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Press publishers' rights in the Digital Age: Challenges and opportunities for legal and policy frameworks

Direitos dos editores de imprensa na era digital: desafios e oportunidades jurídicos e políticos

Bzhar Abdullah Ahmed

Lecturer and Head of Department of Law at Faculty of Law, Political Science and Management - Soran University

Soran, Erbil-Kurdistan, Iraq

bzhar.ahmed@soran.edu.iq

https://orcid.org/0000-0002-4365-8529

Hemdad Faisal Ahmad

Dean of the Faculty of Law, Political Science and Management - Soran University

Soran, Erbil-Kurdistan, Iraq

himdad.ahmed@soran.edu.iq

https://orcid.org/0000-0002-1353-332X

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ABSTRACT: This research critically examines the new related right known as press publishers' right introduced by the European Union. Press publishers right refers to a legal concept that grants publishers of news articles and other publications the right to control the use of their content on digital platforms. The concept is also known as the "neighbouring right" or the "snippet tax". The article introduces the notion of the right and the rationale behind its introduction. There are various reasons for the introduction of this right and the author undertake a qualitative approach to a thorough investigation that reveals that the introduction of this right was necessary due to a significant decline in the revenue for press publishers. The authors also reveal that there are still continuous debates on the necessity of having this right. It is believed that the existence of this right will have a negative impact on the free flow of information on the internet. However, the protection of this right could be justified by the principles underlying the protection of intellectual property rights.

KEY WORDS: Press Publishers; Digital Single Market Directive; Publishers' Right; Freedom of Information; Neighbouring Rights.

RESUMO: Esta pesquisa examina criticamente o novo direito conexo conhecido como direito dos editores de imprensa introduzido pela União Europeia. O direito dos editores de imprensa refere-se a um conceito legal que concede aos editores de artigos de notícias e outras publicações o direito de controlar o uso de seu conteúdo em plataformas digitais. O conceito também é conhecido como "direito de vizinhança" ou "imposto de trecho". O artigo apresenta a noção do direito e a lógica por trás de sua introdução. As razões para a introdução deste direito são várias e o autor procede a uma abordagem qualitativa a uma investigação aprofundada que revela que a introdução deste direito se fez necessária devido a uma quebra significativa das receitas dos editores de imprensa. Os autores também revelam que ainda há debates contínuos sobre a necessidade de ter esse direito. Acredita-se que a existência desse direito terá um impacto negativo no livre fluxo de informações na internet. No entanto, a proteção desse direito pode ser justificada pelos princípios subjacentes à proteção dos direitos de propriedade intelectual.

PALAVRAS-CHAVE: Editores de Imprensa; Diretiva do Mercado Único Digital; Direito dos Editores; Liberdade de Informação; Direitos Conexos.

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1. Introduction

As digital technologies and the internet have developed, people are no longer relying solely on print editions and news websites from press publishers to get their news. Instead, they are increasingly using news aggregators and social media platforms to access news from various sources. These changes have led to a decline in revenue for press publishers since 2000, a decrease in the circulation of printed newspapers, and a significant increase in online news consumption. Despite the efforts and investments made by press publishers to make news accessible, their revenues and advertising sales have suffered as a result of these changes.[1]

The European Parliament finally adopted the new Directive 2019/790 on copyright in the Digital Single Market on March 26, 2019. This Directive establishes new related rights for press publication publishers among other things according to Article 15. The article became one of the most controversial provisions in the whole directive. The discussion about the article was mainly driven by press publishers in the European Union. The traditional press publishing and news media sectors were facing a commercial crisis, and press representatives were worried about content aggregators and search engines profiting from their publications without permission. However, service providers argued that press publishers would lose traffic to their websites, which would harm the quality of the press and infringe on fundamental rights. As a result, press publishers brought their concerns to courts, legislators, and competition authorities, but these complaints were not fully resolved. The only solution to the conflict appeared to be the introduction of an EU-wide related right.[2]

The Directive was created with a few main objectives in mind. One of these objectives was to tackle issues related to the online reproduction and sharing of press materials. Another important goal was to ensure that income is fairly distributed between publishers who invest in and manage the publication process, and information service providers.[3] The European Commission was concerned about the lack of a monopoly for press publishers when it comes to their publications, which they believed could ultimately impact citizens' ability to access information.[4]

In recent years, there has been growing concern about the decline of the traditional news industry and the rise of online news outlets. This has led to a debate about the role of press publishers' rights in the digital age, and whether they are an effective tool for protecting the interests of publishers and promoting a sustainable news ecosystem. While the adoption of press publishers' rights has been hailed as a positive development by some, others have raised concerns about its potential impact on innovation, competition, and user access to information.

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[1] STAVROULA KARAPAPA, *The Press Publication Right in the European Union: An Overreaching Proposal and the Future of News Online*, Edward Elgar, 2018, pp. 1-24, (p. 2).
[2] ANNA SHIMKOVA, *The EU press publishers' right: past, present, and future,* Master's Thesis, Stockholm University, 2021, p. 2.
[3] ELZBIETA CZARNY-DROZDZEJKO, "The Subject-Matter of Press Publishers' Related Rights under Directive 2019/790 on Copyright and Related Rights in the Digital Single Marke*", IIC Springer*, vol. 51, 2016, pp. 624-641, (p. 625).
[4] EUROPEAN COMMISSION, "Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market COM/2016/593 final – 2016/0280 (COD)", 14 September 2016, viable at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0593&from=PL> (14.7.2023).

This research issue seeks to explore the impact of press publishers' rights on the digital news industry, with a particular focus on the European Union's recent adoption of a new press publishers' right.

The qualitative method is used in this research paper in order to examine the complex landscape of press publishers' rights in the digital age, exploring the challenges they face and the opportunities that can be harnessed through legal and policy frameworks. It aims to provide a comprehensive analysis of the current legal and policy landscape surrounding press publishers' rights, including relevant national, regional, and international laws and regulations. The paper will critically evaluate the effectiveness of existing legal and policy frameworks in protecting press publishers' rights in the digital age, and identify areas where further improvements may be needed. Additionally, the research will highlight emerging trends and best practices from around the world that could serve as models for effective legal and policy frameworks in the future.

2. The Concept of Press Publishers' Right

To grasp the idea behind the press publishers' right, we must initially establish a definition of this right and subsequently clarify its scope.

2.1. Definition

The main challenge surrounding the new related rights is the need to accurately define the subject matter, which is press publication. This definition was carefully considered and debated throughout the process of creating Directive 2019/790, and it was ultimately approved by the EU Parliament as it is defined by Article 2 (4) of the directive as follows:

> *Press publication means a collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matter, and which:*
>
> *(a) constitutes an individual item within a periodical or regularly updated publication under a single title, such as a newspaper or a general or special interest magazine;*
>
> *(b) has the purpose of providing the general public with information related to news or other topics; and*
>
> *(c) is published in any media under the initiative, editorial responsibility and control of a service provider.*
>
> *Periodicals that are published for scientific or academic purposes, such as scientific journals, are not press publications for the purposes of this Directive.*

One could interpret that the elements of press publications consist of the following:[5]

> 1. A collection of literary works of a journalistic nature: this is essential for ensuring high-quality press and distinguishes press publications from individual articles.
>
> 2. Included in periodical or regularly-updated press publications: press publications have a long-term character compared to blogs or individual articles.
>
> 3. A single title of a press publication: titles of press publications are crucial for establishing their trustworthy reputation, and publications created by individuals are not included in the scope of protection.
>
> 4. Press publishers' initiative and editorial responsibility: this element ensures credible information is distinguished from incredible information, and press publishers are required to invest in verifying the information they publish.

When comparing the Commission's proposal with this text, it can be observed that the requirement for a press publication to be a "fixation of a collection of literary works of a journalistic nature" has been eliminated. This is because there were anticipated issues with interpreting this term. The concept of "fixation" implies that the original medium of the press publication should be physically placed somewhere, and there would be debate as to whether the fixation needed to be only material or if a physical copy was necessary. The objective of a press publication has also been modified, with the current aim being to provide the public with up-to-date news. Additionally, it was stressed that the distribution medium, whether it is printed or virtual, is not important. However, there is a condition that the press publication must be under the control of a press publisher.[6]

Nevertheless, it should be noticed that Despite Recital 56 listing certain types of publications that should be excluded from the right, there is no clear threshold test to justify the protection. This lack of clarity results in ambiguity regarding the scope of the provision, creating a risk of excessively protecting press publications that have little or no significant underlying investment to recover. According to Hugenholtz, it seems that the EU legislator assumed that any periodical meeting the definition of press publication automatically qualifies for sufficient economic investment deserving protection. Unlike other related EU rights, the press publishers' right does not impose any minimum standard of investment.[7]

2.2. Exclusions from the Scope of the Press Publishers' Right

There are some exclusions from the scope of the press publishers' right which are analysed below:

[5] ANNA SHIMKOVA, *The EU press publishers' right…*, cit., p. 34.
[6] ELZBIETA CZARNY-DROZDZEJKO, "The Subject-Matter of Press Publishers' *…", cit.,* p. 627.
[7] SILVIA SCALZINI, *The New Related Right for Press Publishers: What Way Forward?,* Routledge, 2020, pp. 1-18, p. 8.

First: Personal or non-commercial use: The right may not apply to individuals or non-commercial entities that use snippets of publishers' content for personal or educational purposes. In other words, this exclusion is indicating that the DSM Directive does not apply to certain uses. Rather, the use of press publications will be subject to the EU copyright rules, even if content is shared by users online.[8] The protection mentioned needs to be ensured by giving rights to reproduce and make press publications available online for ISSPs. However, this only applies to publishers who are based in EU member states.[9]

Second: Hyperlinking: The right may not apply to the mere act of hyperlinking to the content, as this is considered a fundamental aspect of the internet's functionality. Although it may seem simple that hyperlinks are exempt from the PPR (an exclusive right of making available to the public), one may question why this exemption exists. Hyperlinks are essentially gateways that allow internet users to move from one website to another by clicking on them. The exception for hyperlinks implies that without it, they would fall under the exclusive right of making available to the public. This was confirmed in *Svensson v. Sverige AB* case which established that hyperlinks could be considered a relevant act of communication according to the exclusive right of communication in INFOSOC.[10] The purpose of any hyperlink is to direct the user to content that has already been made available. In the absence of such content, the hyperlink would be meaningless. This is why it was determined that for hyperlinks to be protected, they must lead to a "new public" if the content is already freely available online by the rights holder. Another way to approach this matter is through the concept of implied consent, which suggests that making something freely available online can be interpreted as consent for subsequent uses, including hyperlinking.[11]

If the content on the other end of a hyperlink is not freely available, or if the hyperlink leads to content that was made freely available without the owner's consent, various criteria must be taken into consideration, such as whether there is any financial gain, as confirmed in the of Media v. Sanoma. In this case, the court stated that 'Article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society must be interpreted as meaning that, in order to establish whether the fact of posting, on a website, hyperlinks to protected works, which are freely available on another website without the consent of the copyright holder, constitutes a 'communication to the public' within the meaning of that provision, it is to be determined whether those links are provided without the pursuit of financial gain by a person who did not know or could not reasonably have known the illegal nature of the publication of those works on that other website or whether, on the contrary, those links are provided for such a purpose, a situation in which that knowledge must be

[8] MARIA-DAPHNE PAPADOPOULOU and EVANTHIA-MARIA MOUSTAKA., "Copyright and the Press Publishers Right on the Internet: Evolutions and Perspectives", in Synodinou T.-E., Jougleux P., Markou C," *EU Internet Law in the Digital Era"* , Springer, 2020, p. 113 .
[9] DSM Directive, Recital 55.
[10] *Nils Svensson et al v Retriever Sverige AB, C-466/12 [2014].*
[11] IAN JONSON, *The press publishers' right, or wrong?,* Master's Thesis, Uppsala Universitet, 2022, p. 30.

presumed'.[12] This reflects a trend in EU copyright law where judges consider multiple criteria on a case-by-case basis. This approach allows for greater flexibility given the constantly changing online environment.[13] However, the introduction of the PPR exempts hyperlinks from scrutiny altogether, regardless of the circumstances. Besides hyperlinks, the exemption must also be examined alongside the last exemption.[14]

Third: Individual words or very short extracts: it is crucial to illuminate the issue concerning the definition of "very short extracts" in press publications before discussing the exception. The Directive does not explicitly provide this definition, leaving it to be determined through national implementations or, more probably, the interpretations of national courts. Striking a balance between conflicting rights and interests in defining the extent of this right becomes a delicate task. A strict interpretation of the term could result in the exercise of such rights in a manner that disproportionately affects not only the fundamental right of online service providers to conduct their business but also undermines everyone's fundamental right to freedom of expression and information. Consequently, it is advisable to apply a proportionality test to prevent press publishers from misusing this right. Some scholars propose excluding "everything necessary to identify the target of a hyperlink" from the right's scope. Similarly, "very short extracts of a press publication" that merely convey news of the day or raw facts should also be exempted from the directive's coverage.[15] The precise definition of "a very short extract " is yet to be determined, probably by the future rulings of the Court of Justice of the European Union (CJEU).[16]

The right may not apply to the use of individual words or very short extracts of the content, which may be considered too insubstantial to trigger the right. To clarify, the exclusion of very short extracts is not an exception to the press publishers' right, but rather a limitation to its extent. Article 15 states that using very short extracts, similar to individual words, is not initially included in the right. The very short extract rule therefore sets the minimum level of protection for press publishers' rights. Article 15(1)(iv) makes it clear that the right does not apply if a very short extract is used. This is similar to the concept in copyright law where an exclusive right is not triggered when a part of a work is too short to be considered original. In terms of procedure, the very short extracts carve-out is considered a limitation, which means that press publishers have to prove that it does not apply in specific cases. This means that when press publishers assert their rights under Article 15, they are responsible for demonstrating that the part of their publication used by an online service provider was more than a very short extract.[17]

[12] *Media v Sanoma* (Case C – 160/15) [2016].
[13] ULA FURGAL, "Ancillary right for press publishers: an alternative answer to the linking conundrum*?"* Journal of Intellectual Property Law & Practice, 2018, vol. 13, No. 9, pp. 700-710, (p. 703).
[14] IAN JONSON, *The press publishers' right…*,cit., P. 31.
[15] SILVIA SCALZINI, *The New Related Right*..., cit., p. 8.
[16] ULA FURGAL, "The Emperor Has No Clothes: How the Press Publishers' Right Implementation Exposes Its Shortcomings", GRUR International Journal of European and International IP Law, 2023, vol. 72, no. 7, pp. 650-664, (p. 651).
[17] KLUWER COPYRIGHT BLOG, "Taking freedom of information seriously: the 'very short extracts' limitation in Article 15 CDSM Directive and how not to implement it – Part 1", 30 March 2022, available at

The rationale of the very short extract limitation is that during the legislative process, scholars and members of civil society emphasized the importance of making fragments freely available to internet users so that they can easily locate relevant information and make informed decisions. If the use of snippets is restricted, it would become more difficult for individuals to understand the content of hyperlinks and access information, which would have negative consequences for their freedom to access information online.[18]

Despite the clear justification for the limitation of very short extracts based on fundamental rights, the CDSM Directive justifies it purely on economic grounds. Recital 58 of the directive argues that the exclusion of individual words and very short extracts is necessary to protect the investments made by publishers in producing news content. However, this does not mean that exclusivity needs to be extended to single words and very short extracts.[19]

It seems that the allowable length of snippets has decreased, which may increase the likelihood of infringement on others' rights in the future. This conclusion is based on the emphasis on the importance of interpreting the exemption in a way that does not impede its effectiveness.[20] However, it is essential to provide snippets alongside hyperlinks as they are crucial to the function of hyperlinks since people do not often click on hyperlinks without context.[21] Supporters of the PPR argue that exempting hyperlinks is sufficient to preserve the modern internet, and limiting lengthy snippets will not change that. On the other hand, critics claim that linking without snippets is pointless and that the hyperlink exemption is worthless when the use of snippets is simultaneously restricted.[22]

Finally, the concept of a press publication should not be extended beyond the written press, whether published on paper or online, excluding non-written media like radio or TV channels. This limitation aligns with the examples provided in Recital 56, all of which pertain to the written press. The definition explicitly refers to a collection of "literary works," indicating a focus on written content. However, this collection may include other media like photographs or videos as well (Recital 56). The use of the adverb "mainly" suggests that literary works are the primary focus, while other types of works may be included to complement the literary content. In essence, the introduction of a new ancillary right was necessary for the protection of the written press, but not for radio or TV press, which were already covered by existing ancillary rights. Thus, it can be understood that this new right pertains to the protection of the written press when published in both physical and online formats.[23]

<https://copyrightblog.kluweriplaw.com/2022/03/30/taking-freedom-of-information-seriously-the-very-short-extracts-limitation-in-article-15-cdsm-directive-and-how-not-to-implement-it-part-1/> (14.1.2023).

[18] KLUWER COPYRIGHT BLOG, "Taking freedom of information …", cit.

[19] KLUWER COPYRIGHT BLOG, "Taking freedom of information …", cit.

[20] DSMD recital 58.

[21] MIREILLE VAN EECHOUD, "A publisher's intellectual property right Implications for freedom of expression, authors and open content policies", 2017, available at: <https://www.openforumeurope.org/wp-content/uploads/2017/01/OFE-Academic-Paper-Implications-of-publishers-right_FINAL.pdf> (20. 02. 2023), pp. 1-68.

[22] MIREILLE VAN EECHOUD, "A publisher's intellectual property…", cit. pp. 1-68; Ula Furgal, "Ancillary right for press publishers…". Cit., p. 707.

[23] EDOUARD TREPPOZ, "The Past and Present of Press Publishers' Rights in the EU", Columbia Journal of Law & The Arts, 2023, vol. 46, no. 3, pp. 267-281 (p. 270).

3. Rationale of the Press Publishers' Right

The rationale behind the press publishers' right is primarily to address the challenges faced by traditional news publishers in the digital era. It aims to provide them with legal protection and enable them to negotiate fair compensation for their journalistic content that is shared and disseminated online.[24]

One of the key arguments supporting the press publishers' right is the need to safeguard the economic viability of news publishers. In the digital age, the proliferation of online news aggregators, social media platforms, and search engines has led to the widespread sharing and use of news content without proper compensation to the original publishers. This has resulted in declining revenues for news publishers, leading to concerns about their sustainability and ability to produce high-quality journalism[25] For years, news organizations have been contending that digital intermediaries must be charged for using their press content online. They point out that these platforms generate substantial revenues through two main channels: direct income from advertising displayed alongside the press content and indirect income by enhancing platforms' attractiveness and the collection of users' data. The latter aspect has become even more significant as platforms claim a larger portion of advertising revenues and programmatic advertising gains traction. In the UK, a study by the Competition and Markets Authority in 2020 revealed that Google and Facebook dominate search and display advertising, accounting for approximately 80% of the total annual expenditure in this domain. The immense reach of these tech giants not only attracts advertisers but also entices news organizations to establish their presence on social media platforms and optimize their content for better visibility in search results.[26]

The press publishers' right is also seen as a way to recognize and protect the investments made by news publishers in creating and curating news content. Publishers invest significant resources, including financial investments, journalistic expertise, and editorial efforts, in producing original news content. The press publishers' right seeks to acknowledge and protect these investments by granting publishers the right to control the use and dissemination of their content online.[27]

3.1. Reasons and Purposes for the Introduction of the Press Publishers' Right

The purpose of this harmonized legal protection for press publications has two main objectives. Firstly, it aims to grant press publishers their "own related right" in order to relieve them of the burden of proving copyright ownership for each journalistic work. This is especially

[24] DSM Directive, Recital 55.
[25] DSM Directive, Recital 55.
[26] ULA FURGAL, "The Emperor Has No Clothes...", cit., p. 652.
[27] DSM Directive, Recital 55.

necessary due to the diverse legal frameworks across EU Member States. In essence, this grants press publishers related rights over the entire press publication, allowing them to effectively manage and monetize press content in the digital landscape. Secondly, the initiative seeks to rebalance the bargaining power between different stakeholders and address the perceived unfair distribution of the value generated by content producers, which is often wrongly appropriated by digital platforms. The directive acknowledges that this new right should enable press publishers to recover their investments, both financial and organizational, in creating press publications. This is crucial for ensuring the sustainability of the publishing industry and, in turn, promoting the availability of trustworthy information.[28] The introduction of the press publishers' right can be attributed to several reasons, including the following:[29]

a) Addressing unfair use of news content by digital platforms: Digital platforms, such as search engines and news aggregators, often display news snippets or headlines without proper authorization or compensation to the original publishers. This can result in reduced traffic to publishers' websites, loss of potential revenue, and disincentives for investing in quality journalism. The press publishers' right aims to address this unfair use by requiring digital platforms to obtain licenses or seek permission from publishers before using their news content.

b) Protecting journalism and promoting media pluralism: Journalism is a crucial pillar of democracy, as it plays a vital role in providing accurate and reliable information to the public. However, declining revenues and challenges posed by digital disruption have put the sustainability of journalism at risk. The press publishers' right seeks to protect journalism by providing publishers with a legal framework to monetize their news content, which can help support the financial viability of news organizations and promote media pluralism.

c) Recognizing the value of news content and incentivizing investment: Press publishers invest significant resources in creating original news content, including journalistic research, reporting, and editing. The press publishers' right aims to recognize the value of this content and provide publishers with exclusive rights over its use, which can incentivize investment in journalism and reward publishers for their efforts in producing high-quality news content.[30] If press publishers are unable to grant licenses, they will struggle to recover their investments, putting the accessibility of reliable information at risk. The EU legislator aims to bolster the bargaining power of press publishers and secure their legal certainty, intending to guarantee their capacity to license. The introduction of an ancillary right is perceived by the EU legislator as a means to safeguard investments in the press industry.[31]

d) Harmonizing copyright rules in the digital era: The digital environment has disrupted traditional copyright rules, and there is a need for harmonization to adapt to the digital era. The press publishers' right is part of broader efforts to modernize copyright rules in the digital

[28] SILVIA SCALZINI, *The New Related Right...*, cit., p. 7.
[29] ANNA SHIMKOVA, *The EU press publishers' right…*, cit., pp. 10-20.
[30] ANNA SHIMKOVA, *The EU press publishers' right…*, cit., pp. 10-20.
[31] EDOUARD TREPPOZ, "The Past and Present of Press...", cit., p. 267.

single market, aiming to establish a level playing field for publishers, promote innovation, and ensure a fair and sustainable ecosystem for the dissemination of news online.[32]

3.2. Main Concerns

While press publishers' rights are viewed by some as effective and beneficial, opponents of their introduction argue that such rights are unnecessary for publishers. This perspective is based on the following reasons:

a) Freedom of information: Some opponents of press publishers' rights argue that granting additional rights to publishers may restrict the free flow of information and hinder access to news content. They contend that news content should be widely accessible without restrictions to ensure that information is available to the public at large, and that press publishers' rights could impede this principle.[33]

b) Potential negative impact on online platforms and innovation: Critics of press publishers' rights argue that such rights may place undue burdens on online platforms and aggregators, which are essential for the dissemination of news content online. They assert that these rights could stifle innovation, limit competition, and hinder the development of new business models for news distribution in the digital age.[34]

c) Potential impact on free speech and expression: Some critics of press publishers' rights raise concerns that granting publishers exclusive rights over their news content may limit freedom of speech and expression. They argue that press publishers' rights could be used to restrict or control the use of news content in ways that could have a chilling effect on public discourse and democratic participation.[35]

d) Harm to consumers' interests: The implementation of the PPR (Press Publishers' Right) can negatively impact consumers' interests as it may hinder their access to press publications, particularly if Internet Service Providers (ISSPs) refuse to obtain licenses. This can limit users' ability to freely communicate and express their opinions without encountering obstacles. Furthermore, online services play a significant role in promoting press publishers' brands by directing traffic to their websites, thus contributing to their increased popularity.[36]

e) Increasing number of "fake news: It is probable that fake news is not required to pay for snippets, which could result in a decrease in reputable news content sharing. This may lead to an increase in the visibility of such unreliable content online, as publishing other news can be costly or legally risky. Additionally, some unreliable press publishers may allow ISSPs (online

[32] ANNA SHIMKOVA, *The EU press publishers' right…*, cit., pp. 10-20.
[33] ELZBIETA CZARNY-DROZDZEJKO, "*The Subject-Matter of Press Publishers' …", cit.,* p. 634.
[34] COMMUNIA, "Publishers Right", available at: <https://reform.communia-association.org/issue/publishers-right-2/> (15.02.2023)
[35] ELZBIETA CZARNY-DROZDZEJKO, "*The Subject-Matter of Press Publishers' …", cit.,* p. 634.
[36] THOMAS HOPPNER, MARTIN KRETSCHMER and RAQUEL XALABARDER, "CREATe Public Lectures on the Proposed EU Right for Press Publishers", European Intellectual Property Review, 2017, vol. 39, no. 10 , pp, 607-622, p. 607.

platforms) to reference their content for free, further contributing to the online visibility of fake news.[37] However, Recital 55 of the DSM Directive acknowledges this concern and emphasizes the need to promote the availability of reliable press publications in the EU.

f) Violation of the principles or provisions of the Berne Convention: A potential conflict with the Berne Convention arises when examining Article 10 (1), which ensures the freedom to use quotations from newspapers and periodicals as press summaries. This provision requires that such quotations be made in a fair manner and not exceed their intended purpose. The conflict arises with the PPR (Preservation and Protection of Right to News) as it mandates obtaining licenses to display news fragments by Internet Service Providers (ISSPs). However, it could be argued that creating summaries, which is commonly done by ISSPs, is distinct from making direct quotations, thus raising questions about compliance with the Berne Convention.[38]

g) Conflicts with the fundamental rights: The conflict arises with regards to fundamental rights, specifically freedom of expression and information, which encompasses the freedom and diversity of the media as outlined in Article 10 of the European Convention on Human Rights (ECHR) and Article 11 of the Charter of Fundamental Rights of the European Union (CFREU). Additionally, there is a conflict with the freedom to conduct a business, including in the media sector, as stated in Article 16 of the CFREU.[39]

4. The Intended Beneficiaries of the Press Publishers' Right

The intended beneficiaries of the Press Publishers' Right are primarily press publishers and authors of journalistic content which are explained below:

4.1. Press Publishers

The primary intended beneficiaries of the press publishers' right are publishers of news publications, which can include newspapers, magazines, online news websites, and other journalistic entities. Although it is easy to conclude that press publishers are the main beneficiaries of the Press Publishers' Right (PPR), the conclusion is more complex than it initially seems.[40] Some argue that traditional print media publishers were always intended to be the primary beneficiaries of the PPR, as evidenced by various submissions during the legislation process. However, the scope of the PPR extends beyond traditional print media

[37] SEVERINE DUSOLLIER, "The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition", Common Market Law Review, 2020, vol. 57, no. 4, pp. 979-1030 (p. 1005).
[38] THOMAS HOPPNER, MARTIN KRETSCHMER and RAQUEL XALABARDER, "CREATe Public Lectures…", cit., p. 607.
[39] RETO HILTY and VALENTINA MOSCON, "Modernisation of the EU Copyright Rules Position Statement of the Max Planck Institute for Innovation and Competition", Max Planck Institute for Innovation & Competition Research, 2017, No. 17-12, pp. 79-88 (p. 88), available at: <https://ssrn.com/abstract=3036787> (15.07.2023).
[40] MIREILLE VAN EECHOUD, "A publisher's intellectual property…", cit., p. 33.

publishers, benefiting "service providers" publishing "press publications" as well, as per the Directive on Copyright in the Digital Single Market (DSMD).[41] Literary publishers were also offered the same protection, but declined it, claiming existing copyright legislation was sufficient. Nevertheless, EU-based service providers will be granted PPR protection by default, while Member States have the freedom to implement the PPR in ways that broaden the right's scope, such as applying it to press publishers based outside the EU.[42]

4.2. Authors of Journalistic Content

While it was easy to determine that press publishers are the primary beneficiaries of the PPR, it is more challenging to ascertain whether authors can be considered indirect beneficiaries. The PPR is designed to respect the hierarchy between copyright and neighbouring rights, as outlined in the DSMD. This means that copyright holders whose content is part of a press publication cannot be challenged using the PPR, and the PPR does not prevent copyright holders from independently using their copyright outside of press publications. However, the preamble of the DSMD allows authors (such as journalists) and press publishers to freely agree on different terms, which may disrupt the established order. As a result, the DSMD does not offer a clear answer to this question.[43]

The question arises as to whether there is a clear consensus in the general debate on this issue. Unfortunately, there are conflicting views on this matter. Some journalists support the PPR, arguing that it will benefit journalists by strengthening publishers' bargaining power and generating more revenue for them to hire journalists for qualitative journalism.[44] This suggests that the introduction of the PPR would be beneficial for everyone. However, there are also skeptics who argue that both authors and press publishers cannot benefit from the PPR, as it may not create new revenue streams but rather divide existing ones among more parties. If that is the case, authors may see a decrease in their share of profits when publishers take a portion for themselves.[45]

5. What the Press Publishers' Right Entails

There are a number of essential components of press publishers' rights which needs to be analysed as follows:

[41] RICHARD DANBURY, "The EU's Press Publishers' Right is too broad. What can be done about it?", European Intellectual Property Review, 2022, vol. 44, no. 1, pp. 20-26, (p. 24).
[42] SEVERINE DUSOLLIER, "The 2019 Directive ...", cit., p. 1006.
[43] IAN JONSON, *The press publishers' right…,* cit., p. 21.
[44] SAMMY KETZ," Neighbouring rights: a question of life or death", 28 August 2018, available at: <https://archive.cyprus-mail.com/2018/08/28/neighbouring-rights-a-question-of-life-or-death/> (15.07.2023).
[45] IAN JONSON, *The press publishers' right…,* cit., p. 22.

5.1. Protected Input and Subject-Matter

The statement suggests that the purpose of the Press Publisher's Right (PPR) is to safeguard publishers from unauthorized use of their press publications online. However, it is clarified that the PPR does not protect the potential originality or creativity of the press publication, but rather the investments made by publishers to enable its publication. Further exploration is needed to fully understand the concept of a "press publication" as defined in the Digital Single Market Directive (DSMD), as the term encompasses a wide range of scope when analysed in detail.[46]

Initially, it is clarified that the subject-matter in question is a collection that consists primarily of journalistic literary works, but may also include other types of works or subject matter.[47] This establishes that a press publication is a collection with specific contents, and that the character of the contents determines whether the collection as a whole qualifies as a press publication. This sets the boundaries for the scope of the provision, although it remains notably broad.[48]

The requirement that the collection mainly consists of journalistic works implies that a press publication covered by the PPR may include content that lacks journalistic value and does not contribute significantly to public debate or safeguarding democracies. Moreover, it is uncertain whether mandating that the majority of the content be journalistic in nature is helpful. The concept of journalistic works is broadly interpreted in EU law, encompassing works produced by non-professional journalists, as well as expressions of ideas or opinions. Additionally, the limitation of the provision to literary works seems to contradict and conflict with the mention of photographs and videos as parts of press publications in the preamble.[49] Nevertheless, some argue that the term "literally" should be strictly interpreted, disregarding any suggestions to the contrary in the preamble.[50]

Afterwards, a collection that meets the conditions mentioned above must also be considered as an individual component within a regularly updated publication with a single title, such as a newspaper or a magazine focused on general or specific interests.[51] This means that the protected collection is just one of many collections that make up the overall content of the publication. This broad definition of a 'collection' could raise concerns if a single journalistic work ends up being included in multiple collections within a publication. This is particularly relevant in the case of newspapers, which have always been bundles of various types of information that cater to different interests, making readers buy the entire paper instead of selecting individual pieces. In a newspaper or any other bundled collection, a single journalistic

[46] MIREILLE VAN EECHOUD, "A publisher's intellectual property…", cit., p. 35.
[47] DSMD, Art. 2(4).
[48] FEDERICO FERRI, "The dark side(s) of the EU Directive on copyright and related rights in the Digital Single Market", China-EU Law Journal, 2021, vol. 7, pp. 21-38 (p. 37).
[49] RICHARD DANBURY, "The EU's Press Publishers'...", cit., p. 23.
[50] THOMAS HOPPNER, MARTIN KRETSCHMER and RAQUEL XALABARDER, "CREATe Public Lectures…", cit., p. 615.
[51] DSMD, Art. 2(4)(a).

work could potentially be part of multiple collections, such as both the sports section and the editorial section, and this could potentially result in infringement on multiple collections.[52]

Moving forward, there is agreement among both proponents and critics that the language used in the provision suggests an extremely broad interpretation of the required purpose for the collection, which is to provide the general public with information related to news or other topics.[53] Initially, it may seem like a weak restriction to require the purpose to be related to news, but the inclusion of "or other topics" at the end of the provision complicates matters. This implies that the purpose could encompass providing information on a wide range of other subjects. As one has aptly put it, "it is challenging to imagine information that does not fall under the categories of news, news-related, or other topics." Furthermore, the wording implies that the collection itself is expected to have a purpose, which is not feasible since only individuals can act with purpose, not collections. Therefore, the question of who is required to have this purpose remains unresolved and unclear.[54]

The final condition for obtaining protection, which requires fulfilment of all previous conditions, states that the collection must be published through a service provider's initiative, editorial responsibility, and control in any media. This appears to exclude individual websites and blogs from the right, as publications on such platforms seldom meet all or most of these requirements.[55] Thus, A blog, consisting of journalistic content, might not be considered a press publication if it lacks editorial responsibility.[56]

Websites and blogs are specifically mentioned as being excluded from the scope of the right in the preamble. However, it should be noted that blogs can sometimes serve as platforms for serious investigative journalism, which raises questions about whether the Press Publishers' Right (PPR) supports institutions or their functions. When the Commission first introduced the proposal for the PPR, blogs were not yet excluded. In summary, the PPR applies to a wide range of subject matter with varying characteristics, which may not be immediately evident from the term "press publications."[57]

5.2. Exclusive Rights

As per the DSMD, Member States are required to grant press publishers the same rights of reproduction and making available to the public as provided in INFOSOC (referencing art. 2 and art. 3(2)). Essentially, these rights are extended to press publishers in relation to unauthorized online use by ISSP.[58] The scope of these rights, as stated in the preamble, is

[52] RICHARD DANBURY, "The EU's Press Publishers'...", cit., p. 23.
[53] DSMD, Art. 2(4)(b); Thomas Hoppner, Martin Kretschmer and Raquel Xalabarder, "CREATe Public Lectures…", cit., p. 615.
[54] RICHARD DANBURY, "The EU's Press Publishers'...", cit., p. 24.
[55] SEVERINE DUSOLLIER, "The 2019 Directive ...", cit., p. 1006.
[56] EDOUARD TREPPOZ, "The Past and Present of Press...", cit., p. 270.
[57] IAN JONSON, *The press publishers' right…*, cit., p. 27.
[58] THOMAS HOPPNER, MARTIN KRETSCHMER and RAQUEL XALABARDER, "CREATe Public Lectures…", cit., p. 608.

intended to be the same as those awarded to copyright holders. This raises questions about the hierarchy and relationship between different rights, as discussed in Sections 4.2.2 and 2.3.[59]

However, it is important to note that these rights granted to press publishers are also subject to exceptions and limitations prescribed by INFOSOC, as well as additional restrictions provided for in the DSMD itself, which will be covered in Section 4.5. Two notable restrictions mentioned are the temporal limitation, where the exclusive rights last for two years after the publication of the press publication, and the exclusion of scientific and academic periodicals from the scope of these rights. While there is much that can be said about the functioning of these exclusive rights, it goes beyond the scope of this thesis and may be a topic for further analysis in a separate thesis.[60]

5.3. Remuneration for the Authors

The hierarchical nature of rights becomes evident in the consideration of DSMD Art. 15(5). According to this article, authors whose original works are included in a press publication are entitled to receive a portion of the revenues that press publishers receive from Internet Service Providers (ISSPs) for the use of their publications. This creates a problem as it contradicts the fundamental principles of both copyright and neighbouring rights, as explained in Sections 2.2-3. DSMD Art. 15(5) grants copyright holders an indirect economic right based on neighbouring rights, which are intended to protect financial and organizational investments made by publishers. This means that authors suddenly receive remuneration for financial and organizational investments, which is not related to the originality of their work that warrants copyright protection.[61] Blurring the lines between copyright and neighbouring rights disrupts the legal order and lacks logical coherence, as copyright should incentivize innovation while neighbouring rights should incentivize investment. Disregarding this distinction leads to arbitrary outcomes and poses challenges in determining what constitutes an appropriate "share of revenues".[62] Press publishers may attempt to maximize their share by claiming that their revenues are made without invoking the neighbouring rights, which would frustrate journalists who supported the introduction of the neighbouring rights in the first place.[63]

[59] DSM Directive, recital 57.
[60] JOÃO PEDRO QUINTAIS, "The New Copyright in the Digital Single Market Directive: a Critical Look", European Intellectual Property Review, 2020, vol. 42, no. 1, pp. 28-41 (p. 36).
[61] SEVERINE DUSOLLIER, "The 2019 Directive ...", cit., p. 1008.
[62] FEDERICO FERRI, "The dark side(s) of...", cit., p. 32.
[63] IAN JONSON, *The press publishers' right…,* cit., P. 28.

6. Principles Underlying Protection of Press Publishers' Right

In general, there are two approaches to protecting intellectual property: natural rights and utilitarianism. The natural rights approach is based on the moral belief that authors have the right to copyright protection in order to safeguard the products of their creative efforts. [64] According to this view, the author's creation is considered their property, and copyright law upholds the author's natural rights by prohibiting unauthorized use of their work. This right is not only seen as a privilege or reward for the author, but also as an incentive for them to create new works.[65]

However, it is important to ensure that granting exclusive rights to authors does not negatively impact the interests of society or other users who seek access to knowledge and information for progress. The intellectual property system is based on the idea that the legal rights given to creators of intellectual works should not hinder society's right to access and benefit from those works. In the digital age, this principle of balance between creators and users is being challenged by technological and legal measures. Nevertheless, it is crucial to maintain and reaffirm the traditional notion of balance between creators and consumers in the digital environment, in order to ensure that genuine progress based on knowledge takes place in today's globalised world.[66]

The utilitarian approach to intellectual property rights focuses on providing economic incentives to inventors or creators. It argues that copyright owners should be granted a limited monopoly as a reward or incentive for their creations, which enriches society.[67] The underlying idea is that the accumulation of inventions and creative works will benefit the public as a whole. This justification was emphasised in the case of Mazer v. Stein (1954), where the US Supreme Court stated that the pecuniary rationale behind copyright and patent laws is based on the belief that encouraging individual efforts for personal gain is the most effective way to promote public welfare through the talents of authors and inventors in science and the arts.[68]

There is an argument that intellectual property rights serve as a public good by preventing "free riding" by third parties who did not invest the same effort and cost in creating the invention initially. For example, copyright protection aims to strike a balance between the cost of limiting access to a work and the benefit of providing motivation for creators to create in the first place. Intellectual property protection is necessary to prevent such market failures because free riding would undermine incentives for inventors. This would result in reduced availability and use of creative works by the public,[69] as competitors could freely copy books,

[64] EDWIN HETTINGER, "Justifying Intellectual Property", 18 Philosophy & Public Affairs, 1989, vol. 18, no. 1, pp. 31-52 (p. 36).
[65] SADULLA KARJIKAR, *Open-source Software and the Rationale for Copyright Protection of Computer Programs*, PhD Thesis, Stellenbosch University, 2013, p. 35.
[66] MANOJ KUMAR SINHA and VANDANA MAHALWAR, "Copyright Law in the Digital World: Challenges and Opportunities", Springer, 2017.
[67] HELEN E NORMAN, *Intellectual Property Law,* 2nd ed, Oxford University Press, 2014, p. 191.
[68] ROBIN RAMCHARAN, *International Intellectual Property Law and Human Security,* Asser Press, 2013, p. 13; *Mazer v. Stein—347 US 201 (1954)*, available at: <https://www.law.cornell.edu/supremecourt/text/347/201> (15.07.2023).
[69] ROBIN RAMCHARAN, *International Intellectual Property…"*, cit., p. 13.

records, films, business techniques, and other creations without motivation to invest time, energy, and resources in creating and developing new products and techniques.[70]

Hence, copyright law has the responsibility of balancing the competing interests of authors who seek to protect their works from unauthorized use, and the public's interest in accessing those works.[71]

This analysis reveals that copyright protection has two rationales: firstly, to incentivize authors to create new works and reward their efforts, and secondly, to enable society to benefit from copyrighted works. Therefore, the researcher believes that for a work to be legally protected, it should be accessible to society so that society can reap the benefits of that work. In other words, copyright laws should consider the interests of both copyright holders and society as a whole. I belief that press publishers should be granted the right to assert their copyright against commercial entities, as it aligns with the fundamental principles of intellectual property rights. This can serve as an incentive for publishers to create new works, from which society can benefit. However, there should be exceptions for non-profit entities and governmental organizations. Furthermore, in cases where the society cannot adequately benefit from copyrighted works, legal mechanisms such as compulsory licensing should be available to make the works accessible to the public.

7. Conclusion

The new related right for press publishers has been introduced to provide extra protection for press publications, in order to guarantee the long-term viability of the press and make it easier to obtain licenses and enforce rights. Press publishers' rights refer to the legal protection afforded to publishers of news content in relation to their online use. The goal of press publishers' rights is to provide publishers with the ability to control and monetize their news content in the digital environment, particularly in the context of online platforms and aggregators that use or reproduce their content. The issue of press publishers' rights, particularly in the context of the DSMD Art. 15(5), raises complex questions regarding the hierarchy of rights, the blurred lines between copyright and neighbouring rights, and the appropriate share of revenues. The provision, which grants authors a portion of the revenues that press publishers receive from ISSPs, challenges the fundamental principles of copyright and neighbouring rights, and may result in uncertainty and confusion. It is imperative for lawmakers to carefully consider the implications of such provisions to ensure that the legal order is maintained and that the rights of all stakeholders, including authors and press publishers, are adequately protected.

[70] EDWIN HETTINGER, "Justifying Intellectual ...", cit., p. 48.
[71] DEBORAH E BOUCHOUX, *Intellectual Property: the Law of Trade Marks, Copyrights, Patents and Trade Secrets,* 4th ed, Cengage Learning, 2013, p. 186.

Proponents of press publishers' rights argue that it is necessary to protect the interests of publishers and ensure that they are adequately compensated for their investment in creating and publishing news content. They argue that online platforms and aggregators often use news content without proper authorization, resulting in financial loss for publishers. Press publishers' rights are seen as a way to address this imbalance and restore a level playing field for publishers in the digital ecosystem. Supporters of press publishers' rights also argue that it is essential to safeguard the quality and integrity of news content. By giving publishers control over the use of their content, they can maintain editorial independence and ensure that their content is not used inappropriately or misrepresented by third parties.

On the other hand, critics of press publishers' rights express concerns about potential negative impacts on freedom of expression and the free flow of information. They argue that such rights may restrict the ability of individuals and organizations to share news content, limit access to information, and impede innovation in the digital news ecosystem. Critics also highlight the challenges of defining and enforcing press publishers' rights in a rapidly evolving digital landscape.

Finally, it is revealed that the protection of press publishers' right can be justified by the principles underlying intellectual property rights.

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