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A publisher's intellectual property right

Implications for freedom of expression, authors and open content policies

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*A publisher's intellectual
property right*

*Implications for freedom of
expression, authors and
open content policies*

Prof. dr. Mireille M.M. van Eechoud

January 2017

'The unusually lucrative moment of late twentieth century is over, but it was an anomaly not the norm in the history of news provision'.

Picard, 2014

FOREWORD

This study was conducted on commission from OpenForum Europe. It was carried out independently, in conformity with the [Declaration of Independence](#) of the Royal Netherlands Academy of Arts and Sciences (KNAW).

Special gratitude goes to all persons and organisations who have shared their insights with us, as well as to J. Bierens LLM, for invaluable research assistance.

EXECUTIVE SUMMARY

The proposed Copyright in the Digital Single Market Directive (COM(2016)593) of July 2016 would introduce a new intellectual property right for publishers of press publications, or ‘PIP’. Publishers would have the exclusive right to authorize or prohibit any reproduction (in whole or in part, direct or indirect) and making available to the public of ‘press publications’, for a period of 20 years.

This study examines the justifications for the proposed new PIP, and assesses how it would fit in the EU copyright framework. In this study, special attention is paid to the freedom of expression dimension, for two reasons. One is that the most important justification advanced in support of a publisher’s right is that it promotes a sustainable quality press and media pluralism. The vital role that the press play in democratic societies as public watchdog and forum for public debate — is a key consideration — in the interpretation of the fundamental right to freedom of expression as guaranteed under the European Convention on Human Rights and the Charter of Fundamental Rights of the EU. The second reason is that the introduction of an intellectual property right, i.e., an exclusive right to control information flows, itself constitutes an interference with freedom of expression. The main recommendation is that the EU legislator should elaborate a clear assessment of what pressing social need a PIP would serve, of the PIP’s proportionality and of alternative solutions (other than merely the option to encourage stakeholder dialogue, cf. the Impact Assessment). This is especially important because, for news and other public interest information, the European Court of Human Rights (ECtHR) upholds a strict standard of scrutiny. Any regulatory intervention must comply with the right to freedom of expression, as laid down in article 10 ECHR / 11 CFR.

With respect to existing copyright and database law, the study concludes that the proposed new publisher’s right would have a wider operation. This is because there is no built-in restriction to the reproduction right, unlike in copyright where the originality requirement prevents appropriation of facts, ideas and non-original expression. The publisher’s right would also be broader than the *sui generis* database right. The proposal sets no substantial investment requirement, and the reproduction would apply to the smallest parts. The introduction of the publisher’s right would mean that unless he or she can invoke a limitation or exception (e.g., for private copying, or quotation purposes), anyone using the smallest bit of text, image or sound contained in a digital press publication would need prior permission from the publisher.

This study also considers the likely effect of the proposed new right on authors, especially freelance journalists, photographers and editors. A growing proportion of the workforce in the newspaper and magazine industries is not employed, but instead consists of freelance profes-

nals who are increasingly dependent on maximum exposure of their work in order to secure new assignments. Publishers are in a position to dictate the terms of agreement for both employed and freelance creators, and already effectively control the ownership of copyright. If the operation of the proposed publisher's right were to lead to a decline in referrals, shares, snippet-linking or the ability to blog about a journalist's works, this would directly harm the journalist's visibility, and thus opportunity to sell future work.

The EC proposal seems to attempt to take the form of newspapers and magazines as we have known them from the age of print, and plant them in the online environment. In light of structural changes to advertising markets and changes in readership behaviours, it can be questioned whether a focus on the *form* of (traditional) press, rather than a focus on its *functions*, is the best way forward. What is more, press publications as currently defined in the proposal would potentially cover all other domains where periodical publications are a form of communication, including professional, business, educational, and government publications. However, for these domains it is unclear that there is any actual need for additional intellectual property right protections. At the very least, publications that emanate from public sector bodies should be excluded, as there is no need in that domain for an intellectual property right to incentivise publication. Quite the contrary, the fast development towards more transparency, active dissemination of public sector information and open licensing (open data) suggests the introduction of a new right would only produce additional costs and barriers. The exclusion of academic and scientific publishing makes perfect sense in light of the strong market position of commercial science publishers and the pursuit of open access and more broadly open science policies by the EU and its member states. To ensure that the exclusion is unequivocal, it is recommended that it be included in the substantive provisions (i.e., Articles) of the Directive, rather than merely in its recitals.

CONTENTS

1 Introduction	8
2 Proposal for a publisher’s intellectual property right (‘PIP’)	9
2.1 Main characteristics	9
2.2 Justifications	11
2.3 Decline in legacy (news) publishing industry	12
2.4 Conclusions	16
3 Freedom of expression implications	18
3.1 A publisher’s right in the fundamental rights framework ..	18
3.2 Scope of freedom of expression	19
3.3 Conclusions	24
4 PIP in the copyright and database right landscape	25
4.1 Current copyright	25
4.2 Database rights	31
4.3 Subject-matter and beneficiaries of the publishers’right ...	33
4.4 The position of journalists and other authors	35
4.5 Position of born digital media	38
4.6 Conclusions	40
5 Open data and Open science policies	41
5.1 Open Data	41
5.2 Open Science	44
5.3 Conclusions	46
6 A proportionate regulatory intervention?	46
7 Sources	51
8 Relevant excerpts from the EC proposal	65

INTRODUCTION

The proposed right would create exclusive rights to control a broad array of information, whether produced in the private sector or financed by public means.



In this short study, we examine the EC’s proposal for the introduction of a new intellectual property right for publishers (“PIP”) and the arguments for and against it. As we will see, two broad arguments are advanced in support of the right. The first is that it is necessary to secure a sustainable press and media pluralism. The new right would secure additional revenue for a print industry under pressure. This argument in effect invokes the fundamental right to freedom of expression, a right the EU has to safeguard in secondary legislation, such as the proposed Copyright in the Digital Single Market Directive (‘CDSM proposal’, COM(2016)593). Therefore, we analyse what conditions flow from freedom of expression as guaranteed by the European Convention on Human Rights, and the EU Charter of Fundamental Rights with respect to legislating new intellectual property rights.

The second argument advanced in support of the new right is that this would make it easier for publishers to conclude licences for the use of press materials by third parties. The latter argument is closely related to existing IP rights in journalistic content. It also concerns the (contractual) relationship between journalists, photographers and other creators, and the media they work for. We therefore assess how the proposal in its current form relates to the existing framework for copyright and database protection in the EU (section 4.1 and 4.2), what subject-matter and right-holder are added (section 4.3) and how the new right might affect the position of creators in the publishing industry (section 4.4) and of born digital media (section 4.5). Section 4.6 concludes.

The proposed right would create exclusive rights to control a broad array of information, whether produced in the private sector or financed by public means. At the same time, policymakers increasingly recognize that intellectual property laws can inhibit the economic and social benefits that sharing of information can bring, especially in domains that are funded with public money. This has led to the EC and Member-States on a path towards institutionalised open access, open science and open data policies, which themselves are built on ideas already applied in open source software and open content communities. This study analyses and highlights the potential discrepancies between the proposed new IP right and open science and open data policies (section 5), and concludes with an assessment of the proportionality of the proposal: is it fit for purpose, limited to what is necessary considering its objectives, and does it avoid disadvantages that are disproportionate to the aims pursued? (Section 6).

Note

This study does not address the plans for a provision which would allow member states to legislate that publishers are entitled to a share of the remuneration that is due to authors for the use of works under reprography and private copying exemptions. The reprography issue arose as a result of the EJC *Reprobel* judgment; it is designed to repair the unfavourable outcome that *Reprobel* produced for publishers. Although the Impact Assessment couples this issue to the press publisher's right, these are in fact two completely separate questions.

2

PROPOSAL FOR A PUBLISHER'S INTELLECTUAL PROPERTY RIGHT ('PIP')

Responding to calls by representatives of part of the publishing industry, especially companies that publish news and general audience magazines, the European Commission proposes the introduction of a new intellectual property right. It is frequently named an 'ancillary right', which implies it is derived from or subordinate to copyright. However, the proposal concerns the introduction of a full blown stand-alone intellectual property right, so in this study we use the more apt term 'publisher's intellectual property', or 'PIP' (a more precise acronym would be P-PIP, for press publisher's IP). The proposal is part of a larger package. When put into law it would be one of the wide-ranging collection of provisions in the new Copyright in the Digital Single Market Directive. Each of the 28 (or 27, depending on the Brexit process) member states (as well, most likely, as other EEA members) will be obliged to implement PIP in its domestic law. This section 2 describes the main characteristics of the proposed right (2.1) and the justifications presented by the European Commission (2.2). Since PIP is presented by its proponents as one solution to the financial problems faced by the print news industry, we also consider the nature and drivers of the newspaper 'crisis' (2.3).

2.1

MAIN CHARACTERISTICS

The beneficiaries of the new right would be 'publishers', and its subject-matter 'press publications' (art. 2(4) CDSM Proposal). The definition of the latter obviously tries to capture the still familiar forms of print newspapers and magazines, but would include a much broader range of publications. Section 4.3 below discusses the subject-matter covered in more detail.

The right would give publishers exclusive control over all 'digital uses' that involve:

- reproducing the content of the publications, that is: ‘the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part’ (art. 2 Information Society Directive 2001/29); or
- making available the content of the publications, that is: ‘the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them’ (art. 3(2) Information Society Directive 2001/29).

The new right would thus take two key exploitation rights that have evolved in copyright law to protect authors of articles, photographs and other literary and artistic works, and apply them to press publications. The limitations and exceptions that apply to copyright would also apply to the publisher’s right (art. 11(3) CDSM Proposal). This includes the ones put forward in the CDSM proposal on text and data mining for public research, and the use of works for illustrative purposes in teaching. The proposed publisher’s right could be invoked against the author of contributions to the publication (art. 11(2) CDSM proposal) unless there is a contractual agreement to the contrary. The proposed new right would have a duration of 20 years from publication (art. 11(4) CDSM proposal), and would not only cover all publications going forward, but also would apply retroactively - to all press publications published before the date set for implementation of the Directive (art. 18(2)). Acts concluded before the implementation date would not be affected (art. 18(3)), i.e., any completed legitimate uses made prior to the introduction of the right in national laws would not trigger liability for infringement. However, any new or continued use of the content after the implementation date would require the publisher’s permission. To ensure compliance, any ‘service provider’ person making digital use of press publications would therefore have to assess the legitimacy of its current use of any press content within a range of roughly 20 years old to current content.

Although the Directive is silent on this point, it stands to reason that PIP would share with other intellectual property rights the characteristic that it would be territorial, that is, would consist of a bundle of 27/28 (or more) national rights, one for each Member State. Likewise, presumably each national right is transferable and can be licensed, for pan-European uses or local use, limited in time or geographically, etc. Domestic laws would govern the modalities of transferability and other legal issues surrounding property interests (e.g., exercise of rights in case of co-ownership) and contractual matters (e.g., whether a licensee can enforce the PIP).

2.2

JUSTIFICATIONS

'A free and pluralist press is essential to ensure quality journalism and citizens' access to information'.



What justifications are advanced for such a new press publisher's intellectual property? The EC argues that publishers need special protection, because they encounter difficulty licensing content online and are entitled to a 'fair share of the value they create.' (CSDM proposal, p. 3). This 'sharing' of revenues generated by other businesses that provide information services (search engines, social media, news monitoring, listing sites and presumably many more) is said to be necessary for the sustainability of the press sector. Without a sustainable press, the citizen's access to information would be (adversely) affected. Recital 31 of the proposal states that 'A free and pluralist press is essential to ensure quality journalism and citizens' access to information'. The introduction of a publisher's right would help achieve this and have a positive effect on media pluralism (id). The accompanying Communication says the right 'recognises the key role press publishers play in terms of investments in and overall contribution to the creation of quality journalistic content' (COM(2016)592, p. 7). Broadcasting organizations, film producers and phonogram (audio recording) producers at one time secured neighbouring rights, but is it controversial to what extent the justification put forward — heavy investment in (technical) infrastructure and production in the analogue era — is still valid (ECS 2016).

A separate line of argument concerns licensing. Recital 32 of the Proposal maintains that 'In the absence of recognition of publishers of press publications as rightholders, licensing and enforcement in the digital environment is often complex and inefficient.' The Explanatory notes to the proposal say that the right for publishers aims 'at facilitating online licensing of their publications, the recoupment of their investment and the enforcement of their rights' (p. 3). This suggests that the publisher's right will serve as a back-up (or frontrunner) to the licensing of the copyrighted materials that (e.g.) a newspaper or magazine contains. Why would this be so? Because in the vast majority of cases, the content of press publications is subject to copyright (and arguably database rights), and publishers control the copyright in the content their employees create or that freelancers supply, see sections 4.1 and 4.4 below.

However, neither the Impact Assessment nor the Commission Communication explains in what way the introduction of an additional layer of rights would facilitate the clearing of rights for online uses and reduce transaction costs for all stakeholders concerned.

The claims that are made about the causal relationship between the introduction of a publisher's intellectual property right, increasing revenues and a sustainable press leading to media diversity, are not substantiated with data. What the data in the Impact Assessment *do* show is that indeed

2.3

DECLINE IN LEGACY (NEWS) PUBLISHING INDUSTRY

It is conventional wisdom that the traditional news press is in 'crisis', suffering from a continuous decline in print circulation numbers and advertising revenues for display and classified advertising.



the print newspaper industry is in decline, and that consumers increasingly read online. Drawing on statistics and research in media and journalism studies, we next delve a bit deeper into the 'newspaper crisis'. After all, a major point in the EC's problem analysis is that the future sustainability of the press is in peril. The proposals are supposed to (help) address that problem.

It is conventional wisdom that the traditional news press is in 'crisis', suffering from a continuous decline in print circulation numbers and advertising revenues for display and classified advertising. Of note, many of the figures that circulate about the crisis in the press concern developments in the UK and US. The crisis in the US is deeper for several reasons: lower readerships for print newspapers combined with much higher reliance on advertising income compared to subscription income (and newsstand sales), as well as structure of ownership, i.e. more stock market listed or private equity owned media companies with concomitant higher pressures to maximize profit for shareholders. It is important to note not just that the situation in the EU as a whole is better than in the US, but also that the decrease in print readership and (print) display advertising revenue also differs substantially across EU member states.

Still, there is no doubt that print circulation and advertising income for legacy news publishers and magazines is declining in the EU too. The figures that publishers have supplied to the EC relating to a number of countries testify to this (EC Impact Assessment, Annex 13). They also show that the decline differs sharply per country. For example, according to the publishers the decline in print circulation in Belgium was 8% over the 5 year period from 2010-2014 (so on average 1.6% per annum), whereas in Italy it was a brutal 52% in the same period (or 10.4% per annum), with Spain faring little better at 38% (or 7.6% per annum). The print sector in the latter two countries also experienced the worst decline in overall revenues, according to the same source. To what extent this overall loss is caused by offline newspapers remains unclear, as the figures take overall revenue of digital and print for papers and magazines. Furthermore, the economic downturn resulting from the financial crisis of 2008/9 possibly explains at least part of the different outcomes (as well as the overall decrease, since declines in advertising expenditure do not just result from, but even predict economic downturns, see Picard 2001).

A complex set of interrelated factors drives the economic health of 'traditional' or 'legacy' news publishers, and these play out differently across borders.



A complex set of interrelated factors drives the economic health of 'traditional' or 'legacy' news publishers, and these play out differently across borders. The set includes access levels to (mobile) internet, legacy systems (e.g., outdated production and print distribution systems), the speed with which business models are transitioned to digital, ability to adapt the workforce to changes in newsroom production processes, high cost of maintaining print while transitioning to digital, shareholder pressure leading to focus on profit margins, existence or absence of a loyal subscription base, consumer willingness to pay ("WTP") for various types of content, the use of paywalls or metered content as opposed to offering news online for free, falling costs of advertising due to structural changes in advertising markets, competition from other players (including broadcasters, social media, 'citizen journalists' and aggregators), and changes in reader preferences (Brandstetter & Schmalhofer 2014; Cornia et al. 2016; Corrigan 2012; Danbury 2016; Goyanes 2014; Levy & Kleis Nielsen 2010; Lewis 2015; Leurdijk et al 2012; Mitchelstein & Boczkowski 2009; Picard and Wildman 2015; Siles and Boczkowski 2012). A recent addition to this already broad set is the use of ad-blockers, which has risen sharply among some audiences. In response, content providers have started to block ad-blocker users from accessing their content (Cornia et al. 2016).

Many of these factors may be categorized as demand-side related (notably preferences and behaviours of advertisers and readers) or supply-side related (offerings of legacy news publishers, competition from alternative sources of news). Technological innovation is a driver for change on both the supply and demand sides, e.g., the penetration of high-speed mobile access and mobile devices affects how consumers behave and how publishers adapt their business models. Across the EU, the past few years have seen dramatic increases in mobile internet access for households. Overall internet access differs substantially among member states though: it is highest in Denmark and the Netherlands (>95%), whereas in contrast Bulgaria and Italy have much lower internet access rates, at 40-50%. In addition, internet access is lower among the elderly (Eurobarometer 538 (T34-35)). Print news demographics show that the elderly are overrepresented in readership numbers.

Communications and management research into the future of publishing media is done on all aspects listed above. Nevertheless, with respect to the complex dynamics that explain changes in the news industry, media scholars also note that 'understanding of the conditions has been difficult because media and scholarly portrayals of the causes and solutions have been so poor' (Picard 2014). Of note, the role of intellectual property regulation is not a topic on the research agenda of media scholars (Tworek and Buschow 2016), a sign perhaps that intellectual property is an unlikely driver of change.

Overall, three overarching causes stand out in terms of explanatory power.

1. Many news publishers continue to rely on print circulation (readership) and the advertising revenue it brings. Across the board, 80-90% of the income for legacy news publishers still comes from print (Cornia et al 2016, Brandstetter & Schmalhofer 2014). European newspapers on average depend on advertising for 50% of revenue (Leurdijk 2012). The growth in online advertising income (notably display ads, e.g., on website) is considerable but so far dwarfs the amount of losses in print advertising revenue due to continuous decline in print circulation numbers. This is connected to factor two.

2. The advertising market has changed structurally in the digital environment, with respect to demand and supply chains and pricing-mechanisms (Sinclair 2016). This has driven down demand and the price of display and classified advertising for print media. It also means that online news media do not have competitive positions in online markets equivalent to their old (strong) position in off-line markets, as advertisers prefer online market places, search engines, social media and other channels. Across the board, the growth in digital advertising remains strong. In Europe, digital advertising has overtaken TV advertising in terms of spending in 2015 (IAB Europe 2016). In the Netherlands for example, digital advertising grew 10-fold in the past decade, with over 80% of spending going to search and display advertising (on websites, etc.). Within display advertising, mobile and video are growing strong (IAB NL 2016). Here too the situation is diverse across various member states. In France for example, online advertising shows strong growth but remains modest in size compared to TV and press (IAB France 2011). The press and broadcast media used to be the primary gatekeepers to mass audiences, but for the press this is no longer the case.

3. Reader preferences change, away from print towards digital outlets, and away from traditional forms of packaging news (i.e. the once a day print newspaper) to a diversity of forms. Here too, national and regional markets differ. In the EU, German and Dutch adult readers still stand out as loyal users of newspapers, about half the adult population reads newspapers daily, whether online or in print. In the UK and France, this is much lower at about 1 in 4 adults (Eurobarometer 84, 2015); although in the UK, nearly half the adult population reads online branded news at least weekly (Ofcom 2016). Of those consumers that say they read news online, in Denmark and the UK over 50% go directly to a news brand (e.g., newspaper website or app), whereas in France, Germany and Italy that figure is much lower and varies from 20-27% (Ofcom 2015). What explains these differences is not addressed in these studies, but it makes sense that the online

availability of branded news might be one factor, as well as the presence of aggregated content.

A generational divide is clearly present. For example, Dutch national media consumption surveys show that the activity of reading (books, papers, magazines, newsfeeds and other text based content) is largely paper based for older adults (50+), whereas other groups read overwhelmingly on mobile, around 8 in 10 persons in the age groups under 34 (Media:tijd 2015). Not only does the younger generation read mostly online, they spend very little time on (online and offline) newspapers and magazines: the daily average for reading newspapers and magazines for those between 13-34 is 3 and 2 minutes respectively. This in sharp contrast to 65+ who spend on average 42 minutes on papers and 11 on magazines (Mediatijd:2015).

For the EU as a whole, of the four main outlets through which people say they predominantly access news online, websites or apps of newspapers or magazines are by far the most important source, about twice that of social media and search engines each, and nearly three times more often the predominant source compared to news aggregation services (Eurobarometer 437, 2016). Of those accessing news outside of the source publisher's website or app, about half say they click through. The Impact Assessment (p.157) claims this erodes advertising revenue for newspaper websites, but that reasoning presupposes that had it not been for these services, all the users would have gone to the newspaper's website. However, it is likely that many of the users who do not click through might be satisfied with reading just headlines or snippets and would not have looked up the newspaper website of their own accord.

The top four reasons people give for choosing a particular service is that it is free, requires no registration, that reading is not interrupted by advertising and that the paper or magazine enjoys a good reputation (Eurobarometer 437 2016). Across countries, there is large variation, e.g. predominant use of news aggregation services range from a low 5% to a high of 25% of those reading news online. In six member states nearly half of readers who access news online do so in some form of paid news (i.e., more than half exclusively access free news), whereas in seven states only 3 in 10 ever access paid news (Eurobarometer 437 2016).

According to Eurobarometer 538, of those households that have (mobile) internet at home, households accessing paid news services range between a low 2% in some member states to a high 20% in others; the EU average is 7%. Unfortunately, no comparison is given with (historic) paid consumption of print news. The use of paid news services also depends on the competition of freely available news of course. Research in the German market shows for example that only 74 of 662 newspapers charge for

online access (Brandstetter & Schmalhofer 2014). There are estimates that in countries such as Slovenia, Finland, Poland and the UK, roughly 10% per cent of media companies' publishing/circulation revenues come from sites protected by paywalls (Myllylahti 2014).

Of relevance from a single market perspective is also the consumption of international news. The main sources for international and national news are TV and internet sources (excluding e-newspapers and newspaper websites). In the UK, France and Germany, TV is the most important source for approximately 40% of adult population, whilst in Spain, Italy and the UK over 30% consider internet the primary source. Fewer than 1 in 10 users in the above member states view newspapers and magazines (including e-paper) as their main source of international news (Ofcom 2015). Of note, this may be connected to the fact that newspaper publishing has traditionally been directed predominantly at national or even regional or local readers, rather than at international markets (Leurdijk et al. 2012).

In sum, there are many established and potential causes for the decline in traditional news media consumption and advertising spending. The situation also varies across member states, which begs the question whether a uniform EU approach makes sense, i.e., will have the desired effect in all local markets and so contribute to the functioning of the internal market as a whole.

2.4

CONCLUSIONS

The EC adopts two arguments from those legacy media companies that actively seek the introduction of a publisher's right. The merits of the necessary-for-a-sustainable-press argument and the necessary-to-facilitate-licensing argument will be discussed in more detail in section 3 and 4 below; suffice it to say here that they appeal to market failure. Only when it can be established that there is substitution and free riding, is there the beginning of an arguable case for the introduction of an exclusive right on the grounds of market failure (cf. MPI 2016). A substitution effect exists when the consumption of information services by new providers replaces consumption of legacy news and magazine publications in print or online. Free riding means that the new services rely directly on legacy content to attract readers/viewers (and in their wake advertisers or other income sources), without themselves making a meaningful contribution to the media ecosystem. For both criteria, the difficult question is of course whether these effects exist, and what threshold the effects must exceed to justify regulatory intervention. As it is, the mere existence of substitution effects and free riding are highly contested issues. According to a Deloitte study (commissioned by Google), in Spain, Germany, the UK and France,

newspaper sites get two-thirds of their traffic through search, news aggregators, social media and other third parties, which creates about 4% of the publishers' total revenue on and offline (Deloitte 2016). A study done for the Spanish Association of Periodicals Publishers concludes that these new services are complementary: as they expand markets (NERA 2015). The EC recognizes that new models arise (like Blendle, discussed below) and that platforms now offer publishers better options to reach online audiences, but maintains that this does not address the problem of use of content by service providers (EC IA 2016). Danbury (2016) warns against a uniform solution that fails to recognize that different types of publishers may have different interests.

Even if the existence of market failure was sufficiently clear, and existing copyright not a good enough instrument to address it, the larger question is whether the introduction of an exclusive right in the content of periodicals as we traditionally have known them makes sense in light of changing readership habits. Shirky (2009) aptly describes the dilemma:

'The problem newspapers face isn't that they didn't see the internet coming. They not only saw it miles off, they figured out early on that they needed a plan to deal with it, and during the early 90s they came up with not just one plan but several... And the core assumption behind all imagined outcomes (save the unthinkable one) was that the organizational form of the newspaper, as a general-purpose vehicle for publishing a variety of news and opinion, was basically sound, and only needed a digital facelift. As a result, the conversation has degenerated into the enthusiastic grasping at straws, pursued by skeptical responses.'

Likewise, the core assumption of the EC proposal is that periodicals are and must be the sound form of publishing news and other editorial content. Otherwise, why create a dedicated new intellectual property right to preserve them? Although our focus so far has been on news and magazines, we would also do well to remember that PIP would potentially cover all other domains where periodical publications are a form of communication, e.g., professional, business, educational, and government publications. Only academic and scientific publishing would seem to be excluded (see section 5). The EC has not advanced any arguments why all of these domains experience market failure justifying regulatory intervention.

FREEDOM OF EXPRESSION IMPLICATIONS

3.1

A PUBLISHER'S RIGHT IN THE FUNDAMENTAL RIGHTS FRAMEWORK

It is long established that respect for fundamental rights forms an integral part of the general principles of EU law. The current Treaty on European Union (TEU) explicitly mentions respect for human rights as one of the basic values of the EU (art. 6(2) TEU) and recognizes the European Charter of Fundamental Rights ('CFR') as a source of primary EU law (art. 6(2) TEU). The EC, Parliament and Council must ensure that laws they enact respect fundamental rights on penalty otherwise of the ECJ declaring them invalid, as it did for example in *Digital Rights Ireland*, *Test-Achats* and *Volker*. The European Convention on Human Rights (ECHR) as interpreted by the ECtHR plays a crucial role in any analysis: Charter rights cannot adversely affect ECHR rights, and the meaning and scope of Charter rights should be the same as those laid down by the ECHR (art. 52 CFR). Also, the ECtHR has produced a large body of case-law that is very rich in analysis of the scope of fundamental rights. By contrast, the EU Court of Justice has had much fewer opportunities for in-depth interpretation of (especially) the right to freedom of expression.

With respect to legislating and enforcing rights in information, the relevant rights of the ECHR and Charter are the right to freedom of expression (art. 10 ECHR; art. 11 CFR), the freedom to conduct a business (art. 16 CFR), the freedom of the arts and sciences (art. 13 CFR) and the right to own and use lawfully acquired possessions. In shorthand, the latter is the fundamental 'right to property', including intellectual property (art. 1 First Protocol ECHR; art. 17 CFR). Since no PIP exists at EU level, we will not go into the property aspect as a right that must be balanced against other fundamental rights. Of note, the fundamental right to property does not extend to future claims (Griffiths & McDonagh 2013). Also, member states have a very wide margin of appreciation in implementing economic and social policies that interfere with rights to property (Carss-Frisk 2003, Van Rijn 2006). This in contrast to interferences with freedom of speech, which are subject to stricter scrutiny. Especially where the free circulation of political information and other information relevant to public debate is restricted, a standard of strict scrutiny applies (Cumper 2014, Van Rijn 2006).

Our focus here is on limitations to the introduction of an intellectual property right for publishers that flow from freedom of expression.



Our focus here is on limitations to the introduction of an intellectual property right for publishers that flow from *freedom of expression*. This is because the EC itself frames the need for PIP on the public interest in a sustainable press: increased intellectual property protection will safeguard a free and pluralist press, so the argument runs. A portion of the press, including newspapers but also publishers of interior design magazines and women's DIY, advances this argument in support of PIP too (see <http://www.empower-democracy.eu/>, News Media Europe 2016 and LSR 2016). The EC ignores the flipside of the coin, which is the fact that the creation of exclusive new rights in information for publishers *necessarily* interferes with the freedom of expression of others. In its Recommendation on a New Notion of Media, the Council of Europe ("CoE") stresses that because regulation itself constitutes an interference with freedom of expression, 'regulatory responses [to changes in the media ecosystem; mve] should therefore respond to a pressing social need and, having regard to their tangible impact, they should be proportional to the aim pursued.' (CoE 2011/7). What the CoE refers to here is the standard test under article 10(2) ECHR. It demands that interferences are 'prescribed by law', serve to protect one of a number of enumerated grounds (e.g., protection of the reputation or rights of others) and that they are 'necessary in a democratic society'. With respect to the possibility to limit freedom of expression and other fundamental rights under the Charter, the requirements of the limiting clause in art. 52(1) CFR are worded differently, but broadly similar. In the following, we discuss these requirements in some more detail and apply them to the proposed publisher's right.

3.2

SCOPE OF FREEDOM OF EXPRESSION

A key rationale that underpins freedom of expression is that the free flow of information is indispensable as it helps ensure that the best democratic decisions are taken. The right protects not just the imparting of ideas and information, but *all phases of the communication process*, from the gathering of information (including, under circumstances, a right to access sources (ECtHR *Tasç, Magyar Helsinki Bizottság*), to the communication and reception of it (*Delfi*). Furthermore, it guarantees its protection to 'everyone', regardless of what the aim pursued or the role played by natural or legal persons in the exercise of that freedom may be. Article 10 protects all manners of speech, whether political, commercial or cultural (e.g. ECtHR *Ashby Donald*).

Whose freedom stands to be affected?

It follows from the aforementioned broad scope of protection that the creation of a new intellectual property right will affect potentially all actors in the new media ecosystem, including individuals in their capacity as

citizens, consumers and producers. In the cases of *Yildirim v. Turkey*, *Animal Defenders International*, and *Cengiz*, the ECtHR specifically emphasized the importance of the internet as a platform for public debate, and the function of social media in the exercise of that freedom. As freedom of expression applies throughout communication processes, it stands to reason that it also protects all providers of information services that would need permission of press publishers in order to reproduce (parts of) the content of press publications.

The CoE notes in its Recommendation on a New Notion of Media, that in a significantly changing media ecosystem, ‘the functioning and existence of traditional media actors, as well as their economic models and professional standards, are being complemented or replaced by other actors... New actors have assumed functions in the production and distribution process of media services which, until recently, had been performed only (or mostly) by traditional media organisations; these include content aggregators, application designers and users who are also producers of content... The roles of each actor can easily change or evolve fluidly and seamlessly.’ (CoE 2011/7).

From the Impact Assessment and proposal, it is clear that the Commission has legacy media companies in mind as primary beneficiaries of PIP. This begs the question whether the EC is not trying to uphold old *forms* and actors rather than *focussing* on reform that safeguards the *function* of the press in a changing environment. Although obviously traditional publishers will be right owners, the wording of the proposed right is so broad that many of the new actors themselves could claim ownership as ‘publishers of press publications’. On the receiving end, where a (legal) person makes use of publications, authorization from publishers is required. Incidentally, the implication is that publishers themselves also need permission to (e.g.) include short references to news items published elsewhere. After all, the reproduction of any part (however small) by anyone for any digital use would be prohibited under the new law, except where limitations apply (e.g. on quotation).

Interference prescribed by law, serving a legitimate interest

Of the three criteria that must be met for an interference to be lawful, the legitimate interest test is the easiest hurdle to clear. One of the grounds on which limitations to the freedom of expression can be based is ‘the protection of the rights of others’, which is very broad and covers all manners of public interests not otherwise enumerated in article 10(2) ECHR (Hugenholtz (2001).

Another requirement of art. 10(2) ECHR is that all interferences are

‘prescribed by law’ (cf. art. 52(1) CFR). This requirement speaks to the rule of law principle, and more specifically requires that the exercise of state power is at all times (i) accessible and (ii) foreseeable. Accessibility would not be an issue with PIP, as it would be laid down by statute. The foreseeability requirement demands that the law is formulated with sufficient precision to enable citizens to regulate their conduct, i.e., be able to foresee the consequences of a given action, if need be with appropriate advice (*Handyside*). The more difficult key concepts used in the proposed publisher’s right provision are to pin down, the more problematic it will be from the foreseeability perspective. In section 4.3, we discuss the elaborate definitions of “press publication” and “publisher” (as given in article 2(4) CSDM proposal) in more detail. Several of their many elements raise questions of interpretation. The legal uncertainty this creates is problematic. The proposed provision speaks of ‘publishers of press publications’ and explains in recital 33 that the scope must be limited to ‘only journalistic publications, published by a service provider, periodically or regularly updated in any media, for the purpose of informing or entertaining’. However, the demarcation of what is journalism and what constitutes editorial control (an element named in the definition) is particularly difficult to pin down in an age of a rapidly evolving media landscape, as the CoE has noted.

Pressing social need

The most serious hurdle is that all restrictions to the freedom of expression should be ‘necessary in a democratic society’. For that to be the case, the interference must answer to ‘a pressing social need’. Once that is convincingly established, authorities must ‘apply necessary and sufficient means to that end’ (*Handyside*); in short, the regulatory intervention must be proportionate. While assessing the necessity of an interference, the ECtHR will seek to strike a ‘fair balance’ between the conflicting interests, taking into account various factors, such as the nature of the speech concerned, the public interest served with an interference and the proportionality of the interference (Harris 2014; Leerssen 2015).

The most serious hurdle is that all restrictions to the freedom of expression should be ‘necessary in a democratic society’. For that to be the case, the interference must answer to ‘a pressing social need’.



Concerning the nature of the speech, the ECtHR has consistently held that a high level of protection against interference should at all times be guaranteed where it concerns speech relating to public debate (*Jersild, Bladet Tromsø and Stensaas, Verein gegen Tierfabriken, Pirate Bay*). The media content covered by press publications will typically amount to such speech. Consequently, the ECtHR would apply a strict scrutiny standard. The crucial question here is whether the new PIP actually would meaningfully promote the sustainability of the (press) publishing industry and media pluralism, and if so, at what cost. The Impact Assessment that accompanies the proposal does not contain even the beginning of an answer.

Experience from Germany and Spain shows no positive effect for (large) publishers, and detrimental effects for smaller players (MPI 2016, Xalabarder 2014, but cf. VGL 2016). Furthermore, from the description of the problems (and causes) of the news industry crisis above, it seems highly questionable that ‘scaling up’ a broader right to EU level helps a sustainable press. This is all the more so since—as set out in section 4 below—publishers already control copyright in the published content, and PIP would to a large degree constitute an additional layer of rights on top of that.

What the EC means by pluralism in its proposal is unclear. It can be understood as multiplicity of providers (market pluralism), and in this sense has long been the object of regulation against concentration of media ownership, within or across different sectors (Dommering 2008). In the press sector for example, concentration is very high in the Netherlands and Flemish Belgium, where two firms control about 80% of the newspaper market (Mediamonitor 2015). Interestingly, one of the most ardent supporters of PIP is Bertelsmann, Europe’s largest media company. It owns the largest magazine publisher in Europe (Gruner + Jahr), a majority of shares in the world’s largest book publisher (Penguin Random House), 75,1% of the largest European broadcasting group (RTL Group, also active in content production & rights trading), music publisher Bertelsmann Music Group (BMG) and other interests, e.g., the largest printing group in Europe (Mediamonitor Bertelsman in 2014; Bertelsman).

The Media Pluralism Monitor (‘MPM’) is a tool funded by the EU, designed to identify risks to media pluralism in member states. Two important assessments concern the risk associated with concentration and cross ownership. The MPM classifies 9 of the 19 member states researched as medium risk, including Germany and the Netherlands; and Spain, Luxembourg, Poland and Finland as high risk (MPM 2015). The EC does not explain how the introduction of an intellectual property right that can be more easily enforced by large media corporations *reduces* risks associated with a lack of market pluralism (cf. Danbury 2016, who warns of the inherent risk that a PIP skews the market in favour of larger players). More likely, content-producing SMEs will not have the bargaining position necessary to extract additional revenue from (e.g.) search services, and therefore would suffer from PIP. Once an intellectual property right for publishers is in place and produces negative effects on media pluralism, it will be difficult to roll back - not only for political reasons, but also for legal reasons: once introduced, the new intellectual property right would be protected under the ECHR and CFR as part of the fundamental right to property. Obviously, abolishing it would be the gravest interference imaginable.

Other dimensions of media pluralism are *diversity* of content (cultural pluralism, political independence of media is an important indicator here)

and diversity of access (political pluralism or social inclusiveness). On social inclusiveness and political independence, the MPM shows no high-risk countries, and 7-9 medium risk countries out of 19 member states researched (MPM 2015). For these types of pluralism, one may wonder whether expanding intellectual property law can have any positive impact.

The next question is whether the proposed measure is proportionate.



Even if for the sake of argument we accept that the proposed measure would produce a positive impact on legacy media companies and indirectly on media pluralism, the next question is whether the proposed measure is *proportionate*. This requirement prohibits overly broad interferences that go further than necessary to pursue their aim (Harris et al. 2014). The proportionality test must be distinguished from the principles of proportionality and subsidiarity that govern the exercise of the EU's legislative powers (Craig & De Burca 2015); we discuss this in section 4 below.

With respect to proportionality, one should ask: are less drastic measures thinkable that would promote a sustainable press? This is the classic domain of public media policy, with its mix of tax deductions, subsidies, public service press, etc. The EC is silent on any alternatives other than the zero-option of no regulatory intervention but facilitating stakeholders to solve the issue themselves (option one in the Impact Assessment). Even where it *would* be proportionate to introduce a new IP-right in order to guarantee the sustainability of an industry, it is unclear why it would have to extend to all and any periodicals that have 'the purpose of providing information related to news or other topics' (art. 12 CSDM proposal). That is a very broad definition (see also section 4.3 below). Are all those sectors and forms (e.g.: general audience magazines (on gardening, cooking, media, history, gossip, fashion, etc.), professional journals, periodicals aimed at the educational sector, publications emanating from the public sector, and blogs.) affected to the same extent as newspapers are? Is introduction of an IP right that extends to all those sectors and forms proportionate, because they carry equal weight to media pluralism? Is market failure likely in all of those domains of publishing? Of note, although Recital 33 specifies that academic and scientific publications should not be covered by PIP, the text of the provision itself contains no such exclusion. Science publishers posit they too should benefit from PIP, to the outrage of universities (LERU 2016). In academic publishing however, the market dominance of a few large highly profitable conglomerates such as RELX Group (formerly Reed Elsevier), Springer, Wolters Kluwer, Wiley-Blackwell and Taylor & Francis is generally perceived as very problematic. Half the academic papers in the social sciences domain are published by the top five companies (Larivière, Haustein & Mongeon 2015). In section 5, the impact on access to scientific knowledge is discussed in more detail.

The EC must take seriously its duty to ensure any legislative intervention conforms to the standards of article 10 ECHR and 11 CFR.



As well as the scope of publications which PIP would cover, another proportionality issue concerns the duration of the right. Why 20 years instead of (say) one year, or even a week? The CSDM proposal is silent on the matter. The ECtHR has held many times that news is a perishable commodity and that to delay its publication, even for a short period of time, may well deprive it of all its value and interest (e.g., *Ürper a.o. v. Turkey*, *RTBF v. Belgium*). Certainly in a 24/7 news cycle environment journalistic content is perishable (although some like reports from news agencies more than others) and arguably has a negligible ‘long tail’, so producers must make revenue in a short time span. Publishers consequently have little economic interest in IP rights that survive the ‘sell by date’, even taking into account that media conglomerates recycle (or syndicate) content across outlets. The proposed 20-year term of protection, especially because it would also apply retroactively, seems grossly disproportionate. The only argument which the EC advances for this term is that it is close to what other right holders (broadcasters, phonogram producers, and database producers) have (EC IA 2016, p. 167).

The perishable nature of news also means that delays in access are problematic for users. A rights-based system whereby users must seek permission *ex ante*, with the associated time this costs, is a larger interference than a system based on remuneration claims *ex post*. Within the field of copyright, there is ample experience of remuneration-based systems, which exist in many member states, for example to deal with private copying and educational uses of materials.

3.3

CONCLUSIONS

The ECtHR upholds a strict standard of scrutiny in the case of news and other public interest information.



In light of the complexities sketched above, the EC’s expectation that the new right would have a positive impact on freedom of expression is, to say the least, surprising. The EC must take seriously its duty to ensure any legislative intervention conforms to the standards of article 10 ECHR and 11 CFR. Therefore, any proposal would do well to recognize the fact that to create exclusive rights in information for publishers is *necessarily* to interfere with the freedom of expression of others. To ensure that regulatory intervention complies with article 10, it should contain a clear assessment of the pressing social need which a PIP would serve, of its proportionality and of alternative solutions (other than merely the option of encouraging stakeholder dialogue, cf. the Impact Assessment). This is especially important, because the ECtHR upholds a strict standard of scrutiny in the case of news and other public interest information.

4

PIP IN THE COPYRIGHT AND DATABASE RIGHT LANDSCAPE

4.1

CURRENT COPYRIGHT

This section analyses how a publisher's intellectual property right would relate to the existing EU framework for copyright and database rights. These are the object of our attention, as the potential overlap in terms of subject-matter is largest there. We will see that current law already extensively protects the content of periodical publications. Where copyright and database law pose limits on protection, this is done for justifiable other interests, many related to freedom of expression and the public interest in free markets. The proposed new PIP has clear potential to undermine the freedoms that are consciously built into copyright law, both with respect to exclusions of protected subject-matter and the scope of rights.

Nearly 25 years of EU harmonization efforts have resulted in a system of 28 national copyright laws that are uniform to a large degree. This is particularly true for the scope of economic rights and their duration. Harmonization of limitations and exceptions is more limited, as the dominant model is that member states can choose which ones to have in their national law from a set 'menu' (see article 5 [Information Society Directive](#)). For our purposes, the Information Society Directive is the most pertinent piece of legislation. The following sub-sections set out the key aspects: what copyright protects (original works), who the beneficiaries are (ownership and transfer), and what the scope of the right is (exploitation rights and limitations).

Original works

With respect to copyright subject matter (what is a 'work?'), the requirement of originality is now harmonized in the EU as a result of a stream of ECJ judgments that developed the standard that a work must be 'the author's own intellectual creation'. Some uncertainty remains, but that does not extend to the kind of content that features in press publications, so is not relevant to further discussion here. However, one uncertainty that is relevant concerns the question whether headings and titles of (e.g.) articles or journals qualify as works in their own right. There is some controversy on the issue and there is some discrepancy between judgments of (lower) Courts in member states. As a rule however, headings and titles are not works, either because they are not an independent unit (but part of the larger work, e.g. article) or are too short to show originality in the expression (see Geller/Bently n.d. for details for different jurisdictions).

Typically, items of journalistic content (i.e. the articles, news reports, photography, infographics and other elements that make up a newspaper or magazine) each attract copyright, as they are the author's own intellectual creation. The whole might also be protected as a copyrighted collection:

The definition of what constitutes a ‘database’ is interpreted in a very broad manner by the ECJ (see e.g. *Freistaat Bayern*; Hugenholtz 2016; Derclaye 2008, Beunen 2007). However, copyright protection for databases only extends to the collection as such (the original selection and arrangement), not the contents that may be public domain or protected works. A collection of articles or any other type of content may also attract *sui generis* database protection, which does protect the contents (see below, section 4.2).

The growing practice of ‘computer assisted’ reporting and algorithmic or automated reporting is significant from a copyright perspective. The use of technology in the production of texts or images does not preclude copyright protection, as long as the journalist, photographer, graphical designer or other creator has some room to make creative choices in how the information is expressed. When the production of content becomes fully automated, the resulting texts are not copyrightable. Press agencies already engage in automated reporting (e.g., Danish press agency Ritzau, AP, Press Association). They enlist software companies to provide programmes that can be used to generate short reports on - for example - sports matches, corporate financial statements or employment statistics (Jackson 2016; Automated Insights 2016; Miller 2015). Automated reporting relies on the availability of structured data. The rollout of open data policies means that more such structured data is becoming available, especially from public sector sources (see section 5 below), e.g. all manner of official statistics, annual reports filed with tax authorities or company registers. Of course, automated reporting can also be based on commercially available data. In the long term, as automated reporting becomes more sophisticated and widespread, the amount of content in press publications that constitutes original works (in copyright terms) is likely correspondingly to decrease. There will be more ‘mere items of press information’, to use the wording of the Berne Convention on the Protection of Literary and Artistic Works (Berne Convention). Such information is considered to be public domain material, free to use.

Copyright ownership

It is safe to assume that currently, most items that make up the content of a press publication constitute a copyright work. The default rule in most countries is that the author (the actual creator) is the initial owner of copyright, but the rules vary when it comes to allocating ownership in works created by several authors, by employees or on commission. There are various ways in which control over copyright rests with publishers. In practice, publishers either own these copyrights directly in member states where the law allocates them initial ownership (e.g., as employers in

The Netherlands, or authors of collective works as in France), or indirectly by way of transfer of rights or by securing (exclusive) licences from the creators/right owners. As will be set out in section 4.4, publishers thus typically control broad exploitation rights from employed staff and freelancers alike, and where this is not the case it is a direct result of copyright policy (which may limit transfers in the interest of creators) or rights management. So, with few exceptions, publishers already control the intellectual property in the content. Obviously, in their relations with third parties it would be easier for them to rely on the proposed publisher's right rather than to have to show proper title to individual content components. However, those third parties would still have to obtain permission for copyright restricted uses from the author (or his successors in title or licensees) - for which the publisher would not have the necessary licensing powers. Either that, or they would have to secure indemnification from the publishers for infringement claims brought by others, or run the risk of injunctions and/or compensation claims by copyright owners.

Exploitation rights

In practice, the usefulness of a 'naked' link (mere URL) on the web, or in other applications such as FTP, is very limited as it offers the reader no information on the resource to which the link directs.



Authors have the exclusive right to authorize reproductions of their work, either completely or in part, directly and indirectly (Art. 9 Information Society Directive). A separate right of distribution gives control over the dissemination of physical copies of works, subject to a rule of 'exhaustion of rights' that seeks to ensure the free flow of goods in the internal market (Art. 4). The Information Society Directive also provides for a broad exclusive right to communicate a work to the public, and this includes the right to make the work available online (Art. 3). As PIP would only regulate digital uses, the proposal is to give publishers the reproduction right and the 'making available' right. The ECJ has elaborated criteria for the application of the communication/making available right, some of which are controversial (ALAI 2014).

With respect to hyperlinking, legal uncertainty still exists. In principle, the act of hyperlinking (posting a URL) does not constitute communication to the public (making available) (*Svensson, Bestwater*). However, hyperlinking to works that have been made available without the right owners' permission may constitute a communication to the public, depending on who is linking (commercial or private person) and what knowledge they have (or should have) of the unauthorised status of the targeted resource (*GS Media*).

In practice, the usefulness of a 'naked' link (mere URL) on the web, or in other applications such as FTP, is very limited as it offers the reader no information on the resource to which the link directs. Hence, it is

customary to use link descriptors, snippets or thumbnails to assist the user in determining whether the resource linked to is worth consulting. For example, without some additional information a user will not know that refers to a [press statement](#) by the EC on its news website about the signature of the CETA, the EU-Canadian trade agreement. The question whether the use of descriptors, snippets and thumbnails requires permission from the copyright owner primarily depends on whether it counts as a reproduction of the work. This in turn depends on whether originality is copied. Limitations and exceptions apply to some forms of reproduction and communication, so that these do not require permission.

Limitations: news and the right to quote under international law

At the international level, the EU and its individual member states are bound by the norms of the Berne Convention (“BC”), the WIPO Copyright Treaty and the TRIPS agreement. It is beyond the scope of this study to include multilateral trade-agreements that are being negotiated, such as CETA and TTIP. For our purposes, the BC is the most relevant, because it contains two provisions that are pertinent to the issue of whether a publisher’s right would conform to international copyright law, and whether PIP could actually be effective. Those provisions concern the public domain status of news of the day, and the free use of works for the purposes of quotation.

The BC protects literary and artistic works and collections of works, on condition that these are original (Ricketson & Ginsburg 2005). Briefly, BC countries must grant authors and works originating from other BC countries national treatment for all subject matter covered. This protection may not fall below the minimum standards laid down in the convention. News of the day and ‘mere press items’ are excluded from protection: article 2(8) BC specifies that ‘The protection of this Convention shall not apply to news of the day nor to miscellaneous facts having the character of mere items of press information.’ Two readings are possible (Ricketson & Ginsburg 2005). The first is that the article merely states the obvious, i.e., that factual statements that lack originality are not works (cf. Dreier 2006). The second is that article 2(8) exempts texts (and images or sounds) that communicate news of the day from copyright altogether, regardless of whether they have original character. The second reading is obviously broader; the first has little added value. In both readings, it is obvious that the contracting states were concerned about the effects copyright might have on the free flow of news. This broader concern for public debate is also evident from (e.g) the optional exception on free use of political and other speeches (art. 2bis BC) and the exception for quotations (Art. 10 BC).

Article 10 BC obliges contracting states to exempt from the copyright owner's control acts of quotation from works that have been lawfully made available to the public, including quotations from newspaper articles and periodicals in the form of press summaries. The quotations must be compatible with fair practice, and not exceed that justified by the purpose. The BC does not limit quotations to certain purposes, like criticism or review. It does define what a 'quotation' is. The mandatory character was introduced in the 1967 revision. In contravention to what the BC prescribes, the corresponding EU provision lacks mandatory character (Xalabarder 2014, Rosati 2016).

EU Quotation exception

In EU law, a quotation exception is laid down in Art. 5(3)(d) of the Information Society Directive. Quotations for purposes such as criticism or review are free uses, on condition that they concern lawfully published works, that the source (including the author) is indicated unless this is impossible, that the use is in accordance with fair practice and does not exceed what is required by the specific purpose. What is fair and required can play out different depending on the nature of the work, e.g. for images it is more often necessary to depict the work completely, but the quality may well be lower (as is the case with thumbnails). Prior to the introduction of Art. 5(3)(d) Information Society Directive, the scope of the quotation exemption differed across member states (Guibault 2002). The ECJ has ruled that the quotation exception must be interpreted in a manner that enables its effectiveness and safeguards its purpose (*Painer*), but has not had the opportunity to interpret it further. As a result, conflicting interpretations persist. For example, under German law search results produced by (dedicated) search engines do not qualify as quotations, whereas under Dutch case law they do (Hugenholtz & Senftleben 2012; Senftleben 2013). In Spain, changes to the quotation exception were introduced so that search engine operators would have to pay compensation for displaying snippets. These have been heavily criticized as being in breach of EU law and the Berne Convention (Xalabarder 2014).

The uncertainties surrounding the scope of the quotation exception would also exist for the proposed publisher's right.



Implications for use of press content

The uncertainties surrounding the scope of the quotation exception would also exist for the proposed publisher's right, because all the limitations of the Information Society Directive (and the new ones to be introduced in the CSDM Directive) would apply to it. On a broad reading, Art. 5(3)(d) Information Society Directive would cover uses for search and also for aggregation, as long as the latter had no significant substitution effect (arguably, the practice is not fair, to the extent that availability of information for readers to access on aggregation services causes those

readers to avoid accessing the source publication to which they would normally go). Under a broad reading of the quotation exception, and if there is no significant substitution effect, a PIP would be of little use to publishers, since what they seek is primarily a share of the revenues of search providers and content aggregators. A narrow reading however leads to the unacceptable result that publishers could prevent uses that are currently free under copyright. The reason lies in the broad scope of the reproduction right. For copyright, because of the originality requirement, there is a built-in restraint to the uses which copyright owners can control under the reproduction right. If the elements taken do not represent the source work's original character, the use is necessarily free, as there is no act of reproduction of the work (*Infopaq*).

It is conceivable in theory that (e.g.) a snippet of text is a reproduction. In *Infopaq*, the ECJ famously opined that 'the possibility may not be ruled out that certain isolated sentences, or even certain parts of sentences in the text in question, may be suitable for conveying to the reader the originality of a publication such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article' (para 47). In this case, an eleven-word snippet drawn from a newspaper article served as example. The very careful phrasing of the Court shows that snippets normally do not trigger the reproduction right (Van Eechoud 2012).

That would be different under the proposed PIP, as the proposed definition of 'press publication' contains no originality requirement or other criterion to restrain the operation of the reproduction right: it would apply to partial and indirect copying, as well as to complete and direct copying. Copyright law purposefully limits protection to the *form* of expression, and not facts or ideas. The originality requirement serves this purpose. A PIP would have no such restriction. This is even more problematic if the reproduction right of article 2 Information Society Directive must be understood to include the exclusive right to authorize *adaptations*. The ECJ has yet to rule unequivocally whether it does, and legal scholars are divided on the issue (Van Eechoud 2009, 2012). Of note, with respect to original databases, the Database Directive explicitly protects against 'alterations' (adaptation, translation), but this concerns only the selection and arrangement of the content (Art. 5(b) Database Directive). If the Information Society Directive's reproduction right does extend to adaptations, this would mean that not just the *verbatim* copying of a whole or parts of a press publication requires permission, but that permission is also needed for using a press publication as a source for the production of other content, e.g., for the creation of a summary, or to extract facts for use in a new article. The only limit in practice would be that it may be difficult for the source to show that its publication was used.

In summary, with respect to the content of periodical publications, publishers can already rely on copyright to prevent reproduction and communication of it by others. The proposed new right however has the potential to erode free uses that are expressly permitted by existing copyright law, and by doing so to produce a conflict with the EU's and its member states' existing obligations under international copyright law.

4.2

DATABASE RIGHTS

Publishers can invoke *sui generis* database rights with respect to collections they produce. Although the ECJ has not ruled on this point explicitly, it stands to reason that print and e-papers, other periodicals and websites each qualify as 'a collection of independent works, data or other materials' that are 'arranged in a systematic or methodical way and individually accessible' (Art. 1(2) Database Directive). The notion of database is interpreted broadly (Hugenholtz 2016, cf. Beunen 2007 for a review of legal doctrine on this point), as is the requirement for a substantial investment. Thus, the collection of articles and other edited (or commercial) content presented on a website constitutes a database if the collection, verification and/or presentation of the content testify to a substantial investment (art. 7(1) Database Directive). Database rights however are not meant to protect the investment made in the creation of content itself, e.g. the writing of articles, making of photographs or generation of automated news items. This is a deliberate choice by the legislator, as the objective of the database right is to incentivize the creation of databases as such, not of their content (*Fixtures Marketing, Football Dataco/Yahoo!*). In contrast, copyright is meant to incentivize the production of journalistic and other content (works).

The two basic rights under the Database Directive are the right to authorize 'extraction' of all or a substantial part of the contents, and the right to prevent re-utilization of the contents, i.e. the making available to the public of all or a substantial part. Essentially, the extraction right is the equivalent of what in copyright we know as the reproduction right. The ECJ interprets these rights broadly (*BHB; Innoweb; Directmedia; Football Dataco/Yahoo!*). Consulting a database that has been made available to the public is a permitted act (*BHB, Innoweb*).

Innoweb concerned a meta search engine 'Gaspedaal', which enabled users to create queries addressed at multiple search engines of databases simultaneously in real time. Autotracker.nl (a car advertisement listings website, with a search form) was one such database covered, and its publisher Wegener brought an action against Innoweb for infringement of database rights. Gaspedaal returns to a webpage to the user, with essential data on car advertisements found. The ECJ held that Gaspedaal in effect serves as a substitute for access to the Autotracker.nl website/database, as

users no longer have to visit the latter. The database producer then runs the risk of losing advertising revenue, not just because of fewer visits, but because fewer people might want to place a car advertisement on its website (as it is no longer necessary to place advertisements on several sites to increase exposure because of the metasearch). This advertising revenue ‘should have enabled him to redeem the cost of the investment in setting up and operating the database’ (para 41 Innoweb). The metasearch engine provider ‘comes close to the manufacture of a parasitical competing product’ (para 48). In these circumstances, the metasearch engine *provider* commits the restricted acts of making available and re-using a substantial part of the contents. Note that this case concerned a meta search engine, and not indexing or crawling search engines, which operate differently.

The *sui generis* database right thus protects against the offering of services that are a (near) substitute. To what extent publishers can invoke it successfully against other types of search providers and news aggregator services is not clear. However, bearing in mind that the database right also protects against the repeated and systematic extraction of insubstantial parts when that undermines normal exploitation, this possibility cannot be excluded. The permitted use of insubstantial parts is covered by the limitations to the *sui generis* right, discussed below.

Limitations to database right

On the basis of its *sui generis* database right, the producer cannot resist all uses of the database. The limitations are fewer than those for copyright works (and the proposed PIP), as there are only three optional ones: for private copying of analogue (print) databases, non-commercial illustrative use for teaching and research, and use for administrative or legal procedures and for public security purposes. There is one mandatory limitation, which in a sense is the mirror image of the exclusive right to control systematic and repeated extraction and re-use of insubstantial parts (art. 7(5) Database Directive). The right owner of a database that has been lawfully made available to the public cannot prevent a lawful user from extracting or re-using insubstantial parts of the contents. This applies only when such use neither conflicts with the normal exploitation, nor unreasonably prejudices the legitimate interests of the database producer (art. 9 Database Directive). The extraction and reuse of snippets in principle falls under this exception, but under what circumstances a conflict with normal exploitation or an unreasonable prejudice will be found to exist is still unclear.

To sum up, where publishers can show they have made a substantial investment in the collection and presentation of (journalistic or other)

content, their publications will often qualify as *sui generis* databases. By contrast, the publisher's right as proposed would not set any standard of (minimum) investment. It provides for a blanket protection of all content of press publications, by enabling the press publisher to control all types of reproduction and the making available thereof (even of the smallest bits). The EU legislator considered this protection to be excessive in the case of databases, hence the exception for the use of insubstantial parts of a database under the *sui generis* regime.

4.3

SUBJECT-MATTER AND BENEFICIARIES OF THE PUBLISHER'S RIGHT

Above we have already indicated in what ways the proposed publisher's right would overlap and be broader than current copyright and database rights in terms of the scope of protection. In this section, the focus is on what a 'press publication' is, and who qualifies as its 'service provider' (publisher) and thus initial owner of PIP. The definition of a press publication in the proposal is elaborate. Its complexity raises numerous problems of interpretation, which we highlight here.

The elaborate definition of article 2 (4) itself contains at least nine elements that require further interpretation: 'press publication' means a fixation¹ of a collection² of literary works of a journalistic nature³, which may also comprise other works or subject-matter and constitutes an individual item within a periodical or regularly-updated publication⁴ under a single title, such as a newspaper or a general or special interest magazine, having the purpose of providing information related to news or other topics⁵ and published in any media⁶ under the initiative, editorial responsibility and control⁶ of a service provider⁷.

The definition of a press publication in the proposal is elaborate. Its complexity raises numerous problems of interpretation.



1. When is there fixation? It stands to reason that this need not be in print (a physical 'analogue' support). Presumably, fixation plays a role in calculating the term of protection, which is 20 years from (first?) publication. However, in the digital environment, newspapers increasingly are no longer a "once a day" phenomenon, but have moved to offering dynamic content, 24/7. How does one calculate the term of protection when there is no longer one set newspaper, but a continuously updated one, which because of the use of personalization techniques might even be different for different reader groups (or individual readers)?

2. How many items make up a collection, and what is their nature? Is there a threshold or is it enough that the collection exists of two articles or other items? The definition suggests that the contents should contain at least several 'literary works of a journalistic nature', or are we to read it as also allowing collections that are predominantly or almost completely composed of items or subject-matter that are not written works? Would for example, a moderated listing of hotels or restaurants with a couple of reviews (i.e., written works) constitute such a collection?

3. Literary works of a journalistic nature implies a triple standard: the item or article must be copyrightable (original), in written form, and have the quality of ‘journalism’. Why protection should be limited to writings that pass copyright’s originality threshold is not explained in any way. Perhaps the reference to ‘literary’ works tries to capture that PIP would serve predominantly to protect *written* texts, as opposed to creations that are audio-visual or audio. Of note, computer programmes are classed as literary works under EU copyright law (Art. 1(1) Computer Programs Directive). In the digital environment and changing media ecosystem, what defines journalism is increasingly difficult to capture. The 2016 CoE Recommendation on protection of journalists stresses that the internet and ICTs have broadened the range of actors that play a similar or equivalent role to that played by professional journalists and institutionalized media. This is why the ECtHR recognizes that protection of the press as ‘public watchdog’ must extend to social watchdogs, such as bloggers, academics, civil society and whistle-blowers). The CoE refers to the UN Human Rights Committee that also stated ‘journalism is a function shared by a wide range of actors, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self-publication in print, on the Internet or elsewhere’ (CoE 2016/4). In another context, the ECJ gave a very broad interpretation of journalism. When asked to interpret the special provisions in the Data Protection Directive for the processing of personal data in the context of journalistic activities, it held that the medium used (e.g., a newspaper) is not determinant, but that activities are journalistic ‘if their object is the disclosure to the public of information, opinions or ideas, irrespective of the medium which is used to transmit them. They are not limited to media undertakings and may be undertaken for profit-making purposes.’ (para 61 *Satamedia*). Should such a broad interpretation also be given to the notion of literary works of a *journalistic nature*, then practically anyone could invoke PIP.

4. The criterion that a publication *must be periodical or regularly-updated and have a single title* ostensibly is meant to exclude books and other ‘one off’ publication forms. As the proposed definition stands, it would cover many traditional and new forms of information such as newsletters, blogs, websites or pages that carry a name, Wikipedia and similar informational works, and possibly even parliamentary records (most official documents are not exempt from copyright in member states) and other serial government publications.

5. The publication must have the purpose of ‘providing information related to news or other topics’. Again, this is a broad concept. News already has little discriminatory value; the Oxford English Dictionary defines it as ‘newly received or noteworthy information, especially about recent events’. The addition of ‘other topics’ extends it to virtually every domain of commercial, government and citizen publishing. Does the proposed

limitation to information exclude entertainment, contrary to what recital 33 suggests?

6. The specification that the publication may be in *any media* seems to relate to the outlet/channel of communication (TV, radio, apps, print, web, etc.). If it merely served to capture the technological ‘support’ (analogue or digital), there would seem to be overlap with the ‘fixation’ requirement.

7-8. The next elements probably set apart actors that merely provide a platform (e.g., Wordpress for blogs, YouTube for user generated content) from traditional forms of publishing, by requiring that publication must take place on the *initiative* and under *editorial responsibility and control* of a *service provider*. That a clear distinction can no longer be made between services that merely communicate content and those that (also) exercise editorial control has long been evident (Dommering 2008). The issue of editorial control is particularly vexing in an age where algorithms are used to select and target news or other information to individuals (Helberger & Trilling), but also to compose publications and remove content. Is the criterion met when a minimum level of editorial control exists? Does it matter whether that control is automated to any large degree? With respect to the *service provider*, presumably the PIP befalls to this actor. Can it be a legal person as well as a natural person? Must the publication of periodicals be the core service provided by that person, or is (e.g.) a company which regularly sends out newsletters to its customers about its own business also a service provider?

From the above questions, it is clear that although the notion of a ‘press publication’ might seem relatively simple at first, the attempt to capture it in a definition raises tricky questions about what exactly would fall within its scope. Clearly, newspapers and magazines as a well-known form of publishing are covered, that is after all the whole idea of the exercise. However, in an environment that allows the function of media to be fulfilled in different new forms, where the concept of newspaper and periodical changes, the proposal creates uncertainty about just who will be able to invoke this new right.

4.4

THE POSITION OF JOURNALISTS AND OTHER AUTHORS

Article 11(2) of the CDSM proposal regulates the relationship between authors as copyright owners (and other right holders such as database producers, broadcasting organizations and performing artists) and publishers of press publications. It states that the publisher’s right would in no way affect the rights of authors and other right holders. However, the article does not prohibit publishers from concluding agreements with authors that effectively set aside this protection. Recital 33 actually makes

It is common wisdom that the position of journalists has changed considerably over the past decades, as a result of disaggregation in the media industries, and of changes in production processes.



explicit that the protection of article 11(2) will not prejudice any contractual arrangements.

Current copyright laws as a rule grant initial ownership in works to the natural person who actually does the creative work: i.e., the ‘author’ of an article, photograph, infographic or video, etc.. The economic rights to control reproduction and communication to the public are transferrable in most jurisdictions and where they are not (e.g., in Germany and Austria), permissions can be granted through licensing. The publishers of works acquire exploitation rights in a number of ways: direct transfer, licences on the basis of employment contracts, freelance contracts or on the basis of legal presumptions that are particular to certain jurisdictions. Where limitations on transferability or licensing exist, these tend to serve the interests of the original author, protecting her/him against weak bargaining positions. In practice, publishers require journalists to transfer or license exclusive exploitation rights, impose non-competition clauses (Europe Economics & IVIR 2016) and make other necessary arrangements so that the publisher can enforce the copyright against infringing users. For obvious reasons, a service provider seeking permission to re-use copyrighted from a (portfolio) of newspapers or magazines will prefer to deal with the publisher rather than with each individual author.

Creators generally have a weak bargaining or negotiation position when it comes to concluding exploitation agreements.



It is common wisdom that the position of journalists has changed considerably over the past decades, as a result of disaggregation in the media industries, and of changes in production processes (Deuze 2003, Levy & Kleis Nielsen 2010, Miller 2015, Mitchell et al 2016, O’Brien 2016). Numbers of employed journalists in news media have declined fast in Europe, albeit less than in the U.S. where much of the data on changes in the publishing landscape originate. Estimates are that in the US over 40% of full-time employed journalists’ positions were lost in the past decade (ASNE 2016), while the growth of journalists, editors and similar staff at digital (news) publishers has reached a plateau, resulting in a net loss of employment of nearly 30% (Williams 2016). In Europe too, more and more professional journalists and photographers rely on freelance work, and experience declining rates of compensation. For example, in the Netherlands one of the two dominant press publishers (which control nearly half the Dutch market for newspapers) cut the rates for freelancers supplying regional newspapers up to 40% in 2016, sparking a public protest campaign by the Dutch Federation of Journalists. In the Netherlands about half of all professional journalists are freelancers, and for Europe as a whole this proportion is about 30% and growing (NJV, EFJ interview).

Creators generally have a weak bargaining or negotiation position when it comes to concluding exploitation agreements (Weda et al 2011; Kretschmer et al 2011). This can be offset through collective bargaining, but the extent to which this takes place varies significantly across member

For the individual freelance journalist in this new environment, maximum exposure is of paramount importance.



states (EuropeEconomics & IVIR 2016). In exchange for their copyright, freelancers get paid a flat rate per article, or even a rate per certain number of clicks or other traffic-based payments (Murtha 2016). Payment in the form of a share of advertising revenues is not uncommon in certain 'born digital' media, such as commercial blogs. Obviously, for the traditional press this is not a workable model in light of the steep decline in display advertising revenue that is not being offset by new digital advertising income.

The dire position of authors is the reason why the CDSM proposal introduces some obligations for publishers to be more transparent about exploitation results and the remuneration due to authors (art. 14 CDSM proposal), and a 'best-seller' clause (art. 15 CDSM). The latter is unlikely to benefit creators who work for periodicals; it grants the author a claim to additional 'appropriate' compensation from the publisher to whom the copyright was licensed or transferred, in case the remuneration that was originally agreed turns out to be disproportionately low compared to subsequent revenues generated by exploitation. Of note, in case any publisher secures additional revenues from (e.g.) search engines and social media, it stands to reason that the publisher will argue that it has done so on the basis of its own PIP. It is unlikely that journalists, photographers and the like will be able to claim a share of those revenues under the proposed copyright-based best-seller clause anyway, as it is designed for extra-ordinary revenues, not foreseeable revenues.

Whatever comes out of articles 14-15, these provisions do not change the writer or photographers' position *ex-ante*. The International and the European Federation of Journalists (IFJ/EFJ) have launched a campaign against 'right-grabbing contracts' by media companies, resisting contracts that demand the author grants a global, irrevocable, perpetual licence against payment of one single fee (see: <http://www.ifj.org/campaigns/fair-contracts-for-journalists/>). In light of existing practices, even if an increase in revenue were to result from the introduction of a publisher's right, it is difficult to see how this would benefit journalists and other creators.

Quite the opposite in fact, for the individual freelance journalist in this new environment, maximum exposure is of paramount importance (Christin 2014), so if the operation of the publisher's right were to lead to a decline of quotes, referrals, or the ability to blog about the journalist's works this would directly harm their visibility and thus their opportunity to sell future work.

Because the publishers are in a position to dictate the terms of agreement for both employed and freelance creators, the protection that article 11(2)

CDSM offers will for most be of no value whatsoever. The effect of this article 11(2) proposal is already limited to situations where the author has granted only a non-exclusive licence to the publisher. In practice however, publishers demand a complete buy-out, so by contract the author is no longer allowed to syndicate the contribution to other media or interested parties. Even where contracts contain a limited term of exclusivity, e.g. the author binds him or herself to not offer the work to others for a period of one week or three months, the perishable nature of articles on current events means that no interested parties are likely to be left after the expiration of that period. Moreover, even if there are, frequently a further condition will stipulate that the author may not exercise his or her copyright in a manner that is detrimental to the publisher's interest. Obviously, this would include any uses for which the publisher himself considers it worth exercising his publisher's right. Precisely because the CSDM proposal does not affect contractual arrangements, it is difficult to see how it would effectively protect authors against publishers. That authors will not benefit, but are more likely to be harmed is also something the EC (implicitly) says: it does not expect that service providers who have already acquired licenses to have to pay more because of the introduction of PIP (p. 168-9 IA). In other words: the pie will not get larger, but publishers will be likely to receive a larger share.

4.5

POSITION OF BORN DIGITAL MEDIA

New born digital journalism services make full use of the 'hypertext' environment in which they must operate.



Exposure is not only of interest to individual journalists. A key reason why publishers of digital journals and newspapers oppose the introduction of PIP is their fear that it will make their work harder to find for audiences, less widely referred to, and that it will disadvantage them and other new entrants to media markets (AEEPE et al 2015, IGL 2016, Niggemeier n.d.).

New born digital journalism services make full use of the 'hypertext' environment in which they must operate, and have responded to the structural changes in advertising markets by relying more on memberships, subscriptions and donations. For example, the Dutch 'paper' De Correspondent focuses on investigative and other long form journalism. It launched in the autumn of 2013 after a crowdfunding campaign, with some 19,000 contributors, 60% of whom went on to continue paid membership. That has since grown to nearly 50,000 members. For reference, the third largest Dutch newspaper has a circulation of 150,000. The website is largely pay-walled and completely free from advertising. Members pay 72 euro a year (or more if they wish), they are allowed to share each article up to 5 times. De Correspondent's nearly 30 staff engage readers by nurturing a sense of community, built around a common interest in better understanding the world. It is a for-profit company, but has pledged to re-invest

at least 95% of its profit in the company (De Correspondent 2016, SDM 2016).

In Spain, the born digital newspaper national El Diario also considers its 'audience' as a community of citizens to whose informational needs it caters. The paper launched in 2012 and currently has about 60 journalists on staff, with about 40 working for regional affiliated editions (Escolar 2016). It has about 20,000 paying members who are responsible for about one third of revenue (they get ad-free access and additional advantages), whilst the rest is funded by advertising (Roper 2015, Sanchez 2016). Most content is made available freely under a Creative Commons Attribution-ShareAlike licence. This means that anyone is free to copy, distribute, adapt the content on condition that they attribute the source, and on condition that when they themselves release content that incorporates El Diario material, they also grant the same 'CC-by-SA' licence. These examples show that different models are possible.

Bridging the gap between legacy and new media is the online kiosk, Blendle.



Bridging the gap between legacy and new media is the online kiosk, Blendle. This new service is about the only example that is mentioned in the IA as a model that is 'trying' a new business model for distribution of press content (p. 169 IA). Blendle started in the Netherlands in 2014 and offers pay per article access to a broad array of newspapers and magazines, including those of the largest media companies in the Netherlands, and a number of high profile foreign titles such as Die Zeit, the New York Times and Time magazine. It has 80,000 users with active credit, and over 1 million registered users. It also launched in Germany in 2015, offering over a hundred titles from Springer and other publishers. Media conglomerate Springer and the NYT have invested in Blendle (Lichterhan 2015). Blendle's ambition is to cater to consumers who do not subscribe to (or buy) particular magazines or papers, but who are interested in reading on a pay per article basis across different publications (Kafka 2016). The website and app offer personalisation and social media features. According to its co-director Blankensteijn (interview with author), its biggest challenge is to convince legacy publishers that the service does not cannibalize but actually grows readership and revenue. Blendle concludes agreements with publishers, who receive 70% of revenues. The publishers must ensure they have the necessary copyright and other relevant intellectual property permissions, so it is important they manage their rights well. The introduction of an additional right in press publications would not change this.

 CONCLUSIONS

The reproduction right would have a wider operation for the publisher’s right than it does for copyright, because there is no built-in restriction equivalent to the originality requirement.



With respect to PIP as an alternative means to enforce copyright, the first question is of course whether there really is a problem with copyright enforcement. If so, then a much less drastic solution could be conceived.



Above we have already set out in what ways PIP would go beyond existing copyright and database rights. To sum up: the reproduction right would have a wider operation for the publisher’s right than it does for copyright, because there is no built-in restriction equivalent to the originality requirement. The publisher’s right would also be broader than the *sui generis* database right. It would set no substantial investment requirement, and the reproduction right would require users to seek permission for the smallest uses (unless they can rely on an exception), whereas today a database producer can only act against the taking of insubstantial parts when such taking is systematic and repeated (i.e., amount to ‘milking’ a substantial part) and conflicts with normal exploitation or unreasonably prejudices the database producer’s interests.

With respect to the subject-matter which PIP would cover, the elaborate definition of ‘press publication’ clearly tries to capture traditional print periodicals and to describe these in a technology-neutral way. As a result however, the danger looms large that the new right would apply to all manner of information and media, from blogs to e-newspapers, from review websites to government newsletters. This casts doubt on the proportionality of the proposal (see section 6.3 below).

In light of the EC’s commitment to foster innovative services, especially by SMEs, the objections of new born digital services deserve serious attention. For born digital providers of media services that do not carry the burden of print legacy, PIP would have few attractions, but it would bring additional transaction costs in the form of having to manage an additional layer of (own) IP and having to secure permission from each publisher to use even the smallest bits of content, i.e. where outward links are enriched with context.

The introduction of such a broad right might also backfire on journalists and the press as users of information. Social media have become an indispensable source of information. In the UK and NL, nearly 60% of journalists regard social media as their most important source of information. In Germany, the figure is somewhat lower but still over 50% (Commissariaat voor de Media 2015). The fact that PIP is likely to be used against freelance journalists and other creators by publishers threatens further to worsen their position in the media ecosystem.

With respect to PIP as an alternative means to enforce copyright, the first question is of course whether there really is a problem with copyright enforcement. Is enforcement substantially hindered by the fact that publishers often are not initial owners of copyright, but licensees or successors in title and need to be able to prove when challenged that they are entitled to enforce? If so, then a much less drastic solution could be conceived. For example, by way of a legal presumption that publishers have standing

5

OPEN DATA AND OPEN SCIENCE POLICIES

to sue for infringement in case content from their publications is used, or by relaxing standards of proof of title. As a general principle, surely it is primarily a responsibility of the publisher to ensure that it manages the administration of its acquired rights. The introduction of a new intellectual property right as an answer to the administrative challenges faced by publishers seems disproportionate, especially in light of the absence of any data on the scope of the problem.

The consistency of the new right with other EU policies is addressed in three sentences in the proposal COM 2016(0280). Essentially these merely express *claims* that the new PIP would be consistent with policies in other domains. No mention is made of the potential impact that the introduction of a new intellectual property right would have on open science and public sector information policies. This section identifies a number of such impacts and tensions between PIP as proposed and the EU's policies designed to improve wider access to and use of research outputs (data, publications) and public sector information. These are the domain of 'open data' and 'open science'. In both domains, intellectual property rights are a potential barrier to broad access and re-use. What is more, with respect to publicly funded information and research, there seems to be no need to create new rights to incentivize production.

5.1

OPEN DATA

Many governments are committed to increasing transparency. Laws that regulate access to information held by public sector bodies are an important instrument to foster accountability and citizen participation in democratic processes. Government-held information is also seen as an important resource for the creation of value added services by the private sector. In fact, the EC has promoted the release of government data for commercial and non-commercial re-use for nearly twenty years, first with Synergy Guidelines (1989) and ultimately with the Public Sector Information Directive ('PSI Directive' of 2003 (revised 2013) and accompanying guidelines.

In the past few years, the release of public sector information as 'open data' has become a priority. Open data means that there are no legal restrictions to access to or use, modification and sharing of information for any purpose, subject at most to an obligation to attribute the source (see <http://opendefinition.org/>). This concept of legal openness is indebted to the 'copyleft' approach of free/open source software movements. 'Open' also means there are no technical restrictions to access and use, e.g. the data is offered in machine readable formats, and in open format rather than in a proprietary format.

The proposal does not explicitly limit the beneficiaries to private sector entities, unless we are to understand the notion of ‘publisher’ or ‘service provider’ as such.



Open data policymaking is partly shaped through political commitment in international forums such as the G8 and the Open Government Partnership (its annual summit attracts thousands of political leaders, civil servants, businesses and civil society organizations). The EU and many of its member states submit action plans to the Open Government Partnership (www.opengovernment.org). In terms of regulation, the PSI Directive is the main EU instrument for stimulating the creation of value added information products and services (tools, apps, content) that take public sector information or data as a (main) source. Through minimum harmonization of national rules and practices, the PSI Directive is meant to create a more level playing field across the EU/EFTA. It does not create access rights or dissemination duties. But if information is public under domestic law, the PSI Directive prescribes that re-use must be allowed, at non-discriminatory terms and in principle against at most the marginal costs of dissemination (there are a few exceptions, e.g. some cultural heritage institutions are not obliged, but merely encouraged, to allow re-use).

The European Commission drafted guidelines that set out the preferred re-use terms (Notice 2014; LAPSI 2014a). The Commission’s guidelines on licensing favour the use of open, liberal licences, such as Creative Commons ‘By’ licence or the CC ‘zero’ instrument. Creative Commons ‘by’ licenses are standard licences that allow any copying, adaptation, distribution of the content on condition that the source (author) is credited. The licence is world-wide (no territorial limitation), irrevocable, granted for an indefinite time and royalty-free. Creative commons zero goes further, as it is effectively a statement by which the (copyright) owner relinquishes all rights.

Public sector beneficiaries

The proposal does not explicitly limit the beneficiaries to private sector entities, unless we are to understand the notion of ‘publisher’ or ‘service provider’ as such (see 4.3). If government bodies, or public sector bodies more broadly, can be ‘publishers’ within the meaning of the proposal, to what extent they will actually have rights turns primarily on whether periodicals contain texts of a ‘journalistic’ nature. Information on public policy, its formation and execution are key topics of public debate. In section 4.4. we have seen that both ECHR and ECJ take a broad perspective of what constitutes press and journalism, with a strong focus on contribution to public debate. What is more, the current definition suggests that PIP could extend to publications with only a limited amount of journalistic content. Thus, public sector bodies might automatically own PIP in what is potentially a large part of their periodical publications. Yet the EC proposal does not explain what justifies this. Presumably, the commu-

nications of governments stand in direct relationship to the exercise of their (publicly funded) public tasks. No incentive is needed in the form of (additional) intellectual property rights. Bestowing an exclusive right on public sector bodies invariably means they will have to devote resources to manage it. For the users of government information, this means another layer of permissions to secure. For example, providers of public policy monitoring services might find themselves in a position that they will have to acquire licences, whereas under current copyright the use which they make is free.

One might argue that in practice, a publisher's right for public sector bodies will not be problematic, because governments have an interest in the widest possible dissemination of information about policy and the fulfilment of public tasks. In itself of course, the latter provides a principled reason to be critical of the need to extent intellectual property protection to information produced by public authorities. But apart from this, it is also important to note that historically the laws of intellectual property on the one hand, and rights to access government information on the other, have developed in near splendid isolation from one another. Open data policies resolve the tension that exists between access rights and intellectual property rights, primarily by means of severely limiting the exercise of intellectual property rights by public sector bodies. Rather than subjecting the use of information to restrictive licences, open data (like open source, open content licenses) come with an affirmation of broad user rights. The introduction of new intellectual property rights for public sector publishers thus has clear potential to weaken open data policy. Introducing a PIP would create a new layer of hard rights, in an environment where the promotion of re-use of public sector data still largely depends on soft instruments, both at EU and national levels.

With respect to access laws, this is primarily the domain of member states to regulate themselves. The past decade or two has seen a wave of new so-called freedom of information laws or 'FOIA' (also known as 'right to information' laws or access to official documents acts) across the EU and beyond. But like their older counterparts, FOIAs tend to focus on 'passive' transparency, i.e., rights for citizens to request the disclosure of specific documents. They seldom contain extensive duties for public authorities actively to publish information. It is also rare for FOIA to regulate questions of copyright (and other intellectual property), especially with respect to questions about the uses which recipients may make of information that is public under an FOIA.

A new right would also raise implementation complications. EU copyright and related rights harmonization drives have never addressed public authorities or public sector works explicitly. Member states have very

differing copyright regimes for government works. In some, the law declares a broad range of government publications to be in the public domain, whereas laws in other member states recognize a government copyright in virtually all works. Many member states exclude only limited categories (laws, court decisions) from copyright and related rights, while yet other member states' laws are silent on the issue (Van Eechoud & Guibault 2016, LAPSI 2014b). Arguably, member states will want to prevent government information that is currently free from copyright from becoming subject to a neighbouring publisher's right.

Another likely associated cost for the public sector is that it would have to review its current licensing and permission schemes, to see if they need adapting to the new PIP. The UK's open government licence for example applies to 'copyright and database right material' (<http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3/>). Licences that are tailored to the exercise of currently existing forms of intellectual property will need to be adapted to cover the new right.

In summary, the EU is actively pursuing a policy aimed at restraining member states from exercising copyright and related rights in public sector information. It seems counterproductive to create a new intellectual property right that would automatically go to public sector bodies.

5.2

OPEN SCIENCE

In tandem with the EC's policy to foster open public sector data, the EC also champions improved access to research publications and research data. The objective is to make more efficient use of publicly funded research and stimulate innovation. For our purposes, open science policies are directed at making both research data, tools and outputs (mostly academic publications) from research institutes more readily accessible to (academic) researchers and the wider public. Two major ambitions of the EU are that: by 2020, all (EU funded) peer reviewed scientific publications are freely accessible and re-usable under Open Access regimes; and all research data comply with FAIR principles, i.e. they must be Findable, Accessible, Interoperable and Re-usable. The EU funds infrastructures such as OpenAIRE to harvest research publications and data, and make them visible.

Indeed, today the rules of the Horizon 2020 ("H2020") research programme obliges all publicly funded projects to ensure that any peer reviewed scientific publications are Open Access. Nearly all member states have open access policies in place, and a growing number also have open research data policies. For now, the EC allows both Green Open Access, whereby a publication is archived in a digital institutional repository (immediately or after a 6-12 month embargo period), instead of being

published directly in a journal as OA (“Gold”). To ensure that copyright does not act as a barrier, H2020 encourages authors not to transfer copyright (something commercial publishers traditionally require) but merely to license their copyright (EC Background note 2016).

Under the influence of open access publishing models, commercial academic publishers no longer automatically require authors to transfer their copyrights. Open access publishing generally operates through licences whereby the copyright remains with the researcher (or her or his academic institution). A licence is granted to the journal and its readers, which allows free access and distribution (depending on the specific licence, distribution may be limited to non-commercial purposes). The author pays an ‘article processing charge’ (publication fee), which ranges from zero for some sponsored journalist to thousands of dollars for high-impact publications. In so-called hybrid open access models, publishers continue to sell subscriptions or charge per-article payment for ‘closed content’, while offering authors the option to pay to have their article made available as OA immediately. Publication fees are usually funded from academic research budgets.

In light of these policies, the introduction of a right in periodicals seems a major step backwards.



A major driver of open access publishing is the huge increase in prices of academic journals over the past decades (well above inflation), combined with concentration in commercial scientific publishing. The precise added value of copyright in academic publications themselves is the subject of intense debate, since for academics copyright does not incentivize publication (reputation and exposure to peers does), and the research concerned is generally paid for by public funds (Shavell 2010, cf Mueller-Langer & Scheufer 2013 for discussion of recent literature). Economists signal a lack of instruments and strategies to counterbalance the market power of large commercial science publishers (see for a discussion: Mueller-Langer & Scheufer 2013).

Commercial science publishers argue that they ‘continually invest in new content and a wide range of innovative solutions’ and that a publisher’s right would ‘recognise[s] the value added by STM publishers and therefore safeguard[s] the important role that STM publishers play in the scholarly communication ecosystem’ (STM 2016). Universities on the other hand maintain that a new intellectual property right for academic publishers would do ‘untold damage to the ability of researchers to share their findings and reference the world of scholarship in their published works’ (LERU 2016).

In light of these policies, the introduction of a right in periodicals seems a major step backwards. The idea behind open access is that author-pays models ensure that research outputs and data flow freely and can be used

by institutional scientists and the wider public. To make this happen is a complex and long process, that in many instances involves wrestling back a fair measure of control over copyright from commercial publishers. If PIP were to extend to scientific (or other academic) periodicals, this would only strengthen the hold of commercial publishers over universities. Science publishers already work to be the primary providers in virtually all segments of the academic knowledge creation and dissemination system: from research data management, bibliographic tools, project management tools, digital repositories, researcher profiles, citation data and other productivity metrics, to journal publication of articles and other outputs.

From recital 33 to the CDMS proposal, it seems clear that the proposed PIP is not meant to apply to academic/science publications. The recital states that ‘periodical publications which are published for scientific or academic purposes, such as scientific journals, should not be covered.’ This ‘soft’ exclusion of academic periodicals from the new PIP, as is currently foreseen in recital 33, does not create enough legal certainty that, should the proposal become law, it would at least unequivocally exclude from the scope of PIP protection all academic publications, or more broadly all publications that predominantly contain outputs of publicly funded research. Whilst recitals can play an important role in the interpretation of EU directives, the inclusion of an explicit exclusion in article 11 itself would be far stronger.

5.3

CONCLUSIONS

As the proposal stands, the publisher’s intellectual property right would extend to periodicals published by public sector bodies. In light of the policies of both national and EU institutions aimed at pro-active dissemination of public sector information and the removal of barriers to its reuse, it is to be recommended at least that public sector bodies as defined under the PSI Directive be excluded from the proposal. Further, in light of the EU’s and member states’ open science agendas, a similar clear exclusion should be made for academic and scientific publications.

6

A PROPORTIONATE REGULATORY INTERVENTION?

In this concluding chapter, we assess the earlier findings with respect to the place of publisher’s intellectual property in the copyright landscape and the limitations that flow from the fundamental right to freedom of expression in the light of the EU’s formal competence to regulate a new publisher’s right. The legal basis for intervention is article 114 TFEU, which grants the EU power to harmonize the laws of member states, to the extent necessary for the functioning of the internal market. Two cumulative criteria must be met: the measure must actually harmonize, and it must contribute to a better function of the internal market. The mere

existence of disparities in the laws of member states is not sufficient ground for intervention; there must also be a real and noticeable effect on the internal market (Van Eechoud et al 2009). The ECJ also recognizes that the likely development of diverging national measures can be a valid reason to intervene. What matters in this regard is what ‘the effect of those different – present or future – national laws [is], and whether intra-EU trade represents a relatively large part of the market for the particular product at stake’ (Ramalho 2016).

Having said that, in practice the EU has a broad competence to regulate intellectual property law. It is however a shared competence, which means that the principle of subsidiarity applies: the EU should only act where the objective pursued cannot be achieved at Member State level, but only through action at EU level. In addition, the measure must be proportionate. That is: the measure must be fit to achieve the aims pursued, go no further than is necessary, and not produce disadvantages that are disproportionate to the aims pursued (Van Eechoud 2009).

The most far-reaching critique of the PIP proposal is that the internal market need which it claims to address does not in fact exist (Ramalho 2016). The proposed PIP is a direct follow-on to the German and Spanish provisions that introduced authorization requirements (Germany) and payment duties (Spain) for amongst others search engines and aggregator sites that list more than naked URLs (and a few words in the case of the German provision) pointing to the content put online by publishers. It is highly debated whether these national measures have in fact achieved their purpose, that is: the creation of an additional revenue stream for publishers. In the case of Spain, certainly this does not seem to be the case, and so far German publishers have not succeeded in concluding paid licences with service providers such as Google, but have granted free licences or chosen not to invoke their rights at all (Bitkom 2015, IGL 2015). If the Spanish and German laws have failed, then they do not form an obstacle to the internal market. Another reason why there may be no internal market need to address is because newspaper publishing has traditionally been directed predominantly at national or even regional or local readers, rather than at international markets (cf Ramalho 2016; on national character of markets, Leurdijk et 2012). As we have seen in section 2.3, a complex set of factors affects the ability of publishers to make the transition to sustainable digital information services, and these factors do not play out the same across all member states. Therefore, it is not obvious at all that a one-size-fits all approach would produce similar outcomes everywhere.

Even supposing there to be a real internal market need, there are various arguments why the publisher’s right as currently conceived is not a proportionate measure. These have to do with the problems which the

Even supposing there to be a real internal market need, there are various arguments why the publisher’s right as currently conceived is not a proportionate measure.



proposed right seeks to address, the availability of alternatives, and the disproportionately adverse effects on creators, SMEs and citizens' freedom of expression. In part, these effects result from the territorial nature of the proposed PIP, and the rights clearance complications territorial rights would produce in the digital sphere. The proposal would also produce legal uncertainty on several other counts.

A thicket of territorial rights to be cleared

The proposed publisher's right would only operate for 'digital uses', so would include any use in services delivered over the web.



With respect to territoriality, from the perspective of the digital single market, it makes sense that uniform rules in the shape of unitary rights (that is: rights that apply for the entire EU territory) create a better environment than territorially distinct rights for each of the affected EU / EEA member states). In its Impact Assessment and Explanatory notes, the EC does not even entertain the possibility of a unitary right under art. 118 TFEU. The new publisher's right would therefore not be a unified, single title for the entire EU territory, but would comprise a bundle of (28 +) harmonized national rights.

The more territorially fragmented the control of an IP right is, the more difficult rights clearance becomes for parties who need or seek permission.



The proposed publisher's right would only operate for 'digital uses', so would include any use in services delivered over the web. Above we have said that although the CDSM proposal is silent on this point, it makes sense that the PIP should be transferable and capable of being licensed. This would be true for each of the specific national PIPs that the Directive would introduce in the EU / EEA member states. Of course, the more territorially fragmented the control of an IP right is, the more difficult rights clearance becomes for parties who need or seek permission. Especially for those businesses that would want to operate pan-European services, securing the necessary licenses for 28 + jurisdictions can be expected to be troublesome. Of note, under the current interpretation of the Information Society Directive's 'making available' right, the use of protected content on the internet –even if targeted at a local audience – always implicates the copyright laws of all the countries from which the content (e.g., website) is accessible. So, parties that intent to cater only to local audiences would have either to use geo-blocking technologies, or to secure rights for all territories, or to seek indemnification and guarantees from the primary licensor/IP owner with which they do business against third party infringement claims, or to take a calculated risk that third parties will not come knocking. In this respect, it matters that in terms of target audiences, newspaper and magazine publishing are largely national and regional products, even if the media conglomerates that own titles operate cross-border.

As was said above, neither the Impact Assessment nor the Commission Communication explains in what way the introduction of an additional layer of rights would facilitate the clearing of rights and reduce transaction costs. How a new intellectual property right would help the development of the internal market, by making it easier to provide information services at a cross-border or even pan-European level is not substantiated either. On the contrary, it seems more likely that new layers of (territorial) rights will make it more difficult for actors who use content to secure the necessary permissions. In light of the fact that - as the EC touts - the vast majority of businesses in the EU are SMEs, this is surprising. After all, for an SME it can be prohibitively expensive to have to identify all potential right owners; the fact that in the new system service providers would probably have their own IP does not decrease this burden. If large players are better positioned to manage their IP and seek licence agreements, that will be bound to put smaller publishers at a competitive disadvantage.

Legal uncertainties

The scope of the proposed right is broader than both copyright and the sui generis database right, primarily because there is no built-in limitation to the reproduction right.



According to the Commission's proposal, the proposed right is proportionate as it only would only cover press publications and digital uses. We have seen above in section 4.3 that the subject matter of the proposed right is very broad. It would cover not only traditional forms of press and magazine publishing as we know them from newsstands, but also a wide array of information resources that are periodically published, e.g., newsletters of all shapes and sizes, blogs and various types of websites. What is more, the scope of the proposed right is broader than both copyright and the *sui generis* database right, primarily because there is no built-in limitation to the reproduction right (i.e., as is the case with the originality requirement in copyright, and the substantial investment / substantial part criterion that limits the scope of the *sui generis* database right).

Another legal uncertainty that arises under the current proposal is the extent to which national solutions will or will not survive. The EC does not state whether the proposed PIP is designed to supplant the existing national provisions, but arguably, they would have to be brought in line with the CSDM Directive. There is also the question whether PIP would not impose double remuneration duties on information service providers. In France for example, a compulsory collective management system has recently been enacted for the reproduction and communication to the public of images (visual works) by image search engines, of which Google Images is the best known (and by far biggest). From 2017 onwards, royalties will have to be paid for the display of visual search results, including via thumbnails (Spitz 2016). Under the proposed PIP, image search services would in addition need authorization from press publishers.

To sum up, in addition to creating legal uncertainty because of the broad scope of protected subject matter, the possible continued existence of local rights, and the creation of a thicket of territorial rights, the proportionality of the proposal is questionable on four other grounds:

First, to the extent that the proposed intervention seeks to bolster the sustainability of press publishers, it is not fit for purpose because it will not meaningfully contribute to resolving the crisis in the traditional print press.

Second, where the aim is to make it easier for publishers to license the use of copyrighted content, the proposed measure goes well beyond what is necessary. As we have argued above, there are other ways in which it can be made easier for publishers to enforce copyright, e.g., by way of introducing a presumption that publishers have the necessary title to enforce the copyright for restricted uses made of content that they publish. It is disproportionate to introduce a new right for publishers just because they fail properly to administer their own copyright transfers and licences.

Third, in light of existing copyright buy-out practices, the proposed new right is likely negatively to affect the position of authors (journalists, photographers, designers, editors), who in today's media industry have very little bargaining power and increasingly work on a freelance basis. For them, maximum exposure of their work is vital, and the new right would give publishers even more power to control the use of content which they produce. Also, even if any increase in revenue actually resulted from the introduction of a publisher's right, it is difficult to see how this would benefit journalists and other content creators, since the proposal would give them no legal ground to claim any part of that additional revenue stream (in sharp contrast to the proposed 'fix' of the ECJ's *Reprobel* judgment: the CDSM proposal enables member states to allocate part of the remuneration due for private copying and reprography of copyrighted works to publishers).

Fourth, and finally, the proposal does not engage in any meaningful way with - as the Council of Europe urges - the needs of all actors in the media ecosystem, so as to guarantee people's fundamental right to seek, receive and impart information. The introduction of an exclusive right to information would be an interference with freedom of speech that deserves much stricter scrutiny, and better justification, than what the EC offers. Once introduced, and not having positive effect but rather negative effects, it will be very difficult to roll back this new intellectual property right, which would be protected under the European Convention of Human Rights and the EU Charter of Fundamental Rights. With respect to the fundamental right to property, although the ECHR provides mem-

ber states broad discretionary powers to regulate intellectual property, any future abolition of these proposed new rights would be much more problematic. The EU legislator would therefore be wise to stick to the precautionary principle: do not legislate new exclusive rights until there is clear hard evidence of the need for them, and only then provided that it is also established with a reasonable degree of certainty that any associated negative effects will be limited.

In its current form, the proposal seems to serve one set of interests, those of legacy print media. As Tworek & Buschow (2016) suggest, the rhetoric of 'theft' advanced by traditional media in support of a claim for new intellectual property rights is a just strategy to ward off threats from new media. The attempt to cement the traditional *form* of press publications into law may well set back the *function* of the press as public watchdog.

7

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8

RELEVANT EXCERPTS FROM THE EC PROPOSAL

Article 11 Protection of press publications concerning digital uses

1. Member States shall provide publishers of press publications with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the digital use of their press publications.
2. The rights referred to in paragraph 1 shall leave intact and shall in no way affect any rights provided for in Union law to authors and other right holders, in respect of the works and other subject-matter incorporated in a press publication. Such rights may not be invoked against those authors and other right holders and, in particular, may not deprive them of their right to exploit their works and other subject-matter independently from the press publication in which they are incorporated.
3. Articles 5 to 8 of Directive 2001/29/EC and Directive 2012/28/EU shall apply mutatis mutandis in respect of the rights referred to in paragraph 1.
4. The rights referred to in paragraph 1 shall expire 20 years after the publication of the press publication. This term shall be calculated from the first day of January of the year following the date of publication.

Article 18 Application in time

1. This Directive shall apply in respect of all works and other subject-matter which are protected by the Member States' legislation in the field of copyright on or after [the date mentioned in Article 21(1)].
2. The provisions of Article 11 shall also apply to press publications published before [the date mentioned in Article 21(1)].
3. This Directive shall apply without prejudice to any acts concluded and rights acquired before [the date mentioned in Article 21(1)].

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