Copyright, news, and "information products" under the new DSM Copyright Directive

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Abstract - This paper analyses the new (so called) ancillary right for press publishers introduced by Directive on copyright in the Digital Single Market (EU) 2019/790. The paper comments some salient points of the new regime, in particular as concerns the regime of 'snippets'. It ends with a reform proposal based on the abandonment of an "exclusionary" copyright mechanism in all cases where the public interest to spread culture and information may marry economic exploitation, by adopting instead a mechanism of open paying access.

1. Foreword

One of the most —perhaps the most- controversial provisions of Directive (EU) 2019/790[1] (the "DSM Copyright Directive"), is the introduction (Article 15) of a new right, lasting two years[2], in favour of newspapers and magazines publishers to prevent information society service providers from the unauthorized online use of their publications, including literary works, photographs, and videos.

As known, online service providers (news aggregators, social media, search engines) strongly opposed the introduction of this new right mainly under the aegis of the need to facilitate the 'free flow' of information on the web. Notwithstanding their opposition, that right (improperly labelled as "ancillary[3]) was upheld by the Commission and the Parliament as capable, *in votis,* to solve the difficulties that press publishers face in negotiating with online providers for the use of their contents. In fact, the European Commission's Impact Assessment estimated that 57% percent of EU online users read press news through online intermediaries and 47% of them do not click on links to access the whole article in the newspaper webpages, thus eroding advertising revenues from the newspaper website.[4] Online intermediaries would therefore make profit from using press contents whereas publishers would not receive compensation for their investments in producing them.

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[1] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

[2] A 'softened' feature of the originary text of the Proposal, which foresaw a 10-year term.

[3] The "new ancillary right has an absolute exclusionary effect, which brings it homologous to a real copyright, of simply reduced duration. Indeed, it confirms the faculty of copyright holders (newspapers and magazine publishers that --in spite of the European Commission's position-- may easily [as typically happens] acquire exploitation rights from authors via contract) to grant or deny the authorization to exploit derivative works (any "online use"). This is specifically confirmed by Recital 57: "*the rights granted to the publishers of press publications under this Directive should have the same scope as the rights of reproduction and making available to the public*".

[4] European Commission, *Impact Assessment on the modernization of EU copyright rules*, Bruxelles, 14 September 2016 SWD(2016) 301 final, part 1, 156.

The European Commission apparently believes that this situation is primarily due to the lack of copyright ownership for press publishers on the press products in many Member States. In addition to current fragmentation under national copyright laws (which do not always recognize publishers as copyright owners), the press publishers' position should be further threatened by the CJEU jurisprudence in the *Reproblel* case[5], which may cause national legislations to limit sharing copyright levies between authors and publishers. Only a new right, in the Commission's view, would give publishers the ability and title to negotiate with online intermediaries and solve the existing market failure: "[i]*n the absence of recognition of publishers of press publications as rightholders, the licensing and enforcement of rights in press publications regarding online uses by information society service providers in the digital environment are often complex and inefficient*" (Recital 53).

2. The prior European experience on rights for press publishers

The introduction of a right for newspaper publishers against the online uses of their works is not a new idea. It stems from recent experience in some Member States. Germany and Spain adopted respectively in 2013 (within the 1965 *Urheberrecht Gesetz*)[6] and in 2014 an "ancillary" right for newspaper publishers against online uses of their publications. Both models were introduced as a result of a debate initiated by certain groups of press editors who complained about the undue exploitation of their content, in particular by the Google News service.

The German model gives press publishers an exclusive right against making press products - or parts thereof - available to the public for commercial purposes[7]. The right lasts for one year. The publisher is considered to be the producer of a "press product" (*Hersteller eines Presseerzeugnisses*), meaning the result of editorial contributions and the technical "fixation" of the individual contents within a periodical publication made by the publisher. That making the content available to the public is only prohibited if it is made available by commercial operators of search engines or services that "edit" the content. In essence, therefore, the ancillary right prohibits the automatic and systematic access and re-use of print products for commercial purposes by online intermediaries.

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5 Case C-572/13 *Hewlett-Packard Belgium SPRL/13 v Reprobel SCRL, Epson Europe BV intervening*, [2015] CJEU.

6 German Federal Copyright Law of 9 September 1965.

7 See Sections 87f et seq. of the German Federal Copyright Law introduced by the *Achtes gesetz zur änderung des Urheberrechtsgesetzes* of 7 May 2013 (English translation published by the German Federal Ministry of Justice at www.gesetze-im-internet.de):

"*Section VII - Protection of publishers of newspapers and magazines - Article 87f Press publishers: (1) The producer of a press product (press publisher) shall have the exclusive right to make the press product or parts thereof available to the public for commercial purposes, unless this pertains to individual words or the smallest of text excerpts. If the press product was produced within an enterprise, the owner of the enterprise shall be deemed to be the producer. (2) A press product shall be the editorial and technical fixation of journalistic contributions in the context of a collection published periodically on any media under a single title, which, following an assessment of the overall circumstances, can be regarded as predominantly typical for the publishing house and the overwhelming majority of which does not serve self-advertising purposes. Journalistic contributions shall include, in particular, articles and illustrations which serve to provide information, form opinions or entertain.*

Article 87g Transferability, term of protection and limitations: (1) The right of the press publisher in accordance with Article 87f (1), first sentence, shall be transferable. [...] (2) The right shall expire one year after publication of the press product. (3) The right of the press publisher may not be asserted to the detriment of the author or the holder of a right related to copyright whose work or subject-matter protected under this Act is contained in the press product. (4) It shall be permissible to make press products or parts thereof available to the public unless this is done by commercial operators of search engines or commercial operators of services which edit the content. In all other cases, the provisions of Part 1 Division 6 shall apply accordingly".

See BARABASH (2013); TALKE,(2017); KREUTZER (2011).

The Spanish model, on the other hand, is based on a right to a fair remuneration ("*derechos a percibir una compensación equitativa*"), which is, moreover, "unwaivable" ("*irrenunciable*": this in order to prevent news aggregators from adopting mechanisms to bypass the application of such right, for example through opt-out mechanisms, see below). This right is granted to all newspaper publishers, against the appropriation of journalistic contents by digital service providers[8]. The management of the fee imposed on service providers for the digital uses of journalistic works is left to collecting societies[9].

In both experiences, German and Spanish, the introduction of a press publishers' right has stirred, as hinted, a heated debate (a tale of two lobbies…) with relevant consequences. In Germany, Google reacted by introducing an "op-out" option for publishers who do not want their articles to appear for free on the Google News portal. In most cases, publishers have confirmed their willingness to join the service anyway. Google, on the other hand, refused to acknowledge payment of the fee for the remaining group of publishers. As a result, litigation had been brought[10]. In Spain, following the introduction of the new law, Google decided to close Google News[11].

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[8] Ley 21/2014 of 4 November 2014, amending the text of the Ley de Propiedad Intelectual, approved by Royal Legislative Decree 1/1996 of 12 April 1996 available at: http://www.mcu.es/propiedadInt/docs/RDLegislativo_1_1996.pdf, and Ley 1/2000 of 7 January 2000 of the Enjuiciamiento Civil, in Boletín Oficial del Estado, 5 November 2014, 90404.

"*Article 32 - 2. La puesta a disposición del público por parte de prestadores de servicios electrónicos de agregación de contenidos de fragmentos no significativos de contenidos, divulgados en publicaciones periódicas o en sitios Web de actualización periódica y que tengan una finalidad informativa, de creación de opinión pública o de entretenimiento, no requerirá autorización, sin perjuicio del derecho del editor o, en su caso, de otros titulares de derechos a percibir una compensación equitativa. Este derecho será irrenunciable y se hará efectivo a través de las entidades de gestión de los derechos de propiedad intelectual. En cualquier caso, la puesta a disposición del público por terceros de cualquier imagen, obra fotográfica o mera fotografía divulgada en publicaciones periódicas o en sitios Web de actualización periódica estará sujeta a autorización.*

Sin perjuicio de lo establecido en el párrafo anterior, la puesta a disposición del público por parte de prestadores de servicios que faciliten instrumentos de búsqueda de palabras aisladas incluidas en los contenidos referidos en el párrafo anterior no estará sujeta a autorización ni compensación equitativa siempre que tal puesta a disposición del público se produzca sin finalidad comercial propia y se realice estrictamente circunscrita a lo imprescindible para ofrecer resultados de búsqueda en respuesta a consultas previamente formuladas por un usuario al buscador y siempre que la puesta a disposición del público incluya un enlace a la página de origen de los contenidos".

See. XALABARDER (2014).

[9] Cd. "canon A.E.D.E." - Asociación de Editores de Diarios Españoles.

[10] BENTLY, KRETSCHMER, DUDENBOSTEL, BY CARMEN CALATRAVA MORENO, RADAUER (2017), 31. See also XALABARDER (2016). It is worth noting that in the case between the German collecting society (VG Media) and Google, in connection with the application of the law relating to Google News, the Court of First Instance of Berlin referred a question to the Court of Justice for a preliminary ruling (Case C-299/17, *VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH v Google Inc*), although in reality in relation to a "procedural" profile related to the failure to notify the European Commission of the German national law that had introduced the related right, under Directive 98/34/EC, which requires Member States to notify any technical regulation they intend to adopt. The CJEU, in its judgment of 12 September 2019 in case C-299/17, held that the new ancillary right is unenforceable for such formal reasons.

Another case was brought against Google before the Court of Berlin, in this case for abuse of dominant position after Google declared to no longer using snippets and thumbnails where publishers would not grant free usage. See NORDEMANN, JEHLE (2019); Grünberger (2016).

[11] Google has always claimed that it offers the Google News service free of charge and without any advertising; and that therefore there would be no economic advantage linked to the news aggregation service and the related exploitation of snippets. This thesis cannot be fully shared: while it is true that many of the services offered by Google are made available free of charge and without advertising, they generate indirect advantages for the group, as they consolidate the "package" of services offered by Google, attracting traffic to the relevant portal, with the possibility of stimulating access to other services in relation to which Google obtains significant advertising revenues. Similar conclusions were reached in Italy by the Italian Competition Authority (AGCM) in its investigation against Google News.

As to France, the first EU country to transpose the new rules into national law[12], the reaction from Google was similar to what already seen in the German and Spanish cases. Google opposed a firm refusal to pay any type of remuneration under the new ancillary right. Instead, it decided to no longer display a preview/snippet of any contents in France for European press publishers, unless the publisher has opted in for this (working as a waiver of their new ancillary rights). This will be the case for search results from all Google services[13]. Indeed, Google's position is that its services are beneficial for press publishers as they ensure them substantial visibility, thus increasing their revenues. French press publishers and news agencies immediately filed a complaint with the French Competition Authority ("**FCA**"). In its interim decision of 9 April 2020[14], the FCA held that Google's practices, under a prima facie view, were likely anticompetitive (by imposing unfair trading conditions on publishers and news agencies) and aimed at circumventing the new ancillary rights. It granted the interim measure requested by publishers and ordered Google to negotiate remuneration for the use of their content. The situation is still evolving.

3. The regime of unauthorized use of even very short parts of articles ('snippets'). From basic tolerance, in the pre-digital era, of 'negligible thefts'…

As the debate on the news publishers' right focused on its scope, the question soon emerged about the measure of the *excerpts* of the original texts whose unauthorized 'appropriation' should be considered a violation of said right. This brings us to the debated issue of the so-called snippets: minimum portions of text extracted from larger articles. The issue evokes an interesting historical development.

In the pre-digital era of information, the reproduction of very short pieces of a literary text (including in journalistic) was generally allowed as incapable of *détourner* readers by pre-empting their interest and curiosity in/for the full text.

This exclusion of 'minimal uses' from the scope of copyright exclusivity was indeed a traditional feature in copyright law. It was based on the French doctrine of the so-called *imperceptibles larcins*[15], and was also rooted in several copyright laws of the XIX

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[12] See JORF n°0172 du 26 juillet 2019, texte n° 4, LOI n° 2019-775 du 24 juillet 2019 tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse <www.legifrance.gouv.fr/eli/loi/2019/7/24/MICX1902858L/jo/texte>.

[13] See Google, "Nouvelles règles de droit d'auteur en France : notre mise en conformité avec la loi » (25 September 2019) <https://france.googleblog.com/2019/09/comment-nous-respectons-le-droit-dauteur.html>, accessed 15 May 2020.

[14] French Competition Authority (Autorité de la concurrence), Google, Decision No 20-MC-01, Press release, 9 April 2020, <https://www.autoritedelaconcurrence.fr/en/press-release/related-rights-autorite-has-granted-requests-urgent-interim-measures-presented-press>. For a comment of the case, see SPITZ, (2020).

([15]) MESSINA(1935): "From the legal point of view, the mere use of elements that do not constitute the originality of a work - originality of the general composition, or even originality of the organic parts that can be individualized in the general composition - does not correspond to any of the characteristics to which the logical justification and social utility of a prohibition are subject [...] This is why the common appropriations of phrases, thoughts, ideas, forms, attitudes, "parties" in painting and chords in music - what has been called 'imperceptible theft' [...] can be a matter of curiosity or gossip, but not a matter of legal regulation" (translated by the authors); FORMIGGINI (1947); VIZIELLO (2013), 86. The French theory of larcins imperceptibles had also been recalled by

century, such as those of Austria,[16] Germany[17], and Lombardo-Veneto[18]. A non-dissimilar approach can also be found in the common law tradition of the *de minimis doctrine*[19].

Moreover, in the specific field of journalism, the minimal use of the texts that the snippets feature might well in many cases lack an original editorial print, i.e. coincide with a simple resume of mere facts and news - which, as is well known, are traditionally—and still are!-- excluded from the copyright scope. Such exclusion is clearly expressed in the Berne Convention, which specifies that the copyright protection "*shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information*" (Article 2(8)). In the US, a similar position has been consolidated since the famous *Feist* case[20].

4. … to present stricter regime, vis-à- vis the potential economic value of snippets in the digital system of distribution of information.

The traditional lenient approach was bound to change in the scenario of digital online information. A scenario characterized, i.e., by a highly concise communication mode, quite often built on short-and-swift messages, even in contracted form, diffused on, and received by smartphones, PCs, iPads. In this …fast food information environment. Snippets, once object of a benign de minimis tolerance, became a potentially significant part of the 'material' contrast between news publisher and online intermediaries. Indeed, even a text of few words can represent a self-standing 'information product', apt for online circulation—hence also a valuable asset, vehicle for advertisements, offers of online services, etc. And, however, an incremental factor of the platforms' 'traffic', hence of their 'audience': itself a propeller of revenues.

Thus, the diffusion of snippets, spread across websites, social networks, and mobile apps, may well result in a substitution/preemption (hence "competitive") effect vis-à-vis the original full text. And—please note—it appears irrelevant that the news are circulated free of charge by the platform. As just reminded, digital intermediaries make even indirect profits from the volume of traffic as such, both in terms of advertising or/and the offer of different associated services.

In sum, snippets may attract internet traffic, hence 'swaying' (subtracting) significant advertising revenue from newspapers. A situation that—damage to individual

Italian jurisprudence, see Italian Supreme Court 17 January 1955, in *Giur. It.* 1955, 1175, 1177: "Le eventuali riproduzioni o imitazioni parziali devono in conseguenza considerare come rientranti tra quelle di minima importanza, che sono tollerate (i 'larcins imperceptibles' dei francesi)". See GHIDINI (2018), 208.

[16] Law No 197 of 26 December 1985 concerning the copyright of literary, artistic and photographic works, did not consider as a reproduction "the literal quotation of individual passages or small passages of an output work" (Article 25.1), see FRANCHI (1902), 188.

[17] The Law of 11 June 1870 concerning authors' rights in writings, drawings, musical compositions and dramatic works did not consider infringement "the quotation of single pieces or small parts of a work already published" (Article 7.a), see FRANCHI (1902), 282.

[18] The Law for the protection of literary and artistic property of 19 October 1846 did not consider infringement "the verbatim reporting of individual passages of works already published" (Article 5.a), see FRANCHI (1902), 83.

[19] The so called *de minimis doctrine* is summarized by the Latin expression "*de minimis non curat lex*". See *Ringgold v. Black Entertainment Television*, 1997, 126 F.3d 70, 74 (2d Cir. 1997) "*de minimis can mean that copying has occurred to such a trivial extent as to fall below the quantitative threshold of substantial similarity, which is always a required element of actionable copying*".

[20] *Feist Publications, Inc. v. Rural Telephone Service Company, Inc.*, 111 Sup. Ct. 1282 (1991) [499 U.S. 340 (1991)]. Cfr. GELLER(1991), 802.

publishers aside-- can well contribute to increase the power of big platforms (themselves already oligopolists) to concentrate in their hands the access to information, with obvious anti-competitive and discriminatory risks[21].

The Directive, finally approved after a bitter strife of the two interest groups (a tale of two lobbies'…) took the part of the news publishers. The prohibition of unauthorized use of editorial content extends in principle to snippets—in so far as these, even made of few words, can be assessed as "parts of press publications [that] have also gained economic relevance" (Recital 58).

5. The scope of the new right.

The statement of Recital 58 is coherent *in principio* with the traditional dichotomy 'informative product'/ resume of mere facts. This is confirmed by Recital 57: the new right should "not extend to mere facts reported in press publications". And Recital 58 states that "use of individual words or *very short extracts* of press publications" should be allowed since these very minimal uses "may not undermine the investments made by publishers of press publications in the production of content" (emphasis added).

In symmetrical logic, the protection in principle of snippets is restated. In its final version, Recital 58 adds that "*it is important that the exclusion of very short extracts be interpreted in such a way as not to affect the effectiveness of the rights provided for in this Directive*".

This seems to suggest that the interpretation of these rules will be restrictive: thus, i.e., that only extracts evidently lacking an autonomous value as 'informative products' would be freely 'appropriable'. An interpretation basically in line with the "ancillary" right scheme introduced in Germany, "very small" snippets ("*es handelt sich um einzelne Wörter oder kleinste Textausschnitte")* were exempted from the scope of exclusivity, as a minimum balancing tool for the operation of digital services[22] (see further next §6).[23]

6. Sequitur. The conditions of copyright protection of snippets under the Directive. A debatable quantitative ('numeric') approach.

Tutto bene, then? We doubt it. In order to guide interpreters to carry on that assessment, the Directive adopts the simplest—nay: simplistic—criterion. The merely quantitative one, fatally leading to focus on the (inconclusive) index of the number of words 'appropriated'. Thus, the quantitative criterion ends up in an objective tautology: that expressed, e.g., by the quoted Article 15(1) para. 3, providing that the protection afforded by the new right "*shall not apply* [only] *in respect of the use of individual words or very short extracts of a press publication*".

(21) See Italian Competition Authority (AGCM), A420 - *Fieg -Federazione Italiana Editori Giornali /Google,* Measure No 20224/2010; and A420 - AS787, 17 January 2010.

22 See MONTANARI *(*2014); ROSATI (2013); XALABARDER (2014) and (2016).

23 As to the Spanish model it assumes that only the use in favor of search engines of "isolated words" is exempted, provided that it is strictly necessary, as the headword of an index, to show the results of the search and does not occur for a further commercial purpose; and therefore such words are associated with a link to the page on which the indicated content is available.

Now, how can such 'guideline' effectively help, in the legal practice, to distinguish/separate an 'informative product' from a mere collection of facts? In noway, indeed. Hence, an (almost: see further) inevitable referral to the 'number of words', as done by the *Copyright Board* of the *Deutsches Patent und Markenamt* which established the maximum quantitative threshold for snippets exempted from German "ancillary" right in *seven words* (excluding search terms)[24].

The 'roughness' of the simple quantitative criterion is apparent, we insist.

Just suppose, e.g., that from the first article published in China Daily announcing the emergence of Coronavirus, an online platform had launched the breaking news 'unknown deadly virus spreading from China'— how could one deny that these *six* words represent an 'informative product'? Or, think to a synthetic juxtaposition expressing a critical political opinion, such as, e.g. "trillions for new arms, funds for Medicaid reduced": 8 words, below the threshold set (albeit in a distinct context) by the Court in the *Infopaq* case[25].

These two simple examples evidence that *other*, *concurring* criteria for assessing the distinction we're discussing now, could well be easily elaborated, instead of leaving judges and interpreter to uncertainly speculate on the basis of a mere quantitative/numerical criteria suitable to produce false negatives and false positives. Thus, inconclusive.

Inconclusive (on the 'merit' of the distinction) *and* forgetful of the functional character that snippets often feature.

In many cases, indeed, snippets work as systematic "previews" in the context of news aggregating services offered to the public. It is not merely an informative use for reporting of current events (as it may happen in a newspaper article or in blog or social media posts), nor a selected press summary offered to a particular limited circle of clients.[26] Rather, they often represent an online service that automatically provides news summary from around the globe to the general public. Now, this use can well compete with the normal exploitation of the press works by subtracting revenues of the original article. As recalled above, according to the European Commission, 47% of users do not click on the link placed next to the snippets to access the original

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[24] See DPMA Resolution 24 September 2015 - summary available at https://www.dpma.de/service/dasdpmainformiert/hinweise/tarifpresseverleger/index.html.

[25] Case C-5/08, *Infopaq International A/S v Danske Dagblades Forening* [2009] CJEU. As known, the CJEU held that capturing 11-word fragments of a newspaper article may constitute an unauthorized reproduction of part of that work (if that fragment is assessed, by the national Judge, an expression of the intellectual creation of the author). The Court also added that it is very likely that news aggregators will make reproductions relevant under copyright law because "*the cumulative effect of those extracts may lead to the reconstitution of lengthy fragments which are liable to reflect the originality of the work in question, with the result that they contain a number of elements which are such as to express the intellectual creation of the author of that work*" (§§ 49-50).

[26] See in this sense a recent decision of the Court of Rome, 18 January 2017, in *marchiebrevettiweb.it*, that held that press summaries are exempted under the quotation right of the Italian Copyright Act (Article 65 – that implemented Article 10-*bis* of Berne) -- in contrast however with prior case-law.

article,[27] despite this data are highly controversial, and many believe that news aggregators are beneficial for the original contents' market[28]. Under this angle of view, snippets might more largely be exempted under national copyright exceptions than the simple quantitative criterion might suggest.

Moreover, from a different positive perspective, one should not downplay the systemic position of snippets as 'quotations' possibly qualifying for protection. This, on one side, under the InfoSoc Directive. Recital 57 says that the new "ancillary" rights "*should also be subject to the same provisions on exceptions and limitations as those applicable to the rights provided for in Directive 2001/29/EC, including the exception in the case of quotations for purposes such as criticism or review provided for in Article 5(3)(d) of that Directive*". This is then confirmed in Article 15(6).

Moreover, snippets might well enjoy protection under the quotation right provided by the Berne Convention (Article 10(1)). The Berne Convention's quotation right expressly allows *revues de presse*[29], and is less restrictive than the quotation right version of the InfoSoc, furtherly and anyway subject to the limits borne by the (in)famous three-step test of Art 5.5. [30]

The uncertainties resulting from these diverse normative tenets do not in our view discourage a less restrictive approach than the one simply based on a very limited 'number' of words. A less restrictive approach coherent with the rationale itself of Art 15 of the DSM Copyright Directive, aimed at ensuring an effective compensation for the commercial use of snippets as 'informative products' resulting from editorial labour and investments.

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[27] It is also true that online intermediaries bring traffic to newspaper websites. The actual situation is unclear and is lacking true economic evidence. See study for the JURI committee, BENTLY, KRETSCHMER, DUDENBOSTEL, DEL CARMEN CALATRAVA MORENO, RADAUER, (2017).

[28] See the hidden draft report by the Joint Research Centre of the European Commission "Online News Aggregation and Neighbouring Rights for News Publishers", (20 December 2017) Ref. Ares(2017)6256585, that was eventually not authorized for publication by the European Commission. The JRC concludes that "*law can create a right but market forces have valued this right at a zero price*", and that ancillary right for press publishers would not generate sustainable benefits. The study suggests overcoming the traditional revenue system (ad or subscription) and exploring new forms of cooperation between digital platforms and press publisher through data exploitation in order to generate more incomes.

[29] Article 10(1): "It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries".

[30] InfoSoc Directive, Article 5.3:

"(c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;

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

Summing up, the evaluation of 'informative product' as distinguished from mere resume of facts should be based on the *substantial* recognition of a group of words as an autonomous, independently circulating, 'information unit'. This should also result from the traceability of that information unit as deriving from a certain specific newspaper/publisher/columnist. Protection should be given to press articles that are published on an initial exclusive basis by a newspaper, for example—as partially hinted just above-- where they are the result of the investigation of a reporter of a specific newspaper, critical articles from journalists and columnists of that newspaper, etc. In all these cases, such press items would be 'traceable', under an ex-post scrutiny, as the object of illegal 'appropriation'. On the other hand, mere news and facts, that normally characterize short news reports of news agencies, are just raw information, should not be protected as such, and should be freely recalled by other news agencies.

7. A more balanced approach to 'compensation vs. access'.

The afore evoked considerations do not exhaust our critical remarks to the Directive. The main one concerns the balance of right to compensation of the newspaper publishers and the intermediaries' right to diffuse online information[31].

Now this is not merely 'private' profile. More precisely, the problem of platform appropriation of journalistic snippets must be tackled in a balanced composition of the conflicting interests of publishers (remuneration), on the one hand, and platforms (offering search services), on the other. Now, this contrast is not merely 'private': there is another stakeholder involved, the general public, bearer of a legitimate interest — of constitutional rank---to a wide, plural[32] and rapidly accessible flow of information.

In this overall scenario, the legitimate purpose of providing a remuneration vis-à-vis third parties' lucrative uses of press contents does not necessarily imply the adoption of a straight 'proprietary/exclusionary' approach to facts-assembling. Indeed, this represents an objective factor of slowdown of the circulation of culture and information[33].

Indeed, of course without underestimating the risk of anticompetitive behaviours on the platform side, the risk of abuse of these exclusionary rights is high and results in

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[31] We are not referring here to the balance above analysed, based on the distinction between mere reports of known facts and 'information products'. We are now referring to another profile of the overall balance of interests: that based on the attribution to publishers of an exclusive/excludent right on parts of the editorial content.

[32] On this regard, the role of news aggregators is positive, insofar as they effectively promote news diversity, facilitating access to different sources.

[33] As to the need to give publishers representation powers over press publications, the proposal of the European Parliament Committee on Legal Affair (rapporteur Therese Comodini) (Draft Report of 10 March 2017, 2016/0280(COD) then echoed by the Council's compromise (Council of the European Union, *Presidency compromise proposal regarding Articles 1, 2 and 10 to 16*, cit.). should have been adopted: i.e. introducing a presumption of representation of authors and title to enforce copyright on press publications. This solution would have granted press publisher the title to negotiate with online intermediaries - the need stressed by the European Commission.

blocking online services[34]. The Italian Competition Authority case-law has already shown an example in a case of refusal of press review license[35]. In front of a proprietary closed mechanism, at present, the only means to impose an "open" approach is through the instruments of competition law.

Yet, these involve not only specific, and costly, litigation but also the proof of a dominant position: hence have a limited chance of application.

This is one of those cases where, as Hanns Ullrich pointed out, the interference of competition law is determined by the failure "to properly define the limits of exclusive property rights" particularly "in new situations, especially with regard to new technologies"[36]. In such cases, then, it would be advisable having a specific provision within copyright law, of a general scope and immediate application, with no need for further competition law investigations.

Thus, it would have been wiser considering news fragments as informative products and providing to press publishers a right of being fairly compensated for their online commercial use by online intermediaries, e.g., by sharing part of the actual direct or indirect incomes generated by derivative uses, if any,[37] in order to facilitate the birth of a licensing market like that of press reviews.[38]

An example *de lege lata* of a similar scheme is provided by Directive 2010/13/EU ("Audiovisual Media Services Directive"). Article 15 provides that all broadcasters shall have the right to access on a fair, reasonable and non-discriminatory basis, events of high interest to the public which are transmitted on an exclusive basis by a broadcaster, for the purpose of short news reports. In other words, the right to use short extracts for the purposes of general news programmes on fair, reasonable and non-discriminatory terms. Recital 55 clarifies that this provision is specifically set out "[i]n order to safeguard the fundamental freedom to receive information". Such short extracts should not exceed 90 seconds. The modalities, the conditions, the maximum lengths of extracts and any time limits, as well as any compensation, are decided in accordance with local practices.

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[34] For a similar view, see Ricolfi (2019).

[35] See the case *L'Adige*, AGCM, A503, Bullettin no. 51 of 8 January 2018, *Società Iniziative Editorial v. Servizi di Rassegna Stampa nella Provincia di Trento*. Cfr. BANTERLE (2020). L'Adige is a local periodical in the autonomous province of Trento, published by S.I.E. S.p.A. - Società Iniziative Editoriali. The case relates the refusal to grant a licence to Infojuice S.r.l. GmbH (formerly Euregio S.r.l. GmbH) for its press reviews. The Authority found an abuse of a dominant position that prevented the development of a downstream service of offering digital press reviews and therefore invited the publisher to offer a copyright license under FRAND conditions. Faced with the inertia of the publisher, the Authority then determined them.

[36] ULLRICH (2004), 401.

[37] As happened in the German ancillary right case, where snippets' tariff was derived from turn-over (the license fee was set to 11% or 6%). License fees for small startups have been thus reasonable. See BENTLY, KRETSCHMER, DUDENBOSTEL, DEL CARMEN CALATRAVA MORENO, RADAUER (2017), 32.

[38] In a wider reform perspective, we suggest that the compensation right should last a limited time (e.g., 1/3 months) since it relates to press news subject to rapid obsolescence and informative uses (the two-years term set out by the DSM Copyright Directive is clearly a too long period for such a right).

In conclusion, we would welcome a scheme of *open-access on fair (FRAND) terms for commercial uses*: an access going beyond the limits of the exception for reporting current events under the InfoSoc Directive. The fair compensation scheme, as well as any other applicable conditions, may be determined through negotiations among online intermediaries and press publishers' associations, and/or, as in the Spanish case[39], by collecting agencies, possibly acting as independent 'brokers' setting compensations obviously differentiated vis-à-vis the audience of the newspaper of reference (20 words from FAZ would cost more than 20 words from the Bamberg Gazette). In case of irreconcilable disputes, even independent authorities might be called in.

Furtherly, we must consider that the digital news market is still evolving. Therefore, the "fair" compensation should not necessarily be limited to traditional revenues schemes (ads or subscriptions). Indeed, there are rooms for further innovation and there may be chances for exploring new revenue sources. An open-access regime on fair terms would therefore offer enough flexibility and promote a dialogue among stakeholders. This would give publishers a negotiating boost - without limiting the innovative capacity of the platforms.

In particular this model solution might encourage the private parties (press publishers and online intermediaries) to collaborate (as already happened in the past) to find mutually satisfactory solutions and new business models, e.g., sharing incomes of ads on press articles previews in addition to accessing data generated in digital news distribution to attract more traffic and generate higher revenues. Therefore, the adoption of an open-access mechanism on fair terms-- as such capable to provide more, more fluid and accessible information to the general public-- would result in a win-win situation for all stakeholders involved.

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[39] See supra n. 9.

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