishing industry and to foster the availability of reliable information, it is necessary to guarantee that rightholders obtain a fair share of the value generated by the use of their work.[46] Despite the unsuccessful attempts at the national level of implementing copyright legislation, aimed at ensuring the sustainability of the publishing industry, the EU decided to introduce a provision awarding publishers of press publications with additional protection. This provision takes the form of Article 15 (formerly Article 11) of the DSM Copyright Directive.

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[40] Eleonora Rosati, 'The German "Google Tax" Law: Groovy or Greedy?' (2013) 8(7) Journal of Intellectual Property Law & Practice 497, 497.
[41] Chrysanthos Dellarocas, Juliana Sutanto, Mihai Calin, Elia Palme, 'Attention Allocation in Information-Rich Environments: The Case of News Aggregators' (2015) 62(9) Management Science 2543, 2543 <https://pubsonline.informs.org/doi/abs/10.1287/mnsc.2015.2237> accessed 22 May 2019.
[42] Urheberrechtsgesetz, UrhG 1965, 87f-h.
[43] La Ley de Propiedad Intelectual 1996, 32.2.
[44] Impact Assessment, para 5.1.1.
[45] DSM Copyright Directive Proposal, recital 31.
[46] DSM Copyright Directive Proposal, Explanatory Memorandum 2.

2. Article 11 of the DSM Copyright Directive Proposal

Article 11 of the DSM Copyright Directive Proposal awarded 'publishers of press publication' with the rights referred to in Article 2 and 3(2) of Directive 2001/29/EC.[47] Article 2 of the InfoSoc Directive provides for an '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', whereas Article 3(2) caters for an 'exclusive right to authorise or prohibit any communication to the public of (...) works'.[48] This means that publishers of press publications would now obtain reproduction rights and rights of communication. These rights would expire only after 20 years following the date of publication.[49] Additionally, they would apply retroactively to articles and media already published in the public domain.[50]

3. The Criticism of the Proposed Article 11

Although Article 11 of the DSM Copyright Directive was not as controversial as Article 13, it did result in Google indicating that it may be forced to cease Google News' operations across the EU.[51] As many journalistic sources also appear in the general search engines rather than merely in the specialist news aggregators, the proposed Article 11 would also affect the operations of the search engines within the EU. The proposed 'link tax' would require news aggregators to seek permission to use the rightholders' works in exchange for the payment of license fees. Similarly to how radio stations pay fees for playing music, the news aggregators would pay fees to digital press publishers. Despite Article 11 being referred to

[47] DSM Copyright Directive Proposal, art 11.
[48] 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] OJ L167/10 (InfoSoc Directive), arts 2, 3(2).
[49] DSM Copyright Directive Proposal, art 11.
[50] ibid.
[51] Isobel Asher Hamilton, 'Google is prepared to ruthlessly shut down its news service if it is stung by sweeping new European internet laws' (*Business Insider,* 19 November 2018) <www.businessinsider.com/google-may-shutter-google-news-over-eu-link-tax-2018-11?r=US&IR=T> accessed 20 July 2019.

as a 'link tax', one of the senior executives at Google stated that: '[w]hat worries us isn't the money, which would probably be negligible, but the precedent this would set. Imagine if we had to strike a licensing deal with everyone who uploads a recipe'.[52]

Richard Gingras, Vice-President of News at Google, emphasises that the proposed Article 11 'will have unintended consequences for smaller news publishers, limit innovation in journalism and reduce choice for European consumers'.[53] He goes further to explain that currently there are 80,000 news publishers that can show up in Google News and that forcing services, such as Google News, to enter into licensing agreements with news publishers would mean that it would be necessary for news aggregators to select only a limited number of publishers to feature in their results.[54]

Apart from the corporate opposition, many academics throughout Europe also criticised the proposal.[55] The proposed right was found to be 'undesirable',[56] to introduce 'unnecessary uncertainty',[57] and to be 'unlikely to achieve anything apart from adding to the complexity and cost of operating in the copyright environment'.[58]

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[52] Matthew Karnitschnig, Laura Kayali, 'Google's last stand on copyright' (*Politico,* 12 December 2018) <www.politico.eu/article/google-last-stand-copyright-rules-silicon-valley-eu-fight/> accessed 20 July 2019.
[53] Richard Gingras, 'Proposed copyright rules: bad for small publishers, European consumers and online services' (*Google Official Blog*, 6 December 2018) <www.blog.google/around-the-globe/google-europe/proposed-copyright-rules-bad-small-publishers-european-consumers-and-online-services/> accessed 20 July 2019.
[54] ibid.
[55] Gustavo Ghidini, Francesco Banterle, 'A Critical View on the European Commission's Proposal for a Directive on Copyright in the Digital Single Market' (2018) 6 Giurisprudenza Commerciale 921, 923 <https://ssrn.com/abstract=3168070> accessed 20 July 2019; Alexander Peukert, 'An EU related right for press publishers concerning digital uses. A legal analysis.' (2016) Research Paper 22 of the Faculty of Law, Goethe University, Frankfurt am Main 5 <www.eco.de/wp-content/uploads/2019/07/20161220-Peukert-final-RRPP.pdf> accessed 20 July 2019.
[56] Lionel Bently and Others, 'Call For Views: Modernising the European Copyright Framework - Response to Article 11 of the Proposal for a Directive, entitled 'Protection of Press Publications concerning digital uses' (Letter to Baroness Neville-Rolfe, Ms Lynch of the Copyright Policy Directorate, 5 December 2016) 1 <www.cipil.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cipil.law.cam.ac.uk/documents/ipomodernisingipprofresponsepresspublishers.pdf> accessed 21 July 2019.
[57] ibid.
[58] ibid.

3.1 The Value Gap and News Aggregators

One of the main criticisms is that the Commission has not offered any probative data demonstrating how the implementation of a press publishers' right would specifically give rise to an increase in revenue for press publishers,[59] and subsequently achieve the primary goal of sustaining a free and pluralist press. This lack of evidentiary data undermines the Commission's hypothesis that it was the emergence of news aggregators and search engines which directly caused the decline in newspaper revenues. Instead, the critics refer to the two alternative factors that have been widely recognised to have had an influential effect upon this decline, these being: new advertising practices via the internet and the online availability of traditional newspaper content, which have both led to a decreased incentive to subscribe to physical content.[60] These two factors have no direct connection to the activities of the search engine and news aggregator markets. In fact, when Germany and Spain introduced a national ancillary right for press publishers, the activities of search engines and news aggregators had been shown to actually contribute to the increased reader traffic for online publications on press publishers' websites.[61] This criticism demonstrates that the overall evolution of the online news publication market, and the accompanying decrease in revenue

[59] Giancarlo F. Frosio, 'Reforming Intermediary Liability in the Platform Economy: A European Digital Market Strategy' (2017) 112 Northwestern University Law Review 19, 26-27 <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1250&context=nulr_online> accessed 21 July 2019; European Copyright Society, 'General Opinion on the EU Copyright Reform Package' (24 January 2017) 5 <https://europeancopyrightsocietydotorg.files.wordpress.com/2015/12/ecs-opinion-on-eu-copyright-reform-def.pdf> accessed 21 July 2019.

[60] Giuseppe Colangelo, Vario Torti, 'Copyright, online news publishing and aggregators: a law and economics analysis of the EU reform' (2019) 27(1) International Journal of Law and Information Technology 75, 90 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3255449> accessed 21 July 2019; Lionel Bently and others, 'Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive' (2017) 19 <www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU(2017)596810_EN.pdf> accessed 21 July 2019.

[61] Susan Athey, Markus Mobius, Jeno Pal, 'The Impact of Aggregators on Internet News Consumption' (2017) Stanford Institute for Economic Policy Research (SIEPR) Working Paper 17-034, 14-15 <https://siepr.stanford.edu/sites/default/files/publications/17-034_0.pdf> accessed 22 May 2019; NERA Economic Consulting, 'Impact on competition and on Free Market of the Google Tax or AEDE Fee: Report for the Spanish Association of Publishers of Periodical Publications (AEEPP)' (*Insights in Economics,* 2017) 57 <www.aeepp.com/pdf/Informe_NERA_para_AEEPP_(INGLES).pdf> accessed 21 July 2019.

for press publishers', might be a natural result of the increasing digitalisation of modern society and should not be strictly attributed to news aggregators.

3.2 The Spanish and German Experience

By introducing Article 11, the Commission followed in the footsteps of the German and Spanish authorities that attempted to introduce similar measures already in 2013 and 2014. Both these attempts were ultimately unsuccessful and therefore many believed that the Commission, with its own ancillary right proposal, was biting off more than it could chew.[62]

Spain introduced the right for publishers to claim reasonable compensation via collective societies for the use of non-significant fragments by commercial search engines or news aggregators.[63] This right cannot be waived by the copyright holder, meaning that the compensation has to be sought from the news aggregators, even if the holder does not wish to claim it. As a result of this new legislation, Google ceased to operate its news aggregation service in Spain.[64] The traffic of online readers to the Spanish newspapers' online editions subsequently declined by approximately 6% to 30%.[65] Additionally, there has been no evidence of significant additional remuneration for press publishers through claims of compensation.

Likewise, Germany introduced an ancillary right that meant press publishers and other 'producers of a press product' held the exclusive right to make their works available to the

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[62] European Policy Centre, 'Rewarding quality journalism or distorting the Digital Single Market? The case for and against neighbouring rights for press publishers' (*European Policy Centre,* 29 May 2017) 5-8 <http://aei.pitt.edu/87760/1/pub_7712_rewardingqualityjournalismordistortingthedsm.pdf> accessed 10 August 2019.

[63] Armin Talke, 'The "Ancillary Right" for Press Publishers: The Present German and Spanish legislation and the EU Proposal' (2017) 3 <http://library.ifla.org/1849/1/119%20talke%20en.pdf> accessed 10 August 2019.

[64] David Román, 'Google's Shutdown of Spanish News Service Watched Elsewhere in Europe' (*The Wall Street Journal*, 16 December 2014) <www.wsj.com/articles/google-shuts-spanish-news-service-ahead-of-new-law-1418728149> accessed 10 August 2019.

[65] Lionel Bently and others, 'Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive' (2017) 19 <www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU(2017)596810_EN.pdf> accessed 21 July 2019.

public for commercial purposes. Unlike the Spanish equivalent, the individual copyright holders could 'opt-in' to be included in news aggregators and search engines by waving this exclusive right. Even with more flexibility in the German approach, there was a reported decline of 8% in online reader visits to the outlets controlled by the Axel Springer publishing group.[66] This was most likely the effect of the change in how news aggregators operated. In response to the new law, they minimised the display of the search results, so as to not risk incurring liability for damages from potentially infringing press publishers' rights.[67] Similarly to the Spanish experience, there has been no evidence of an increase in revenue for press publishers as a result of this exclusive right.

The Spanish and German experiences demonstrate that the implementation of an ancillary right for press publishers could actually be counterproductive to its main objectives i.e. the sustainability of the press and an increase of revenue for press publishers and journalists. Whilst it is necessary to recognise that Google News was able to cease the operation of its services in Spain due to the insignificant number of readers contained in only one country, it is unlikely that Google News and other news aggregators would simply apply the same strategy and exit a market as large and significant as the EU. Accepting this assumption, there exists an argument for the necessity and merit of creating an ancillary right for press publishers at a Community-level. The criticisms referring to the unsuccessful attempts of Spain in introducing a similar law do not take into consideration the principle of subsidiarity.

[66] Joan Calzada, Ricard Gil, 'What Do News Aggregators Do? Evidence from Google News in Spain and Germany' (2018) 1, 30 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2837553> accessed 10 August 2019.

[67] Bundeskartellamt, 'Bundeskartellamt takes decision in ancillary copyright dispute' (*Press Release*, 9 September 2015) <www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/09_09_2015_VG_Media_Google.html> accessed 10 August 2019.

This principle is applied in areas which do not fall within the exclusive competence of the European Union. It states that:

> the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.[68]

Both the DSM Copyright Directive Proposal and the final text of the Copyright Directive refer to the scale, effects and cross border dimension of online distribution requiring action at a community level, as opposed to national level where it could not be sufficiently effective.[69] The example of Google being able to circumvent the Spanish territory and maintain its operations and profit arising from the rest of the European territory might only be prevented through a Community-wide action.

Nevertheless, the only conclusion drawn from the available evidence in Germany, where Google and other news aggregators continued to operate, is that Google would simply restrict the manner it displays its search results, as it attempts to avoid any potential liability.

The evidence shows that this action would not only cause an overall decline in online readership for press publishers, but it could also be detrimental to the users of news aggregators that search for a specific article, but struggle to identify it, because of the limited information on display in the news aggregators' search listings. Thus, this ancillary right will likely lead to an even greater decline in revenue for the press publisher market, threatening its very status as a free and pluralist press, the same status that this right was designed to sustain.

[68] Consolidated Version of the Treaty on European Union [2008] OJ C115/13, art 5(3).
[69] DSM Copyright Directive Proposal, recital 44; DSM Copyright Directive, recital 83.

The proposed Article 11 could negatively impact smaller publishers and limit users' access to information. Moreover, based on the experiences of Germany and Spain, a neighbouring right would have a significant impact on the position of smaller press publishers. When news aggregators ceased to operate in Germany (Bing News) and Spain (Google News), smaller press publishers were the most seriously affected in terms of the loss of traffic from online readers. News aggregators and search engines have become an invaluable tool for smaller press publishers.[70] They allow them to compete with the bigger publishers for readers without significant investments in a distribution network or marketing scheme.

Decreasing the incentive for news aggregators and search engines to be active in the European market means that it is more than likely that the newspaper market will become re-centralised and consist of only a few large press publishers that will be able to rely on their established distribution networks to remain competitive. This was supported by Google's suggestions that it would feature and conclude licenses with only a select few number of publishers.[71] This negatively affects the public, as it decreases the potential sources of information that they have access to, allowing the larger press publishers to possess a near monopoly on the public narrative. This consequence is outright counter-productive to the aim of maintaining a pluralistic press and strengthening democratisation.

3.3 The Need for an Ancillary Right

It has been suggested that the creation of an ancillary right is unnecessary or even unlikely to be beneficial to press publishers.[72] The Spanish Competition Authority published a

[70] Susan Athey, Markus Mobius, Jeno Pal, 'The Impact of Aggregators on Internet News Consumption' (2017) Stanford Institute for Economic Policy Research (SIEPR) Working Paper 17-034, 27-28 <https://siepr.stanford.edu/sites/default/files/publications/17-034_0.pdf> accessed 22 May 2019.
[71] Richard Gingras, 'Proposed copyright rules: bad for small publishers, European consumers and online services' (*Google Official Blog*, 6 December 2018) <www.blog.google/around-the-globe/google-europe/proposed-copyright-rules-bad-small-publishers-european-consumers-and-online-services/> accessed 20 July 2019.
[72] Jens-Henrik Jeppesen, 'CDT responds to European Commission consultation on ancillary rights: unnecessary barriers for innovation and free speech' (*CDT Insights,* 20 June 2016)

commentary on the implementation of the ancillary right, where it stated that it was unnecessary to offset or balance out a market failure, as:

> despite the constant use of their content made by search engines and aggregators, there is actually no loss of income or of incentives, insofar as the publishers benefit from the user traffic that the search engines and aggregators divert to their website, and they are able to prevent indexing and aggregation using the standardized file "robots.txt".[73]

This raises the question of whether this right will be effective if press publishers already possessed the option of removing their content from Google News and other aggregators. Equally, publishers in Germany attempted and failed to challenge Google under competition law to compel Google to agree a licensing agreement with them.[74] These two examples demonstrate that it is doubtful whether the introduction of the ancillary right at the community-level will prove effective in strengthening the negotiating position of press publishers and journalists.

It is common practice for publishers to secure the author's economic rights to a work through a contract. However, it is also the practice in some member states that the publisher becomes the initial owner of a collective work, such as a newspaper or a journal, by virtue of it being created within the course of their employer relationship with journalists. Furthermore, through *sui generis* database rights and unfair competition rules, the investment in collecting, verifying and presenting the contents of a database, such as sports or television fixtures, is

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<https://cdt.org/insights/cdt-responds-to-european-commission-consultation-on-ancillary-rights-unnecessary-barriers-for-innovation-and-free-speech/> accessed 10 August 2019.

[73] Patricia Mariscal, Nerea Sanjuan, Fernando Carbajo, 'Copyright, to be or not to be' (Copenhagen ALAI Congress 2017) 7 <http://alai2017.org/fileadmin/user_upload/ALAI_2017/_Spain.pdf> accessed 10 August 2019.

[74] Bundeskartellamt, 'Bundeskartellamt takes decision in ancillary copyright dispute' (Press Release, 9 September 2015) <www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/09_09_2015_VG_Media_Google.html> accessed 20 June 2020.

also protected.[75] As a result, there was no consensus among European publishers for the need to create an ancillary right, because many press publishers already possessed sufficient commercial rights relating to the works. In fact, some publishers argued against the creation of an ancillary right.[76] Publishers have been continuously innovating their protection methods online and safeguarding access to their publications.[77] These methods offer international protection,[78] even going so far as to prevent search engines from 'scraping' content from protected publications, the very activity that Article 11 is introduced to remedy.

A core justification for the creation of this new ancillary right is that it will remedy the legal uncertainty surrounding the enforcement of press publishers' rights. Specific examples cited by the Impact Assessment include removing the need for the court to request that the publisher demonstrates it possesses the rights to all the infringed content.[79] Nevertheless, the introduction of an ancillary right will not alter the burden of proof that lies with the publishers in proving their ownership of author's rights. The problematic enforcement of the current rights held by publishers should not justify a creation of a new proprietary right for the sole benefit of the publisher and not the author.

3.4 The Other Criticisms

The aforementioned criticisms are further justified by the excessive scope of the proposed right. The Commission initially suggested to offer press publishers protection for a disproportionate duration of 20 years.[80] This protection would also apply retroactively.[81] As

[75] Christophe Geiger, Giancarlo Frosio, Oleksandr Bulayenko, 'The Introduction of a Neighbouring Right for Press Publisher at EU Level: The Unneeded (and Unwanted) Reform' (2017) 39(4) European Intellectual Property Review 202, 214 <https://www.academia.edu/33307473/The_Introduction_of_a_Neighbouring_Right_for_Press_Publisher_at_EU_Level_The_Unneeded_and_Unwanted_Reform> accessed 10 August 2019.
[76] ibid 13.
[77] ibid 13.
[78] WIPO Copyright Treaty (adopted 20 December 1996, entered into force 6 March 2002) 2186 UNTS 12, art 11.
[79] Impact Assessment, para. 5.3.3.
[80] DSM Copyright Directive Proposal, art 11.
[81] ibid.

such, any internet intermediaries, including news aggregators, would need to assess the legitimacy of the use of any content published throughout the past twenty years.[82]

While the Commission justifies the proposed term of protection by stating that it is similar to what other rightholders possess,[83] the critics find it to be disproportionate.[84] It is necessary to emphasise that news is a perishable commodity. Thus, even a lapse of a short period of time might deprive it of all its value.[85] Additionally, the Commission was not clear enough in defining the 'date of publication'. It is uncertain how to calculate the term of protection, as digital newspapers are constantly updated and offer dynamic content.[86]

The retroactive right would remove material from the public domain and impinge the freedom of expression and the freedom to information.[87] The freedom of expression and the spirit of democracy are intrinsically tied to the information that is within the public domain. When information is in the public domain, it can be freely utilised by any person regardless of their means. Publicly accessible materials invite an increasingly diverse range of narratives, which in turn contribute to a democratic culture. Without the ability for authors to substantiate and inform their expressed narratives with referenced factual material, it becomes difficult to distinguish true publications from false narratives. It also deprives smaller publishes from the ability to challenge the narrative of the largest publications, due to the large discrepancy between their informational inventories.[88] Smaller publishers and

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[82] ibid.
[83] Impact Assessment, para 5.3.3.
[84] Giuseppe Colangelo, Vario Torti, 'Copyright, online news publishing and aggregators: a law and economics analysis of the EU reform' (2019) 27(1) International Journal of Law and Information Technology 75, 87 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3255449> accessed 27 December 2019.
[85] *Hashman and Harrup v the United Kingdom* ECHR 1999-VIII 25594/94, para 32; *Ürper and others v Turkey* (2009) ECHR, para. 39; *RTBF v. Belgium* (2011) ECHR, para 89.
[86] Mireille M.M. van Eechoud, 'A publisher's intellectual property right: Implications for freedom of expression, authors and open content policies' (University of Amsterdam: Institute for Information Law 2017) 33 <https://pure.uva.nl/ws/files/36128252/OFE_Implications_of_publishers_right.pdf> accessed 27 December 2019.
[87] ibid.
[88] Giancarlo F. Frosio, 'Reforming Intermediary Liability in the Platform Economy: A European Digital Market Strategy' (2017) 112 Northwestern University Law Review 19, 31-32

individuals would have to pay to access this information, leading to the disenfranchisement of those who lack the market power to ensure their voices are heard. The introduction of the ancillary right would be a step back from the level of democratisation that has resulted from the internet. The internet is 'a driver of greater pluralism in the media, giving both access to a wider range of sources and points of view as well as the means for individuals – who might otherwise be denied the opportunity – to express themselves fully and openly'.[89]

This is hardly the result that was the aim and underlying reason for the introduction of the Directive, which had sought to maintain a plurality of media publications.

Moreover, some critics raised the concern that providing publishers with an explicit economic right to the work, would automatically result in the authors' or creators' share of the revenue declining to accommodate the redistribution.[90] This assumption was made on the basis that the Commission stated that the license fees charged to current online platforms would not increase as a result of the ancillary right.[91] This led some to conclude that without an increased flow of revenue from a higher license fee, the shares would have to be divided up to realise a new share attributed to publishers. However, this criticism was perhaps exaggerated, as the Impact Assessment made it clear that the ancillary right 'would only imply costs for those online services providers which are not concluding licences for the reuse of publishers' content today when they should in principle do so, pursuant to copyright law'[92]. This demonstrates that the Commission clearly intended the ancillary right to only

<https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1250&context=nulr_online> accessed 27 December 2019.

[89] Commission, 'A Digital Agenda for Europe' (Communication) COM(2010) 245 final (May 19, 2010) 30

[90] Christophe Geiger, Giancarlo Frosio, Oleksandr Bulayenko, 'The Introduction of a Neighbouring Right for Press Publisher at EU Level: The Unneeded (and Unwanted) Reform' (2017) 39(4) European Intellectual Property Review 202, 212-213 <hwww.academia.edu/33307473/The_Introduction_of_a_Neighbouring_Right_for_Press_Publisher_at_EU_Level_The_Unneeded_and_Unwanted_Reform> accessed 10 August 2019.

[91] Impact Assessment, para 5.3.3.

[92] ibid.

provide publishers a share of the revenue for currently unlicensed content, rather than readjust the revenue already earned through established license agreements.

Furthermore, the proposed Article 11 is considered to be inconsistent with the Berne Convention.[93] While Article 2(8) of the Convention explicitly excludes 'mere items of press information' and 'press summaries' from protection,[94] '[t]he rights granted to the publishers of press publications under this Directive should have the same scope as the rights of reproduction and making available to the public provided for in Directive 2001/29/EC, insofar as digital uses are concerned'.[95] As explained by Stavroula Karapapa:

> '[i]f snippets, headlines incorporating links, and other digital uses, such as non-permitted text mining, are to be covered by the proposed right to press, it is very likely that the protection thereby afforded would be more akin to protecting information than offering protection to original subject matter as such'.[96]

This was something that copyright law was never designed to achieve. However, as explained by the Commission within the Impact Assessment, 'this intervention would not change the legal status of hyperlinks in EU law as it follows from the case-law of the CJEU according to which the "provision on a website of clickable links to works freely available on another website" does not constitute a copyright relevant act'.[97] This demonstrates that some of the criticism levelled at Article 11 omits material information contained in the

[93] Berne Convention for the Protection of Literary and Artistic Works (adopted 28 September 1979, entered into force 19 November 1984) 1161 UNTS 3.
[94] Berne Convention for the Protection of Literary and Artistic Works (adopted 28 September 1979, entered into force 19 November 1984) 1161 UNTS 3, art 2(8).
[95] DSM Copyright Directive Proposal, recital 57.
[96] Stavroula Karapapa, 'The press publication right in the European Union: an overreaching proposal and the future of news online' in Enrico Bonadio and Nicola Lucchi (eds), *Non-Conventional Copyright: Do new and Non-Traditional Works Deserve Protection?* (Edward Elgar 2018) 20-21 <http://centaur.reading.ac.uk/75767/> accessed 18 July 2020.
[97] Impact Assessment, para 5.3.2.

Impact Assessment that accompanied the DSM Copyright Directive Proposal. Nevertheless, the criticism levied at snippets and headlines were still highly relevant.

While some critics have potentially exaggerated their arguments, the Commission should have taken more care when drafting the provisions of the DSM Copyright Directive Proposal to avoid ambiguity and minimise the level of generated controversy.

4. The European Commission's Response to the Raised Criticisms

Although the Commission maintained its stance towards the overall purpose of Article 15, it has taken steps to remedy certain issues that were foreseen with the original proposal. The reduction of the duration of protection from 20 years to 2 years and the removal of retroactive protection addresses the perishable value of news items. Excessive and disproportionate protection would have led to substantial compliance costs for news aggregators and made it more difficult for researchers and journalists to utilise past work. The protection period now accurately reflects the true value of these news items, where their principal value is an immediate influence on public discourse, meaning that they increasingly depreciate in relevance in only a short time. Increasing the duration of protection would not have had a drastic effect on the value of these news items and subsequently not increase the bargaining power of the press publishers to a level that would correspondingly justify such burdensome standards.

Additionally, the explicit exception for private or non-commercial use should dissuade fears of a chilling effect on the right of citizens to freely express their views and concerns by sharing relevant news items. Nevertheless, the right to freedom of expression concerns a citizen's right to access information, which the member states have a positive duty to uphold, especially in the area of search engines.

As explained by the Committee of Ministers of the Council of Europe:

> a prerequisite for the existence of effective search engines is the freedom to crawl and index the information available on the Web. The filtering and blocking of Internet content by search engine providers entails the risk of violation of freedom of expression guaranteed by Article 10 of the Convention in respect to the rights of providers and users to distribute and access information.[98]

Therefore, this amendment only protects one aspect of a citizen's right to expression, which may possibly be meaningless if they are accessing the material through their usual online sources.

Responding to criticism that publishers would now benefit from an exclusive right of use for a work, even when it had previously been licensed to others under a non-exclusive license, the Commission clarified that this would not be the case under the finalised Directive.

The Commission included a provision that expressly stated that the authors of works included in press publications shall receive a share of the revenue stream generated by the new press publication right.[99] Nevertheless, this was never expanded upon to determine exactly what form a 'fair share' may take. As explained in section 3.4 of this chapter, the concern that authors would receive diminished returns was perhaps misplaced, with the ancillary right aimed at tackling the use of unlicensed content. In this case, the previous focus on publishers was logical, as they were significant enough in terms of possessing a sufficiently strong negotiating position to conclude these new licenses with online platforms. It is perhaps difficult to imagine how an author is meant to factor into these negotiations, or

[98] Council of Europe, 'Recommendation of the Committee of Ministers to member States on the protection of human rights with regard to search engines' (2012) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805caa87> accessed 28 December 2019.
[99] DSM Copyright Directive, art 15(5).

whether it is expected that the publisher must secure the author's 'fair share' as a condition of its ancillary right. Therefore, this provision, at best, does not go far enough to clarify the author's position under new licensing arrangement, and at worst, further complicates what would undoubtedly be a difficult task in securing new and proportionate licensing agreements with global online platforms.

5. The Remaining Criticisms

Despite including the aforementioned amendments in the DSM Copyright Directive, the Commission did not address some of the most important criticisms that were levied at the proposed article.

The explicit exception to the use of 'short extracts' does not relieve the uncertainty as to what will be permissible and what will be an unauthorised use. In fact, the Directive refers to a deliberate effort for a broad interpretation of what is considered as a 'short extract', as to not deprive 'the effectiveness of the rights provided for in this Directive'.[100] However, it is an undeniable fact that a significant aspect of the value of a news item, the disclosure of new information, is commonly provided in the form of a short summarised headline. These headlines can constitute less words than what can be used in a conventional grammatical sentence, meaning it will be difficult to find situations where headline descriptions have not deprived the value of the protected ancillary right even with the smallest of extracts provided. Despite this inescapable fact, a strict interpretation is unlikely, as it would be too draconian and cause a substantial chilling effect upon the dissemination of news items via online intermediaries and contradict the express meaning of the actual provisions of Article 15. Therefore, it is more than likely that the interpretation will not have a drastic effect upon the current operation of news aggregator enterprises.

[100] DSM Copyright Directive, recital 58.

The most significant criticism still remains with the burden that is imposed upon online news aggregators and search engines. The amendments do not facilitate the ability for online intermediaries and traditional press publishers to come to an agreement over the licensing of copyrighted material.

As a result, some member states have specifically augmented the provisions in their implementation of the Directive that ensure a fairer negotiation between online intermediaries.[101] These additional provisions mandate online intermediary services to supply information to the press publishers on how their content is used and other information that ensures a transparent assessment of the appropriate remuneration to be paid. France has also included a provision detailing that remuneration should be based not only on the content's value to the general public but also the investment made by press publishers when producing the content, including the 'human, material and financial' costs.[102]

Despite the augmented provisions, press publishers have had limited success in agreeing any form of remuneration with online intermediaries. In a directly parallel situation to the aftermath of the failed German ancillary right, Google, the most prominent online intermediary, has responded to this implementation by an outright refusal to enter into a licensing agreement with a publisher demanding remuneration for their content.[103] This has led to most press publishers freely licensing their content to Google to avoid being removed from Google Search's index and its search results page. The failure of the legislation to provide press publishers with sufficient leverage has brought about the attention of the French competition authority, which has made an interim order mandating Google to enter into good faith negotiations with press publishers and come to an agreed payment

[101] Code de la propriété intellectuelle (Version consolidée au 1 juillet 2020), L218-4.
[102] ibid.
[103] Alex Baker, Mehreen Khan, Madhumita Murgia, 'Google under fire over not paying for news content in Europe' (*Financial Times,* 25 September 2019) <www.ft.com/content/a451ffda-df87-11e9-9743-db5a370481bc> accessed 15 May 2020.

mechanism.[104] Such an order is highly ground-breaking, as not only are interim orders rarely utilised by the authority, but it could also result in a drastic expansion of the current duty of care imposed on dominant online intermediaries under competition law.[105]

The French competition authority alleges that Google has breached Article 102 of the Treaty on the Functioning of the European Union by abusing its dominant market position in refusing to negotiate with publishers in good faith.[106] The implications of this finding could dramatically alter how competition law applies to online intermediaries in the press publication market. The interim order specifically forbids Google from delisting content from its general search service during the negotiations,[107] therefore preventing Google from leveraging its commercial advantage by denying press publishers their primary source of online readers. It also lays the foundations for what may become a mandatory duty for dominant online intermediaries to display press publishers' content, comparable to the duty imposed upon owners of 'essential facilities' to license their infrastructure to competitors under European competition law.[108]

However, this new expansion of liability conflicts with established competition law and fundamental rights. Previously, competition law has found abusive behaviour when a rightholder has refused to supply a competitor with their copyrighted work, but only in 'exceptional circumstances'.[109] In this current context, it would not be a *refusal to supply*, but Google's *refusal to demand* the rightholders' work that would be considered abusive. In

[104] Pablo Ibáñez Colomo, 'Interim measures by the Autorité de la Concurrence: history repeats itself after IMS Health' (*Chillin'Competition,* 15 April 2020) <https://chillingcompetition.com/2020/04/15/interim-measures-by-the-autorite-de-la-concurrence-history-repeats-itself-after-ims-health/> accessed 15 May 2020.
[105] ibid.
[106] ibid.
[107] ibid.
[108] Case C-7/97 *Oscar Bronner GmbH & Co. KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG* EU:C:1998:569, [1998] ECR I-07791, para 24.
[109] Nicolas Petit, 'The Antitrust and Intellectual Property Intersection in European Union Law' in Roger D. Blair, Daniel Sokol (eds), *Handbook of Antitrust, Intellectual Property and High Tech* (Cambridge University 2017) <https://ssrn.com/abstract=2796670> accessed 15 May 2020.

a parallel situation, the German competition authority had held that '[e]ven a dominant company cannot be compelled under competition law to take on a considerable risk of damages where the legal situation is unclear'.[110] Essentially, the French competition authority is preventing Google from disposing of content it might not wish to display, despite its fundamental right of freedom to conduct a business. In this regard, it is not unsurprising that Google have challenged the use of the interim order.[111]

If Google was to remove content from its search listings, it would lead to an undeniable decrease in the quality of its service, as end-users would find it more difficult to access the most relevant content to their search query. As has been shown in detailed studies on consumers switching in the general search services market, consumers respond very negatively to degraded quality and are eager to switch to an alternative supplier.[112] For Google to risk the degradation of its quality, it must either strongly believe that paying remuneration would set a precedent that is unsustainable for its long term commercial performance or, more likely, that its competitors would be unable to meet the press publishers' demands and take advantage of Google Search's depreciation in quality.

The general search service market is highly concentrated and possesses substantial barriers for new entrants. A recent report undertaken by the UK competition authority stated that most competitors lack the means to produce an index of data to rival Google, leaving them little to no option but to access Google or Microsoft's indexes through syndication

[110] Bundeskartellamt, 'Bundeskartellamt takes decision in ancillary copyright dispute' (Press Release, 9 September 2015) <www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2015/09_09_2015_VG_Media_Google.html> accessed 20 June 2020.
[111] Arezki Yaïche, Nicholas Hirst, 'Google appeals French antitrust order to negotiate with press publishers' (*MLex*, 2 July 20) <www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1204548&siteid=190&rdir=1> accessed 3 July 20.
[112] Aaron S. Edlin, Robert G. Harris, 'The Role of Switching Costs in Antitrust Analysis: A Comparison of Microsoft and Google' (2013) 15(2) Yale Journal of Law & Technology 170, 203.

agreements.[113] It is difficult to anticipate whether the licensing agreements between press publishers and Google would include the possibility of sub-licensing the content to smaller general search services via Google's index, but it is likely that this will not be the case. The ancillary right focuses on the actual communication to the public of the work, which does not happen when the work is indexed, but when it is displayed on the search results page. This would likely entail a requirement for all general search services to license the right to display the work from the relevant press publication. Although initially it may seem that this will enhance the incentive for producing work that benefits the public through increased remuneration, this will likely disincentivise creators in the long-term.

The novel requirement to acquire a license for displaying copyrighted work represents another barrier that new general search engines have to overcome to attempt to compete with Google. The likely result is that there will be a huge discrepancy in quality between smaller general search engines and Google, which may in turn result in Google having no other competitors than Microsoft. This will inevitably lead to an even more concentrated general search market, subsequently leading to the competitive harm identified in the European Commission's Google Shopping decision, where Google can charge unconstrained prices for advertisers.[114] This would likely also apply to press publishers, where Google will be able to leverage its dominance to demand low license fees due to the lack of competitors. It also disincentivises creators in other aspects than remuneration, as it will become even more difficult to gain awareness and recognition. Currently, publishers are able to attract readers through different online intermediaries, where they may become more prominent than if they were exclusively displayed on Google and other market leaders. It is increasingly likely that,

[113] Competition and Markets Authority, 'Online platforms and digital advertising Market study interim report' (2019) 61-62 <https://assets.publishing.service.gov.uk/media/5dfa0580ed915d0933009761/Interim_report.pdf> accessed 15 May 2020.
[114] Google Search (Shopping) (Case AT.39740) Commission Decision C(2017) 4444 [2017] OJ C9/17 593.

with an even more concentrated market for news aggregators, only a few press publishers will dominate the search results, disincentivising smaller publishers from producing content that will likely receive little to no recognition. Therefore, it would be in the best interest of press publishers that there exists a diverse and competitive news aggregator market. To this end, the ancillary right is counterproductive and to the detriment of the press.

It is also necessary to re-evaluate whether the introduced press publishers' right is even practically enforceable. The need for the interim order to be made and the expansion of European competition law to enable the ancillary right to be potentially effective demonstrates the difficulty in actually achieving the desired result through the creation of this right. As shown by the German experience, this is applicable to both national and community-level attempts. There is no guarantee that these negotiations will culminate in a satisfactory result for press publishers. If it is the case that Google needs to secure a license for every potential copyrighted work that it encounters through web-crawling, as it has no current method of distinguishing between what should be considered to be more valuable work until it receives positive feedback from its users, then there exists a real possibility that news aggregators will significantly minimise and degrade the quality of their results. As the senior executive at Google previously remarked, it is not the cost of the fess that is the chief concern, but the precedent that this will set for compliance requirements in other industries.[115] It may be impossible to determine the future administrative costs that news aggregators and general search services will face in finding the copyright holder, verifying their rights, and then negotiating and concluding a license for the work. The restriction on delisting or removing copyrighted work from Google's search results is also a significant interference with the fundamental right to enterprise. Why should Google pursue a publicly

[115] Matthew Karnitschnig, Laura Kayali, 'Google's last stand on copyright' (*Politico,* 12 December 2018) <www.politico.eu/article/google-last-stand-copyright-rules-silicon-valley-eu-fight/> accessed 20 July 2019.

beneficial commercial activity, which accounts 'for more than 8 billion visits per month to the websites of press publishers',[116] when it is subject to substantial administrative and commercial burdens?

Even though it may initially appear unlikely, it may in fact be the rational economic choice to minimise all activity in the European sector, which would be to the detriment of all parties, including any potential competitors that would face similar burdens. The treatment of Google Search as a quasi-essential facility is a particularly harsh extension of competition law, especially when Google is not charging publishers to be listed among its search results. It may be the case that the news aggregator model will become similar to that of a comparison shopping model, where press publishers will need to pay to be featured among Google's news service. All of these potential outcomes seem to offer glaring detrimental effects that may entirely eclipse any positive effect that the ancillary right brings about. This is especially true when considering that press publications outside of the EU will not face these potential disadvantages, leading to them inevitably outperforming their European counterparts. It is important to remember that European readers are not a captive audience and are able to access publishers from across the world via the internet and in particular through the use of foreign news aggregators.

Therefore, despite the Commission's amendments in response to the criticism levied at the proposed ancillary right, it has only mitigated some of the unintended potential negative effects. The Commission should be rightly praised for removing the retroactive application of the right and providing an exception for the non-commercial use of protected works, nevertheless, there still exists substantial ambiguity in determining the exact threshold where

[116] Brad Spitz, 'Press Publishers' Right: the French Competition Authority orders Google to negotiate with the publishers' (*Kluwer Copyright Blog,* 14 April 2020) <http://copyrightblog.kluweriplaw.com/2020/04/14/press-publishers-right-the-french-competition-authority-orders-google-to-negotiate-with-the-publishers/?doing_wp_cron=1588439482.6412229537963867187500> accessed 17 May 2020.

a short extract would deprive the effectiveness of the ancillary right. Perhaps this is a result of the inescapable fact that the 'effectiveness' of the ancillary right is nigh on impossible to achieve, due to an inherent flaw in the understanding of the relationship between news aggregators and press publishers. As demonstrated above, there are a substantial number of potential implications in the creation of the ancillary right, which are significantly more complex than the simple narrative of this right forcing Google and other news aggregators to pay a fair share for its display of copyrighted work. News aggregators have become the primary distribution networks for news articles, due to their inherent efficiency advantages when compared to the traditional delivery of press publications. Any weighty disruption to the now established default distribution system will inevitably involve a certain degree of self-harm for press publishers.

As explained in section 3.2 of this chapter, the introduction of an ancillary right in Germany or Spain did not secure additional revenue for press publishers. Although an ancillary right for publishers prominently increases their negotiating leverage, this increased leverage has been shown to have actually resulted in a decrease in revenue for press publishers on a whole, as it simply interfered with the already established online market infrastructure. Additionally, they already possessed this leverage in the form of the choice to delist their content from news aggregators' indexes.

A potential reason, previously outlined, for why there has been a less dramatic decline in the German example compared to scenario in Spain is that press publishers were afforded the opportunity to co-operate with news aggregators by awarding royalty-free licenses. Following the failure of securing a licensing agreement with Google, firstly via negotiations and then challenging them under competition law, VG Media followed Axel Springer's example and granted a royalty free licence to Google to display its copyrighted works in its search listings. This, combined with the commentary from the Spanish Competition

Authority, remarking that there has been no detrimental effect on the press publisher market, raises the question of whether the attitude of press publishers toward news aggregators should change.

6. An Alternative Solution

The goals of increasing the revenue of press publications and maintaining a thriving pluralistic press could be better achieved by treating news aggregators as potential partners as opposed to competitors.

Since 2015, Google has been running a program aimed at European press publishers called the Digital News Initiative.[117] This program has provided funding amounting to €149,689,000 to over 662 projects for press publishers including the Financial Times[118] and the Economist.[119] The intended purpose of the Digital New Initiative, and the newly created Google News Initiative, is to provide funds for press publishers and journalists to innovate and experiment in their method of distributing digital content. For example, the Economist has stated that its aim is to use the funding to debut a weekly video format exploring the true story behind trending news topics, using livestreaming and audience engagement tools to enable viewers to interact.[120] HugoDécrypte, on the other hand, will use the funds to staff and train a production team, which will create a studio-based live news show,[121] which will also function as an on-screen meeting place for its YouTube community.[122] The intended

[117] Ludovic Blecher, 'Digital News Innovation Fund: three years in, and 662 total projects supported' (*Google Official Blog,* 21 March 2019) <www.blog.google/around-the-globe/google-europe/digital-news-innovation-fund-three-years-and-662-total-projects-supported/> accessed 4 June 2020.
[118] Matthew Garrahan, Mehreen Khan, 'Google criticised for push against EU Copyright Reform' (*Financial Times,* 26 June 2018) <www.ft.com/content/a8031d7a-78a0-11e8-bc55-50daf11b720d> accessed 4 June 2020.
[119] David Cohen, 'Which Publishers Are Getting Innovation Funding From Google News Initiative?' (*AdWeek,* 17 December 2018) <www.adweek.com/digital/which-publishers-are-getting-innovation-funding-from-google-news-initiative/> accessed 4 June 2020.
[120] ibid.
[121] ibid.
[122] Timothy Katz, 'GNI YouTube innovation funding: supporting 87 news organizations in 23 countries to build video capabilities and innovate with new formats' (*Google Official Blog,* 17 December 2018) <https://youtube.googleblog.com/2018/12/gni-youtube-innovation-funding.html> accessed 4 June 2020.

effect of this innovative project is an increase of reader traffic for these press publishers. An additional project that has been proven to be successful in this regard was the launch of the Accelerated Mobile Pages ("AMPs") Project, an open source project spearheaded by Google based on their initial discussions with press publishers in 2015.[123] AMPs are designed to increase the speed that pages embedding complex data, such as videos and images, load on a mobile device, and has apparently proven to have had an increase in reader traffic for publishers that use AMPs, even when reader traffic from other intermediary sources, such as Facebook, was decreasing.[124]

This demonstrates that cooperation between publishers, news aggregators, and search engines can result in mutual benefits for the parties. In fact, in the case of Google, the leading news aggregator with a near total market share, disincentivising user traffic to press publications would not align with its commercial interest. Google's chief source of revenue is search engine advertising, which only materialises when a user actually uses a listed hyperlink.[125] In this regard, Google does not receive any revenue from a potential reader simply reading the headline of an article displayed as a hyperlink without actively using it. This suggests that not inducing the reader to click on one of the advertised search listings is a failure on Google's part. Additionally, the blame for a decreasing number of subscriptions to press publishers cannot be realistically placed upon Google, as Google in cooperation with press publishers is developing a platform, called 'Subscribe with Google', where users can digitally subscribe to participating press publishers and manage all these subscriptions

[123] David Besbris, 'Introducing the Accelerated Mobile Pages Project, for a faster, open mobile web' (*Google Official Blog,* 7 October 2015) <https://googleblog.blogspot.com/2015/10/introducing-accelerated-mobile-pages.html> accessed 4 June 2020.
[124] John Saroff, 'Google referrals are up: Why that's good and how to make the most of it' (*Digital Content Next,* 14 February 2018) <https://digitalcontentnext.org/blog/2018/02/14/google-referrals-thats-good-make/> accessed 4 June 2020.
[125] Google, 'How We Make Money with Advertising' <https://howwemakemoney.withgoogle.com/> accessed 4 June 2020.

simultaneously on an individual application.[126] It is in the interest of the leading news aggregator to generate as many potential readers for press publications as possible, as it leads to an increase in the potential advertisement revenue Google can receive from these readers.

Therefore, one of the key aims of the Copyright Directive's implementation of an ancillary right is being achieved in the form of increased reader traffic to press publications, alongside the future likelihood of increased subscriptions, which will all result in an overall increase in revenue for the press publisher market. As a consequence of their increasing revenue, the press publishers will continue to operate without there being any need for the creation of such an ancillary right. However, the activities and generosity of Google in its cooperation and subsidising of innovation will be unlikely to achieve the goal of a free and pluralistic press sought by the EU, in fact, it may be working toward its antithesis, a small concentrated number of press publishers that are beholden to the interest of global corporation.

A determinative factor in which press publishers' projects receive funding is if they are likely to enhance the economic value of their business. Indeed, 70% of all the funding is distributed among commercial media, with non-commercial media receiving far less with an estimated 5% of the total funds.[127] Many have seen this as a PR tool, specifically introduced to incentivise the European Press Publishers to stop lobbying for regulatory reform.[128] This has been supported by Google utilising the program to vocalise their dissent regarding the Copyright Directive, suggesting that it is threatening the eco-system of the internet and that press publishers should accordingly voice a similar opinion to the European Parliament.[129]

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[126] Jim Albrecht, 'Introducing Subscribe with Google' (*Google Official Blog,* 20 March 2018) <https://blog.google/outreach-initiatives/google-news-initiative/introducing-subscribe-google/> accessed 4 June 2020.

[127] Alexander Fanta, 'The Publisher's Patron: How Google's News Initiative Is Re-Defining Journalism' (*European Journalism Observatory,* 26 September 2018) <www.googletransparencyproject.org/articles/publishers-patron-how-googles-news-initiative-redefining-journalism> accessed 4 June 2020.

[128] ibid.

[129] E-mail from Madhav Chinnappa to Digital News Initiative Workgroup (14 June 2018) <https://netzpolitik.org/wp-upload/2018/09/google-dni-email-on-copyright.pdf> accessed 4 June 2020.

Regardless of any existing potential merit or truth behind Google's correspondence, it does raise serious questions on the nature of independence for the press under such an initiative, when publishers and their competitors are indebted to the wills of global corporations for their commercial success in the digital world.

As demonstrated by the success of publishers utilising AMPs, press publishers that work closely with large tech corporations, such as Google, can outperform their competitors in the market due to their superior digital distribution technologies. This could have an impact upon what press publishers choose to report on, knowing that publishing a story that shines a negative light on the tech industry could jeopardise their partnerships with their digital distributors.[130] Without these partnerships, press publishers could be prevented from competing at the same level as those that are partnered with news aggregators, causing a decline in their readers and subsequently a decline in their revenue. Therefore, a chilling effect could emerge with press publishers being hesitant to report on their partners. This is against the public interest, as these tech partners, such as Google or Facebook, have access to hundreds of millions of users' personal data, whereas journalists are a vital component to ensure that these data controllers are complying with the relevant standards, by investigating and reporting to the public how these corporations utilise their data. Despite this, these fears of a chilling effect have not yet been proven. Press publications have continued to report on concerns over user privacy on Google's services[131] and on Google's attempts to dissuade

[130] Des Freedman, 'Google's Digital News Initiative: Picking winners in the future of journalism' (*LSE Media Policy Project,* 6 August 2017) <http://eprints.lse.ac.uk/80518/1/Google%E2%80%99s%20Digital%20News%20Initiative_%20Picking%20winners%20in%20the%20future%20of%20journalism%20_%20LSE%20Media%20Policy%20Project.pdf> accessed 4 June 2020.

[131] Davey Winder, 'Google Confirms Creepy New Privacy Problem' (*Forbes,* 23 June 2019) <www.forbes.com/sites/daveywinder/2019/06/23/google-confirms-creepy-new-privacy-problem/#3c6bb2f69d8b> accessed 4 June 2020; The Economist, 'As GDPR nears, Google searches for privacy are at a 12-year high' (*The Economist,* 21 May 2018) <www.economist.com/graphic-detail/2018/05/21/as-gdpr-nears-google-searches-for-privacy-are-at-a-12-year-high> accessed 4 June 2020.

publishers from supporting copyright reform,[132] despite being recipients of funding from the Digital News Initiative. Nevertheless, there still exists the possibility that such a chilling effect could emerge. This is also a risk in the form of the Google News Initiative's goal to combat misinformation. Google is cooperating with other news aggregators and intermediaries to designate which press publications can be credited as trustworthy sources of information for readers. Whilst the majority of these projects at the current stage are open source, with a degree of independence from Google, it is yet to be seen how much soft influence Google wields within these projects.

Likewise, it would not be in the interest of the Commission for Google's offerings to continue unchecked. Through programs such as 'Subscribe with Google' press publishers could become more dependent on Google's infrastructure, increasing their dominance in the market.[133] It would be in the interest to prevent a potential antitrust concern to emerge, where Google once again becomes a dominant entity in a vital market. It could then abuse its position to significantly affect the prices which readers pay for their digital subscriptions without the existence of any competitive pressure.

Therefore, this paper proposes that there is a necessity for a public fund that could supply the same demand which is currently being met by Google. Google's projects have shown to be successful in increasing the potential number of readers for press publications, however, there are significant concerns of how their influence in the market will affect the independence of the press. These concerns motivated the United Kingdom to conduct an investigative review into the sustainability of high-quality journalism in the UK. The

[132] Matthew Garrahan, Mehreen Khan, 'Google criticised for push against EU Copyright Reform' (*Financial Times,* 26 June 2018) <www.ft.com/content/a8031d7a-78a0-11e8-bc55-50daf11b720d> accessed 4 June 2020.
[133] Mark Scott, 'Google's mobile web dominance raises competition eyebrows' (*Politico,* 1 June 2018) <www.politico.eu/article/google-amp-accelerated-mobile-pages-competition-antitrust-margrethe-vestager-mobile-android/> accessed 4 June 2020.

Cairncross Review investigated the current state of journalism in the digital age, taking into consideration where readers are most likely to search for news sources, the current composition of the digital distribution infrastructure, and how that threatens public interest journalism.

The report echoes what has been discussed in this paper, namely that the majority of readers now accesses their news online:

> the Reuters Institute for the Study of Journalism reported that 74% of UK adults used some online method each week to find news, and 91% of 18-24 year olds. Most online news is available for free and much of it is carried by aggregators such as Google News or Apple News, posted on Facebook's news feed, or sent from one person to another at the tap of a finger.[134]

The review, similarly to the Commission's assessment, identified that the transition from paper format to digital format has significantly altered how revenue is awarded to press publishers, which has left a severe lack of funding for public interest journalism. Public interest journalism is a term used to describe the reporting on public institutions and figures that underpin democracy. It serves a democratic purpose by allowing the public to make informed decisions at the ballot box. Nevertheless, instead of relying on empowering the press publishers through increasing their control of copyrighted work, the Cairncross Review advocates for a measure that will remedy the main component of the lack of incentive for public interest journalism: the lack of available funding.

By providing a public fund to innovate and establish new distribution systems fit for the digital age, and importantly, systems not dominated by commercial online platforms, the

[134] Frances Cairncross, 'The Cairncross Review, A Sustainable Future For Journalism'(2019) 6 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/779882/021919_DCMS_Cairncross_Review_.pdf> accessed 4 June 2020.

European institutions would achieve their aim of preserving an independent and pluralistic press through securing additional reader traffic. Following the guidance of the Cairncross Review, the United Kingdom has pledged £2 million for the creation of the 'Future News Fund', a pilot fund for the innovation of new approaches and tools to support public interest journalism in the digital era.[135] In addition to efforts by both the Netherlands[136] and France[137], this would be another example of addressing the value gap by providing funds for the innovation of revenue collection techniques, as opposed to relying on increased copyright protection similar to Spain and Germany. This paper proposes that these efforts would be better achieved at the community-level, where resources could be pooled together and the results of such endeavours would not be limited to use by press publishers in a single member state, but by press publishers throughout the entire European Community, just as the DSM Copyright Directive intended.

Alternatively, the Cairncross Review also suggests that it would be beneficial for the introduction of a regulator, which would establish a code of conduct between digital online platforms and press publishers in a model similar to that of the sectoral regulator for telecommunications and broadcasts. This approach would actually align with the direction taken by the Commission in regard to the regulation of online intermediation services. Under the umbrella of the Digital Single Market Policy, the Commission has legislated with the intent of increasing the transparency of the terms and conditions between online intermediary services and small and medium enterprises.[138] Within the newly enacted

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[135] UK Department for Digital, Culture, Media & Sport, '£2 million Future News Fund to boost local public interest journalism' (*gov.uk,* 21 July 2019) <www.gov.uk/government/news/2-million-future-news-fund-to-boost-local-public-interest-journalism> accessed 4 June 2020.
[136] svdj, 'What the Dutch Journalism Fund is here for?'<www.svdj.nl/dutch-journalism-fund/> accessed 4 June 2020.
[137] Ministere de la Culture, 'Fonds stratégique pour le développement de la presse' <www.culture.gouv.fr/Regions/Drac-Provence-Alpes-Cote-d-Azur/Aides-demarches/Aides-financieres/Fonds-strategique-pour-le-developpement-de-la-presse> accessed 4 June 2020.
[138] Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services [2019] L186/57 (P2B Regulation).

regulation, the Commission has suggested that it would be attractive for the establishment of new codes of conduct to regulate market interactions, and that '[w]hen drawing up such codes of conduct, in consultation with all relevant stakeholders, account should be taken of the specific features of the sectors concerned'.[139] Therefore, the creation of a new sectoral authority to regulate the press publisher sector's interaction with online intermediary services would be perfectly in accordance with the current European legislative strategy. The UK competition authority has also made recommendations in support of establishing a code of conduct for online platforms following its recent market study focused on digital advertising.[140]

As explained in section 5 of this chapter, the creation of an ancillary right for press publishers is an inadequate measure to address the identified value gap. Instead of creating new methods for press publishers to restrict access to their content, there should be more focus on developing new methods of increasing the ways for readers to access content. This could be achieved by partnering with online intermediary services to provide a better distribution system to online readers, or alternatively developing an independent distribution system to directly compete with established dominant intermediaries. Overall, the approach taken by the Commission towards changing the status quo and improving the position of the press publishers was ill-founded. Instead of employing the mechanism from the failed national attempts and fragmenting the DSM's eco-system, the EU should have offered attractive alternatives to press publishers, thus countering Google's influence.

[139] P2B Regulation, recital 48.
[140] Competition and Markets Authority, 'Online platforms and digital advertising Market study final report' (2020) 5 <https://assets.publishing.service.gov.uk/media/5efc57ed3a6f4023d242ed56/Final_report_1_July_2020.pdf> accessed 4 June 2020.

CHAPTER III: ARTICLE 17 – THE FILTERING SYSTEM OF AUTOMATIC COPYRIGHT DETECTION

'This legislation poses a threat to both your livelihood and [Youtube's] ability to share your voice with the world' – Susan Wojcicki

1. The Background

As the use of the Internet has gained importance for both personal and commercial purposes, internet intermediaries have become an essential part of our lives. Internet service providers ("ISPs") allow us to access the internet, whereas social-media platforms, such as YouTube, allow its users to share videos with the rest of the world. Internet intermediaries contribute to, *inter alia*, the development of the internet as a whole and the freedom of expression. Despite this, they often become legally liable for their users' actions. Already in 1991, an ISP was found liable for a user's libel hosted on a CompuServe forum.[141]

In the mid-1990s, the uncertainty concerning the situation of intermediaries contributed to calls for statutory regimes which would provide intermediaries with immunity from liability.[142] In the year 2000, Europe decided to award the intermediaries with 'safe harbour' from potential liability through the Electronic Commerce Directive (the "e-Commerce Directive"). This Directive aimed at outlining a framework of rules governing the liability of intermediaries for the infringement of copyrighted works. Articles 12 to 15 of this Directive exclude or limit the liability that may arise at a national level. These Articles

[141] *Cubby, Inc v CompuServe* 766 F Supp 135 (SDNY, 1991).
[142] Lilian Edwards, 'Role And Responsibility Of Internet Intermediaries In The Field Of Copyright And Related Rights' (2010) 4 <www.wipo.int/export/sites/www/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf> accessed 25 May 2019.

granted ISPs safe harbour when they operated as a 'mere conduit,'[143] only 'caching,'[144] and 'hosting'[145] the infringing data.

Furthermore, there is no general obligation to monitor content that is stored and transmitted by the ISP under the aforementioned categories. These exemptions to intermediary liability were further clarified through the CJEU case law.[146] The case of *Promusicae*[147] was a significant decision in the field of ISPs liability.[148] In this case, the CJEU held that all the member states must strive for 'a fair balance to be struck between the various fundamental rights protected by the Community legal order'.[149] The principle of fair balance became a basis of further CJEU's judgments in this area. It was clearly established that ISPs and intermediaries are exempted from any form of liability if their conduct was merely 'technical, automatic, and passive'.[150] However, it is also relevant to note that ISPs and intermediaries cannot enjoy the safe harbour guaranteed under Article 14 of the e-Commerce Directive, if they have been informed of relevant facts or circumstances,[151] on the basis of which they should have recognised the presence of the illegal conduct and prevented its recurrence. This means that while ISPs and intermediaries can be found liable if they are

[143] 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) [2000] OJ L178/1 (e-Commerce Directive), art 12.
[144] ibid, art 13.
[145] ibid, art 14.
[146] Case C-236/08 *Google France Sarl v Louis Vuitton Malletier SA* EU:C:2010:159, [2010] ECR I-2417; Case C-324/09 *L'Oréal SA and Others v eBay International AG an Others* EU:C:2011:474, [2011] I-0601; Case C-291/13 *Sotiris Papasavvas v O Fileleftheros Dimosia Etaireia Ltd and Others* EU:C:2014:2209; Case C-70/10 *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* EU:C:2011:771, [2011] ECR I-11959.
[147] Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* EU:C:2008:54,[2008] ECR I-00271.
[148] Himanshu Arora, 'Article 13 of EU Copyright Directive – A step forward or rearward' (2018) 1, 6 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3296955> accessed 25 May 2019.
[149] Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* EU:C:2008:54, [2008] ECR I-00271, para 68.
[150] Case C-236/08 *Google France Sarl v Louis Vuitton Malletier SA* EU:C:2010:159, [2010] ECR I-2417, para 42.
[151] e-Commerce Directive, art 14(1)(a).

aware of hosting illegal content, they cannot be subject to any general obligation to monitor the information they store on their services.[152]

In this context, it is also vital to refer to the *Scarlet*[153] and *Netlog*[154] cases. In *Scarlet,* the CJEU held that requiring ISPs to install the filtering system would 'oblige it to actively monitor all the data relating to each of its customers in order to prevent any future infringement of intellectual-property rights'.[155] Not only would this be contrary to Article 15(1) of the e-Commerce Directive, but it would also lead to an unfair balance between 'the protection of copyright and the protection of the fundamental rights of individuals who are affected by such measures'.[156] Most importantly, this requirement, apart from infringing the freedom to conduct business by the ISP concerned, would also infringe its customers' right to protection of personal data and their right to freedom of information.[157] In both *Scarlet* and *Netlog*, it is emphasised that while the protection of the right to intellectual property is enshrined in Article 17(2) of the Charter of Fundamental Rights, this is not an inviolable right and does not require absolute protection.[158]

The e-Commerce Directive became vital in promoting the growth of a digital market. Internet intermediaries, free from liability for content authored by third parties, had a chance to develop, whereas the world witnessed the growth of e-Commerce and user-generated content industries.[159] However, intermediary liability has recently become increasingly

[152] e-Commerce Directive, art 15(1).
[153] Case C-70/10 *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* EU:C:2011:771, [2011] ECR I-11959.
[154] Case C-360/10 *Belgische Verenigung van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog* EU:C:2012:85.
[155] Case C-70/10 *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* EU:C:2011:771, [2011] ECR I-11959, para 40.
[156] ibid 45.
[157] ibid 53.
[158] Case C-70/10 *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* EU:C:2011:771, [2011] ECR I-11959, para 43; Case C-360/10 *Belgische Verenigung van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog* EU:C:2012:85, para 41.
[159] Lilian Edwards, 'Role And Responsibility Of Internet Intermediaries In The Field Of Copyright And Related Rights' (2010) 6

controversial in relation to intellectual property rights. With the internet becoming the main marketplace for the distribution and access to copyright-protected content, rightholders argue that ISPs are not neutral, but take an active role in the promotion of content with a profit-making purpose.[160] As outlined in the paper prepared for the World Intellectual Property Organisation, this debate is justified by two relevant developments: (i) the increase of unauthorised downloading by internet users, and (ii) the increasing use of 'Web 2.0' user-generated content websites, such as YouTube or Facebook.[161] While the evolution of digital technologies has led to the emergence of new profitable business models and an increased promotion of rightholders' work, the Commission found that the current rules governing intermediary liability are to blame for the lack of appropriate protection of copyrighted materials.[162] The Preamble to the DSM Copyright Directive Proposal states that:

> In this new framework, rightholders face difficulties when seeking to license their rights and be remunerated for the online distribution of their works. This could put at risk the development of European creativity and production of creative content. It is therefore necessary to guarantee that authors and rightholders receive a fair share of the value that is generated by the issue of their works and other subject matter.

The Commission attempted to solve this issue by introducing a provision aimed at closing the often cited 'value gap' dilemma. This provision takes the form of the infamous Article 17 (formerly Article 13) of the DSM Copyright Directive.

<www.wipo.int/export/sites/www/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf> accessed 15 July 2020.

[160] Niels Lutzhöft, 'The EU Copyright Directive: Platform liability, the value gap, and unanswered questions' (*Bird&Bird,* 22 May 2019) <www.lexology.com/library/detail.aspx?g=cf2d9558-f5d5-4e8a-a6fd-bd8c90fc1b5e> accessed 15 July 2020.

[161] Lilian Edwards, 'Role And Responsibility Of Internet Intermediaries In The Field Of Copyright And Related Rights' (2010) 6 <www.wipo.int/export/sites/www/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf> accessed 25 May 2019.

[162] Giuseppe Colangelo, Mariateresa Maggiolino, 'ISPs' copyright liability in the EU digital single market strategy' (2018) 26(2) International Journal of Law and Information Technology 142, 147.

2. Article 13 of the DSM Copyright Directive Proposal

Article 13 of the DSM Copyright Directive Proposal imposed obligations on 'information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users'.[163] The original article included two requirements: (i) a licensing requirement for any information society service provider falling outside the scope of the safe harbour provision,[164] and (ii) a pro-active infringement-prevention requirement applicable to all information society service providers.[165] Additionally, it required providers to adapt their complaints and redress mechanism.[166] This would be available to users in case of disputes arising over the application of the pro-active measures meant to ensure the functionality of licensing agreements with rightholders and prevent the availability services of works or other subject-matters identified by rightholders to be displayed on their services.[167]

3. The Criticism of the Proposed Article 13

As outlined in Chapter I, the originally proposed Article 13 was associated with the apparent threat representing the 'death of the internet'. This association raises the question of why did so many users equate the prevention of the use of unauthorised copyrighted work with the complete prevention of the ability to share and create content that is relied upon by the most successful websites.

The reason for this is also why Article 13 has been infamously termed the 'meme-ban'. A 'meme' is a unique concept that emerged from the increasing popularity of communication across the internet. It consists of a user taking a still image, or even a short video clip, of a

[163] DSM Copyright Directive Proposal, art 13.
[164] DSM Copyright Directive Proposal, recital 38.
[165] ibid.
[166] DSM Copyright Directive Proposal, art 13(2).
[167] DSM Copyright Directive Proposal, art 13(1).

well-known pop cultural reference that conveys a particular emotion and applying a textual description of a common scenario that the user hopes to associate with that particular emotion. It could be described as a form of pastiche, which is a permitted use under the InfoSoc Directive.[168] By doing so, the reader of the 'meme' understands the context of the message's scenario and its tone, without having to read an abundant amount of textual description. Since communication over the internet is often in shorthand and relies on its quick delivery, as opposed to a large amount of detail, 'memes' have become a very popular form of communication. However, most pop cultural references used in 'memes' are copyrighted work, and most works have not been authorised to be used in such a way. Therefore, the extent of whether the use of copyrighted work in a 'meme' is considered to be a fair use or an infringement upon the copyright holder's rights, depend upon the specific context of each individual 'meme'. This will undoubtedly cause a significant compliance issue for website operators, who would need to manually review and determine, by their own personal judgement, whether a 'meme' is infringing upon the rights of the copyright holder. Thus, many website operators would choose to simply scale back their operations and only permit the hosting of content that has been explicitly authorised by the copyright holder, so as to not be held liable for assisting in the infringement of the rights of copyright holders.

The users, whilst understanding of the website operators' motives, hold such an action as a restriction upon their right to share and create content, which would be affected even without the use of copyrighted material. This is because of the debate on how member states should ensure that website operators monitor their hosted content, with suggestions of employing the use of content recognition systems being particularly controversial. Many users believe that this would have a severe chilling effect upon their right to freely express themselves, as similar systems utilised by YouTube, have been infamous for detecting false positives, often

[168] InfoSoc Directive, art 5(3)(k).

misidentifying a user's own original work as the copyrighted work of large commercial enterprises, who are then permitted to commercially exploit the user's copyrighted work despite not having any legal right to do so.

Apart from the public and corporate opposition, there has been a large-scale effort from academics to illustrate the potential flaws in the proposed reform.

The main criticism levelled against the proposed article is its incompatibility with the existing legal framework, in particular the e-Commerce Directive, the InfoSoc Directive, and the Charter of Fundamental Rights of the European Union.

3.1 Article 13 and its Interaction with the InfoSoc and e-Commerce Directives

The DSM Copyright Directive Proposal created legal uncertainty in respect of how it would operate within the current legal framework, specifically with provisions of the InfoSoc and e-Commerce Directives.

The Licensing Requirement

One of the criticisms is that Recital 38 of the DSM Copyright Directive Proposal is inconsistent with the interpretations of 'communication to the public' by the CJEU.[169] Recital 38 stated that information society service providers that store and provide access to copyrighted works for the public would be performing an act of communication to the public. In *GS Media*, the CJEU held that the posting of hyperlinks allowing illegitimate access to protected works was a communication to the public, if the individual posting the hyperlink had full knowledge of the consequences of his actions and that, without his action, the work would not have been communicated.[170] The critics consider that applying this interpretation to the new proposed provisions would be contradictory, as online intermediaries cannot be said to have full knowledge of their users' actions or the subsequent consequences. Intermediaries would only acquire full knowledge and become complicit in the act of communication to the public, upon being informed that they were providing an unauthorised access to protected works and took no action to remedy this. Critics suggested that the proposed law, which would make intermediaries that merely store and provide access to copyrighted works complicit for an act of communication to the public,[171] regardless of their awareness of the act taking place,[172] contrasts with the CJEU's interpretation of the law in

[169] Sophie Stalla-Bourdillon and Others, 'A brief exegesis of the proposed Copyright Directive' (2016) 1, 13-15 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875296> accessed 15 January 2020.
[170] C-160/15 *GS Media BV v Sanoma Media Netherlands BV* EU:C:2016:64, paras 35, 49, 54.
[171] DSM Copyright Directive Proposal, recital 38.
[172] Sophie Stalla-Bourdillon and Others, 'A brief exegesis of the proposed Copyright Directive' (2016) 14 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875296> accessed 15 January 2020.

the case of *GS Media.*[173] The proposed article fails to take into account the CJEU's statements in *GS Media,* where it was commented that:

> [f]urthermore, when the posting of hyperlinks is carried out for profit, it can be expected that the person who posted such a link carries out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead, so that it must be presumed that that posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder.[174]

Online intermediaries are beholden to a rebuttable presumption that they had full awareness of the act of communication to the public of a protected work. Indeed, online intermediaries would at least have a reasonable expectation that their service could allow the means for the illegitimate dissemination of protected works, meaning that they are required to carry out necessary compliance checks to ensure that protected works are not accessed via their service. The wording of 'necessary checks' suggests a standard that is not simply, what would be helpful or proportionate in the given circumstances, but what is actually necessary to determine that the work concerned is not protected. Under the current legal framework of the e-Commerce Directive, this would be a notification and take down process, where upon becoming aware of hosting protected work, the service would expeditiously proceed to remove access to it.[175] The new Directive simply builds upon this concept, updating the compliance expectation to what could be reasonably expected from a service in taking 'appropriate and proportionate measures'[176] to verify that they are not hosting infringing content. Therefore, the new provisions do not explicitly conflict with the established

[173] C-160/15 *GS Media BV v Sanoma Media Netherlands BV* EU:C:2016:64.
[174] ibid 51.
[175] e-Commerce Directive, art 14(1).
[176] DSM Copyright Directive Proposal, recital 38.

interpretations of an act of 'communication to the public', but the same cannot be said in regard to the e-Commerce Directive's relevant provisions.

The licensing requirement concerns providers falling outside the scope of the safe harbour established under Article 14 of the e-Commerce Directive. The Commission, in its proposal, stated that the application of the safe harbour provision depends on 'whether the service provider plays an active role, including by optimising the presentation of the uploaded works (…) or promoting them'.[177] This indicates that services, such as YouTube, Vimeo, or Dailymotion, must license the works their users stream, or be liable for infringement of the proposed Article 13. The Commission supported its view by defining services, similar to the above, as going beyond the mere provision of physical activities, therefore performing an act of communication to the public and falling within the scope of Article 3(1) of the InfoSoc Directive.

The Infringement-prevention Requirement

The infringement-prevention requirement concerns all information society service providers, including those falling within the safe harbour exception under Article 14 of the e-Commerce Directive, and is considered to be vital to the appropriate functioning of licensing agreements. The providers shall comply with this requirement by 'implementing effective measures, such as content recognition technologies'.[178] In deciding on the appropriate and proportionate content recognition technologies, it is necessary to take into consideration, 'among others, the nature of the services, the availability of the technologies, and their effectiveness in light of technological developments'.[179]

[177] ibid.
[178] DSM Copyright Directive Proposal, art 13(3).
[179] ibid.

While the proposed article merely referred to the use of effective content recognition technologies, Annex 12 of the Impact Assessment provides further detail concerning the content recognition or identification technologies. It distinguishes between different types of content recognition technologies, i.e. fingerprinting and watermarking, and provides examples of suppliers providing different types of technologies. Additionally, it refers to some major online services, such as YouTube, Soundcloud or Pinterest, who already use these technologies. The number of suppliers providing access to content recognition services, with some of them, such as Shazam, offering their services for free, suggests that providers would in fact be legally required to use content recognition technologies, as it would be the most appropriate measure within the meaning of Article 13. Although the Commission attempts to support its bold proposal by referring to an example of a free content recognition service, it does not take into consideration the fact that Shazam is 'available as apps for smartphones, tablets and personal computers whose core functionality is to allow *consumers* to recognize music'.[180] There is no evidence that services similar to Shazam could be used on a commercial scale. In fact, it is unlikely that any content recognition technologies will be available for free upon the transposition of the DSM Copyright Directive into member states' national law, as it would make little commercial sense. The expense of implementing and maintaining these measures would need to be covered entirely by the online intermediaries. This represents a strong departure from the e-Commerce Directive's prohibition of monitoring obligations for online intermediaries.

Nevertheless, there have been arguments made that content recognition technologies are not necessarily incompatible with the e-Commerce Directive, as member states may obligate an intermediary to monitor information when specifically targeted.[181] This has been accepted

[180] *Apple/Shazam* (M.8788) Commission Decision C(2018) 5748 final, para 53.
[181] Case C-314/12,*UPC Telekabel Wien v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* EU:C:2014:192, para 56.

in a German case, where if the content to be monitored is specific and not generic, then it is not a general obligation to monitor and is compatible with existing EU law.[182] An example of this would be an intermediary obligated to trace a specific and known infringement and to take steps to prevent this user from committing further infringements. However, the German interpretation cannot apply to the content recognition systems highlighted in the Impact Assessment, because they are required to monitor almost all of the information contained on the platform to identify and distinguish between infringing and non-infringing content. Therefore, any requirement for the implementation of a content recognition system would be analogous to the circumstances of *Netlog,* thus the obligation would be incompatible with current EU law.

It is not clear whether Article 13 was to be designed to take precedence over the e-Commerce Directive, however, this was likely to be the case as the e-Commerce Directive was not listed among the existing legislation that would remain unaffected by the Copyright Directive's implementation. Nevertheless, it would be argued by certain academics that a modification of existing legislation should be explicitly stated in the text of the directive.[183] Even though recital 38 explicitly refers to the e-Commerce Directive, it does not explicitly derogate from the obligation to not impose general monitoring requirements. There does exist the possibility to interpret the recital as implicitly derogating from the e-Commerce Directive's Article 15, as the recital states that:

> In order to ensure the functioning of any licensing agreement, information society service providers storing and providing access to the public to large amounts of

[182] *BGH Gema v Rapidshare* [2013] I ZR 80/12.
[183] Reto M. Hilty, Valentina Moscon, 'Contributions by the Max Planck Institute for Innovation and Competition in response to the questions raised by the authorities of Belgium, the Czech Republic, Finland, Hungary, Ireland and the Netherlands to the Council Legal Service regarding Article 13 and Recital 38 of the Proposal for a Directive on Copyright in the Digital Single Market' (Max Planck Institute for Innovation and Competition 2017) 6 <www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/Answers_Article_13_2017_Hilty_Moscon-rev-18_9.pdf> accessed 20 July 2019.

> copyright protected works or other subject-matter uploaded by their users should take appropriate and proportionate measures to ensure protection of works or other subject matter, such as implementing effective technologies. This obligation should also apply when the information society service providers are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC.[184]

If Recital 38 is to be interpreted in conjunction with the judgement of the ECJ in *Netlog*, specifically that content recognition technologies that monitor all user data is considered to be contrary to Article 15's prohibition of an obligation to generally monitor user traffic, it would almost certainly be the case that Article 15 of the e-Commerce Directive has been superseded. The explicit reference to the fact that Article 13 of the proposed directive would apply *additionally* to the liability exemption for hosting content under Article 14 of the e-Commerce directive demonstrates that Article 13 is to be applied in a wider context, rather than simply being an additional requirement for information society service providers to meet to benefit from the safe-harbour provision. However, without an explicit derogation there will be conflicting interpretations of the proposed Directive's relationship with the provisions of the e-Commerce Directive in specific cases and legal uncertainty arising from differing interpretations will be the prevailing result.

An example of this has been the criticism relating to the effect that Article 13 of the proposed Directive would have on the liability exemption of Article 14 of the e-Commerce Directive. It has been argued that Recital 38 is nonsensical, as 'if a service provider is protected by Article 14 and therefore not liable for the infringements committed using its services by its users, why would the provider sign a licensing agreement with rightsholders?'[185] However,

[184] DSM Copyright Directive Proposal, recital 38.
[185] Reto M. Hilty, Valentina Moscon, 'Contributions by the Max Planck Institute for Innovation and Competition in response to the questions raised by the authorities of Belgium, the Czech Republic, Finland, Hungary, Ireland and the Netherlands to the Council Legal Service regarding Article 13 and Recital 38 of the Proposal for a Directive on Copyright in the Digital Single Market' (Max Planck Institute for Innovation and

this most likely arises out of a misinterpretation of Recital 38, which specifies that 'In order to ensure the functioning of *any* licensing agreement,'[186] which arguably is meant to be interpreted as the functioning of every licensing agreement in general. In other words, if there was free access to copyrighted works on these information society service providers' portals, then why would anyone pay the rights holder for a license to exploit their copyrighted work? Nevertheless, the possibility for reasonable diverging interpretations lends credibility to the criticism related to the ambiguity of the language used, especially when it relates to an area with a sensitive need for precise terminology, such as the amendment of existing legislation.

Equally, it is doubtful that a service provider would be able to rely on the liability exemption of Article 14 with the introduced obligations of Article 13. The ECJ held that the conduct of any intermediary wishing to rely on the defence under Article 14 must be operating in a manner that is 'merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores.'[187] With the introduction of content recognition technologies, it is uncertain to what aspect a service provider is lacking knowledge or control over the data that it stores. In fact, the term 'effective content recognition technologies' would imply that the service provider has the capable means to ascertain knowledge and subsequently exercise control over any data stored by its users. Consequentially, it is probable that Article 13 will alter the state of applicability of the hosting liability exemption.

Currently, technology is not sophisticated enough to determine whether particular content is actually protected by copyright, without at least some human oversight. This gave rise to

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Competition 2017) 7-8 <www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/Answers_Article_13_2017_Hilty_Moscon-rev-18_9.pdf> accessed 20 July 2019.

[186] DSM Copyright Directive Proposal, recital 38 (emphasis added).

[187] C-236/08 *Google France v Louis Vuitton* EU:C:2010:159, [2010] ECR I-2417, para 114.

concerns over the technical measures requirement's effect on fundamental rights included in the Charter of Fundamental Rights of the European Union (the "EU Charter").

3.2 Article 13 and the Charter of Fundamental Rights of the European Union

The EU Charter encompasses a range of civil, political, social, and economic rights. It has the same status in law as the Treaties.[188] As such, all the EU Directives, including the DSM Copyright Directive, need to be in accordance with the rights and principles of the Charter,[189] which acts as a parameter for the interpretation of the primary and secondary rules of Union law and of the national measures that fall within its scope.[190] This also means that the DSM Copyright Directive must be interpreted in a manner that ensures the protection of the fundamental rights.

It is widely recognised that a fair balance needs to be struck between competing fundamental rights.[191] As stated in the *Netlog* case,[192] copyright protection[193] must be fairly balanced with the protection of personal data,[194] the freedom of expression and information,[195] and the freedom to conduct a business.[196]

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[188] Consolidated version of the Treaty on European Union [2016] OJ C202/1, art 6(1).
[189] Himanshu Arora, 'Article 13 of EU Copyright Directive – A step forward or rearward' (2018) 6 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3296955> accessed 20 July 2019; Reto M. Hilty, Valentina Moscon, 'Contributions by the Max Planck Institute for Innovation and Competition in response to the questions raised by the authorities of Belgium, the Czech Republic, Finland, Hungary, Ireland and the Netherlands to the Council Legal Service regarding Article 13 and Recital 38 of the Proposal for a Directive on Copyright in the Digital Single Market' (Max Planck Institute for Innovation and Competition 2017) 4 <www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/Answers_Article_13_2017_Hilty_Moscon-rev-18_9.pdf> accessed 20 July 2019.
[190] European University Institute, 'ACTIONES Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter: Module 1 – the EU Charter of Fundamental Rights: Scope of application, relationship with the ECHR and National Standards, Effects' (2017) 4 <https://cjc.eui.eu/wp-content/uploads/2019/03/D1.1.a-Module-1.pdf> accessed 20 July 2019.
[191] Case C-360/10 *Belgische Verenigung van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog* EU:C:2012:85, para 50; Case C-275/06 *Productores de Música de España (Promusicae) v Telefónica de España SAU* EU:C:2008:54, [2008] ECR I-00271, para 68.
[192] Case C-360/10 *Belgische Verenigung van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog* EU:C:2012:85, para 261.
[193] Charter of Fundamental Rights of the European Union [2012] OJ C326/2 (EU Charter), art 17(2).
[194] EU Charter, art 8.
[195] EU Charter, art 11.
[196] EU Charter, art 16.

While many academics emphasise that the CJEU explicitly rejected a content recognition system as a measure to protect intellectual property rights,[197] it is necessary to assess the alleged conflict between the aforementioned fundamental rights by referring to Article 52 of the Charter. This Article allows limitations to the exercise of the rights and freedoms to be made, if they are: (i) provided by law, (ii) respect the essence of these rights, (iii) are proportionate, (iv) are necessary, and (v) genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. For any interference with fundamental rights to be justified, all the aforementioned requirements need to be met.[198]

The limitation can be provided by law either in the form of national law[199] or in the form of a legal act of the EU.[200] Additionally, the limitation needs to be both accessible and foreseeable.[201] While the proposed Article 13 is included in the DSM Copyright Directive Proposal, thus being explicitly provided by law and clearly accessible, it also needs to be formulated with sufficient precision to satisfy the foreseeability principle. According to this principle, the consequences that a law entails must be foreseeable. While the proposed Directive does not provide any information regarding the potential consequences facing hosting providers if they did not implement the technology, nor does it specify the exact threshold determining the effectiveness of content recognition technologies, any domestic

[197] Case C-360/10 *Belgische Verenigung van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog* EU:C:2012:85, para 51.
[198] Paul Craig, Gráinne De Búrca, *EU Law Text, Cases and Materials* (5th edn, Oxford University Press 2011) 397.
[199] Case C-650/13, *Thierry Delvigne v. Commune de Lesparre Médoc and Préfet de la Gironde* EU:C:2015:648, para. 47
[200] Case C-190/16, *Werner Fries v. Lufthansa CityLine GmbH* EU:C:2017:513, para. 37; Case C-601/15 PPU*, J. N. v. Staatssecretaris van Veiligheid en Justitie* EU:C:2016:84, para. 51.
[201] European Union Agency for Fundamental Rights, 'Applying the Charter of Fundamental Rights of the European Union in law and policymaking at national level (Guidance)' (Publications Office of the European Union 2018) 71.

law based on the Directive would need to be more precise and provide for specific consequences connected to the measures under the proposed Article 13.

Modernising a copyright regime and ensuring that rightholders receive fair remuneration became one of the top priorities for the Commission, therefore it is likely that national legislation will genuinely meet the objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

It is not possible to determine whether all of the requirements listed in Article 52 of the Charter will be fulfilled, as it will depend on how the individual member states choose to transpose the specific provisions of the proposed Directive into their national law. However, this paper will analyse Article 13 of the DSM Copyright Directive Proposal, and its supporting documents, within the context of the existing case law to decide whether the Commission did strike a balance the competing fundamental rights within the directive, and therefore whether the suggested limitations did respect the essence of the fundamental rights contained in Articles 8, 11, and 16 of the Charter.

Freedom of expression and information

As stated in Article 11 of the Charter, 'everyone has the right to freedom of expression'.[202] Many critics indicated that the introduction of Article 13 would have a negative impact on the freedom of expression,[203] or would result in private censorship.[204] They support these statements by referring to the fact that the Explanatory Memorandum does not provide any explanation supportive of the fact that the Directive has a limited impact on the freedom of

[202] EU Charter, art 11.
[203] Emma Woollacott, 'Copyright Directive Threatens Freedom Of Expression, UN Official Warns' (*Forbes,* 12 March 2019) <www.forbes.com/sites/emmawoollacott/2019/03/12/copyright-directive-threatens-freedom-of-expression-un-official-warns/#5c9ad446b672> accessed 15 January 2020;
[204] European Digital Rights, 'Deconstructing the Article 13 of the Copyright Proposal of the European Commission: Revision 2' 2 <https://edri.org/files/copyright/copyright_proposal_article13.pdf> accessed 15 January 2020.

expression and information.[205] As already recognised by the CJEU in *Scarlet Extended* and *Netlog,* the use of this technology generates concerns in regard to its impact on the freedom of expression.[206] While some algorithmic enforcement programs, such as Audible Magic, have nearly 100 percent effectiveness in blocking content, they can also produce so-called 'false positives'. Due to the fact that choices are not based on a human understanding, but on software and database matches, the introduced system could lead to many mistakes, such as the blocking of lawful content.[207] In fact, it has been evidenced that YouTube's Content ID, one of the most popular content recognition technologies, may not be able to distinguish between copyrighted material and works belonging to the public domain, e.g. by blocking copyright-free music pieces[208] or even white noise videos.[209] While some critics state that the Commission's proposal did not 'address the known limitations of ACR technology or the impact of those limitations on the expressive rights of users attempting to share third-party content lawfully but without authorization',[210] it is necessary to recognise that the Commission actively considered the aforementioned points within its Impact Assessment:

> The freedom of expression and information may be affected negatively in cases where the services limit user uploaded content in an unjustified manner (for example

[205] Sophie Stalla-Bourdillon and Others, 'A brief exegesis of the proposed Copyright Directive' (2016) 1, 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875296> accessed 15 January 2020.
[206] Case C-70/10 *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* EU:C:2011:771, [2011] ECR I-11959, para 51, Case C-360/10 *Belgische Verenigung van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog* EU:C:2012:85, para 49.
[207] US Copyright Office, 'Section 512 Study: Comments of Annemarie Bridy and Daphne Keller' (2017) 2-3 <www-cdn.law.stanford.edu/wp-content/uploads/2017/08/SSRN-id2920871.pdf> accessed 15 January 2020.
[208] Mike Masnick, 'How the EU may be about to kill the public domain: copyright filters takedown Beethoven' (*Techdirt,* 28 August 2018) <www.techdirt.com/articles/20180827/16481940516/how-eu-may-be-about-to-kill-public-domain-copyright-filters-takedown-beethoven.shtml> accessed 15 January 2020.
[209] Chris Baraniuk, 'White noise video on Youtube hit by five copyright claims' (*BBC News,* 5 January 2018) <www.bbc.co.uk/news/technology-42580523> accessed 15 January 2020.
[210] Annemarie Bridy, 'The Price of Closing the "Value Gap": How the Music Industry Hacked EU Copyright Reform' (2020) 22 Vanderbilt Journal of Entertainment & Technology Law 323, 347 <www.jetlaw.org/wp-content/uploads/2020/04/22.2-Bridy.pdf> accessed 15 January 2020.

when an exception or a limitation to copyright applies or the content is in public domain) or when the technologies fail to identify the content correctly.[211]

The Commission concluded that any potential negative impact on the freedom of expression would 'be mitigated by the fact that the services would be obliged to put in place the necessary procedural safeguards for the users which in the majority of cases already exist in the related context of notice and take down requests'.[212] While YouTube's Content ID system will not always achieve perfect results and might be subject to abuse,[213] YouTube acknowledges this fact and is taking proactive steps towards fixing these identified issues.

In fact, since 2016, when a Content ID claim is disputed, the revenue from the video is put to escrow for the duration of the dispute. Following the resolution of said dispute, the escrowed revenue is awarded to the appropriate rightholder.[214] This practice mitigates the harm for smaller content creators, where their work continues to be monetised instead of deleted, and they are able to put forward their case as to their legal right to upload the disputed work. The criticisms levied against the interference with the current status quo regarding the balance between freedom of expression and the need to protect property rights are exaggerated. The status quo unfairly favours the users' unfettered right to freedom of expression at the expense of the copyright holders' ability to enforce their legal rights. The limitation or burden placed on the right to freedom of expression is completely justified by the need to remedy the unfair balance between it and the fundamental right to protection of property. In the same way that a budding street artist is prevented from freely making a canvas from someone's home, the measures put in place to prevent copyright infringement

[211] Impact Assessment, para 5.2.3.
[212] ibid.
[213] Tom Gerken, 'YouTube's copyright claim system abused by extorters' (*BBC News,* 14 February 2019) <www.bbc.co.uk/news/technology-47227937> accessed 15 January 2020.
[214] Franklin Graves, Michel Lee, 'The Law of YouTubers: The Next Generation of Creators and the Legal Issues They Face' (2017) 9(5) American Bar Association: Landslide 1, 3 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2966793> accessed 15 January 2020.

on online platforms are a necessary and proportionate component for a democratic society. While there exists the possibility that the balance could swing toward a disproportionate level of protection in practice, this will be solely attributable toward each individual member states' transposition of the Directive. This will accordingly need to be evaluated based on the specific wording of each state's implementation.

Personal data

As stated in Article 8 of the Charter, 'everyone has the right to protection of personal data'.[215] Many critics point out that the right to privacy and the right to protection of personal data are not referred to at all in the Explanatory Memorandum, despite its importance being emphasised in the cases of *Promusicae* and *Scarlet*.[216]

Yet, the fact that Article 20 of the DSM Copyright Directive Proposal specifies that 'the processing of personal data carried out within the framework of this Directive shall be carried out in compliance with Directives 95/46/EC and 2002/58/EC'[217] suggests that the Commission did in fact take into consideration the right to protection of personal data. Despite the DSM's explicit reference to compliance with data protection laws, the critics focus on the use of content recognition technologies.[218] The use of these technologies raises concerns in regard to its impact on the right to the protection of personal data. In the case of *Scarlet Extended,* the CJEU stated that a filtering system may infringe the fundamental rights of ISP's customers, namely their right to the protection of their personal data, as it would require collecting IP addresses of users that send unlawful content on the network.[219] As

[215] EU Charter, art 8.
[216] Sophie Stalla-Bourdillon and Others, 'A brief exegesis of the proposed Copyright Directive' (2016) 1, 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875296> accessed 15 January 2020.
[217] DSM Copyright Directive Proposal, art 20.
[218] Sophie Stalla-Bourdillon and Others, 'A brief exegesis of the proposed Copyright Directive' (2016) 1, 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875296> accessed 15 January 2020.
[219] Case C-70/10 *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* EU:C:2011:771, [2011] ECR I-11959, para 51.

emphasised by the CJEU, an IP address is considered to be protected personal data, as it allows for an identification of a user.[220]

In light of the *Scarlet Extended* and *Netlog* cases, many criticised the proposed Article 13 for not being fairly balanced with the right to privacy and protection of personal data.[221] Although many critics refer to the CJEU's statement in *Scarlet Extended* that 'requiring the ISP to install the contested filtering system' would conflict with ' the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other',[222] it is necessary to recognise that the CJEU's analysis in this case focused on the limitations of the freedom to conduct business. In fact, the CJEU stated that the filtering system *might*, not *would,* infringe users' right to protection of their personal data.

In the recent case of *Constantin Film Verleih,*[223] which concerned YouTube, it was emphasised that member states do have the option to grant holders of intellectual property access to personal data, such as email addresses or IP addresses, as long as 'a fair balance is struck between the various fundamental rights involved and compliance with the other general principles of EU law, such as the principle of proportionality'.[224] The identification of users through their personal data has also been an important factor in the granting of copyright enforcement injunctions. In the *McFadden*[225] judgement the CJEU found that:

[220] ibid 26.
[221] Sophie Stalla-Bourdillon and Others, 'A brief exegesis of the proposed Copyright Directive' (2016) 1, 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875296> accessed 15 January 2020.
[222] Case C-70/10 *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* EU:C:2011:771, [2011] ECR I-11959, para 53.
[223] Case C-264/19 *Constantin Film Verleih GmbH v YouTube LLC and Google Inc* EU:C:2020:542.
[224] ibid 39.
[225] Case C-484/14, *Tobias McFadden v Sony Music Entertainment* EU:C:2016:689.

> a measure consisting in password-protecting an internet connection may dissuade the users of that connection from infringing copyright or related rights, provided that those users are required to reveal their identity in order to obtain the required password and may not therefore act anonymously.[226]

As such, an injunction requiring these circumstances was deemed necessary to ensure the effective protection of the 'fundamental right to protection of intellectual property'.[227] When determining the legality of a copyright enforcement mechanism, the CJEU will determine whether there has been consideration of a fair balance being struck between an individual's fundamental right to privacy and the fundamental right to protection of intellectual property.

In the context of a suggested automatic content filtering system, the CJEU would likely rule that the collection of personal data in the form of IP addresses was a necessary requirement to ensure the effectiveness of the measure taken to safeguard the protection of intellectual property. In doing so, the measure would have fulfilled the requirement of the principle of effectiveness, as well as being justified as a legal basis under the GDPR, where the collection of IP addresses would be prescribed by legal obligations and in the vital interest of the intellectual property right holder.

Freedom to conduct a business

While the criticisms in respect of Article 13's limiting of the freedom of expression and the right of personal data might have been exaggerated, the introduction of the new right would have a much more significant impact effect on small and medium-sized enterprises ("SMEs") than predicted by the Commission. The critics state that the Commission does not provide an explanation supporting the fact that the Directive has a limited impact on the

[226] ibid 96.
[227] ibid 99.

freedom to conduct a business.[228] Although the Commission did consider the impact of the proposed Article on SMEs,[229] it is disputable whether it managed to achieve a fair balance. While big tech companies, such as Alphabet, may have the financial power to develop upload-filters and maintain an efficient internal complaint and redress mechanism, smaller companies or start-ups will face significant costs associated with the measures proposed in Article 13. As stated in an open letter from a coalition of 240 businesses, 'most companies are neither equipped nor capable of implementing the automatic content filtering mechanisms'.[230] Therefore, the strict adherence that all enterprises adopt the best possible technical standards was disproportionate. As recognised in *Scarlet Extended* requiring an ISP to install a filtering system would be 'contrary to the conditions laid down in Article 3(1) of Directive 2004/48, which requires that measures to ensure the respect of intellectual-property rights should not be unnecessarily complicated or costly'.[231] In fact, the CJEU held that:

> the injunction to install the contested filtering system is to be regarded as not respecting the requirement that a fair balance be struck between, on the one hand, the protection of the intellectual-property right enjoyed by copyright holders, and, on the other hand, that of the freedom to conduct business enjoyed by operators such as ISPs.[232]

SMEs would be unlikely to have a user base that would commit copyright infringement to a degree that would severely prejudice the rightholder. The proposal clearly focused on the

[228] Sophie Stalla-Bourdillon and Others, 'A brief exegesis of the proposed Copyright Directive' (2016) 1, 5 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875296> accessed 15 January 2020.
[229] Impact Assessment, paras 3.1, 4.1.
[230] Jos Poortvliet, '240 EU businesses sign open letter against Copyright Directive Art. 11 & 13' (*Nextcloud,* 19 March 2019) < https://nextcloud.com/blog/130-eu-businesses-sign-open-letter-against-copyright-directive-art-11-13/> accessed 20 January 2020.
[231] Case C-70/10 *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* EU:C:2011:771, [2011] ECR I-11959, para 48.
[232] ibid 49.

most prominent online platforms, such as YouTube and Facebook, that would now have no excusable defence in profiting from the dissemination of unlicensed works. SMEs that did not receive any similar amount of revenue would not only be unlikely to be illegitimately depriving the rightholder of a material source of remuneration, but would also be unlikely to cope with the additional compliance costs. It would be significantly more proportionate to adopt a discretionary compliance standard that reflected the actual number of users and size of a platform, rather than referring to what can be achieved by the best performing players of the market.

3.3 Impact of Article 13 on Innovation and Competition in the Digital Market

The disproportionate impact upon SMEs would almost certainly be counterproductive to the end-goals of the DSM Copyright Directive. The Directive sought to enhance the negotiation position of content creators when securing a license with online platforms. However, increasing the compliance costs of operating an online platform could further concentrate an already oligopolistic market and bolster the negotiating position of these platforms, as the essential means of online distribution. New compliance costs would act as a further barrier to entry for new entrants in a market where the incumbent platforms benefit from strong network effects.[233] With a further disincentive for potential new competitors, the current platforms would be unconstrained in their ability to demand lower fees in licensing agreements with rightholders.[234] This was demonstrated in the difficulties faced by the press publishers in securing license agreements with news aggregators. Weakened competition would also disincentivise innovation in methods of delivering digital content to readers, listeners and viewers in more efficient ways.[235] Therefore, it may have been

[233] David Bailey, Richard Whish, *Competition Law* (8th edn, Oxford University Press 2015) 194-196; Case T-201/04 *Microsoft v Commission* EU:T:2007:289, [2007] ECR II-03601, paras 1061-1062.
[234] David Bailey, Richard Whish, *Competition Law* (8th edn, Oxford University Press 2015) 6-8.
[235] ibid 7.

counterproductive to stave off new competitors to online platforms, as it will be the content creators and readers who will ultimately bear the burden of the additional compliance costs.

Furthermore, prescribing specific content recognition technologies would also weaken competition in the market for suppliers of these technologies. Audible and other market leaders benefit from patented protection of their technologies, meaning that if businesses are mandated to acquire the best technical measures available, they would be expected to contract with these providers. This would allow Audible and other suppliers to charge higher license fees to online platforms, which most likely would impact upon the licensing arrangements with content creators, where rightsholders may be unable to demand higher license fees due to online platforms facing even higher compliance costs.

4. The European Commission's Response to the Raised Criticisms

In response to the mounting criticism, the EU institutions stood firm against the calls to remove the article from the Directive entirely, but did make significant amendments to the original text. The main alterations directly address some of the most prominent criticisms levied against the proposed measures. This part summarises those changes and assesses how effectively the Commission responded to the criticism discussed in part 3 of this chapter.

Article 17(1) of the Copyright Directive states that:

> an online content-sharing service provider (OCSSP) performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.[236]

[236] DSM Copyright Directive, art 17(2).

As defined in Article 2(6), OCSSP means:

> a provider of an information society service of which the main or one of the main purposes it to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes.[237]

Article 17 of the Directive therefore explicitly excludes online content-sharing services that are not designed for profit making services. As such, online encyclopaedias, open source software development and sharing platforms, and scientific and educational repositories will not be required to enact the stricter protection standards that are prescribed within the Directive. For a service to fall within the scope of the directive, its main function and purpose must be:

> to store and enable users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit therefrom, either directly or indirectly, by organising it and promoting it in order to attract a larger audience, including by categorising it and using targeted promotion within it.[238]

Therefore, online services such as cloud-based business to business platforms, electronic communication services, and online marketplaces will also be exempt from the directive. The added clarity successfully addresses another criticism of the directive, that it would stifle research and educational development, particularly in scientific fields.

The new drafting of the Directive has made a clear-cut separation between OCSSP platforms and the safe harbour provisions of the e-Commerce Directive. Article 17 now states that:

[237] DSM Copyright Directive, art 2(6).
[238] DSM Copyright Directive, recital 62.

> When an online content-sharing service provider performs an act of communication to the public or an act of making available to the public under the conditions laid down in this Directive, the limitation of liability established in Article 14(1) of Directive 2000/31/EC shall not apply to the situations covered by this Article.[239]

Therefore, there is now improved clarity between the interrelationship of the new Directive and the previous status quo under Article 14 of the e-Commerce Directive. It is worth noting that this will undoubtedly affect the cases still in dispute, such as *LF v Google*,[240] where the CJEU will be likely to interpret the law in accordance with the EU Parliament's newly drafted provision. It will now be the case that OCSSP platforms must license the content that is featured on its platforms, otherwise it will be complicit in the infringement should they fail to remove this content.

The revised Article 17 of the DSM Copyright Directive now includes a provision that specifically focuses on the position of start-ups.[241] Start-ups in the form of an online content-sharing service provider that has been operating for less than three years and has an annual turnover below €10 million, will now be exempt from the majority of compliance requirements. Instead, for start-ups to benefit from safe harbour, they will be required to simply demonstrate that they have made best efforts to secure authorisation from rightholders and to have acted expeditiously to disable access to unauthorised subject matter on their platform. An additional duty arises when the service provider receives over 5 million users monthly, but this is limited to preventing the continued upload of the same unauthorised work that has been previously notified to be taken down.

[239] DSM Copyright Directive, art 17(3).
[240] Case C-682/18 *LF v Google LLC* [2019] OJ C 82 (Request for preliminary ruling).
[241] DSM Copyright Directive, art 17(6).

These new provisions mitigate one of the most controversial aspects of the proposed reforms, that the new regulatory standards were too burdensome on new and upcoming services, barring them from challenging the incumbent providers. By permitting a less burdensome safeguard for smaller providers, the Directive strikes a better balance between the need for effective copyright protection and the maintenance of an innovative and competitive market. The requirements that smaller providers have to meet are not too dissimilar from the previous standards. The level of protection is not drastically reduced, as the most damaging publication of unauthorised work is on online platforms with substantial audiences, not platforms which are not as relatively known and receive far less user traffic. The provision also takes into consideration the capacity for dynamic and explosive growth in the digital platform market, where a service can become a household name in a short span of time. By measuring the audience of the service, the Directive ensures that the exemption is not exploited by services that knowingly allow widespread copyright infringement, who should be required to prevent the future upload of identified material.

The revised Directive also has a recital that attempts to address the most prolific and controversial criticism of the Directive, that the new protective measures would put a stop to the use of memes. The new text expressly states that '[u]sers should be allowed to upload and make available content generated by users for the specific purposes of quotation, criticism, review, caricature, parody or pastiche.'[242] Due to the inherent flexible nature of the meme format, it is impossible to completely determine that every meme-type communication would be freely used, however, this is clearly an attempt by the EU institutions to protect what would be, at the very least, the majority of the legitimate usage of memes, hoping to put an end to the Directive's unfairly given and infamous nickname, the 'meme-ban'. This is reinforced by the increased importance placed upon the complaint

[242] DSM Copyright Directive, recital 70.

and redress mechanisms. The complaint and redress mechanism aims to assist the users of the content-sharing services in any disputes with the rightholders over the disabling of access to, or complete removal of, content that the users have uploaded. This new emphasis on an impartial out of court mediation process is a clear attempt at balancing the users' right to free expression and right to conduct a business in the context of monetised content against the need to protect copyrighted work.

The fear that motivated the prospect of the Directive causing a chilling effect on users' freedom of expression, along with the idea that certain service providers would not be able to comply with the new regulations, was caused by the specific mention of content recognition technologies in the original proposal. The new text has been amended to remove any such specific mention of these features, instead stating that providers need to demonstrate that they have 'made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information.'[243] The EU institutions have listened and taken into consideration the arguments against the wide-spread implementation of untested and potentially unreliable technology, choosing to now offer more flexibility to member states and the industry itself on how best to ensure the fulfilment of the Directive's aims of effective copyright protection.

These amendments have substantially addressed some of the significant complaints against the proposed reforms. The revised text clarifies the positions of start-ups, non-profit services, and users of online content-sharing platforms. Nevertheless, there is still the criticism relating to the actual effectiveness of the obligatory licensing mechanism.

[243] DSM Copyright Directive, art 17(4)(b).

5. The Remaining Criticism

As demonstrated by the difficulties faced by press publishers in concluding a satisfactory license with Google, a policy that creates a new licensing obligation will not always culminate in increased revenues for the content creator. Even with the assistance of collection societies, such as was the case in Spain's prototype of Article 15, artists will still likely find themselves locked into difficult negotiations with YouTube and other user-content sharing platforms, facing the strong likelihood that their work will not be featured on these platforms unless they capitulate and grant them a royalty-free license. Instead, it may be wiser for the path to reform to look to proven methods of ensuring a fairer distribution of revenue that have been already been utilised through European copyright law.

6. An Alternative Solution

An example of a proven method of ensuring a fairer distribution of revenue could be the variation of the private copying levy, which would apply to platforms that rely on user generated content. The private copying levy is a system that is available to member states that allows them to require the manufactures or importers of copying devices to pay a levy to copyright collection societies.[244] It was introduced to complement the right of individuals to reproduce copyrighted works for personal and non-commercial use. The private copying exemption was deemed to be sufficiently beneficiary for the public that it merited an interference with the rightsholders' power to limit reproduction of their work, however, this exemption was achieved on the basis that rightholders would receive equitable remuneration for said interference with their property rights.

As has been demonstrated by the level of controversy, copyrighted works have become intrinsic with the use of the most popular online platforms and the way that users express

[244] InfoSoc Directive, art 5(2)(b).

themselves. In the same way that private copying was deemed beneficial to the public, user generated content has quickly become a significant representative feature of modern society. The rational for the new licensing obligations was that the party who financially benefits the most should provide the equitable remuneration.

These online platforms were built upon their users creating content from sources that were copyrighted works, in the same way that manufacturers and importers of copying devices were funded by customers copying protected work. Collection societies would be able to acquire the user content levy from the online platforms and distribute it amongst the authors and creators they represent. The online platforms can subsidise the levy from the revenue it generates through advertising or by charging users for the use of the platform. This process avoids the largest criticism of the obligatory licensing solution, the overly cumbersome burden of monitoring and securing the license for each individual work or judging whether user content should benefit from an appropriate exemption. Under a levy system, users would be free to use the full range of copyrighted work in their creations without being limited to the few works that have been licensed.

Martin Senftleben has advocated for such an approach that would be based upon a new use privilege for user generated content.[245] This new privilege would apply to content that was based upon copyrighted work, but is sufficiently differentiated due to the platform user adding their own value to the content. This content would be for the purposes of entertainment, illustration, or pastiche and exclude purposes that do not require the users to compensate the rightsholder, such as criticism, review, or parody. Enacting such a system at the Community level would eliminate the burdensome requirement to accommodate different levy systems across member states, allowing for online platforms to apply a single

[245] Martin Senftleben, 'User-Generated Content – Towards a New Use Privilege in EU Copyright Law' in Tanya Aplin (ed), *Research Handbook on Intellectual Property and Digital Technologies* (Edward Elgar 2020) 139.

system to determine the amount of necessary remuneration that must be paid to collection societies.

Regarding the appropriate remuneration, member states could implement a provision similar to France's requirement for news aggregators to share the information with the rightholder on how their users utilise the copyrighted work.[246] This would enable the creation of a formula that appropriately proportioned the amount that should be required to equitably remunerate authors and creators for their work based on the detected dissemination across the platform. If the levy was based upon the number of distributed 'copies' of the work, the levy costs would scale with the size of the platform. An exception for start-ups could exist in the same manner as the current exception contained in Article 17. In this way, start-ups would not be overburdened by large compliance costs, rightholders would be compensated based on the actual usage of their work, and the remuneration costs would scale in alignment with the market share and success of the platform. Under such a system, platforms of different sizes would not pay the same licensing costs, with the platforms that benefit the most from the copyrighted work being the main source of remuneration for the rightholders. It would also incentivise OCSSPs to secure technology that is not overly cautious, as their revenue would be directly affected. The recommendations for a newly established sector regulator would also complement this mechanism, where it could act as a mediator to determine what would be a fair formula to determine equitable remuneration, it could establish standards over what content recognition technology is suitable, as well as an adjudicator over disputes related to whether content should be subject to a levy.

However, there could be a concern that imposing a levy on a platform based on uploaded content which it cannot directly oversee may be unfair and impede competition in the market. It may be difficult to ascertain future costs, as user uploads are independently coordinated

[246] Code de la propriété intellectuelle (Version consolidée au 1 juillet 2020), art L218-4.

and the viral nature that content is often replicated could result in platform compliance costs dramatically surging in a short period of time. Nevertheless, it must be stated that platforms do have some control and freedom over user behaviour, with the ability to charge fees to its users or throttle uploads. The ability for platforms to engage these options would almost certainly curb user uploads to a manageable level. Moreover, these options would likely be actions of last resort, considering that surges in user traffic will likely be monetised through advertisement and likely result in the platforms having sufficient revenue to pay the cost of the levy and still maintain a healthy profit margin.

This user generated content levy offers the opportunity to close the value gap by effectively remunerating rightholders while not drastically impacting business operations and users' fundamental rights. It offers the most proportionate response to the value gap that does not solely rely on mandatory and lengthy negotiations. Therefore, it may be the case that there existed a much more proportionate method to closing the value gap than the finalised Article 17.

CONCLUSION

The proposed Directive gave rise to a significant amount of controversy, with opponents claiming that it will result in the metaphorical death of the internet. While many of the criticisms had been exaggerated, the DSM Copyright Directive has been guided by an ill-founded understanding of the digital market's functioning ecosystem.

The DSM Copyright Directive aims to create a fairer marketplace for online content that ensures consumers and creators can make the most of the digital world. However, the introduction of Articles 15 and 17 of the DSM Copyright Directive has likely led to a counter-productive result. The Commission has fragmented and disrupted the digital distribution chain, devolving the market to resemble the past.

Article 15 is likely to be ineffective in providing additional revenue to press publishers. As demonstrated by its national predecessors, Article 15 will likely result in news aggregator websites ceasing to provide their services. This will not lead to an increase in remuneration for news publishers or journalists, as news aggregators are a primary player in the online distribution network and drive a significant amount of reader traffic to publishers' articles.

Many journalists currently perceive news aggregators websites as beneficial to them. Therefore, certain press publishers may still freely license their content to Google to avoid its removal from Google Search's index and its search results page. As demonstrated in France, the right is unlikely to be effective. France's augmented implementation has failed to bolster the negotiating position of publishers to the level that was hoped for. Press publishers are having to rely on competition law to help facilitate the conclusion of the licensing agreements, as Google have threatened to simply de-list the content from its platform's search results. However, an interim order will only function as a temporary fix to delay the inevitable result of press publishers being cut off from their chief digital distributor

should they fail to conclude the agreement. Despite the Commission's best efforts, Google still holds all of the cards.

Nevertheless, delisting content and degrading the service it provides is hardly in Google's best interest. Perhaps the best path forward for all parties would be to cooperate with news aggregators to increase the competitive pressure placed on Google. Google is already taking advantage of this practical approach by supporting press publishers with the AMP project and 'Subscribe with Google'. This approach will likely be successful in taking account of the specific technical measures required to be implemented that would drive additional reader traffic to press publishers, subsequently increasing their revenue. However, this presents a real danger to the independence of the press, which will not be remedied by the failed negotiation mechanism present within Article 15. It would be wise for a newly established sector regulator to establish a code of conduct to govern the cooperation between press publishers and online platforms.

The European Commission's aims of preserving an independent and pluralistic press would be better served by providing an alternative to Google's infrastructure. By providing public funding for the development and innovation of new technological distribution systems, public interest journalism would be substantially supported in a manner similar to how the United Kingdom and some member states have proposed to accomplish it. Establishing a 'Future News Fund' programme at the Community level would likely accomplish far more for press publishers and their vital role in our democratic society.

Article 17 finds itself in a similar situation. Envisioned as a way of re-distributing the wealth away from OCSSP platforms and toward the content creators, Article 17 fails to sufficiently strengthen the negotiating position of rightholders to achieve the desired outcome. Article 17 in its initial draft form within the proposal was the most infamous aspect of this current

copyright reform, due to the large-scale public protest against its unintended effects. Examining the criticism levied at the initial draft of the provision, it is clear that some of it was clearly exaggerated. Despite this, the European institutions have heeded most of the criticism and revised the final form of the provision to eliminate, or at least mitigate, nearly all of the unintended consequences.

The final draft of Article 17 greatly clarifies the previously ambiguous relationship it will have with the current legal framework for online businesses with the EU, with the effect of depriving OCSSP platforms of the benefits of the safe harbour protection contained within the e-Commerce Directive. The published Directive also limits the impact on non-profit enterprises and start-ups, reducing the impact that these administrative burdens would have on the future competition and innovation within the market.

Nevertheless, Article 17 still remains fatally flawed in exactly the same manner as Article 15. For content creators to be attributed with increased revenue, they must be able to facilitate the actual conclusion of an effective licensing agreement. As has been the case with the current press publishers' negotiations with news aggregators, simply imposing a new licensing obligation upon the largest tech companies will not necessarily result in the actual realisation of a successful license. This situation will likely be exacerbated in the case of smaller content creators, who even with the support of a collection societies, would struggle to enforce a favourable agreement. With the threat that some content creators could simply license their content for free to benefit from the rare opportunity of a sparsely populated OCSSP platform, the negotiating position of rightholders will remain consistently undermined.

Therefore, would it not be more sensible and practical to rely on previous practices that have been effective in European copyright law? A new form of the 'private copying levy' could

apply to OCSSP platforms, where rightholders would automatically receive a determined share of the revenue based on the usage of their work measured by metadata and detection by content filtering tools. A newly established sector regulator would also be best placed to mediate on what could be considered as fair remuneration and review the content identification methodology. This would significantly decrease the burden on all parties to negotiate and achieve a favourable agreement, while also taking the form of a transparent and fair form of remuneration. Such a system would increase the revenue of rightholders in line with the value of their work, not based on the strength or weakness of their negotiating position. The method would also benefit consumers of the content, as no content would be delisted in the case of a failure to achieve an agreement. It would be up to OCSSPs whether they choose to subsidise this new cost through higher fees charged to advertisers or directly imposed upon their users.

In conclusion, the new provisions of the DSM Copyright Directive are unlikely to achieve the promised boost for creative industries, but they are also certainly not the death of the internet. Nevertheless, looking past the exaggerated criticism, it is undeniable that the European institutions have failed to understand the functioning of the ecosystem within the digital market. If the European institutions were to revisit this area of copyright reform, it is clear that there are viable alternative solutions, which are not as disruptive or fragmenting of the current market and that take advantage of the possible benefits offered by modern technology which are present within the Digital Single Market.

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