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Rethinking journalism protection: looking beyond copyright

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ABSTRACT

Journalism plays a crucial role in providing reliable information and holding those in power accountable. However, newspapers have experienced a significant drop in profitability, with digital platforms controlling the industry's main revenue sources being one contributing factor. To tackle this problem, the EU has granted press publishers the right to demand payment for copyright licenses from digital platforms. This article examines the nature and history of the new neighbouring right introduced by the EU Directive 790/2019 (DCSM) and considers the relationship between copyright and competition law in this area. While this move aims to enhance the bargaining power of publishers, it alone might not be sufficient to safeguard the public's right to information, freedom of speech, and a diverse news media landscape. Consequently, the effectiveness of the EU Directive will require additional regulatory measures, including bargaining codes, information-sharing mechanisms, and the implementation of specific 'choice architectures'.

KEYWORDS Copyright; public interest journalism; competition law; Directive 790/2019; media diversity

Introduction

The information landscape has undergone swift changes since the advent of the internet. The ubiquitous and uninterrupted presence of online services, such as search engines and social networks, has made it cheaper and easier to access information. But it has also endangered the position of traditional creators (in particular, the press publishers) that are struggling to monetise their content on the internet.[1] Press publishers have three main revenue

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[1]Among the many studies on the issue, see N Newman and others, 'Reuters Institute Digital News Report 2020' (Reuter Institute for the Study of Journalism 2020) <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2020-06/DNR_2020_FINAL.pdf>; News Media Alliance, 'News Media Alliance Calls for Legislation to Address Impact of Digital Duopoly on News Organizations' (*News Media Alliance*, 10 July 2017) <https://www.newsmediaalliance.org/release-digital-duopoly/>; News Media Alliance, 'Google Benefit from News Content: Economic Study' (2019) <http://www.newsmediaalliance.org/

streams: single print purchases, subscriptions, and advertisements.[2] Although on the rise, subscriptions are still a fraction of the advertisement revenues, and print purchases have declined for at least twenty years now.[3] Besides, the major publishers attract most of the subscriptions, leaving the small and local publishers with little left.[4] On the other hand, digital platforms offer a unique opportunity for news publishers to open their publications to a wider, worldwide audience almost instantaneously.

The economic turmoil occurring in the news industry has captured the attention of governments and European institutions alike. News publishers have long blamed search engines and news aggregators for parasitically exploiting their content, diverting readers from their websites.[5] They have claimed that search engines and news aggregators, notably Google, free-ride on their content in various ways, including by showing 'snippets' of their news.[6] Since the news snippets were introduced, publishers contend that daily visitors and advertisement revenues have declined.[7] Other digital platforms using this content on social media, news aggregators, and online press reviews have also been included in such complaints.[8] An EU report has found that nearly half of those who use news aggregators and other platforms to access information online browse the news without clicking through to the publisher's website, thus reducing their internet traffic and ad revenues.[9] Conversely, it is also true that digital platforms are crucial partners of press publishers, as they can connect them with their audiences.[10]

wp-content/uploads/2019/06/Google-Benefit-from-News-Content.pdf>; 'Commission Staff Working Document Impact Assessmnet Accompanying the Document Proposal for a Regulation of the European Parliament and of the Council on Promoting Fairness and Transparency for Business Users of Online Intermediation Services, COM(2018) 238 Final – SEC(2018) 209 Final – SWD(2018) 139 Final'; Lionel Bently and others, 'Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive', Study for the JURI committee PE 596.810- September 2017, the available at <https://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU%282017%29596810_EN.pdf>.

[2]Digiday Editors, 'Digiday Research: Publisher Satisfaction with Platforms Plummets in 2019' (*Digiday*, 4 November 2019) <https://digiday.com/media/digiday-research-publisher-satisfaction-platforms-plummets-2019/> accessed 31 October 2022.

[3]Newman and others, 'Reuters Institute Digital News Report 2020' (n 1) 22 ff.

[4]ibid 22–23.

[5]Natalia Drozdiak, 'EU Defends Proposals Granting Publishers New Rights' *Wall Street Journal* (2016) <https://www.wsj.com/articles/eu-defends-proposals-granting-publishers-new-rights-1473083853> accessed 8 June 2020.

[6]A snippet is a small extract of a piece of news, sometimes accompanied by an image or an illustration.

[7]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 (OJ L 130) Recital (54); Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, SWD(2016) 301 final 20 ff.

[8]Commission Staff Working Document, Impact Assessment on the modernisation of EU copyright rules, SWD(2016) 301 final 155–156.

[9]DG COMM, 'Eurobarometer: Internet Users' Preferences for Accessing Content Online' (2016) <https://ec.europa.eu/digital-single-market/en/news/eurobarometer-internet-users-preferences-accessing-content-online>.

[10]Damien Geradin, 'Complements and/or Substitutes? The Competitive Dynamics between News Publishers and Digital Platforms and What It Means for Competition Policy' (2019) 003 TILEC Discussion Paper <https://ssrn.com/abstract=3338941>.

Indeed, most readers land on a newspaper's page via a digital platform.[11] As a result, digital platforms have become essential intermediaries or gatekeepers of potential and actual readers. Moreover, the same platforms control the advertising space constituting the newspapers' main revenue source.[12]

Historically, large publishers held significant power, profitability, and social influence because they controlled the communication channels and amassed large audiences for their content.[13] While publishers still play a crucial role in producing news and maintaining direct connections with their loyal users, the way people access news is shifting, as many individuals now discover news through products and services offered by platform companies.

For these reasons, it has been argued that digital platforms have acquired superior bargaining power vis-à-vis the publishers allowing them to impose boilerplate text and unilateral terms and conditions, which can be unfavourable to the publishers.[14] This may further weaken the position of news publishers, thus negatively affecting the quality and quantity of news they provide, with a direct effect on democratic institutions.[15]

In an attempt to solve this problem, Article 15 of the EU Directive 2019/790 (the 'Directive' or the 'CDSM Directive')[16] grants publishers an ancillary right[17] to receive revenue from online uses of their publications by information society service providers.[18] The CDSM Directive protects the economic interests of press publishers by strengthening their bargaining position against 'information society service providers' (here also digital platforms). In other words, it leaves the market forces to decide the outcome of the negotiations between content creators and digital platforms while helping the weaker contractual party to obtain a better and more balanced

[11] Pew Research Center, 'Trends and Facts on Online News | State of the News Media' (*Pew Research Center's Journalism Project*) <https://www.journalism.org/fact-sheet/digital-news/> accessed 4 June 2020.

[12] Claudio Lombardi, 'Competition in Online News, Algorithmic Curation, and Advertising: Between Markets and Democracy' (Social Science Research Network 2020) SSRN Scholarly Paper ID 3582360 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3582360> accessed 19 August 2021.

[13] Rasmus Kleis Nielsen and Sarah Anne Ganter, *The Power of Platforms: Shaping Media and Society* (Oxford University Press 2022) 67.

[14] CMA and Ofcom, 'Platforms and Content Providers, Including News Publishers Advice to DCMS on the Application of a Code of Conduct, November 2021' 41 <https://www.gov.uk/government/publications/advice-to-dcms-on-how-a-code-of-conduct-could-apply-to-platforms-and-content-providers>; Australian Competition and Consumer Commission, 'Digital Platforms Inquiry: Final Report (26 July 2019)' <https://www.accc.gov.au/system/files/Digital%20platforms%20inquiry>; Frances Cairncross, 'The Cairncross Review: A Sustainable Future for Journalism' (Technical report, Department for Digital, Culture, Media & Sport, HM … 2019) <https://www.gov.uk/government/publications/the-cairncross-review-a-sustainable-future-for-journalism>.

[15] See below, Sections 1.2. and 2.3.

[16] Directive 2019/790 of 17 April 2019 on copyright and related rights in the Digital Single Market OJ L 130.

[17] This article refers, alternatively, to 'ancillary rights', 'neighbouring rights', and 'related rights' to address the new right introduced with Article 15, Directive 2019/790.

[18] For a comparative overview of the Directive and the reason why other countries, and in particular the US, may not follow suit, see Pamela Samuelson, 'Regulating Technology through Copyright Law: A Comparative Perspective' (2020) 42 European Intellectual Property Review 214.

deal. Other countries, although observing the same power dynamics unwinding in their news industries, have opted for different regulatory solutions, for example, based on the *ex-ante* regulation of competition to prevent abuses of dominance and ensure fair remuneration of news publishers.[19]

The Directive recognises that the advertising-based model contributed to the financial difficulties of press publishers and may put their survival at risk.[20] Moreover, it underscores the pivotal role that press publishers play in preserving media plurality in European democracies, thereby emphasising the significance of implementing Article 15 of the CDSM Directive.[21] However, it is here argued that this reform alone risks having the opposite and paradoxical effect of creating more concentration among press publishers and digital platforms.[22] Big media conglomerates and publishers will be the primary beneficiaries of this ancillary right, thus leading to more concentration and possibly entrenched interests between the dominant digital platforms and the dominant media conglomerates. On the other hand, this new right may raise the barrier to entry for nascent and smaller digital platforms.

This article focuses on the ambivalent relationship between copyright and competition law in this sector. Although they are often seen as contrasting with each other, competition law has recently been used to operationalise the news publisher's ancillary copyright.[23] This is particularly perplexing if one observes that Article 15 of the CDSM Directive aims to use copyright to restore competition and prevent the application of competition laws. However, this is not the first time that the conundrum of news protection in copyright has been discussed. Since at least the nineteenth century, news publishers have asked to introduce special copyright rules protecting their economic interests against alleged free-riding and unfair or parasitic competition of market rivals.

This article traces the history of copyright in the news to the present day. It uses this historical introduction to explain the development and the establishment of Article 15 CDSM Directive and other similar national provisions. It then analyses one of the most salient case studies to date to examine the relationship between competition law and intellectual property with regard to Article 15. This article concentrates on the use of copyright[24] and claims that, although it was not the most effective regulatory choice, Article 15 CDSM Directive should be reinforced using complementary regulatory solutions. This is necessary as, albeit some newspaper publishers may

[19]See Section 5.1.
[20]See also Lombardi (n 12).
[21]See Recital (54) and the more detailed analysis of these aspects below. See also Bently and others (n 1) 11.
[22]But also in the advertising industry, see Lombardi (n 13).
[23]See Section 3 below.
[24]Thus, other aids or regulatory solutions, such as State subsidies or antitrust exemptions for press publishers are not discussed in this article.

have failed to adapt to the time and harness digital technologies, in the absence of a better alternative to journalism (especially local and investigative), their survival and performance is a public interest concern.

A brief history of copyright in news

The history of copyright protection in news spans over the course of the last two centuries and has been the subject of extensive debates. The commercial exploitation of news can be traced back to the eighteenth century,[25] coinciding with the rise of newspapers due to increased literacy rates and the invention of the telegraph.[26] At the same time, a question about their protection arose, although this protection was claimed only for a short time, generally twenty-four hours after publication.[27] International treaties have recognised copyright protection for authors but rejected the idea of safeguarding news publishers through the creation of special neighbouring rights.[28] In particular, Article 2(8) of the Berne Convention explicitly excludes any special protection for press publishers, stating that the convention does not apply to 'news of the day or to miscellaneous facts having the character of mere items of press information'.[29]

The complexity surrounding the regulation of publishers' rights becomes evident through the numerous revisions of the treaty's provisions. The early formulations of the Berne Convention allowed for the reproduction or translation of newspaper articles unless expressly forbidden by the publishers.[30] The rules for extracting quotes from press publications and reproducing their content have been modified six times before being consolidated in the latest version of the Convention, sanctioned by the Paris Act of 1971.[31] This Act established that authors possess exclusive rights to authorise the reproduction of their work. Furthermore, it recognised the possibility of extracting quotations, emphasising that such extracts should adhere to fair practices and remain within reasonable limits justified by their intended

[25]Andrew Pettegree, *The Invention of News: How the World Came to Know about Itself* (Yale University Press 2015); Lucy Brown, *Victorian News and Newspapers* (Oxford University Press, USA 1985).
[26]Sam Ricketson and Jane Ginsburg, 'Intellectual Property in News? Why Not?' in Megan Richardson and Sam Ricketson (eds), *Research Handbook on Intellectual Property in Media and Entertainment* (Edward Elgar Publishing 2017) 11.
[27]ibid 12.
[28]For a detailed historical reconstruction see Sam Ricketson, 'The Public International Law of Copyright and Related Rights' in Isabella Alexander and H Tomás Gómez-Arostegui (eds), *Research Handbook on the History of Copyright Law* (Edward Elgar Publishing 2016) 288 ff.; Sam Ricketson and Jane Ginsburg, 'Intellectual Property in News? Why Not?' in Megan Richardson and Sam Ricketson (eds), *Research Handbook on Intellectual Property in Media and Entertainment* (Edward Elgar Publishing 2017) 10 ff.
[29]Berne Convention for the Protection of Literary and Artistic Works signed on 9 September 1886 (4 May 1896) 331 UNTS 217, entered into force 5 December 1887, last revised at Paris on 24 July 1971 and amended on 28 September 1979 (Berne Convention), Art.2(8).
[30]Article 7 of the Berne Convention.
[31]Article 9(1).

purpose.[32] In qualifying a quotation, the Paris Act omitted the adjective 'short', used in the Brussels Act of 1948.[33] This is because the paragraph's overall phrasing appeared, to the drafters, sufficiently restrictive by relying on the concepts of fairness and purpose of the use. As a result, national legislation and the judiciary determine the legality of quotations based on these two concepts.[34] This was, arguably, the first attempt at regulating 'news snippets'.

Before the Berne Convention, a UNIDROIT committee proposed a *sui generis* copyright protection for press publishers.[35] However, it was not included in the convention due to concerns about limiting the circulation of news[36] and impeding the free flow of information.[37] Moreover, according to the drafters, the publisher's interest could hardly be located in the province of copyright.[38]

More recently, at a national level, several European countries discussed granting special (ancillary) rights to press publishers. However, it was only with the most recent 'digital platform revolution' that Germany[39] and

[32]See also the WIPO's guide to Article 2(8), World Intellectual Property Organization, Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971), available at <https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf>.

[33]Berne Convention for the Protection of Literary and Artistic Works as revised at Brussels 26 June 1948, Article 10(1).

[34]ibid para 10.6. Moreover, the guide specifies that the news is not left undefended against parasitic exploitation, as 'for example the laws of unfair competition allow for action against newspapers which filch their news from competitors rather than subscribe to news agencies', para 2.28.

[35]Samedan draft, Art.2: (1940), see Ricketson (n 30) 26–27.

[36]Records of the Intellectual Property Conference of Stockholm, 11 June to 14 July 1967, vol.1 (Stockholm Intellectual Property Conference, WIPO 1971) 115. On the relationship between copyright and public interest concerns, see Isabella Alexander, *Copyright Law and the Public Interest in the Nineteenth Century* (Bloomsbury Publishing 2010).

[37]On the relationship between copyright and public interest concerns, see ibid.

[38]Actes de la Conférence réunie a′ Berlin du 14 octobre au 14 novembre 1908 (Bureau de l'Union international littéraire et artistique 1909) 251ff. Furhermore, the Convention's drafters believed that the commercial issues ensuing from using the news of the days were already protected under 'unfair competition statutes'. In particular, under Article 10bis (2), Resolution of the International Congress of Press Agencies, Berne 1924, reproduced in *Actes de la Conférence réunie à La Haye du 8 octobre au 6 novembre 1925* (Bureau international de l'Union 1926) 100–1; see Ricketson and Ginsburg (n 30) 23. However, also the Paris Convention rejected the proposal of according special protection to publishers on the ground that the parasitic conducts denounced by some of them failed to fit within the object of unfair competition Actes de la Conférence 1925 (n 52) 478–9 (report of fourth subcommittee). Other international laws protecting the neighbouring rights are the Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations, 1961, the WIPO Performances and Phonograms Treaty of 1996, and the TRIPS, which accord special protection to performers and broadcasters and protect collective management of performers, however, excluding newspapers.

[39]In Germany, some of the most prominent newspapers filed a complaint, through their collective management organisation, VG Media, to receive payment of copyright fees, but ultimately conceded free access to their content to Google. At the same time, they denied the same free license to other news aggregators; see Bently and others (n 1) 31; 'News zu News bei Google' (*Der offizielle Blog von Google Deutschland*) <https://germany.googleblog.com/2014/10/news-zu-news-bei-google.html> accessed 8 June 2020.

Spain[40] introduced such rights. Italy, Austria, Sweden, and France, instead, halted the process to the stage of reform proposals[41] until Directive 790/2019 came into force, giving a new start to copyright reforms throughout the EU.[42]

Freedom of expression and right to information in the new 'economic space'

The history of copyright in the news has shed light on issues at the intersection between intellectual property law, unfair competition, and public policy. Firstly, there is tension between freedom of speech and copyright in the news,[43] as freedom of expression and information directly depend on peoples' access to information.[44] Strengthening authors' and publishers' rights may limit the circulation of the content they publish and encroach on access to information.[45] This may restrict the freedom of expression of internet users, other content creators, and even digital platforms. Article 10 ECHR establishes that 'Everyone has the right to freedom of expression' without selecting specific protected categories of expression.

The idea/expression dichotomy encapsulated in Article 9(2) TRIPS[46] ensures that this protection is granted only to the expression of

[40]In Spain, Google news was shut down in 2014, after the copyright reform introduced an inalienable ancillary right. Despite this, some newspapers gave a free license (*contra leges*!) to Google, see Raquel Xalabarder, 'The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government-Its Compliance with International and EU Law' [2014] IN3 Working Paper Series 31 <https://ssrn.com/abstract=2504596> or <https://doi.org/10.2139/ssrn.2504596>. 31; Pedro Posada de la Concha, A Gutiérrez and H Hernández, *Impacto Del Nuevo Artículo 32.2 de La Ley de Propiedad Intelectual* (NERA Economic Consulting, July 2015); After the entry into force of the CDSM Directive, Google News returned to Spain, see Google blog, Google News to return to Spain, <https://blog.google/around-the-globe/google-europe/google-news-in-spain/>.

[41]Valentina Moscon, 'Use and Abuse of Neighbouring Rights and the Growing Need for a Sound Understanding: The Case of Online News Protection in Europe' in Susy Frankel (ed), *The Object and Purpose of Intellectual Property* (Edward Elgar Publishing 2019) 315–316.

[42]See infra Section 3.

[43]On the relationship between copyrights and freedom of information, see Christophe Geiger and Elena Izyumenko, 'Freedom of Expression as an External Limitation to Copyright Law in the EU: The Advocate General of the CJEU Shows the Way' (2019) 41 European Intellectual Property Review; Giulia Priora, 'Diritto d'autore e Accesso All'informazione Giornalistica: Accanimento o Lungimiranza Del Legislatore Comunitario?(Copyright Protection and Access to News Information: Dogged Determination or Prescient Vision of the EU Legislator?)' (2021) 4 Diritto dell'Informazione e dell'Informatica 833, 835; Elena Izyumenko, 'The Freedom of Expression Contours of Copyright in the Digital Era: A European Perspective' (2016) 19 The Journal of World Intellectual Property 115.

[44]Thomas Hoppner, Martin Kretschmer and Raquel Xalabarder, 'CREATe Public Lectures on the Proposed EU Right for Press Publishers' (2017) 39 European Intellectual Property Review 607.

[45]The right to information is generally combined with the freedom of expression as in a dyadic relationship: 'Everyone has the right to freedom of expression' Art 10 European Convention on Human Rights and Art 11 Charter of Fundamental Rights of the European Union. See, for example, the UN Special Rapporteur on freedom of speech utilizing phrases such as 'freedom of information' and 'right of access to information' and 'right to information' interchangeably, David Kaye, 'Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression' (UN, 2018) <https://digitallibrary.un.org/record/1631686> accessed 24 August 2021.

[46]Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

the idea.[47] Accordingly, mere facts are not protected under copyright because of the possible restrictions to the circulation of information that may ensue. Ergo, governments have generally dispensed facts reported in the news from copyright protection.

Secondly, the history of copyright in the news shows that authors and publishers may have contrasting economic interests. While the former may want to disseminate the article through as many channels of information as possible, the publisher has an economic interest in remaining the main source of dissemination of that piece.[48] Thus, the law has taken into account the different economic interests of authors and publishers, and has established copyright protection for authors while subjecting publishers to unfair competition statutes and antitrust laws.

Thirdly, protecting the rights of authors and publishers can conflict with freedom of expression, but failing to do so may harm their businesses and lead to a less diverse information environment.[49] This is the main policy justification for the enactment of Article 15 CDSM Directive, which the following sections examine in more detail.

The neighbouring right in the CDSM Directive

Article 15 of the CDSM Directive grants an ancillary right to press publishers for two years after publication.[50] During this period, they can collect levies from 'information society service providers'[51] (ISSP or 'digital platforms') intending to publish their news or part of it.

The Directive omits a specific description of press publishers. Still, it defines press publication as a 'collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matter'.[52] Whilst wide-encompassing and addressing the modern nature of online publications comprising different media of

Article 9(2) establishes that 'Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.'

[47]See also WR Cornish, David Llewelyn and Tanya Frances Aplin, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (Ninth edition, Sweet & Maxwell 2019) part IV; Eleonora Rosati, 'The Idea/Expression Dichotomy: Friend or Foe?', *Handbook on the Economics of Copyright* (Edward Elgar Publishing 2014); Edward Samuels, 'The Idea-Expression Dichotomy in Copyright Law' (1988) 56 Tenn L Rev 321; Amy B Cohen, 'Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgements' (1990) 66 Ind LJ 175; Abraham Drassinower, 'A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law' (2003) 16 Canadian Journal of Law & Jurisprudence 3; Rosati.

[48]Moscon (n 58) 17.

[49]This is happening, especially to local and investigative reporting, see Newman and others, 'Reuters Institute Digital News Report 2020' (n 1).

[50]The expiration time is provided at Article 15(4).

[51]As defined in Directive (EU) 2015/1535 of the European Parliament and of the Council.

[52]Article 2(4).

expression, this definition remains vague.[53] It may indeed be problematic to establish what a work of a 'journalistic nature' is and, thus, what the Directive aims to protect. Recital 56 of the Directive states that the definition of 'press publication' should include journalistic publications published in any media that are part of an economic activity providing services under Union law. This includes various types of publications, such as newspapers, magazines, and news websites. While press publications mostly contain literary works, they may also include other types of works, such as photographs and videos. On the other hand, scientific or academic publications like scientific journals should not be protected under the Directive, nor should websites like blogs that do not fall under the editorial control of a news publisher.[54]

According to Article 2 (5), '"information society service" means a service within the meaning of point (b) of Article 1(1) of Directive (EU) 2015/1535'. This provision defines it as 'any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services'. Whereas social networks can potentially be included in this definition, the relationship between them and the right-holders is different from the one observed in the case of search engines and news aggregators. Uploading a news article on a social platform is voluntary and subject to acceptance of the platform's general terms and conditions. Thus, Article 15 may have to be clarified under national law to include not only the negotiations for the licensing of content that is extracted from news websites but also for the content that publishers use on other platforms.[55] Social networks are, in this sense, infrastructures to disseminate news,[56] whilst the relevance of each platform for news publishers determines whether they are unavoidable channels of dissemination or not.

Article 15 does not define the 'use' of a press publication but establishes several limitations to this right. Firstly, the ancillary right does not apply to 'non-commercial uses of press publications by individual users'.[57] The Directive explains that individual users act for non-commercial purposes when they share their content without any profit-making purpose, 'or where the revenue generated by their uploads is not significant in

[53] A different approach was followed by the Australian News Media and Digital Platforms Mandatory Bargaining Code which defined 'core news content' as 'content that reports, investigates or explains: (a) issues or events that are relevant in engaging Australians in public debate and in informing democratic decision-making; or (b) current issues or events of public significance for Australians at a local, regional or national level', thus focusing on public interest journalism, see Article 52, Bill 2021.

[54] Recital 56 Directive 790/2019.

[55] Ula Furgal, 'The EU Press Publishers' Right: Where Do Member States Stand?' (2021) 16 Journal of Intellectual Property Law and Practice 887, 9.

[56] Mason Walker and Katerina Eva Matsa, 'News Consumption Across Social Media in 2021' (*Pew Research Center's Journalism Project*, 20 September 2021) <https://www.pewresearch.org/journalism/2021/09/20/news-consumption-across-social-media-in-2021/> accessed 11 April 2022.

[57] Article 15 (1)(2).

relation to the copyright relevant acts of the users covered by such authorisations'.[58]

Secondly, hyperlinks are excluded from the protection of Art 15(1).[59] Finally, the Directive also exempts individual words or 'very short extracts' of a press publication.[60] The CDSM Directive omits any definition of 'very short extracts' but observes that it has to 'be interpreted in such a way as not to affect the effectiveness of the rights provided for in [the] Directive'.[61] Domestic laws implementing the CDSM Directive will possibly define such extracts whereby the extract can be longer than a single word but has to be short enough to avoid jeopardising the economic interests of press publishers.

Revenue sharing

Since Article 15 introduces a right connected to the authors' copyright, it also specifies that authors shall 'receive an appropriate share of the revenues that press publishers receive'.[62] This provision delegates to the Member State's (MS) law the definition of 'appropriate share' and the modality in which this has to be paid to the authors. One of the main future challenges will be building appropriate metrics to determine fair remunerations for press publishers and, subsequently, the 'appropriate' amount to be shared with authors. The collaboration between press publishers and digital platforms generates value for both parties. It can simultaneously increase the visibility of press publishers and increment the traffic on the digital platform. However, this collaboration comes with costs for both the press publishers and the digital platforms. As a result, the joint value created by this collaboration 'is the sum of the incremental benefits of both parties generated by the use of content, less the sum of any incremental costs incurred'.[63] Leaving the determination of such benchmark to digital intermediaries may result in greater value given to news outlets generating the most user engagement and clicks. For example, Google announced that, in France, it will prioritise the 'daily volume of publications' and 'monthly internet audience' in determining the remuneration provided in the licensing agreements.[64] As a result, the emphasis on volume and visibility would benefit and could encourage news outlets to create more sensational or controversial content to attract more clicks or diminish the value of publications that

[58]Recital (69).
[59]Article 15 (1)(3).
[60]Article 15 (1)(4).
[61]Recital (58).
[62]Article 15(5).
[63]CMA and Ofcom (n 14) 5.7.
[64]Google blog, 'Alliance de la Presse d'Information Générale and Google France sign agreement on the use of online press publications', 21 Jan 2021, <https://blog.google/intl/fr-fr/nouveautes-produits/explorez-obtenez-des-reponses/apig-google/>.

specialise in specific topics or require a significant investment of time and resources.[65] Doing so would contradict the stated goals of the law.

In order to provide a useful benchmark for calculating copyright levies, the MS's law has to establish methods to determine a fair and reasonable price, which should comprise methods to estimate the joint value of the collaboration and then determine whether the levels of remuneration result in a fair share of this.[66] Moreover, the law has to establish methods to determine the distribution of remuneration between authors and publishers.[67] As better detailed below, the opacity of the conditions under which digital platforms compensate publishers aggravates the finding of a common metric.

The scope and aims of Article 15 CDSM Directive

Article 15 grants special legal protection to publishers to improve the chances of economic exploitation of their publications.[68] The previous regulatory framework, according to the Directive, failed to provide harmonised and adequate legal protection for press publishers and thus ensure the overall sustainability of the industry.[69] As a result, the survival and performance of certain press publishers were at risk, with immediate repercussions on the democratic institutions of the EU and its Member States.[70]In this connection, Article 15 also aims to preserve the role of the press as an independent monitor of power in a democratic society.[71] It is observed that 'A free and pluralist press is essential to ensure quality journalism and citizens' access to information. It provides a fundamental contribution to public debate and the proper functioning of a democratic society.'[72] Consequently, MSs' laws will need to carefully address and reconcile various public interest considerations. These include safeguarding a diverse and pluralistic media

[65]Caitlin Chin, 'How to Balance the Scales between Newspapers and Technology Giants', Center for Strategic and International Studies 5 May 2022, <https://www.csis.org/analysis/how-balance-scales-between-newspapers-and-technology-giants>.

[66]CMA and Ofcom (n 14) Appendix D.

[67]Whereas this article does not aim to cover all the details about metrics and methods to calculate a fair share, it is crucial to remark that even when the negotiation may take place, it may be halted due to the lack of a common metric.

[68]Recital (54) of the Directive observes that 'publishers of press publications are facing problems in licensing the online use of their publications to the [information society service providers], making it more difficult for them to recoup their investments'.

[69]Recital (55).

[70]Recent research brings empirical evidence in support to the statement that a well-functioning press is essential for the democratic institutions: Pengjie Gao, Chang Lee and Dermot Murphy, 'Financing Dies in Darkness? The Impact of Newspaper Closures on Public Finance' (2020) 135 Journal of Financial Economics 445; Jonas Heese, Gerardo Pérez-Cavazos and Caspar David Peter, 'When the Local Newspaper Leaves Town: The Effects of Local Newspaper Closures on Corporate Misconduct' [2021] Journal of Financial Economics.

[71]Recital (54), stating that 'A free and pluralist press is essential to ensure quality journalism and citizens' access to information'. On the different functions of journalism in a democratic society, see Lombardi (n 12) 45.

[72]Recital (54).

landscape while also ensuring fair negotiations between digital platforms and press publishers.

In interpreting the Article 15 ancillary right and its statutory objectives, one must consider the multifaceted nature of online press publications, often including text, images, and videos, which are individually protected as independent copyright.[73] Creators collaborate to produce a single piece of news, which may create further friction to effectively protect their sparse interests. Thus, the Directive concludes, the need to create a 'new category of rightholders',[74] the press publishers, to generate more fair, sustainable, balanced, and harmonised outcomes for the EU press industries. In order to achieve the goals above, the CDSM Directive strives to provide 'press publishers legal certainty and put them in a better negotiating position in their contractual relations with online services using and enabling access to their content'.[75] However, it is here argued that Article 15 of the CDSM Directive, rather than directly protecting press publishers and certain relevant public interest concerns, largely relies on market mechanisms and competition to restore a level playing field in this industry, which should allow the market to self-regulate. In other words, this provision is based on the assumption that it will rebalance the power disparity in this market, thus leading to fairer private negotiations, which, in turn, will benefit press publishers and democracy alike. Nonetheless, these assumptions bear several flaws, including that restoring power equilibria should be based on a multifactorial approach, addressing not only the rights of the parties but also other elements equally contributing to this unbalance, such as information asymmetry and market opacity.[76] Moreover, the realisation of fundamental rights, such as freedom of expression, and the protection of public interest concerns, such as a diverse information landscape, are not necessarily the by-product of competitive markets. As already pointed out, provisions such as Article 15 may actually lead to the paradoxical result of favouring information that poorly contributes to the democratic institutions of a society.[77]

[73]Newman and others, 'Reuters Institute Digital News Report 2020' (n 1) 27.

[74]Commission Staff Working Document Impact Assessment on the modernisation of EU copyright rules accompanying the document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market SWD (2016) 302, 162.

[75]European Commission (2016), 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market', COM (2016) 592 final, 14 September.

[76]See below Section 5.12.

[77]Sometimes jeopardising the role of investigative and local journalism that are crucial for the attainment of these objectives.

Criticism of Article 15 CDSM Directive

Before the adoption of the CDSM Directive, Germany[78] and Spain[79] had already recognised special neighbouring rights to news publishers, conferring an exclusive right for the commercial exploitation of their online content.[80] The establishment of a neighbouring right for press publishers has been a target of criticism since then.

Relying also on the Spanish and German experience, several scholars had firmly opposed the Proposal Copyright Directive in the part where it suggested the introduction of a neighbouring right for press publishers.[81] Hilti and Moscon, in a comment to the proposal, had observed that the proposed neighbouring right had an 'undefined object'.[82] Moreover, they maintained that the new ancillary right had no economic justification, as there was no clear specification and evidence of a market failure.[83] Finally, they claimed that search engines and aggregators are not substitutes for press publishers, as the formers do not create content. Instead, they complement and enhance each other's services.[84]

Of a similar opinion were Colangelo and Torti, who had also analysed the information available on the German and Spanish post-reform markets. Based on this research, they observed that news aggregators generate a market expansion effect that outweighs the substitution effect.[85] Moreover, they considered that these reforms had failed to increase revenues for press publishers in the respective countries. Thus, they asserted that 'a

[78]In Germany, Google had already renounced to display snippets from news published by some of the most popular national newspapers, following a lawsuit, see 'News zu News bei Google' (n 64).
[79]See Williams (n 65); Mullin (n 65); Posada de la Concha, Gutiérrez and Hernández (n 65).
[80]Sections 87(f)(g)(h) of the German Copyright Act (1965) and Article 32(2) of the Ley de Propiedad Intelectual 21/2014.
[81]Article 11 now Article 15 CDSM Directive. Amongst the many, see Raquel Xalabarder, 'Press Publisher Rights in the New Copyright in the Digital Single Market Draft Directive' [2016] CREATe Working Paper 2016/15; Giuseppe Colangelo and Valerio Torti, 'Copyright, Online News Publishing and Aggregators: A Law and Economics Analysis of the EU Reform' (2019) 27 International Journal of Law and Information Technology 75; Moscon (n 58); Reto Hilty and Valentina Moscon, 'Modernisation of the EU Copyright Rules – Position Statement of the Max Planck Institute for Innovation and Competition' [2017] Max Planck Institute for Innovation & Competition Research Paper No. 17-12 <SSRN: https://ssrn.com/abstract=3036787n>; Alexander Peukert, 'An EU Related Right for Press Publishers Concerning Digital Uses. A Legal Analysis' 22 [2016] Research Paper of the Faculty of Law, Goethe University Frankfurt am Main <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888040>; Christophe Geiger, Oleksandr Bulayenko and Giancarlo Frosio, 'The Introduction of a Neighbouring Right for Press Publisher at EU Level: The Unneeded (and Unwanted) Reform' (2017) 39 European Intellectual Property Review (EIPR); Gustavo Ghidini and Francesco Banterle, 'A Critical View on the European Commission's Proposal for a Directive on Copyright in the Digital Single Market' <https://papers.ssrn.com/abstract=3168070> accessed 25 August 2022. See also the letter signed by multiple scholars warning against the introduction of a new ancillary right for news publishers, 'Academics Against Press Publishers' Right' (IVIR) <https://www.ivir.nl/academics-against-press-publishers-right/> accessed 12 June 2020.
[82]Hilty and Moscon (n 117) 81.
[83]ibid 82.
[84]ibid 82–83.
[85]Colangelo and Torti (n 117) 85–86.

neighbouring right has a negative impact on publishers' economic interests, particularly to the detriment of start-ups and small businesses'.[86]

On the other hand, the European Commission's Impact Assessment noticed that:

> [t]he gap in the current EU rules further weakens the bargaining power of publishers in relation to large online service providers and contributes to aggravate the problems faced by press publishers as regards the online exploitation of, and enforcement of rights in, their content. Online service providers often have a strong bargaining position and receive the majority of advertising revenues generated online. This makes it difficult for press publishers to negotiate with them on an equal footing, including regarding the share of revenues related to the use of their content.[87]

In this sense, the Directive failed to provide a balanced metric to calculate the share of revenues but also to solve the information asymmetry that affects the negotiations by increasing transparency.

Several academics criticised the proposal saying that it would hinder the free flow of vital information in a democracy by granting broad ownership rights in news and information, which would be specific to each Member State and owned by established news institutions.[88] These rights would increase costs for others using news content, leading to higher transaction costs and the need for permissions for even small uses. Consequently, non-institutional news creators, including journalists and freelancers, would be negatively affected by it,[89]as the Directive would discourage the use and dissemination of their content. Quite compellingly, the same letter posited that large news publishers would likely benefit the most, worsening existing power imbalances in media markets.[90] In this connection, other scholars have posited that the idea/expression dichotomy is intentionally constructed to strike a balance between ownership, natural rights arguments, and the free flow of information in a democratic society.[91] Therefore, the ancillary right under Article 15 could disrupt the delicate balance that has been established between natural rights arguments favouring copyright

[86]ibid 81.
[87]European Commission, 'Impact Assessment on the modernisation of EU copyright rules', SWD(2016) 301 final, 160; also cited by ibid 9.
[88]'Academics Against Press Publishers' Right' (*IViR*) 1 <https://www.ivir.nl/academics-against-press-publishers-right/> accessed 12 June 2020.
[89]ibid.
[90]ibid.
[91]Richard Danbury, 'Is an EU Publishers' Right a Good Idea – Final Report on the AHRC Project: Evaluating Potential Legal Responses to Threats to the production of News in a Digital Era' 72 <https://www.cipil.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cipil.law.cam.ac.uk/documents/copyright_and_news/danbury_publishers_right_report.pdf>; R Danbury, 'Why Article 15 of the Directive on Copyright in the Single Digital Market Is a Bad Idea (Opinion)' (2021) 43 European Intellectual Property Review 695; Robert P Merges, *Justifying Intellectual Property:* (Harvard University Press 2011) 19.

and other societal goods.[92] While this criticism has meritorious theoretical foundations, it presupposes that Article 15 would not just restore a fair balance of bargaining power between press publishers and digital platforms but potentially grant excessive power to the former, thus leading to a restriction of the free flow of information. However, such concerns have not materialised in reality, indicating that the assumption is unfounded at least in this specific market structure.

Detractors of the Directive also challenge the assumptions laid down in Recitals (54) and (55),[93] observing that:

> The end of democracy will not, apparently, occur if news organisations are granted new rights over the very facts of events, and if search engines are obligated to pay them money for the privilege of crawling their websites. Democracy seems easily preserved by money changing hands.[94]

In other words, the regulators should leave markets free to replace businesses and models that have failed to adapt. Moreover, according to the same critics, newspapers have placed less emphasis on investigative journalism (the essence of public interest journalism) due to their adaptation to reduced demand. As a result, these critics argue that even with the introduction of new laws, stimulating greater demand for investigative journalism would prove challenging, considering this pattern persisted for over a century.[95] This last point, which suggests that it would be difficult to force more demand for investigative journalism, overlooks a crucial aspect of the role of investigative journalism in democratic institutions. Like other public interest concerns, the allocation of resources for this type of journalism should not solely depend on market forces, but also consider deliberate political choices. Moreover, this criticism assumes that low consumption reflects lower demand for quality journalism, which contradicts the empirical research available.[96] The challenge lies not in accepting a lower consumption for investigative journalism but in finding ways to provide incentives for quality journalism despite the changing media landscape.

One of the main problems with the CDSM directive is that it characterises press publishers as a homogenous class. On the contrary, the news market includes powerful corporate groups as well as small and medium

[92]Danbury, 'Is an EU Publishers' Right a Good Idea – Final Report on the AHRC Project: Evaluating Potential Legal Responses to Threats to the production of News in a Digital Era' (n 130) 73.
[93]See Section 2.3 above.
[94]William Patry, *How to Fix Copyright* (Oxford University Press, USA 2011) 146.
[95]ibid 148.
[96]Pew Research Center (n 11); Sara Atske, '4. Journalists and the Public Differ on How Journalists Are Doing, How Connected They Are' (*Pew Research Center's Journalism Project*, 14 June 2022) <https://www.pewresearch.org/journalism/2022/06/14/journalists-and-the-public-differ-on-how-journalists-are-doing-how-connected-they-are/> accessed 5 June 2023; Jigsaw Research and Ofcom, 'News Consumption in the UK: 2022' (2022) <https://www.ofcom.org.uk/__data/assets/pdf_file/0027/241947/News-Consumption-in-the-UK-2022-report.pdf>.

newsrooms.[97] It is accounted, for instance, that although small and medium publishers in the UK reach about 39 million people per year via their websites alone, their 'typical' revenue is only £31000.[98] Moreover, independent and small local newsrooms have been severely impacted by the digital transition, leaving 'news deserts' in most countries.[99] As a result, fewer (if any) journalists are covering state governments, universities, zoning boards, municipal and county councils, courts, and police unions. But this is the core of public interest journalism, which the Directive's Article 15 was meant to protect.

Finally, it can be pointed out that copyright enforcement has a corrective structure whereby it is up to the harmed party to exercise the right to damages or injunctive relief. However, publishers entitled to bring such actions are often in a situation of economic dependence on the digital platforms that use their material.[100] As these publishers have even greater economic interests to protect, they may prefer to waive these rights or desist from enforcing them for fear of losing readership and advertising revenues.[101] A

[97] See Mediatique report for the Department for Digital, Culture, Media & Sport, Overview of recent dynamics in the UK press market, April 2018, available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/720400/180621_Mediatique_-_Overview_of_recent_dynamics_in_the_UK_press_market_-_Report_for_DCMS.pdf>, and Pew Research Center, 'State of the News Media: Digital News Fact Sheet' (2019) <https://www.journalism.org/fact-sheet/newspapers/> accessed 2 June 2020. ibid.

[98] Public Interest News Foundation, 'Index of Independent News Publishing in the UK' (2022) 11 <https://www.publicinterestnews.org.uk/_files/ugd/cde0e9_482883de647c46acb5ae4a0166d6d048.pdf>. ibid.

[99] Nielsen and Ganter (n 13) 81 ff.; Rasmus Kleis Nielsen, *Local Journalism: The Decline of Newspapers and the Rise of Digital Media* (Bloomsbury Publishing 2015); C Hendrickson, 'Local Journalism in Crisis: Why America Must Revive Its Local Newsrooms' [2019] The Brookings Institute, <https://www.brookings.edu/wp-content/uploads/2019/11/Local-Journalism-in-Crisis.pdf>; Heese, Pérez-Cavazos and Peter (n 100). Nielsen and Ganter (n 13) 81 ff.; Nielsen; Hendrickson; Heese, Pérez-Cavazos and Peter (n 100).

[100] For more information about the abuse of economic dependence in Europe, see Mor Bakhoum, 'Abuse without Dominance in Competition Law: Abuse of Economic Dependence and Its Interface with Abuse of Dominance', *Abusive Practices in Competition Law* (Edward Elgar Publishing 2018); Alice Rinaldi, 'Re-Imagining the Abuse of Economic Dependence in a Digital World' (2020) 4 Eur Competition & Reg L Rev 253; Pranvera Këllezi, 'Abuse below the Threshold of Dominance? Market Power, Market Dominance, and Abuse of Economic Dependence', *Abuse of Dominant Position: New Interpretation, New Enforcement Mechanisms?* (Springer 2008); Sangyun Lee, 'A Theoretical Understanding of Abuse of Economic Dependence in Competition Law' [2022] Available at SSRN 4134583; Jan Blockx, 'Belgian Prohibition of Abuse of Economic Dependence Enters into Force' (2021) 12 Journal of European Competition Law & Practice 321; Patrice Bougette, Oliver Budzinski and Frédéric Marty, 'Exploitative Abuse and Abuse of Economic Dependence: What Can We Learn from an Industrial Organization Approach?' (2019) 129 Revue d'economie politique 261.

[101] On the 'fear factor', but with specific reference to authors, Recital (76) of the CDSM Directive states '*Authors and performers are often reluctant to enforce their rights against their contractual partners before a court or tribunal. Member States should therefore provide for an alternative dispute resolution procedure that addresses claims by authors and performers, or by their representatives on their behalf, related to obligations of transparency and the contract adjustment mechanism. For that purpose, Member States should be able to either establish a new body or mechanism, or rely on an existing one that fulfils the conditions established by this Directive, irrespective of whether those bodies or mechanisms are industry-led or public, including when part of the national judiciary system. Member States should have flexibility in deciding how the costs of the dispute resolution procedure are to be allocated. Such alternative dispute resolution procedure should be without prejudice to the right of parties to assert and defend their rights by bringing an action before a court.*'

decrease in visibility on digital platforms would cause an immediate reduction in the competitiveness of the newspaper,[102] as the platform access to the publisher's material ensures greater visibility within and across platforms.

The Spanish and German[103] experiences demonstrate that press publishers depend on search engines and news aggregators and may only be harmed by decreasing the amount and depth of cooperation. For now, there is at least one widely known case on the effects of the implementation of Article 15 of the CDSM Directive, and the next section proposes to investigate it.

The Google France case

Soon after it entered into force, France was the first to implement the CDSM Directive.[104] The French Ministry of Culture saluted the creation of a neighbouring right for press publishers as 'absolutely essential for our democracy and the survival of an independent and free press'.[105] Shortly after the enactment of the French copyright reform, Google France, with a blog post, announced that they would no longer display excerpts of news for European press publishers in France unless the publisher had made the arrangements to indicate that it accepted Google's conditions to show the snippet for free.[106]

Not long afterwards, the case was brought to the attention of the *Autorité de la Concurrence* (the French competition authority, or FCA), which granted a request for interim measures to several press publishers associations requiring Google to negotiate remuneration for the use of their protected content.[107] The FCA decided that Google had abused its dominance in the market for general search services by imposing unfair trading conditions on news publishers.[108] In particular, Google circumvented the

[102]For instance, in 2017, the Wall Street Journal, after blocking users from reading articles for free, witnessed a 44% decrease of visits to their website from Google searches 'WSJ Ends Google Users' Free Ride, Then Fades in Search Results' *Bloomberg.com* (5 June 2017) <https://www.bloomberg.com/news/articles/2017-06-05/wsj-ends-google-users-free-ride-then-fades-in-search-results> accessed 14 February 2020.

[103]Although for the latter an ECJ decision established a violation of EU procedural rules determining its invalidity, see C-299/17 – VG Media.

[104]Law 2019-775 of 24 July 2019.

[105]See The Local '"We Can Be Proud:" France Becomes First Country to Adopt EU Copyright Reform' (24 July 2019) <https://www.thelocal.fr/20190724/french-parliament-adopts-eu-copyright-reform> accessed 12 December 2019.

[106]Google, 'Nouvelles règles de droit d'auteur en France: notre mise en conformité avec la loi.' (*Le blog officiel de Google France*) <https://france.googleblog.com/2019/09/comment-nous-respectons-le-droit-dauteur.html> accessed 10 June 2020. For more details on the cases, see also Emmanuel Reille, 'France: Anti-Competitive Practices – Enforcement' (2021) 42 European Competition Law Review; David Tayar and Jalil El Khanchoufi, 'The Neighbouring Rights Saga (France): Google Fined€ 500 Million for Breaching Interim Order to Negotiate in Good Faith With News Agencies and Publishers' (2022) 13 Journal of European Competition Law & Practice 355.

[107]Autorité de la Concurrence, *Agence France Presse*, interim decision 20-MC-01 of 9 April 2020.

[108]ibid paras 190 ff.

application of the new law on copyright by requesting the concession of free licenses. With this decision, the French authority also considered the situation of economic dependence of news publishers and the correspondent abuse of such dependence by Google.[109] As a general stance, Google refused to pay for any protected content and share the information needed to calculate a fair remuneration to publishers that the Directive and the French law require.

The French competition authority deemed the 'zero remuneration' policy as anticompetitive discrimination as it 'treats objectively non-comparable situations identically'.[110] Moreover, the FCA observed how, paradoxically, after the implementation of the copyright directive, the trading conditions of publishers worsened.[111] Google had sent to all newspapers three new 'tags', i.e. strings of code that publishers can implement in their websites. When Google's robots read the page, they recognise the tag and act accordingly. With the first tag (the 'max-snippet'), the publisher can choose between two options: allow Google to use its content without any limit and for free or exclude the platform from any access to it.[112] A second tag applies to images on the publisher's website (the 'max-image-preview'). Here, the choice is between enabling Google to display high-resolution images or no thumbnail at all. Finally, the 'max-video-preview' allows the publisher to choose whether to authorise the reuse of its video content. According to the applicants, newspaper organisations had no actual choice or room to negotiate, neither on the license nor other terms of the agreement implemented through these tags. Concerned by the loss of visibility, most publishers allowed Google to utilise their content, paradoxically giving more ample rights of use to the digital platform. As a result, there were virtually no limits to the size and scope of what Google could publish, free from any fee.[113]

On October 2020, the Paris Court of Appeal confirmed this decision on the ground that:

> This injunction does not prevent improvements and innovations in the services offered by the companies Google LLC, Google Ireland Ltd and Google France, provided that they do not lead, directly or indirectly, to any consequences detrimental to the interests of the holders of related rights concerned by the negotiations provided for in Articles 1 and 2 of this decision.[114]

[109]Para 173 ff.
[110]ibid para 239.
[111]ibid para 217.
[112]For more details, see ibid para 93.
[113]This was not the first time for Google to impose take-it-or-leave-it agreements for free access to websites' information. In 2012, according to an FTC Report, Google imposed a blanket agreement to its U.S. counterparties that gave it full and free access to third parties' data feeds, see FTC, Memorandum on Google Inc., File No. 111 0163, at 18 30 (8 August 2012) 32.
[114]Paris Court of Appeal, decision 8 October 2020, n° 20/08071.

Despite the appellate decision, Google refused to comply with the FCA's order and, for this, was again sanctioned by the same authority.[115]

With its original interim decision, more than enforcing the new ancillary right, the competition authority has punished an anticompetitive circumvention of the law. And it did so by considering the dominant position of Google in the market and its discrete relationships with publishers.[116] Competition law was thus used to solve an abuse of power paradoxically exacerbated by an IP law reform that was introduced to solve it. The next sections examine this issue in more details.

Competition law and intellectual property

As seen in the previous section, digital platforms have the potential to obtain free licenses,[117] thus annulling the Directive's effort to rebalance market relations. Competition law is envisaged as a solution to the drawbacks of unfair outcomes in negotiations due to its power to punish abuses of dominance or abuses of economic dependence. To understand why this may become an additional regulatory failure, it is important to briefly consider the relationship between copyright and competition and compare it to the specific relationship addressed by Article 15 CDSM Directive.

EU competition law is based on two main provisions, Articles 101 and 102 TFEU. Article 101 prohibits all agreements between economic entities (i.e. undertakings), decisions by associations of undertakings and concerted practices which may affect trade between Member States and prevent, restrict or distort competition. Article 102 TFEU prohibits any abuse of a dominant position having the same distorting effects on competition and trade. If a case falls outside the European Commission's (EC) jurisdiction, as it does not affect the trade between MSs, it may still be investigated by a national competition authority.[118]

Competition law has a remedial structure whereby it can be used only against infringements of Articles 101 and 102 TFEU. However, it can be enforced both by private parties as a redress tool (private antitrust enforcement) and by competition authorities (public antitrust enforcement). This

[115]Decision 21-D-17 of 12 July 2021.

[116]Although press associations have then been able to negotiate license agreements with Google to the satisfaction of their members, see 'Exclusive: Google's $76 Million Deal with French Publishers Leaves Many Outlets Infuriated' Reuters <https://www.reuters.com/article/us-google-france-copyright-exclusive-idUSKBN2AC27N> accessed 9 November 2022.

[117]Or paid to delay the enforcement of such copyrights, such as in the case of the Google News Initiative, Sundar Pichai, 'Our $1 Billion Investment in Partnerships with News Publishers – Google News Initiative' (*Google*, 1 October 2020) <https://blog.google/outreach-initiatives/google-news-initiative/google-news-showcase/> accessed 30 November 2021.

[118]For their powers and the issue of coordination between the EC and the national competition authorities, see Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ L001.

allows governmental authorities to intervene regardless of any private initiative, especially in markets where the parties' unequal bargaining power prevents the weaker party (sometimes economically dependent) from pursuing a successful lawsuit.

Competition law and copyright

The EU courts have explored the relationship between copyright and competition law, generally concluding that EU law allows national intellectual property rights to derogate from the free movement rules on the grounds of protection of industrial or commercial property[119] but that, at the same time, competition law fully applies to intellectual property rights (IPRs). In other words, a combination of national and EU provisions authorises the creation of exclusive rights but poses limits to their use through competition law. This relationship between IPRs and competition law has often been described as a clash between 'conflicting interests'.[120] On the other hand, IPRs also aim to promote competition[121] and competition law generally acknowledges the importance of IPR protection for fostering innovation and providing incentives for market entry.[122] Consequently, to a certain degree, competition and IPR are complementary policies. This complex relationship has provided the basis for extensive case law on the subject.

These cases mainly address anticompetitive agreements and abuses of dominance carried out by the copyright holder. The infringement is generally the result of an abusive use of copyright in such a way as to partition markets,[123] refuse access to an 'essential facility'[124] or distort competition

[119]T-70/89 *British Broadcasting Corporation and BBC Enterprises Ltd v European Commission* (*Magill*) ECR 1991 II-00535., para 25.

[120]See eg. AG Gulmann observing that 'The cases again raise the fundamental issue of the balancing of two conflicting interests, on the one hand the concern to protect industrial and commercial property rights based on national law and on the other the concern for undistorted competition which it is one of the Community' s tasks to ensure.' Opinion of Mr Advocate General Gulmann in *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities* (Joined cases C-241/91 P and C-242/91 P _European Court Reports 1995 I-00743). For more on the intellectual property-competition law relation, Valentine Korah, *Intellectual Property Rights and the EC Competition Rules* (Hart Pub 2006); Ioannis Lianos and Rochelle C Dreyfuss, 'New Challenges in the Intersection of Intellectual. Property Rights with Competition Law. A View from Europe and the United States' (2013) 4 CLES Research Paper series <https://discovery.ucl.ac.uk/id/eprint/10045063/>; Robert Pitofsky, 'Challenges of the New Economy: Issues at the Intersection of Antitrust and Intellectual Property', *Dominance and Monopolization* (Routledge 2017); Herbert Hovenkamp, *IP and Antitrust an Analysis of Antitrust Principles Applied to Intellectual Property Law* (Aspen 2009); Michael A Carrier, *Innovation for the 21st Century: Harnessing the Power of Intellectual Property and Antitrust Law* (Oxford University Press, USA 2011).

[121]See, with regard to trade marks, the judgment of the Court of Justice in Case C-10/89 HAG GF [1990] ECR I-3711, paragraph 13.

[122]Shubha Ghosh, 'Intellectual Property Rights: The View from Competition Policy' (2008) 103 Nw. L. Rev. Colloquy 344.

[123]Case T-442/08 *CISAC v Commission* [2013] ECLI:EU:T:2013:188.

[124]See Joined cases C-241/91 P and C-242/91 P (*Magill*) *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities*.ECR 1995 I-00743, Case C-7/97

in the market. For instance, with regard to copyright under Article 101 TFEU, the CJEU has generally punished exclusive rights agreements[125] and market partitioning agreements[126] or the action of charging fees exceeding a fair return on investment.[127] In Article 102 cases, competition law has been mostly used against the copyright holder for abusive use of the dominant position acquired thanks to it. Although, in most cases, the direct copyright owner perpetrated the antitrust infringement, this was not always the case. For example, the Court of Justice of the European Union (CJEU) has found copyright management agencies abusing their dominant position against third parties and authors.[128] However, also here, the dominant undertaking secured its market power through copyright concessions.

In the case of press publishers against digital platforms, and Google in particular, the platform has not gained a dominant position through copyright or related rights. Hence, competition law would be used to put into force the copyright rather than limit its abuse. The abuse of power by a digital platform, in the form of imposition of unfair contractual conditions against a copyright holder, may have market-distorting effects. Copyright ownership, per se, does not create dominance, as this condition needs to be proved. It is thus possible that the dominant undertaking is the digital platform, not the copyright holder, especially when the latter waives its rights vis-à-vis the former. Alternatively, the abuse can be seen as an imposition of unfair trading terms by a dominant undertaking,[129] in particular, an imposition to waive an acquired right. Copyright owners may sell or waive part of their rights granted by the law against specific price concessions. By contrast, in the French case, for instance, the waiver followed an aggravation of the contractual conditions of the copyright owner, thus leading to abuse.

The practice of demanding copyright waivers may also put at a competitive disadvantage those firms refusing to give up their rights, resulting in

Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG, Mediaprint Zeitungsvertriebsgesellschaft mbH & Co KG and Mediaprint Anzeigengesellschaft mbH & Co KG ECR 1998 I-07791, Case C-418/01 *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* [2004] ECR I-5039 and – Case T-201/04 *Microsoft v Commission* (2007) ECR II-3601.

[125]Case 395/87 *Ministère public v Jean-Louis Tournier* [1989] ECR 02521.

[126]Case T-442/08.

[127]Case 262/81 *Coditel SA and others v Ciné-Vog Films SA and others* [1982] ECR 03381.

[128]Case C-52/07 *Kanal 5 Ltd and TV 4 AB v Föreningen Svenska Tonsättares Internationella Musikbyrå (STIM) upa* [2008] ECR I-09275; and Case 395/87 *Ministère public v Jean-Louis Tournier* [1989] ECR 02521. In the *Kanal 5* case, the court argued that 'Article 82 EC must be interpreted as meaning that, by calculating the royalties with respect to remuneration paid for the broadcast of musical works protected by copyright in a different manner according to whether the companies concerned are commercial companies or public service undertakings, a copyright management organisation is likely to exploit in an abusive manner its dominant position within the meaning of that article if it applies with respect to those companies dissimilar conditions to equivalent services and if it places them as a result at a competitive disadvantage, unless such a practice may be objectively justified'.

[129]Article 102 (2) (a) TFEU.

discriminatory conduct.[130] To determine whether this conduct turns into anticompetitive behaviour, causing a welfare loss, one should first define the power relations existing in the relevant market and correspondently establish a theory of harm, which falls outside the scope of this article. However, it is important to note how the application of competition law has followed a regulatory failure, in particular on the side of copyright regulations to pursue their prescribed goals. Alternatively, the imposition to waive such rights might also be seen as a direct infringement of the CDSM Directive in the part where it states that 'as contractual freedom should not be affected by those provisions, right holders should not be obliged to give an authorisation or to conclude licensing agreements'.[131]

As already pointed out above, the fear of losing readership and advertising revenues, the decrease in visibility on digital platforms, and the lack of information or financial resources may curb the enforcement of this new ancillary right. On the other hand, competition law is mostly applied by antitrust authorities (public enforcement), whose decisions do not require an adversarial process with the aggrieved party and apply to the entire relevant market. Yet, the intervention of the antitrust authority to remedy the problems that have arisen during the implementation of the copyright reform does not seem to be the most effective and efficient solution to solve the market failures in the news publishing industry, at least in the medium and long term.

Like any other regulatory intervention, the CDSM Directive has introduced new information and compliance costs. Industry stakeholders must change their agreements, find new information and adjust their internal and external business practices. However, if this process fails to achieve the promised efficiencies, sufficient economic benefits do not outweigh the negative externalities. Competition law enforcement, then, adds new costs and commits additional resources that could be more efficiently used elsewhere.

Copyright reforms: between intellectual property and competition law

Thanks to the experience accrued in the past, especially in France, Spain, and Germany, some of the proposed reforms have gone beyond the explicit wording of Article 15. For example, in Italy, a draft law proposed to introduce an obligation, not a recommendation, for press publishers and information society service providers to negotiate an agreement.[132] At the

[130]The case law on discriminatory abuses mostly concerns price discrimination, for example Case C-525/16 *MEO – Serviços de Comunicações e Multimédia SA v Autoridade da Concorrência* ECLI:EU:C:2018:270.
[131]Recital (61).
[132]Article 5 (8) Draft Legislative Decree for the implementation of the Directive 2019/790, 13 July 2021.

request of the publishers, negotiations for a fairly-priced license had to be concluded within ninety days. Once finalised, the agreement would become valid for all publishers. Moreover, the Italian Authority for Communication Guarantees (Agcom) had the power to intervene in the negotiation to set fair remuneration levels for the license fees.

However, following fierce criticism, especially from the Italian competition authority,[133] the provision did not survive parliamentary revisions. The Legislative Decree No. 177/2021, which transposes the CDSM Directive and amends Law No. 633 of 22 April 1941 on copyright, has a more modest approach and purpose than the draft law, although it does introduce changes to the text of the Directive. The most important innovation introduced by the Italian law concerns the consequences of a negotiation failure. If no agreement has been reached within thirty days of the request to commence negotiations, either party may apply to the Agcom to determine the fair compensation, setting out its economic request.[134] Agcom makes its decision within sixty days from the request, based on the criteria referred to in paragraph 8 of the same article, and declares 'which of the economic proposals formulated complies with the aforementioned criteria or, if it does not consider any of the proposals to be compliant, it indicates ex officio the amount of the fair compensation'.[135] Agcom's determination is not automatically implemented, as parties must integrate it within the agreement. In the event of a further failure in such implementation, either party may refer the matter to the judicial authority to ascertain the liability of the counterparty, also invoking the legislation on the abuse of economic dependence.[136]

The majority of EU Member States have incorporated the Directive into their national laws[137] with minimal deviations. However, this approach raises concerns as it has the potential to diminish the effectiveness of the Directive. As mentioned earlier, there is a risk that the Directive could become not only ineffective but also have unintended negative consequences.

Mixed regulatory solutions

The Italian draft law, which failed to be implemented, resembles, to a certain extent, the Australian mandatory news media bargaining code in the part where the Australian Communication and Media Authority (ACMA) (although it was initially entrusted to the antitrust authority) is involved in the process of negotiation for a revenue-sharing agreement between

[133]Opinion n. S4297.
[134]Art. 43-bis, para 10.
[135]ibid.
[136]Article 9 of the Law no. 192 of 18 June 1998.
[137]With the exception of Bulgaria, Denmark, Finland, Latvia, Poland and Portugal, which, by 15 February 2023, failed to fully transpose the Directive.

publishers and digital platforms.[138] In case of failure of such negotiations, the ACMA appoints an independent mediator to facilitate the achievement of a mutually beneficial agreement.[139] As a last resort, the parties are remitted to the decision of an independent arbitrator.[140]

This process of mediated negotiation could help prevent the paradoxical outcome that occurred in the French Google case but poses problems related to the calculation of fair remuneration for publishers. It is not impossible that EU Members States will decide to adopt further modifications to the current laws, including an industry bargaining code. However, as settlements or private negotiations remain possible, digital platforms still have a chance to avoid mediation. Moreover, if the enforcement of the bargain is left to the parties, it is likely that it may be rarely enforced or subsequently modified. Another issue that needs clarification in any law introducing an obligation to negotiate license fees is whether the compulsory negotiations are on an opt-in or opt-out basis for the news businesses and if the right can be waived,[141] especially in the case of collective bargaining. Press publishers differ in size and power they can exert in negotiations with digital platforms.[142] Whilst larger media outlets may be able to bargain with digital platforms and bear the costs for enforcing the negotiated contracts, smaller publishers have shown their concerns in this regard.[143] The fact that there is no information about small publishers' collective and granular worth jeopardises any fair compensation. Moreover, there is a general lack of information also about successful bilateral negotiations with large news publishers, as these are protected by confidentiality clauses.[144]

[138]Australian Competition and Consumer Commission, 'Mandatory News Media Bargaining Code: Concepts Paper' (2020) 7 <https://www.accc.gov.au/system/files/ACCC%20-%20Mandatory%20news%20media%20bargaining%20code%20-%20concepts%20paper%20-%2019%20May%202020.pdf>. For a critical overview of the reform see Tai Neilson and Baskaran Balasingham, 'Digital Platforms and Journalism in Australia: Analysing the Role of Competition Law' (2022) 45 World Competition.

[139]Australian Competition and Consumer Commission (n 177) 9.

[140]ibid. For a critique of the current formulation of the Code and why it may fail to protect all press publishers in Australia, see T Neilson and B Balasingham, 'Big Tech and News: A Critical Approach to Digital Platforms, Journalism, and Competition Law' in J Meese, & S Bannerman (eds), *The Algorithmic Distribution of News: Policy Responses* (Palgrave Global Media Policy and Business, 2022), and B Balasingham and T Neilson, 'Digital Platforms and Journalism in Australia: Analysing the Role of Competition Law' (2002) 45 World Competition 295–318.

[141]For instance, the previous Spanish and German copyright reforms adopted two diametrically opposed stsances on this last regard, with the art 32(2) of the *Ley de Propiedad Intelectual* 21/2014 establishing the inalienability of the right and the ss 87(f)(g)(h) of the German Copyright Act providing for the possibility to renounce to the enforcement of this right.

[142]Nielsen and Ganter (n 13) 10–11.

[143]See examples in Courtney C Radsch, 'Frenemies: Global Approaches to Rebalance the Big Tech v Journalism Relationship' (*Brookings*, 29 August 2022) <https://www.brookings.edu/blog/techtank/2022/08/29/frenemies-global-approaches-to-rebalance-the-big-tech-v-journalism-relationship/> accessed 22 December 2022.

[144]Zsuzsa Detrekői, 'Tackling News Media Underfunding: From Copyright Reform to Cutting the (Platform) Middleman' [2022] Internet Policy Review <https://policyreview.info/articles/news/tackling-news-media-underfunding-copyright-reform-cutting-platform-middleman/1617> accessed 2 May 2023.

Furthermore, it is essential to identify the news providers subject to legal protection to avoid unfair treatment or discrimination.[145] The current definition of press publication in the EU vaguely refers to 'means a collection composed mainly of literary works of a journalistic nature'.[146] This may lead to incongruous protection of similar subjects throughout the EU. The CDSM Directive 'seeks to achieve a fair balance between the rights and interests of authors and other right holders, on the one hand, and of users on the other'.[147] If so, then the exclusion of news published outside of the 'recognised' outlets would generate unfair treatment against excluded creators. However, the very nature of a press publication scarcely lends itself to comprehensive yet precise definitions, as it needs to encompass publications and authors qualified as journalists under different laws and in different jurisdictions.

The brief history of copyright in the news has shown that the reason for denying the neighbouring right to press publishers was not an exquisitely dogmatic one but rather a matter of proportionality. The publisher's economic interests did not justify the restriction to the circulation of information that the neighbouring right would cause. The priority was to create free information markets since the survival of news publishers was not at stake.[148] Digital platforms have changed competitive dynamics and market relations in this industry. If the power struggles among platforms and their users are resolved, more venues for sharing and curating information can emerge, leading to increased competition.

Bargaining power

In order to benefit from the newly created neighbouring right and improve publishers' bargaining power, additional regulatory solutions must be implemented. In particular, information asymmetry is one of the main reasons for unequal bargaining power in this market.[149] In a joint report, CMA and Ofcom have found that data access asymmetry[150] and algorithmic opaqueness[151] plague the relationship between certain digital platforms and publishers, tipping the power balance towards digital platforms. For this

[145]For example, the Australian mandatory news media bargaining code provides for a system of registrations, managed by the ACMA, whereby only registered media can apply for negotiations.
[146]Article 2(4) CDSM Directive. For an examination of the definition of 'press publication' under the CDSM Directive, see Furgal (n 88) 889.
[147]Recital (6).
[148]See supra.
[149]Lawrence M Ausubel, Peter Cramton and Raymond J Deneckere, 'Bargaining with Incomplete Information' (2002) 3 Handbook of game theory with economic applications 1897; William Samuelson, 'Bargaining under Asymmetric Information' [1984] Econometrica: Journal of the Econometric Society 995.
[150]CMA and Ofcom (n 14) 29–30. See also paragraphs 32–39 of CMA (2020) Online platforms and digital advertising market study Appendix S: the relationship between large digital platforms and publishers.
[151]ibid 27–29. See also paragraphs 25–31 of CMA (2020) Online platforms and digital advertising market study Appendix S: the relationship between large digital platforms and publishers.

reason, regulation on disclosure obligations could help to rebalance the bargaining power and, thus, increase the chances for the publisher's ancillary rights to be effective.[152]

Nonetheless, even without information asymmetry, publishers may have limited bargaining power. This is evident in situations where digital platforms were compelled to share information, yet negotiations still did not favour press publishers.[153] Therefore, regulatory measures should focus on enhancing the publishers' bargaining power beyond the confines of contractual arrangements with digital platforms.[154] This is especially important for small and independent publishers.[155]

If Article 15 fails to restore the equilibrium of bargaining power between newspapers and digital platforms, there is a risk that its application will predominantly impact publishers and digital platforms with limited bargaining power. The potential outcome of this situation could lead to a decrease in actual and potential competition within the publishing industry and the intermediary market. If only larger entities have the ability to exercise the ancillary right against smaller digital platforms, it would limit the chances of smaller players to enter the market or compete against larger platforms. Moreover, small publishers would not be able to enforce it.

A further element determining the imbalance in bargaining power between publishers and digital platforms is the loss of the publisher's capacity to curate their content and promote their brand. News publishers depend on their reputation and readers' trust.[156] However, two main factors have contributed to the erosion of their brands. Firstly, news articles are displayed in a disaggregated format on the internet,[157] where readers access them through third-party platforms. The digital intermediary will

[152]In this sense, the DMA may help where it addresses audience data and transparency in online advertising markets, at Article 5(9) Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector (Digital Markets Act) OJ L 265, 12.10.2022, p. 1–66.

[153]As, for instance, in France (see supra Section 3) or in Germany and Spain (see supra Section 1).

[154]The belief here is that regulators made a mistake by relying on the neo-classical economic assumption that businesses and consumers make rational choices about the information they consume, generate and disseminate. This assumption allows the market to determine supply and demand without outside interference. Instead, regulators should encourage publishers, digital platforms and consumers to prioritise and read public interest journalism, without infringing on their freedom of expression and information. This can be done through the adoption of a specific 'choice architecture' and the use of 'nudges', rather than forcing a specific information agenda. See Claudio Lombardi, Reconceptualising Media Pluralism: A Behavioral Perspective on the Competition-Centric Paradigm and its Implications for Public Interest Journalism, Ascola 2023 Conference paper.

[155]Jonathan Heawood, 'Platforms Don't Owe Publishers a Living, but They Do Owe Them Compensation' (*Media Voices*, 21 March 2023) <https://voices.media/platforms-dont-owe-publishers-a-living-but-they-do-owe-them-compensation-heres-why/> accessed 2 May 2023.

[156]N Newman and others, 'Reuters Institute Digital News Report 2021' (Reuter Institute for the Study of Journalism 2021) 10 ff. <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2020-06/DNR_2020_FINAL.pdf>; N Newman and others, 'Reuters Institute Digital News Report 2022' (Reuter Institute for the Study of Journalism 2022) 9 ff. <https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2022-06/Digital_News-Report_2022.pdf>.

[157]See, on 'algorithmic curation' Lombardi (n 12) 15 ff.

display each news item uniformly, employing a standardised layout.[158] Additionally, digital platforms assume the role of curating content for readers, determining how it is displayed and prioritising specific news items. This curation of news by digital platforms affects the newspapers' control over their content and diminishes the value of their branding,[159] ultimately lowering the value of their content.[160]

It has been argued that branding and control over the presentation of the publisher's content is a fundamental element determining the power balances in this market.[161] The atomisation of news and the loss of publishers' power to curate their publications increases the chances of confusing news outlets,[162] which may reduce publishers' incentive to invest in quality and costly content.[163] On the other hand, it was also observed that brand dilution may lower barriers to entry, thus facilitating the entry of new publishers.[164]Arguably, this would benefit independent and small media. However, more research is needed to determine the actual impact of digital intermediaries' active content curation and ranking.

Finally, another issue that needs to be addressed is the economic and technological dependence of press publishers on digital platforms. The former often give in due to the majority of their revenue being generated through digital platforms,[165] and Article 15 of the CDSM directive may not be enough to solve this dependency for the reasons examined above. Therefore, additional regulatory solutions are necessary.

Complementary regulatory solutions

This article has presented the argument that Article 15 is designed to safeguard the public function of the press by relying on market forces. Nevertheless, if the existing rules prove insufficient in preventing potential abuses, alternative measures should be considered. Although there were numerous, possibly better, regulatory alternatives to Article 15 of the CDSM

[158]For example, the Google News or Google Search layouts, or the Facebook News Feed where news content often appears as an isolated entry alongside entirely various sorts of content (mostly that produced by the user's 'friends, family, and groups').
[159]CMA and Ofcom (n 14) 31.
[160]The main way to protect corporate branding is through trademarks. However, newspapers content is not easily covered by trademarks. In general, courts decline to accept single work titles as trademarks since the title identifies the works rather than the source.
[161]CMA and Ofcom (n 14) 31.
[162]Susan Athey, Markus Mobius and Jeno Pal, 'The Impact of Aggregators on Internet News Consumption' (National Bureau of Economic Research 2021) 17.
[163]OECD, 'Competition Issues Concerning News Media and Digital Platforms, OECD Competition Committee Discussion Paper', (2021) 83 <https://www.oecd.org/daf/competition/competition-issues-in-news-media-and-digital-platforms.htm>.
[164]Australian Competition and Consumer Commission (n 14) 298–299.
[165]Pew Research Centre, 'Newspapers Fact Sheet' (*Pew Research Center's Journalism Project*) 29 June 2021, available at <https://www.pewresearch.org/journalism/fact-sheet/newspapers/> accessed 23 August 2022.

directive,[166] the available options have become more limited. Nonetheless, the effectiveness of copyright reforms can be enhanced by integrating them with other regulatory solutions.

In the short term, if the objective is to ensure the survival of public interest journalism, governments could consider implementing a subsidy system to support it.[167] However, it is crucial to avoid relying solely on this subsidy system as a long-term solution. A standalone subsidy system would inadvertently reinforce the current system of rent extraction established by digital platforms, leading to a contradictory policy choice.

A long-term solution formed and predicated on the CDSM Directive can start from a bottom-up initiative. The press-publisher industry itself can do more to take advantage of the copyright reform, spearheading the creation of collecting management bodies where they are absent or using them more effectively where they already exist.[168] Using a collecting society in the news publishing industry can increase countervailing power, leading to more successful negotiations of license fees with digital platforms. In turn, this would promote fair distribution of value between publishers and press agencies, as well as between publishers and authors.[169] However, as this may raise issues of compliance with competition law's cartel prohibition, it will also be necessary to clarify the role of collecting societies, strengthen their role and provide ad hoc exemption as in Directive 2014/26.[170] Policymakers may want to facilitate collaboration among newspapers, creating block exemptions to antitrust enforcement.[171] This is what, for instance, has happened in Germany and what is discussed in the US. The 9th amendment to the German Act against Restraints of Competition (ARC) (*Gesetz gegen Wettbewerbsbeschränkungen*)[172] brought a number of modifications

[166]Lombardi (n 12).

[167]This paper does not aim to give a definition of public interest journalism for the application of copyrights or competition law. However, for a general overview of public interest journalism, see Lynette Sheridan Burns, *Understanding Journalism* (SAGE 2012) 55 ff; Andrea Carson, 'Explainer: What Is Public Interest Journalism' (2017) 14 The Conversation.

[168]Ula Furgal, 'The Emperor Has No Clothes: How the Press Publishers' Right Implementation Exposes Its Shortcomings' [2023] GRUR International 9.

[169]For example, in France with the establishment of *La société des Droits Voisins de la Presse* (DVP) and Alliance Presse (AP). The latter has, for instance, successfully negotiated license agreements with Google, see 'Agreement between the General Press Alliance and Google' <https://www.culture.gouv.fr/Presse/Communiques-de-presse/Accord-entre-l-Alliance-de-la-presse-d-information-generale-et-Google> accessed 24 August 2022. For other examples, see also Sulina Connal, 'Google Licenses Content from News Publishers under the EU Copyright Directive' <https://blog.google/around-the-globe/google-europe/google-licenses-content-from-news-publishers-under-the-eu-copyright-directive/>.

[170]Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance OJ L 349, 5.12.2014, p. 1–19. Certain EU Member States, such as France, Germany, and Denmark have already enacted laws allowing news publishers to form alliances, share information, or collectively negotiate.

[171]Lombardi (n 12) 50–51.

[172]With the 9th amendment approved on 9 March 2017 and entered into force on 9 June 2017.

to the domestic competition law regime, introducing a sector-specific exemption for 'non-editorial cooperation' among newspapers and magazines publishers. Within the limits of this exemption, all anticompetitive agreements (even in the form of hard-core cartels) on 'intra-media' competition between newspapers or magazine publishers will not be caught by the German antitrust laws.[173]

However, since the industry is relatively new to this type of negotiation, industry codes and new intermediaries and monitoring institutions could also be created.[174] In particular, bargaining codes and mediating mechanisms may prevent anticompetitive conduct, thus improving market performance and saving public and private resources. Moreover, mediated negotiations could help small publishers and smaller digital platforms strike a fair deal with the more powerful news publishers, thus helping not only publishers but also new entrants in the digital services (eg news aggregators). In this connection, it is crucial to provide a clear definition of publication of a journalistic nature and device metrics to determine fair contribution for small, independent, and local publishers. Moreover, as argued before, negotiations are jeopardised by a strong asymmetry of the information available to the parties.[175] Press publishers would find, therefore, easier to negotiate their licenses if they had access to relevant data associated with their content and their audiences. This would allow them to better quantify the value of their news and ancillary right.

However, relying solely on market forces to restore demand for public interest journalism is not enough. Instead, it is necessary to implement media policies that favour the creation and consumption of quality journalism.[176] This can be achieved through the adoption of an ad hoc 'choice architecture',[177] which can incentivise consumers to seek out and engage with this type of content.[178] Both newspapers and digital platforms have contributed to the decline in quality journalism,[179] hence the importance of taking action to reverse this trend, however, without infringing the fundamental right to free speech.

Finally, transparency and contestability of gatekeepers' conduct may be improved by the Digital Services Act and Digital Markets Act. But other,

[173]The new Section 30 (2b) recites: '§ 1 shall not apply to agreements between newspaper publishers and periodicals publishers, in so far as the agreement allows the parties to strengthen their economic base for intermediary competition. Sentence 1 shall not apply to editorial cooperation'.
[174]Similarly to the Australian News Media Bargaining Code, see Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021 (C2021A00021). A somewhat similar solution has been proposed also in the UK, see CMA and Ofcom (n 14).
[175]CMA and Ofcom (n 14) 29–30.
[176]Which is what Recital (54) CDSM Directive commits to achieve.
[177]Richard H Thaler, Cass R Sunstein and John P Balz, 'Choice Architecture' in E Shafir (ed) *The Behavioral Foundations of Public Policy* (Princeton University Press, 2013).
[178]Lombardi (n 176).
[179]Newman and others, 'Reuters Institute Digital News Report 2022' (n 156).

even bolder, solutions, such as limiting the use of cookies and other tracking technologies for programmatic advertising, could also be adapted to the news industry.

Conclusion

This article argues that more than just protecting press publishers, the current regulatory efforts should aim at protecting a free and diverse information landscape by creating more balance and transparency in the information markets. Online information markets comprise various economic actors spanning from ISSPs to advertising agencies and newspaper publishers. This ecosystem of relations has generated mutual and unilateral dependencies raising questions on the legality of certain market conducts. The European Union has responded by adopting a new copyright reform in an attempt to rebalance the bargaining power between press publishers and digital platforms.

Many comments about Article 15 of the CDSM Directive have either criticised the use of copyright and the creation of an ancillary right, propending for the application of competition law (sometimes confusingly conflating competition law with unfair competition statutes) or denied the necessity of any regulatory intervention. Many of these comments have focused on a doctrinal analysis of the law, suggesting that Article 15 disrupts a coherent legal framework regulating intellectual property rights. On the other hand, the European institutions focussed on the pursuit of a policy objective (the protection of a service of public interest)[180] and have chosen a specific legal instrument to achieve this objective. Firstly, it seems that the Directive's arguments happen on a different level than the academic critiques, thus exacerbating the dispute around the efficacy of ancillary rights for press publishers. Secondly, the discourse around the use of ancillary rights seems to be affected by a 'nirvana fallacy',[181] whereby an imperfect solution should be replaced with no intervention or some other abstract alternative.[182] On the contrary, this article has argued that given the fact that the Directive cannot be undone, it is best to experiment with regulatory solutions that reinforce and complement the ancillary right.

The CDSM Directive granted an ancillary right to press publishers to tame power imbalances and avoid abuses in the use of the online content they generate. Yet, paradoxically, this reform created new possibilities for abuse. In

[180]Whilst not defying it as 'service of general economic interest', the CDSM directive gives emphasis to the role of public interest journalism in democratic society, thus highlighting its important role to enhance the public good.

[181]Harold Demsetz, 'Information and Efficiency: Another Viewpoint' (1969) 12 The Journal of Law and Economics 1.

[182]In law, this is an issue discussed by Neil K Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (University of Chicago Press 1994).

fact, the ancillary right alone is insufficient to foster a competitive environment and promote a diverse and high-quality information landscape. At best, this new right could benefit large legacy newspapers, thus leading to more concentration in the media industry, and harm smaller digital platforms, consequently increasing market concentration also in this industry. Thus, this paper proposes that the ancillary right should be combined with other regulatory measures to guarantee fair compensation for all press publishers, particularly in the realm of public interest journalism. The solutions proposed in this article operate on the source of the power imbalance, such as information asymmetry, economic dependence, and lack of countervailing power, rather than its symptom, i.e. the inability to negotiate effectively.

However, these solutions have a remedial or temporary nature, as they are not directly operating on the market forces and on the protection of public interest concerns raised by the EU law. Thus, it would be necessary to combine them with long-term policies of a different nature. Moreover, several countries are discussing the adoption of a news media bargaining code to govern the relationships between platforms and content providers.[183] This solution, especially if embedded in a larger digital markets mandate of antitrust authorities and media regulators alike, would allow for a more flexible and yet effective presence of regulators whilst minimising regulatory compliance costs.

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[183]CMA and Ofcom (n 14); 'Canada Reveals Its Australia-Style Big Tech News Media Bargaining Code' <https://pressgazette.co.uk/canada-news-code-australia/> accessed 25 August 2022.