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**An EU related right for press publishers
concerning digital uses. A legal analysis**

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Abstract: On 14 September 2016, the European Commission proposed a Directive on “copyright in the Digital Single Market”. This proposal includes an Article 11 on the “protection of press publications concerning digital uses”, according to which “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.” Relying on the experiences and debates surrounding the German and Spanish laws in this area, this study presents a legal analysis of the proposal for an EU related right for press publishers (RRPP). After a brief overview over the general limits of the EU competence to introduce such a new related right, the study critically examines the purpose of an RRPP. On this basis, the next section distinguishes three versions of an RRPP with regard to its subject-matter and scope, and considers the practical and legal implications of these alternatives, in particular having regard to fundamental rights.

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Summary

On 14 September 2016, the European Commission proposed a **Directive on “copyright in the Digital Single Market” (CDSMD proposal)**. This copyright package includes an Article 11 on the “protection of press publications concerning digital uses”, according to which “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.” Relying on the experiences and debates surrounding the German and Spanish laws in this area, this study presents a legal analysis of the proposal for an EU related right for press publications (RRPP).

- The limited competence of the EU

The Commission bases its copyright package including the RRPP on the Internal Market competence of Art. 114 TFEU. Even if one accepts, for the sake of argument, the proposition that an EU RRPP would resolve obstacles to cross-border digital trade and services, the exercise of this **competence is subject to a number of conditions and limitations**. Firstly, Art. 114 TFEU does not empower the EU to regulate with the primary aim of fostering a free and pluralist press in the interest of the public debate and the proper functioning of a democratic society. Secondly, the Commission itself points out that any possible intervention ought to be consistent with the EU copyright acquis and other EU policies. Thirdly, an EU RRPP has to comply with applicable international laws and must respect fundamental rights.

With its proposal for an RRPP, **the European Commission exceeds all these limits**. It firstly presents the RRPP primarily as a tool of media regulation with a view to a free and pluralist press (recital 31 CDSMD proposal), for which the EU lacks, however, a separate competence. Secondly, the proposed RRPP is incompatible with the E-Commerce Directive 2000/31 and the Database Directive 96/9. Thirdly, it arguably runs afoul of the mandatory exception for “press summaries” under Art. 10(1) of the Berne Convention. Finally, all currently debated versions of an RRPP entail serious, unjustified interferences with the fundamental rights set out in Art. 11, 16, and 20 of the Charter of Fundamental Rights of the EU (CFREU). If an RRPP does not satisfy an objective of

general interest or if it is not appropriate for attaining the legitimate objectives pursued by the legislation at issue or if it exceeds the limits of what is appropriate and necessary in order to achieve those objectives, **a directive establishing an RRPP would be invalid.**

- What is the objective of general interest in the case of an RRPP?

The regulatory aims that the European Commission puts forward with regard to an RRPP for the most part already **fail to satisfy an objective of general interest** (Art. 52(1) CFREU). In and of itself, the “sustainability of the publishing industry” (the first sentence of Recital 32 of the CDSMD proposal) is a private interest of the enterprises that belong to this industry.

- The well-functioning market place for copyright

The notion of a **well-functioning marketplace for copyright** is both circular and economically unfounded. In particular, news publishers already receive a fair share of the value created by the availability of journalistic content on the Internet in that online service providers drive massive amounts of traffic to their websites.

An analysis of the online market for news and other journalistic publications reveals that there is **no market failure** that prejudices the strong general interest in the existence of a free and pluralistic media (Art. 11(2) CFREU). In its analysis, the Commission insufficiently acknowledges the transformative power of the Internet, which induces a shift from linear, hierarchical value chains running from rightholders via distributors to consumers to a highly diverse network, in which “new business models and new actors continue to emerge”. In particular, digitisation and the Internet have tremendously reduced the costs to publish and distribute any kind of journalistic content on an EU- and even world-wide scale. For this reason alone, the Commission’s focus on a revenue gap is flawed. Moreover, online markets for news publications and other content are characterised by an unbundling effect, which is a challenge for press publishers who offer full coverage of many topical areas but which also lowers the barriers to entry into the news market. The difficulties of traditional print publishers managing the shift from print to digital are furthermore due to a tough competition in the online market for news

publications, which is more diverse and cross-border than ever before. In spite of this intense competition between traditional and “other” media companies, some press publishers that had already established well-known brands in the pre-Internet era are successful online, both as regards the attention they receive and the revenues and profits they generate. Finally, content providers are free to implement widely available, low-cost technical protection measures to regulate and request payments for the access to and use of their digital content and/or they may generate advertising revenue by attracting as much traffic to their website as possible.

Taken together, the current online market for press publications and the competition between different providers of journalistic content is **functioning according to the basic market laws**. There is also no indication that the “quality” of news or special interest information online (cf. Art. 2(4) CDSMD proposal) has declined. In any event, **an RRPP cannot generate consumer demand for journalistic content if that demand does not exist**. Without such demand, there is no justification for the market-based remuneration of publishers. The European Commission tries to reshape the structural shift from linear print value chains to digital networks in order to support the private interests of a particular group of press publishers.

This finding remains valid if one brings into the analysis the main targets of an EU RRPP, namely online services like search engines, news aggregators, and social media. In order to properly assess the economic significance of the alleged commercial “reuse” of publishers’ content by these service providers, it is **necessary to take a closer look at the characteristics and functionality of these services and how they affect the competition between news providers**. It is one of the major flaws of the Commission’s proposal for an RRPP that it does not deal with the issue at this level of detail.

Web search engines intensify the already “tough” competition in the intra-media market for journalistic content. They make transparent that there are several sources of potential interest available. At the same time, neither the empty (!) search form of a search engine nor the result list displayed upon an individual search request is a substitute for visiting the source. The lack of transaction costs for finding and accessing

journalistic content increases the demand for information (market expansion effect). The **referral traffic that search engines send to press publishers represents the “fair share of value”** that can be attributed to the provision of journalistic content by publishers.

This observation also holds true for **news aggregators** like Google News or Bing News that can be regarded of as specialised search engines dedicated to news and other journalistic content. News aggregators intensify intra-media competition and amplify the market expansion effect of search engines in that they further reduce search time and display a wide variety of content limited to news only, again free of charge for both readers and publishers. Several empirical studies show that the increase of direct and referral traffic (market expansion) outweighs any supposed substitution effect in the sense that some users only browse the front page of news aggregators without clicking on a link. The latter behaviour merely signals that the Internet user is not interested in reading any article in full. Moreover, press publishers do not appear in news aggregators’ overviews and search lists against their will. They do not employ the robot exclusion protocol in order to “disallow” (refuse to accept) the use of their content. Press publishers even take active steps to appear on news aggregators in a way that promotes referral traffic. In particular, they provide the text fragment that appears as the “snippet” on news aggregators’ websites. If a news provider has actively added text snippets to the source code of its website for the sole purpose of their use by a news aggregator, the reproduction and making available of those text snippets is agreed to and therefore in compliance with the law.

The role of **social media platforms** in online news markets differs fundamentally from that of search engines and news aggregators. Their primary function is to host all type of content and to enable Internet users to share information including news. The European Commission fails to provide an explanation of why these actors should be covered by an RRPP. If operators of social media hosting platforms were to become directly liable under an RRPP, this would be inconsistent with the restrictions on liability that host providers (as well as search engines and news aggregators) benefit from under Art. 12-14 of the E-Commerce-Directive 2000/31.

In stark contrast to the German and Spanish versions of an RRPP, the Commission proposal even covers purely private, non-commercial acts of reproduction and making available. It thus concerns the **everyday practice of millions of EU citizens to browse, download, recommend and share journalistic content**. However, these activities did not give rise to the proposal for an RRPP in the first place. Accordingly, the serious interference that such an intervention would create with regard to the European population's freedom of expression and freedom of information lacks even a rudimentary justification.

- The aim to reward and incentivise organisational or financial efforts

The aim of **recognising the organisational and financial contribution** of publishers in producing news publications (Recital 32 CDSMD proposal) again only begs the question. The RRPP is the reward that is at stake. The rhetoric that press publishers deserve this reward explains nothing.

All relevant investment by press publishers into the production and presentation of journalistic content on the Internet **is already effectively and adequately protected under existing copyright laws** so that a fair participation in the use of news publications online is guaranteed. Current EU and Member States' copyright laws already protect all kinds of journalistic content and thus all investments in that regard, be it literary works or other works or subject-matter, in particular simple photographs and videos (cf. Art. 2(4) CDSMD proposal). Creative efforts of editorial boards to select and arrange journalistic content result in copyrights in databases. Publishers of online news portals furthermore benefit from the sui generis database right. None of these rights prohibits the consultation of freely available databases nor the current practice of search engines and news aggregators. If the EU RRPP covered ground that the Database Directive deliberately left open, it would not leave intact and complement the existing EU copyright acquis (but see Recital 4, Art. 1(2) CDSMD proposal).

Last but not least, press publishers are able to control the access to and use of their content by applying **technological protection measures**, which are protected against circumvention. Private ordering on the basis of software and contracts is the market

compliant and Internet-compliant way to realise the value of journalistic content on the Internet. If one includes these tools into the analysis, which the Commission fails to do, there simply remains no investment undertaken by news publishers that does not already enjoy protection against unauthorised use online. This is even true for investment in the marketing and advertising of news publications, which is generally not considered proper justification for granting new copyrights because it does not relate to the creation of journalistic content but only its subsequent commercialisation.

- The improvement of licensing and enforcement

If the aim of an EU RRPP is to **facilitate online licensing and enforcement of rights in news publications** (Recital 31 sentence 3 CDSMD proposal), Art. 5 of the Enforcement Directive 2004/48 could be amended by introducing a presumption according to which, in the absence of proof to the contrary, a press publisher must be regarded as holding exploitation rights sufficient to entitle him to institute infringement proceedings, if his name appears on the news publication in the usual manner and the author of the work in question has agreed to this publication. In contrast to what the Commission insinuates, formally established online service providers like Google, Bing, Facebook or Twitter do not base their businesses on continuous infringements and infringement proceedings whose outcome is evident. At the same time, rights enforcement against pure pirates will remain difficult with and without an RRPP.

- Supporting a free and pluralist press

An RRPP **does not support “a free and pluralist press”** (Recital 31 sentences 1 and 2 CDSMD proposal). The news market on the Internet is less concentrated and more diverse than the newspaper and magazine markets in the printing age. This unprecedented wealth of journalistic content is made accessible free of charge by the very online services the Commission now considers as problematic.

An RRPP **will also not foster quality journalism**. The proposed RRPP is not limited to publications that concern the general interest but also includes “special interest magazine[s], having the purpose of providing information related to news or *other* topics” (Art. 2(4) CDSMD proposal, my emphasis). It is moreover not tailored to “quality

journalism”, i.e. to original and reliable information about issues of general interest but equally protects “press” publications that are redundant or even misleading. This disconnection between the proposed RRPP and the aim to foster quality journalism cannot be cured on the level of distribution of any revenues an RRPP might create. If the RRPP revenues attach to the number of clicks, they induce more quantity, not quality. If the RRPP is administered by a collective management organisation and the revenue distributed per capita, the RRPP subsidises publishers who have nothing or little to contribute to the public debate.

- Three versions of an RRPP

In order to assess the legal consequences of the absence of a convincing justification for an RRPP, it is necessary to specify its precise subject-matter and scope. To this end, the study distinguishes three possible versions of an EU RRPP. **All these versions are either incompatible with fundamental rights or, alternatively, ineffective** for failing to cover the current, news-related practice of online service providers and Internet users.

- Protection of the concrete layout of the press product

The **first version** would be an RRPP **in the concrete electronic format/layout** of a news publication. However, neither search engines nor news aggregators or social media reproduce news articles in their original format. It follows that an RRPP with such a limited scope would miss its primary targets. And indeed, the European Commission expressly states that its proposal concerns a “totally different subject-matter of protection” compared to the protection of typographical arrangements in national copyright laws.

- Protection of journalistic content as such

The **second version** of an RRPP, which is the one proposed by the European Commission, is an exclusive **right in digital uses of journalistic content as such**. The conclusion that the proposed EU RRPP effectively attaches to the journalistic content as such follows inter alia from the applicability of limitations and exceptions to

copyright, i.e. provisions that allow the use of works and other subject-matter contained in press publications, and from the rule regulating conflicts between the RRPP and rights in the content comprised in a press publication (Art. 11(2) and (3) CDSMD proposal).

The European Commission repeatedly justifies its proposal for an RRPP by reference to the **related rights of film and phonogram producers**. A comparison between the neighbouring rights in phonograms, films and broadcasts on the one hand and press publications on the other reveals, however, that these **analogies are misguided**. Whereas phonograms, films and broadcasts can be clearly distinguished from the works, performances and other subject-matter (“content”) that they embody, this distinction collapses in the case of an RRPP that extends to digital uses of journalistic content (the text, the picture, the video) in whatever format.

A protection of news content abstracted from the concrete layout of the publication in which it appeared is problematic in several respects. In the many cases of parallel publications of identical journalistic content, it will often **not be possible to establish a connection between an allegedly infringing use and a particular press publication**. This missing link between the supposed subject-matter (press publication) and its digital uses will seriously hamper the enforcement of such an RRPP in practice.

A right in generic online uses of journalistic content also leads to **irreconcilable overlaps of independent RRPPs**. This scenario arises if an article, image or video is published in parallel in several news publications. In this case, all publishers acquire independent RRPPs in effectively the same subject-matter, namely the content irrespective of its electronic format. There is no rule to decide such a conflict of overlapping RRPPs because no publisher can claim priority. If it is impossible to resolve these kinds of conflicts, they ought to be avoided.

The **second category of conflicts of rights** triggered by an RRPP in journalistic content as such concerns the relationship between press publishers on the one hand and authors and other holders of rights in journalistic content on the other. Art. 11(2) of the CDSMD proposal resolves this conflict in favour of the latter group of rightholders.

In spite of this conflict rule, an RRPP in journalistic content as such **still adversely affects authors, in particular journalists, economically**. If one thing is clear, it is the fact that an RRPP cannot increase the demand for and thus the exchange value of an article etc. Instead, by making it more difficult and/or more expensive to find and access content online, it will reduce the demand for and usage of journalistic content. Although news publishers should be able to make up for this loss by increasing the price for their product, journalists still don't benefit. The reason is that an RRPP grants news publishers an extra share in the total exchange value of particular journalistic content. This additional participation necessarily reduces the share of journalists. The contract adjustment mechanism provided for in Art. 15 of the CDSMD proposal is too unspecified and restricted in order to compensate authors for this disadvantage.

An exclusive right in the generic commercial and non-commercial use of journalistic content comprised in press publications is finally in **conflict with the freedom of information of individual Internet users**. An RRPP with such a broad subject-matter and scope is either invalid due to violation of fundamental rights or, if interpreted restrictively, ineffective for failing to cover the current news-related practices of Internet users and online service providers.

The only concrete reference to the freedom of communication in the text of the CDSMD proposal concerns the freedom of hyperlinking (Recital 33 sentence 3 CDSMD proposal). The **freedom of hyperlinking** may, however, turn out to be a **hollow promise** because press publishers regularly choose a URL that contains the title or other keywords taken from the respective article. Press publishers claim that these excerpts already reproduce and make available a protected "part" of a press publication. The same type of argument can be advanced against the use of snippets, preview images (thumbnails) and video stills.

In order to assess the impact of an RRPP in journalistic content as such on the freedom of information, it is thus necessary to define **what constitutes a "part" of a press publication** that must not be reproduced and then made available under Art. 11(1) CDSMD proposal. It is an unresolved issue under EU law whether related rights of

producers are subject to a minimum threshold of protection, and if yes, which criteria apply.

If a “part” of a press publication was interpreted as extending to **insignificant, minimal fragments** such as single words, video stills or images of a reduced size, the current practice of searching for, accessing, and sharing news on the Internet would become subject to a requirement of prior authorisation. Such a measure would not only interfere with the fundamental right of online service providers to conduct a media-related business (infra). It would be **incompatible with everyone’s fundamental right to freedom of expression (Art. 11(1) CFREU)**.

The European Commission proposal directly **affects the online communication of the European population** in that it extends to any non-commercial act of reproduction and making available to the public of journalistic content. Without the freedom to communicate news and miscellaneous facts expressed in works of a journalistic nature, the public debate would, however, come to a halt. In addition, without the news-related services of search engines, news aggregators and social media platforms, it would become **effectively impossible to locate, access and share the highly diverse wealth of journalistic content** that is available on the Internet.

There are **no compelling reasons that justify this wide-ranging and particularly serious interference** with Art. 11(1) CFREU. The German and the Spanish RRPPs demonstrate that **an EU RRPP of whatever structure will not create additional revenues for press publishers** because online service providers would rather close down or reduce their news-related services in order to avoid any liability under an RRPP than change their business model completely and for the first time ever pay for content that they make accessible. Consequently, an RRPP is inappropriate for attaining its primary objective. Since the EU online news market is characterised by the same competitive conditions that have also been present in Germany and in Spain, there is no reason to believe that the mere size of the EU Digital Single Market will make a difference.

The interference with the fundamental right to freedom of expression of Internet users is also disproportionate. **Press publishers are not in need of an RRPP** because they

can rely on existing rights, contracts and technological measures in order to control access to their publications and the use of snippets. Furthermore, the communicative practices targeted by the RRPP do not prejudice the economic interests of press publishers. Their **fair share in the value of news publications is the massive referral traffic** that online services create free of charge.

If the EU legislature or, eventually, courts introduced certain limits to the protectable subject-matter of an RRPP in order to save it from being invalid due to violation of the Charter, the RRPP would miss its main targets, namely commercial search engines, news aggregators and social media: Firstly, neither these news-related online services nor acts of news sharing by individual Internet users prejudice the economic interests of press publishers (supra). Secondly, if the use of the “smallest of text excerpts” was declared to be lawful in so far as this is necessary to communicate news of the day as such or miscellaneous facts, the current practice of search engines, news aggregators and social media would also remain beyond the scope of an RRPP limited like this. This is because neither the link as such nor its “source”, which usually is the web page’s URL, nor commonly used text snippets go beyond what is necessary and proper in order to communicate news/facts as such.

The decision between the two versions of failure (invalidity or ineffectiveness) will take years and consume many efforts of stakeholders without furthering any of the aims articulated by the European Commission. The reason for this **long-lasting legal uncertainty** is that there simply is no passage between the Scylla of monopolizing news of the day or miscellaneous facts on the one hand and the Charybdis of a redundant RRPP that only steps in if copyright is available anyhow.

- An RRPP limited to online services that provide hyperlinks to press publications

The **third version** of an EU RRPP has been codified in Germany and Spain, where the **RRPPs do not include the right of reproduction** and only extend to the making available of news publications by **search engines, news aggregators, and “commercial providers of services which process the content accordingly”**. These online uses are characterised by the fact that they always contain a hyperlink to

a source. Thereby, it is possible to trace back an online use to a particular news publication. An RRPP limited like this also avoids overlaps of rights (supra).

However, even an EU RRPP tailored in this way involves **serious and indeed unjustified interference with the fundamental rights of online service providers, Internet users, and last but not least e-only press publishers** who are far more dependent on the continuity of the current practice of search engines and news aggregators than the well-known press publishers who strongly lobby for an RRPP. Due to these violations of the Charter, **an RRPP of this type would be invalid too.**

Search engines, news aggregators and social media platforms allow the public debate to move from a linear one-person-one-source structure to a network structure where readers consult, share and comment on a huge variety of different sources. The efforts of the European Commission to turn back the clock and again concentrate the public debate on a few well-known news portals ignores the “particularly distinct” character of the Internet and its “role in enhancing the public’s access to news and facilitating the dissemination of information in general” (ECtHR). Conscious of the fact that the Internet is an information and communication tool particularly distinct from the printed media, the function of these online services is equivalent to that of the wholesaling of printed editions of newspapers and magazines in the pre-Internet era. Wholesalers of newspapers and magazines enjoy the heightened protection under the freedom of the press. By analogy, the news-related services of search engines, news aggregators and social media **are not only protected by the freedom to conduct a business (Art. 16 CFREU), but also by the guarantee of free media (Art. 11(2) CFREU and Art. 10 ECHR).**

Since the revenue that can be attributed to news-related services is very small if not zero, online services would rather reduce or even completely stop such activity than that agree to pay remuneration to press publishers for channelling referral traffic to them. Accordingly, **an RRPP effectively works as a prohibition on providing such online services in the first place.**

As explained above with regard to the freedom of expression of Internet users, this serious interference with the fundamental rights of online news service providers under

Art. 16 and 11(2) CFREU also **cannot be justified as proven by the failure of the German and Spanish RRPPs**. Again, the fact that the EU digital news market is larger than the German and the Spanish markets does not make for a relevant difference because the structural conditions for marketing journalistic content on the Internet are the same.

An RRPP targeted at search engines and news aggregators would furthermore be **incompatible with the principle of equality before the law (Art. 20 CFREU) and the guarantee of equal opportunities for media businesses (Art. 11(2) CFREU)**. News aggregators but also general search engines offer automated or search-initiated, structured overviews about which online sources contain information about which news. This service is equivalent to **press reviews that press publishers have offered for a long time** without a need to ask for authorisation or pay remuneration (Art. 10(1) and 10^{bis}(1) Berne Convention; Art. 5(3)(c) Infosoc Directive 2001/29). It is one thing to exclude search engines and news aggregators from the scope of application of existing copyright limitations that only favour news overviews “by the press”. It is another, and indeed unjustified measure to create requirements for the lawful provision of online press reviews that only exist for some media businesses (namely search engines and news aggregators) but not for others (namely press publishers). Further unjustified discrimination follows from the fact that an RRPP would rule out algorithmic link lists with snippets whereas **summaries of newspaper and magazine articles written by natural persons and including hyperlinks to these sources** remain permissible under copyright law.

Art. 11(2) CFREU also creates a positive duty of the EU legislature to maintain a level playing field in the news publication market, and it has to allow effective market access for all kinds of journalistic content. An RRPP tailored to search engines and news aggregators **distorts the level playing field which currently exists between press publishers** of all kinds on the Internet **to the detriment of** a particular subgroup of content providers, namely **lesser-known, in particular e-only, publishers of journalistic content**. For if search engines and news aggregators reduce or even stop their news-related services, smaller publishers that are more dependent on referral traffic than well-known news brands are deprived of their preferred business model.

The media landscape has never been more diverse and active than today. Instead of distorting the intense competition in online news markets with an RRPP that favours some publishers and disadvantages others, Member States – or the EU if competent to do so – have other means to foster quality journalism. In particular, **tax reductions or tax benefits for press publishers** are an effective and non-discriminatory way to support a free and pluralist press.

I. The proposal for a related right in press publications concerning digital uses

- 1 The discussion about the need for a related right for press publishers (RRPP) concerning digital uses is of recent origin. It can be traced back to complaints of certain German newspaper and magazine publishers about unfair market conditions on the Internet that were raised publicly in and around 2009.¹ In response, in 2013 Germany introduced a new “ancillary” copyright for press publishers, who were granted an exclusive right to make their press product or parts thereof publicly available if this is done by “commercial providers of search engines or commercial providers of services which process the content accordingly”.² In 2014, Spain enacted a copyright amendment, which entitles publishers of periodicals and regularly updated websites with informative or entertaining content to claim fair compensation if news aggregators make insignificant fragments of their content publicly available.³ Both laws focus on the interests of press publishers vis-à-vis online service providers such as search engines and news aggregators.

- 2 The debate about the copyright status of press publications has now moved to the EU level. Whereas the European Commission’s “Digital Single Market Strategy for Europe” of May 2015⁴ was silent on this issue, the Copyright Communication of December 2015 introduced the general aim of “achieving a well-functioning marketplace for copyright”, including and in particular concerning content distributed online.⁵ In this context, the Commission expressly referred to solutions for news aggregators in certain Member States, which, however, carried “the risk of more fragmentation in the digital single market”.⁶ It accordingly announced that it would consider “whether any action specific to

¹ Hegemann/Heine 2009; Peifer 2010:263.

² See paragraphs 87f-h German CA, English translation available at http://www.gesetze-im-internet.de/englisch_urhg/index.html. In 2015, the Austrian government withdrew a draft proposal modelled on the German amendment; see <https://netzpolitik.org/2015/vorerst-doch-kein-leistungsschutzrecht-in-oesterreich-ehrenrunde-bei-eu-kommission/>.

³ See Art. 32.2 of Texto Refundido de la Ley de Propiedad Intelectual (LPI); European Commission 2016b:190.

⁴ European Commission 2015a:6-8.

⁵ European Commission 2015b:9-10.

⁶ Id.

news aggregators is needed, including intervening on the definition of rights.”⁷ In May 2016, the Commission initiated a public consultation, as part of which it consulted all stakeholders “as regards the impact that a possible change in EU law to grant publishers a new neighbouring right would have on them, on the whole publishing value chain, on consumers/citizens and creative industries”.⁸ Although the consultation was framed in a very general way and referred to publishers in all sectors including publishers of books and scientific journals, it was also primarily concerned with the online use of press publications.

- 3 This focus was eventually confirmed by the Commission proposal for a Directive on “copyright in the Digital Single Market” (CDSMD proposal) of 14 September 2016, which was accompanied by an Impact Assessment “on the modernisation of EU copyright rules” and a Communication with the title “Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market”.⁹ This copyright package includes an Article 11 CDSMD proposal on the “protection of press publications concerning digital uses”, according to which

“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.”

- 4 Relying on the experiences and debates surrounding the German and Spanish laws in this area, this study presents a legal analysis of the proposal for an EU RRPP. After a brief analysis of the limited competence of the EU legislature to introduce such a new related right (II), the study examines the purpose of an RRPP in the digital context (III). On this basis, the final section distinguishes three versions of an RRPP with regard to its subject-matter and scope, and considers the practical and legal implications of these alternatives, in particular having regard to fundamental rights (IV).

⁷ European Commission 2015c.

⁸ European Commission 2016g:6, 9-10.

⁹ European Commission 2016b, 2016c and 2016d.

II. The limited competence of the EU to codify an RRPP

- 5 The Commission bases its copyright package including the RRPP on Art. 114 TFEU, which confers on the EU the power to adopt measures which have as their object the establishment and functioning of the internal market.¹⁰ According to the Commission, an RRPP limited to digital uses of press publications would contribute to the functioning of the Digital Single Market, which is by essence cross-border. By establishing a fully harmonised legal framework, an EU RRPP would resolve obstacles to cross-border digital trade and services that the German and Spanish laws in this area have already evoked.¹¹ Even if it was supposed, for the sake of argument, that this disputed finding was accepted,¹² the exercise of this competence is subject to a number of conditions and limitations that inform the following analysis.
- 6 Firstly, Art. 114 TFEU is a competence with a particular purpose, namely the establishment of the Internal Market. It does not empower the EU to regulate with the primary aim of fostering a free and pluralist press in the interest of the public debate and the proper functioning of a democratic society.¹³ Intervention motivated by these general political aspects of media regulation is for the Member States to take. As highlighted by the Audiovisual Media Services Directive (AVMSD) 2010/13 and its pending amendment, the EU may intervene in media markets, but it has to do so with a focus on the freedom to provide services in the Internal Market.¹⁴ In this context, the EU legislature has to observe the basic principles governing this Internal Market, which are set out in Art. 3(3) TEU. According to this provision, the EU legislature has to work for a highly competitive social market economy, and it is required to promote scientific and technological advance. The AVMSD 2010/13 implements these general objectives with

¹⁰ Recital 1 CDSM directive proposal; European Commission 2016d:4. See also Rosati 2016.

¹¹ European Commission 2016d:2; European Commission 2016a:132.

¹² Critical Ramalho 2016 (there is neither a current nor a likely future obstacle to cross-border trade in what concerns the publishing market, nor is there an appreciable distortion to competition that could merit EU's intervention).

¹³ But see recital 31 sentence 1 and 2 CDSMD proposal and infra III 4.

¹⁴ See European Commission 2016f.

regard to the Internal Market for audiovisual media services by fostering free competition, equal treatment, transparency and predictability, low barriers to entry, and, last but not least, “the free flow of information”.¹⁵ Recital 1 of the CDSMD proposal also aims at ensuring “that competition in the digital market is not distorted”.

- 7 Secondly, the Commission itself points out that any possible intervention to the benefit of press publishers shall be consistent “with other EU policies.”¹⁶ The CDSMD proposal states that it is “based upon, and complements” the existing copyright acquis, in particular the Database Directive 96/9.¹⁷ Closer inspection reveals, however, that the RRPP is incompatible with the value judgments underlying the Database Directive because it extends to digital uses of press publications – namely the repeated and systematic indexing of news databases and the display of snippets – that the Database Directive *deliberately* left free from exclusive rights in the interest of the freedom of information.¹⁸ Moreover, an RRPP is in latent conflict with the restrictions on liability that certain intermediary service providers benefit from under Arts. 12-15 of the E-Commerce Directive 2000/31.¹⁹ Under Art. 14(1) of that directive, “social media” providers, which store information provided by a recipient of the service, cannot be held liable for the data which they stored at the request of a recipient unless they fail to act expeditiously, after having become aware of the unlawful nature of data or of activities of a recipient, to remove or to disable access to those data.²⁰ This safe harbour is taken away if these operators become directly liable under an RRPP in the event that their users post fragments of and links to press publications.²¹ The same is arguably true for search engines and news aggregators, which are information society services under the E-Commerce Directive, and which also provide services of a mere technical, automatic

¹⁵ Cf. recitals 10, 33 sentence 3 AVMSD 2010/13.

¹⁶ European Commission 2016g:6.

¹⁷ Recital 4 and Art. 1(2) CDSMD proposal.

¹⁸ *Infra* III 2 b bb cc.

¹⁹ Xalabarder 2014:26; Wimmers 2012:666.

²⁰ CJEU C-236/08-238-08, 23.3.2010 *Google France* ECLI:EU:C:2010:159, para 109.

²¹ *Infra* III 1 b dd (3).

and passive nature without playing an active role of such a kind as to give them knowledge of, or control over the data they process.²²

- 8 Thirdly, an EU RRPP has to comply with applicable international laws. At first glance, this compliance is facilitated by the concept of minimum protection in international copyright treaties. Thus, the fact that the mandatory minimum protection of the Berne Convention (BC) does not apply to “news of the day or to miscellaneous facts having the character of mere items of press information” (Art. 2(8) BC), does not mean that countries of the Berne Union were barred from granting some form of protection to these items, including an exclusive right related to copyright. The immediate effect of Art. 2(8) BC only is that the principle of national treatment under Berne, the WCT and TRIPS does not apply.²³ Nevertheless, both this provision and the mandatory exception for “press summaries” under Art. 10(1) BC are proof of an international consensus that copyright law should, in the interest of the freedom of expression and information, not extend to news as such and their public communication in overviews that cover several sources. Since an RRPP attaches to digital uses of journalistic content in whatever layout or format, it effectively grants protection for subject-matter (news and miscellaneous facts) and uses (press summaries) that are required to remain free from copyright protection under international law.²⁴ Even if one takes the formalist position that an RRPP is beyond the scope of application of the current international copyright acquis and thus does not run afoul of the obligations of the EU and its Member States under Berne, the WCT, and TRIPS, international copyright law highlights the importance of the freedom of news of the day and of press summaries/reviews.
- 9 The legal significance of these freedoms follows from the fourth and final limitation of the competence of the EU to introduce an RRPP, namely from fundamental rights. The

²² Oberlandesgericht Cologne 28 O 370/14, 13.10.2016, BeckRS 2016, 18916, para 93. But see Art. 21(2) sentence 1 Directive 2000/31 (excluding the question of the liability of “providers of hyperlinks and location tool services” from the scope of application of the E-Commerce Directive).

²³ Ricketson/Ginsburg 2006:para 8.105; v. Lewinski 2008:para 5.83; Czychowski/Schaefer 2014:§ 87f para 12. See also paragraph 49(2) German CA (“It shall be permissible without limitation to reproduce, distribute and communicate to the public miscellaneous news items of a factual nature and news of the day which has been published via the press or broadcasting; protection granted under other statutory provisions shall remain unaffected thereby.”)

²⁴ *Infra* IV 3 e.

Commission proposal stresses that it “respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union”.²⁵ As will be explained with regard to the different versions of an RRPP in more detail below, this is, however, not the case.²⁶

- 10 On the one hand, the fundamental right to intellectual property under Art. 17(2) of the Charter does not imply a positive duty of the EU legislator to grant press publishers protection against digital uses of press publications. According to the CJEU, there is nothing whatsoever in the wording of that provision or in the Court’s case-law to suggest that the fundamental right to (intellectual) property is inviolable and must for that reason be absolutely protected.²⁷ The international human-rights framework merely requires that states adhere to previously established IP rules and forego arbitrary exercises of state power.²⁸ The abstract institutional guarantee of property under the German Basic Law demands that an individual is generally enabled to live an autonomous life in the economic sphere independent of public welfare.²⁹ Publishers of news and other journalistic content already enjoy comprehensive protection under the current copyright acquis, and on this basis they are able to conduct their media business without state subsidies.³⁰ Accordingly, the current status quo does not run afoul of the constitutional minimum of property protection.³¹
- 11 On the other hand, “the protection of the fundamental right to property, which includes the rights linked to intellectual property, must be balanced against the protection of other fundamental rights”.³² And indeed, whatever its precise scope, an RRPP would

²⁵ Recital 45 CDSMD proposal; Art. 6(1) TEU.

²⁶ See *infra*, IV 2 and 3.

²⁷ CJEU C-70/10, 24.11.2011 *Scarlet Extended* ECLI:EU:C:2011:771, para 43; CJEU C-360/10, 16.02.2012 *SABAM* ECLI:EU:C:2012:85, para 41.

²⁸ Helfer/Austin 2011:516.

²⁹ Peukert 2008:702 et seq.

³⁰ *Infra* III 2 b.

³¹ Czychowski/Schaefer 2014:§ 87f para 9; see also European Commission 2016d:9 (“positive impact on copyright as a property right”).

³² CJEU C-70/10, 24.11.2011 *Scarlet Extended* ECLI:EU:C:2011:771 paras 41 et seq; CJEU C-360/10, 16.02.2012 *SABAM* ECLI:EU:C:2012:85, paras 42-44; CJEU C-160/15, 8.9.2016 *GS Media* ECLI:EU:C:2016:644, para 31.

not only have a “limited”³³, but a serious impact on the fundamental right of every Internet user to freedom of expression and information (Art. 11(1) Charter), on the fundamental right of Internet service providers to conduct a media business (Art. 16 with Art. 11(2) Charter), and last but not least on the fundamental right of numerous online press publishers who want to continue exercising their media freedom (Art. 11(2) Charter) under current conditions and are opposed to the distortions of intra-media competition that an RRPP would create. According to Art. 52(1) of the Charter, such interferences

“must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”³⁴

- 12 The requirement to justify the creation of an RRPP can also be derived directly from Art. 11 and 16 of the Charter.³⁵ With a view to Art. 10 ECHR, the ECtHR likewise held that copyright has to pursue one or more of the legitimate aims referred to in Art. 10(2) ECHR, and that the protection at stake has to be “necessary in a democratic society”.³⁶ It is therefore not only a matter of political expediency to clearly state the objectives of an RRPP. If an RRPP does not satisfy an objective of general interest or if it is not appropriate for attaining the legitimate objectives pursued by the legislation at issue or if it exceeds the limits of what is appropriate and necessary in order to achieve those objectives, a directive establishing an RRPP would be invalid.³⁷
- 13 The following sections reflect these basic requirements for a valid EU act. The next section asks whether the objectives that the European Commission puts forward with

³³ European Commission 2016d:9.

³⁴ See CJEU C-293/12 and C-594/12, 8.4.2014 *Digital Rights Ireland Ltd* ECLI:EU:C:2014:238, paras 38 et seq.

³⁵ See ECJ C-200/96, 28.4.1998 *Metronome Musik* ECLI:EU:C:1998:172, para 26; Peukert 2015b:132 (criticising the balancing paradigm).

³⁶ ECtHR no 40397/12 *Fredrik Neij and Peter Sunde Kolmisoppi v. Sweden*.

³⁷ Cf. CJEU C-293/12 and C-594/12, 8.4.2014 *Digital Rights Ireland* ECLI:EU:C:2014:238, paras 38 et seq.

regard to an RRPP are not only objectives of particular interests, namely press publishers' private interests but also at the same time objectives of general interest. On this basis, section IV provides a detailed analysis of three versions of an RRPP measured against the requirements set out in Art. 52(1) of the Charter.

III. What is the objective of general interest in the case of an RRPP?

1. Achieving a well-functioning market place for copyright

a) The circularity of the argument

- 14 According to the second sentence of Art. 1 of the CDSMD proposal, the Directive aims, inter alia, at ensuring “a well-functioning marketplace for the exploitation of works and other subject-matter”. In its Impact Assessment, the Commission states that the prime “general objective” of the RRPP is “to achieve a copyright marketplace and value chain that works efficiently for all players and gives the right incentives for investment in and dissemination of creative content”.³⁸ The intervention aims to foster the Digital Single Market’s ambition “to deliver opportunities for all and to recognise the value of content and of the investment that goes into it.”³⁹
- 15 At first sight, the notion of a well-functioning marketplace that delivers fair opportunities for all clearly satisfies an objective of general interest. One must, however, be careful to not confuse the rhetoric of a “general objective” with an “objective of general interest”. Only the latter is able to justify the creation of an RRPP. In and of itself, the “sustainability of the publishing industry” (Recital 32 sentence 1 CDSMD proposal) is a private interest of the enterprises that belong to this industry. The fact that the

³⁸ European Commission 2016a:134.

Commission repeatedly relies on market data and expectations concerning an RRPP provided by “the main newspaper and magazine brands”⁴⁰ reinforces the impression that the RRPP is primarily a measure to the benefit of certain private parties.

- 16 Moreover, a closer look reveals that the notion of a “well-functioning market place for copyright” is a circular and effectively hollow concept, which painstakingly tries to cover the fact that the RRPP only supports private interests without a demonstrable indirect benefit to the *general* interest. At a very fundamental level, the circularity of the argument derives from the fact that the Commission does not refer to a marketplace for digital *goods* or *online services*, in particular news and other journalistic content. Instead, it speaks of a well-functioning market-place for *copyright* and problems caused by the fact that “rightholders face difficulties when seeking to licence their rights and be remunerated for the online distribution of their works.”⁴¹ It is, however, precisely the question whether more types of copyrights/neighbouring rights are needed, and whether press publishers should become original rightholders. Only under this condition is it correct to refer to a press publication as “their” content that they may claim to licence and be paid for.⁴² In other words, the notion of a well-functioning marketplace for copyright puts the cart before the horse. It starts off with a market place where press publishers already own content and can claim remuneration for its use, although that is what is to be explained and justified.
- 17 If a market-based argumentation is to form the basis of an objective of *general* interest, it would have to aim at a well-functioning online marketplace *for news and other journalistic content*. As the Commission rightly points out, such a market does exist, and it is “constantly evolving ..., with more and more players and means of content

³⁹ European Commission 2015b:9-10.

⁴⁰ Cf. European Commission 2016a:156 (“news publishers report that the current decline of the industry has already led to closing down or reducing their editorial teams...”), 160 (“online service providers often have a strong bargaining position and receive the majority of advertising revenues generated online (e.g. 40 % of total advertising investments in BE, according to publishers”), 167 (“losses for news publishers related to piracy have been estimated to be around €10.76 million per year in BE, and the industry estimates €27.59 million annually on increased licensing revenues if piracy decreased”), id. (“introduction of a new related right could lead to a 10 % increase in revenues or between 10-15 % in publishers’ operating profit margin”).

⁴¹ European Commission 2016d:3.

distribution”.⁴³ Only if this existing market situation produces undesirable results to the detriment of the *general* interest – in particular because the public debate is at risk due to a lack of free, quality journalism – is an intervention warranted. This analysis is generally conducted under the label of a “market failure” analysis.

b) The lack of a failure in the online press publishing market

- 18 An analysis of the online market for news and other journalistic publications reveals that there is no market failure that already prejudice or is likely to prejudice the strong general interest in the existence of a free and pluralist media landscape (Art. 11(2) of the Charter). This assessment is based on the actual experience with the German and Spanish RRPPs, and on several detailed and fact-based economic studies that were produced in the course of debates about these national laws.⁴⁴ It is consistent with the market data presented by the European Commission,⁴⁵ and furthermore with decisions of the German Arbitration Board for disputes relating to Collective Management Organisations,⁴⁶ the German competition authority (Bundeskartellamt)⁴⁷ the Landgericht Berlin,⁴⁸ and the opinion of the overwhelming majority of independent copyright experts in Germany and other EU Member States.⁴⁹

⁴² European Commission 2016a:134.

⁴³ European Commission 2016a:160.

⁴⁴ In particular Dewenter/Haucap 2013; NERA 2015; Chiou/Tucker 2015; Calzada/Gil 2016.

⁴⁵ European Commission 2016a:155 et seq. (“publishing industry is in the middle of a shift from print to digital”); European Commission 2016e.

⁴⁶ Copyright Arbitration Board Case Sch-Urh 13/14, 24.9.2015, para 29. See paragraphs 92 et seq. Act on the Management of Copyright and Related Rights by Collecting Societies, available in English at https://www.gesetze-im-Internet.de/englisch_vgg/englisch_vgg.html#p0468.

⁴⁷ Bundeskartellamt B6-126/14, 8.9.2015 *Google Inc. et al*, BeckRS 2016, 01138, paras 187 et seq., 213, 234, 239.

⁴⁸ Landgericht Berlin 92 O 5/14, 19.2.2016 *VG Media/Google*, BeckRS 2016, 10612.

⁴⁹ See, in particular European Copyright Society 2016; Max Planck Institute for Innovation and Competition 2015 and 2016; Ohly 2014; Xalabarder 2014; Ehmann/Scilagyi 2012; Spindler 2013.

aa) The focus on the revenue gap of “press” publishers caused by the shift from print to digital

- 19 Resembling similar statements of the German government and publishers associations, the European Commission considers it a “precondition” for a well-functioning market place for copyright that “rightholders” have the possibility “to licence and be paid for the use of their content, including content distributed online”.⁵⁰ Leaving aside the fact that this starting point begs the question (see above), the Impact Assessment explaining the CDSMD proposal reveals that the Commission refers to a very particular group of (possible) rightholders, namely press publishers who were already in the business of news publishing in the printing age (thus “press” and not “news” publishers), and who allegedly face a revenue gap as a result of the shift from print to digital. According to the Commission, an RRPP is meant to solve the following problem:

“Despite the growing success of publishers’ content online, the increase of publishers’ digital revenues has not made up for the decline of print. Between 2010 and 2014, press publishers’ total print revenues decreased by €13.45 billion and digital revenues rose by €3.98 billion: a net revenue loss of € 9.47 billion (-13 %). In addition, news publishers report that the current decline of the industry has already led to closing down or reducing their editorial teams, in particular in the case of smaller and regional newspapers.”⁵¹

- 20 This print-to-digital revenue gap had already been a key argument in the debate about the German RRPP. The German associations of newspaper and magazine publishers

⁵⁰ European Commission 2015b:9-10; European Commission 2016a:132 (“difficulties faced by rightholders in negotiating with online services involved in the commercial reuse of copyright-protected content”); similarly Bundesregierung (Germany) 2012:1; European Publishers Council 2016:2.

⁵¹ European Commission 2016a:156, internal citations omitted; for more detailed data see European Commission 2016b:175-6, 178, 188.

pointed to the “expensive editorial staff and journalists”⁵² they have to finance, and to the aim of replacing print by e-only revenues.⁵³

bb) Limitations of an RRPP following from this starting point

- 21 The very specific problem focus of the Commission is useful in so far as it provides teleological reasons for limiting the protection of press publications. This starting point firstly explains why the CDSMD proposal is only concerned with press publishers as opposed to book, scientific, and other publishers.⁵⁴ For as the Commission correctly observes, only “press publishers have traditionally made available online large proportions of their content for free, since the early days of the Internet”.⁵⁵ In contrast, book and scientific publishers accomplished the shift from print to digital without taking this step away from the “more traditional linear model”.⁵⁶ They have continued to generate revenues in exchange for offering access to books and articles by selling e-books, articles or via subscriptions. The markets for books and scientific publications function well.⁵⁷
- 22 There is also no apparent market failure in *offline* press publication markets. Press publishers confirm that today as ever, they have complete control of the production and distribution of printed editions of newspapers and magazines during their short period of exploitation.⁵⁸ In highly concentrated newspapers and magazine markets with very few press/news agencies, there is also no need for a special protection of “hot news” against misappropriation by other press publishers.⁵⁹ In line with this observation, the Commission justifies its proposal for an RRPP with reference to difficulties that press

⁵² Keese 2013:5.

⁵³ Id, 6.

⁵⁴ But see European Commission 2016:9-10 (“publishers in all sectors”).

⁵⁵ European Commission 2016a:156.

⁵⁶ European Commission 2016a:158.

⁵⁷ Id; Max Planck Institute 2016:paras 7, 21.

⁵⁸ European Publishers Council 2016:6; VG Media 2016a:4-5; Bundesregierung (Germany) 2012:6.

⁵⁹ Prantl 1983:70-71; Ohly 2012:42.

publishers allegedly face on the Internet as the new, “main marketplace for the distribution of and access to copyright-protected content”.⁶⁰ The aim is to facilitate “online licensing of their publications, the recoument of their investment and the enforcement of their rights”.⁶¹ In an unofficial version of the CDSMD proposal, this limited objective was implemented by granting rights “for the *online* use” of press publications.⁶² The final version of Art. 11(1) CDSMD proposal grants press publishers, however, the rights of reproduction and making available “for the *digital* use of their press publications”. Whereas Art. 3(2) InfoSoc Directive 2001/29 indeed only applies in the Internet context, digital reproductions that fall under Art. 2 InfoSoc Directive 2001/29 and thus under Art. 11(1) CDSMD proposal can also occur in pure offline situations, e.g. if a digital copy of a press publication that was downloaded or received via email is further reproduced onto a USB stick or another digital data carrier. Apart from vague references to the problem of piracy, the Commission does not offer any explanation for extending the RRPP to such acts. Consequently, the reproduction right under Art. 11(1) CDSMD proposal should be interpreted restrictively as an accessory right that only covers reproductions “to the extent needed” for acts of making press publications available to the public on the Internet.⁶³ This would include reproductions of press publications by search engines, news aggregators and social media whose activities gave rise to the RRPP in the first place, and that press publishers would like to licence “upstream”.⁶⁴ As it stands, the reproduction right under Art. 11(1) CDSMD proposal also covers temporary and permanent copies that private Internet users create if they browse the websites of search engines etc. or download press publications that are freely available on the Internet. Again, the Commission does not provide reasons why this activity of EU citizens should fall into the ambit of the RRPP, which is presented as

⁶⁰ European Commission 2016d:3; European Commission 2016a:132.

⁶¹ European Commission 2016d:3; Recital 3 CDSMD proposal.

⁶² Proposal for a Directive on copyright in the Digital Single Market, without date, on file with the author.

⁶³ Cf. European Commission 2016a:162 (“press publishers would be granted the exclusive rights of making available to the public and reproduction to the extent needed for digital uses”). Publishers do, however, claim full copyright equivalence including the distribution right; cf. Schweizer 2010:12; European Publishers Council 2016:2 (right of reproduction and of communication to the public according to Art. 2 and 3 InfoSocDir, distribution right under Art. 9 Dir 2006/115).

⁶⁴ European Commission 2016a:134.

a tool to foster the “emergence of a solid B2B licensing market for online uses of press publications”.⁶⁵

- 23 The lack of a market failure in offline publication markets finally provides a compelling reason to strictly distinguish the issues of an RRPP on the one hand and of the eligibility of publishers of all sorts to claim compensation for uses under an exception to copyright on the other.⁶⁶ The Commission also distinguishes the latter *Reprobel* problem, which will not be further discussed in this study, from the RRPP, which in turn does not provide a basis for claiming a share in the compensation for the reprography exception. Nevertheless, it links the two issues together by regulating and explaining them under the heading of “rights in publications”, which are allegedly needed for a “well-functioning marketplace for the exploitation of works and other subject-matter”.⁶⁷ In fact, whatever the justification for improving the ability of publishers to receive compensation for (offline) uses of their publications under exceptions, these justifications do not provide support for the introduction of an RRPP.

cc) Competition in the online market for press publications

- 24 Though helpful for understanding the limited scope of an RRPP, the starting point taken by the Commission and the conclusions drawn from its analysis of the relevant issues are flawed for a number of reasons.
- 25 To begin with, the Commission insufficiently acknowledges the transformative power of the Internet. It observes that the Internet has already become the “main marketplace for the distribution and access to copyright-protected content”,⁶⁸ and provides evidence that a majority of consumers prefers Internet sources to printed editions when accessing

⁶⁵ European Commission 2016a:157; infra III 1 b ee.

⁶⁶ Sprang 2016; Conrad/Berberich 2016:656; Stieper 2016:§ 87g para 14.

⁶⁷ Art. 1 s. 2, title IV chapter 1 CDSMD proposal; European Commission 2016d:155 et seq.

⁶⁸ European Commission 2016d:3.

news.⁶⁹ But the transformation is not only quantitative, but also qualitative in nature. As the ECtHR rightly points out, “the Internet is an information and communication tool particularly distinct from the printed media”.⁷⁰ The Internet continues to “*transform the way works and other protected subject-matter are created, produced, distributed and exploited*”.⁷¹ In a nutshell, it induces a shift from linear, hierarchical value chains running from rightholders via distributors to consumers to a highly diverse network, in which “new business models and new actors continue to emerge”.⁷² It is true that this online market for press publications differs from the print market. But the distinct characteristics of the online news market do not imply that it is not functioning well.

26 Firstly, digitisation and the Internet have tremendously reduced the costs of publishing and distributing written and audiovisual content, in particular on an EU- and even world-wide scale. Whereas printing newspapers and magazines was subject to the laws of economies of scale, the marginal costs of making an additional article, picture or video available online are very low and in many cases effectively zero. The same applies to formerly cost-intensive and labour-intensive activities such as typography, layout, and typesetting that have become largely redundant thanks to low-cost digital technologies.⁷³ For this reason alone, the sole reference to digital *revenues* and an alleged print-to-digital revenue and profit gap is flawed. Only media companies that operate on both the print and the online market are confronted with the problem that digital revenues do not offset the loss of print revenues. E-only publishers can be highly profitable in spite of lower revenues per article, due to the decrease in costs.

27 Already at this point, it is important to stress the relevance of the distinction between traditional “press” publishers and “other” providers of journalistic content on the Internet to the legal evaluation of the proposed RRPP. The Commission only addresses media companies that were already in the business of publishing journalistic content in the printing age and that are therefore often well-known to the public. At the same time, the

⁶⁹ European Commission 2016a:156; European Commission 2016b:179.

⁷⁰ ECtHR no. 33014/05, 5.5.2011 *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, § 63.

⁷¹ Recital 3 sentence 1 CDSMD proposal; European Commission 2016d:2 (my emphasis).

⁷² Recital 3 sentence 2 CDSMD proposal.

⁷³ European Copyright Society 2016:4.

Commission systematically ignores the significant and constantly growing group of “other” news providers that, according to a recent study of the Bavarian regulatory authority for new media, already hold a share of 41 % in the highly diverse online information market.⁷⁴ Since these businesses, including e-only news providers such as *theuropean.de* or *golem.de*, entered the market for journalistic content only with the advent of the Internet, they do not face the revenue gap that an RRPP is supposed to close. It may well be that the growth of these “other” editorial teams offsets the cuts that traditional press publishers report and complain about.⁷⁵ These content providers, including private Internet users who comment on other publications, share news and publish reports, images and videos of incidents on social media platforms, are in fact opposed to the introduction of an RRPP because such a measure would severely impair their competitive position vis-à-vis well-known “press” brands.⁷⁶ This finding is confirmed by the summary of the stakeholders’ views on an RRPP, in which the Commission states that “most press publishers, in particular the main newspaper and magazine organisations” support the introduction of an RRPP, whereas journalists and consumer organisations have expressed reservations.⁷⁷ As will be explained in detail below, ignoring and discriminating against “other”, in particular e-only, media companies, who try to attract attention by making their journalistic content as accessible as possible, creates serious fundamental rights concerns with regard to the guarantee of media pluralism under Art. 11(2) of the Charter.⁷⁸

- 28 Online markets for press publications are secondly characterised by an unbundling effect.⁷⁹ Instead of having to buy and browse a complete newspaper or magazine edition (print or digital), consumers are able to search for and access separate articles or videos of particular interest to them. The individual article/video replaces the bundle of news content contained in a printed newspaper/magazine or on a publisher’s website as the primary product that consumers demand and publishers offer. Accordingly,

⁷⁴ Bavarian Regulatory Authority for New Media 2016:27 (unspecified “other” publishers).

⁷⁵ Cf. European Commission 2016d:156.

⁷⁶ See NERA 2015:47 et seq.

⁷⁷ European Commission 2016a:163.

⁷⁸ *Infra* IV 3 c bb.

⁷⁹ Wieduwilt 2010:561; Ladeur 2012:423.

competitive activity and business models are increasingly oriented towards the individual article. One effect of this unbundling is a trend towards differentiation and specialisation of both users' interests and content providers' services.⁸⁰ Press publishers who were established under conditions of bundled news products and who still cover as many topical areas find it increasingly difficult to keep up with the speed and level of in-depth information that specialised content providers are able to offer, e.g. blogs that only deal with IP law and policy.⁸¹ More importantly, the unbundling effect makes it more difficult to cross-subsidise niche content with articles attracting strong readers' interest. At the same time, unbundling effects lower the barriers to entry into the news market, which fosters media diversity and pluralism.⁸²

- 29 Thirdly, the difficulties of traditional print publishers to manage the shift from print to digital are due to the fact that "competition for digital advertisement revenues is tough and free-access news are widely available".⁸³ However, the intensity of this competition does not imply that it is distorted and needs intervention. To begin with, the decision to make large proportions of their content available for free on the Internet was a voluntary one taken by press publishers in "the early days of the Internet".⁸⁴ This move contributed to the expectation of many consumers that access to news articles is free of charge.⁸⁵ But the lack of consumer willingness to accept paywalls is not merely a manifestation of a lamentable mindset of the Internet generation which has become accustomed to receiving information gratis: this is a phenomenon that an RRPP could not change anyhow.⁸⁶ It is the necessary consequence of the fact that a large number of news providers – traditional newspaper and magazine publishers, TV stations including public broadcasters, providers of online services like Internet access or email, e-only news publishers, blogs, social media, primary sources of public authorities, etc.⁸⁷

⁸⁰ Ladeur 2012:423.

⁸¹ See, e.g. the IPKat blog, <http://ipkitten.blogspot.de/>.

⁸² Dewenter/Haucap 2013:4.

⁸³ European Commission 2016a:164.

⁸⁴ European Commission 2016a:156.

⁸⁵ European Commission 2015b:2; Mitchelstein/Boczkowski 2013:380.

⁸⁶ Neither would an RRPP remedy the fact that advertising revenues linked to access through smartphones are lower than through computers; but see European Commission 2016a:149.

⁸⁷ Bavarian regulatory authority for new media 2016:27 (41 % „other“ content providers on the information market online).

– offer identical or substitutable content, namely news of the day and miscellaneous facts. Online services like news aggregators and search engines provide a free, transparent, and real-time overview of what is on offer in this highly diverse and transnational market. In such a situation, it is difficult if not impossible for news content providers to demand a positive price. But again, this is not a dysfunctionality, but the predictable result of a highly transparent market with minimal transaction costs and many substitutable offers.⁸⁸ Exactly these features – free competition, equal treatment, transparency, low barriers to entry, and “the free flow of information” – should, according to the EU legislator, characterise the Internal Digital Market.⁸⁹

30 Fourthly, and in spite of this intense competition between traditional and “other” media companies, press publishers that had established well-known brands already in the pre-Internet era, are successful online. According to the European Commission, “digital audiences of newspapers and magazines have been growing exponentially”.⁹⁰ The amount of unique user/browser access at 39 press publishers across eight national markets has *more than doubled* over the last five years, from 248.4 million unique visits in 2011 to 503.4 million visits in 2015.⁹¹ These websites and apps “are the main services used to access news”, occupying more than 40 % of the online news market.⁹² The largest individual share (namely 9.2 %) of the online news market in Germany is held by Springer – at the same time one of the main supporters of an RRPP in Germany.⁹³ Well-known news portals also attract considerable cross-border traffic, which in itself realises the very ideal of the Digital Single Market, and which helps to establish a transnational, European public sphere. This success can in part be attributed to the fact that one of the most important criteria for consumers for choosing a service to read news online is the “good reputation” of a newspaper or magazine.⁹⁴ The

⁸⁸ NERA 2015:13 et seq.; Dewenter/Haucap 2013:3 et seq.; Ehmann/Szilagyi 2009:8.

⁸⁹ Cf. recitals 10, 33 sentence 3 AVMSD 2010/13.

⁹⁰ European Commission 2016a:156; Keese 2013:5; Mitchelstein/Boczkowski 2013:385 (“soaring audiences across many platforms”); Ehmann/Szilagyi 2009:8.

⁹¹ European Commission 2016b:177.

⁹² European Commission 2016a:156 (42 %); Bavarian regulatory authority for new media 2016:32-33, 38 (45 %).

⁹³ Bavarian regulatory authority for new media 2016:27.

⁹⁴ European Commission 2016e:35.

development of the digital revenue of these companies, who have for the most part already undergone a transformation from a traditional “press” publisher to a digital media company, confirms that the strongest players on the news market are not in need of intervention in the form of an RRPP. The Commission reports that the number of people who pay for news is projected to grow in the future between 7 % and 23 %.⁹⁵ It also observes that “paywalls and B2C digital-subscription offers are being increasingly proposed, in particular by the main newspaper and magazine brands”.⁹⁶ Axel Springer SE, for example, reported an 8.9 % increase in revenue in 2015 compared to 2014, as well as which the growth of the digital business, in line with prior expectations, “more than compensated” for the shrinking of the print business.⁹⁷

- 31 Fifthly, the current EU copyright framework provides a sufficient basis for a flexible market strategy for both traditional and non-traditional press publishers. Content providers are free to implement widely available, low-cost technical protection measures to regulate and request payments for the access and use of their digital content and/or they may generate advertising revenue by attracting as much traffic to their website as possible.⁹⁸ These technical tools to implement a wide variety of business models are completely ignored in the Commission documents accompanying the CDSMD proposal. The existing EU copyright *acquis* also provides effective protection in relation to streaming platforms like Spotify in the music sector or Netflix in the movie sector, which the Commission apparently considers as the ultimate business model for news content.⁹⁹ Aside from the fact that in a market economy it is not for the EU institutions to decide which business model ought to prevail, an RRPP would in no way foster the evolution of such a service because press publishers would only be granted a stronger individual veto position.
- 32 In summary, there is no indication that the current online market for press publications and the competition between different providers of journalistic content is not functioning

⁹⁵ European Commission 2016a:164.

⁹⁶ *Id.*, at 156.

⁹⁷ Axel Springer SE, Quarterly Financial Report as of Sept. 30, 2015, pg. 2. See also Dewenter/Haucap 2013:8 et seq. (heterogeneous landscape); Dreier 2015:§ 87f para 4; Nolte 2010:166 with fn 4.

⁹⁸ Dewenter/Haucap 2013:13-4.

according to the basic market laws. A market failure justifies a new IP right only if (1) a market participant creates or invests into the creation of new content and (2) this effort would not occur absent the legal intervention.¹⁰⁰ Instead of presenting independent evidence, the European Commission embraces complaints of press publishers about lower profit margins and difficulties sustaining their editorial staff.¹⁰¹ At the same time, the Commission itself points out that the constantly-evolving online news market sees “more and more players and means of content distribution”.¹⁰² This correct observation is incompatible with the suggestion that the online market for journalistic content is doomed to collapse. Indeed, market entries by non-traditional media companies, the success of well-known supporters of an RRPP like Springer, and last not least few if any complaints among thriving online audiences about a lack of online or print news – all these facts prove the contrary and clearly militate against the need for an RRPP.

- 33 In any event, an RRPP cannot generate consumer demand for journalistic content if that demand does not exist. Without such demand, there is no justification for a market-based remuneration of publishers. This, ultimately, is the reason for the failure of the German and the Spanish RRPPs, which did not result in any additional revenue for press publishers.¹⁰³ These experiences prove that an RRPP does not solve a market failure. Instead, the European Commission is trying to reshape the structural shift from print – characterised by linear value chains with publishers on the top – to digital networks – characterised by a highly diverse and competitive market for journalistic content – in order to support the private interests of a particular group of press publishers.¹⁰⁴

⁹⁹ See European Commission 2016a:169 with fn. 520.

¹⁰⁰ Bundesgerichtshof I ZR 149/14, 19.11.2015, *Pippi Langstrumpf-Kostüm II* GRUR 2016, 725 para 28; Dewenter/Haucap 2013:19; Max Planck Institute 2012:3.

¹⁰¹ European Commission 2016a:156.

¹⁰² European Commission 2016a:160.

¹⁰³ European Commission 2016a:159-60.

¹⁰⁴ Cf. Ehmann/Szilagyi 2009:8; Peukert 2015a:384.

dd) The role of online services and the fair share of press publishers

34 This finding remains valid if one brings online services like search engines, news aggregators, and social media into the analysis. Although both the explanatory memorandum and the text of the proposed CDSM directive do not mention these services at all, the Impact Assessment leaves no doubt that these services are indeed at the heart of the new RRPP. Press publishers generally claim, and the Commission responds to

“difficulties faced by rightholders in negotiating with online services involved in the *commercial reuse* of copyright-protected content, in particular online services distributing content uploaded by end-users and news aggregators, social media and other online services providing access to publications”.¹⁰⁵

35 As the Commission explained in its Digital Single Market Strategy for Europe, online platforms that include search engines and social media are indeed

“playing an ever more central role in social and economic life: they enable consumers to find online information and businesses to exploit the advantages of e-commerce. ... Moreover, platforms have proven to be innovators in the digital economy, helping smaller businesses to move online and reach new markets.”¹⁰⁶

36 These observations also hold true for the news publishing market on the Internet. More than 50 % of the EU population mainly use social media like Facebook, Twitter or YouTube, search engines and news aggregators to read news online.¹⁰⁷ It is important to add that this increasingly important group of services is highly fragmented and diverse. The study reporting about Internet users' preferences for accessing content online finds that only one service, namely “a global online social media service” is

¹⁰⁵ European Commission 2016a:132 (my emphasis).

¹⁰⁶ European Commission 2015a:4.

¹⁰⁷ European Commission 2016b:183; European Commission 2016e:30-32.

mentioned by more than 10 % (precisely 17 %), “a global search engine” is cited by 9 % of respondents, whereas “an Internet portal mostly present in the Balkan states” is mentioned in third place by 7 % of all respondents. “Besides these three services, no other service was mentioned by more than 3 % of respondents.”¹⁰⁸ In other words, there is no evidence whatsoever that press publishers are faced with only a few news-related online services with a strong, individual position on the Digital Single Market.¹⁰⁹

37 These online services have in common that they do not provide news content themselves. Accordingly, they are not in direct competition with publishers in news markets. Whereas it is clear that a publisher loses market share and revenue if readers switch to another news portal, the Commission does not suggest the existence of a direct substitutional effect of social media, search engines and other online services that help to find and access information.¹¹⁰ In order to properly assess the economic significance of the alleged commercial “reuse” of publishers’ content by certain service providers, it is necessary to take a closer look at the characteristics and functionality of these services and how they affect the competition between news providers. The following analysis distinguishes between general web search engines (1), news aggregators (2), social media (3), and other online service providers (4). It is one of the major flaws of the Commission’s proposal for an RRPP that it does not deal with the issue at this level of detail.¹¹¹

(1) General web search engines

38 General Internet search engine operators crawl, index, and, upon individual search requests, display hyperlinks to any kind of content available on the Internet. Providing

¹⁰⁸ European Commission 2016e:32.

¹⁰⁹ But see European Commission 2016a:167 (necessity to increase press publishers’ bargaining power “vis-à-vis third parties”).

¹¹⁰ Höppner 2013:77 (intra media competition between publishers is economically more important than the inter media competition with news aggregators).

¹¹¹ Cf. Calzada/Gil 2016:18 (“A full understanding of the effect of news aggregators on news consumption

an efficient search engine is by no means a trivial undertaking. Google, for example, has identified more than 60 trillion URLs. It crawls 20 billion websites every day and replies to more than 100 trillion search requests every month in, on average, less than a quarter of a second. This service is free of charge for Internet users and website operators, which reduces the transaction costs for the exchange of information on the Internet to a minimum. Search engine providers recoup their significant investment by providing opportunities for advertisements on their own and on third parties' websites.¹¹²

- 39 Search engines are absolutely essential for the operation of the Internet and its positive effects on the freedom of expression. Consequently, there is a strong public interest in retaining the full functionality of a search engine. Without search engines, Internet users would never be able to reach the wealth of information that is available on the Internet. They would be left with the option of satisfying their demand for news and other journalistic content by directly accessing websites of well-known publishers. If Internet users, however, feed a standard search engine with news-sensitive words like "European Commission Copyright", they will be pointed to the primary source, i.e. the website of the European Commission. In addition, journalistic articles dealing with current EU copyright themes may be displayed, including e-only publications like highly specialised blogs etc. EU Internet users value this service a lot. Around one in five respondents of a recent Eurobarometer study *mainly* use search engines to access news online.¹¹³ When it comes to images, including news-related images, the numbers are even more impressive. In this content section, 52 % of the respondents find it important that the service they use "provides a quick browse and selection of images coming from different webpages".¹¹⁴
- 40 By means of this service, search engines intensify the already "tough" competition on the intra-media market for news and other journalistic content. They make transparent that there are several sources of potential interest available, including the primary

is essential for copyright policy design that benefits consumers and societies overall.").

¹¹² For a detailed assessment see Bundeskartellamt B6-126/14, 8.9.2015 *Google Inc. et al*, BeckRS 2016, 01138 paras 117 et seq; Berlin Regional Court Case 92 O 5/14, 19.2.2016 *VG Media/Google*, BeckRS 2016, 10612.

¹¹³ European Commission 2016e:30.

source (e.g. the homepage of the European Commission). The Internet user has the choice on which hyperlink to click, thereby creating potential advertising or sales/subscription revenue with the respective content provider. All of this occurs within split seconds and free of charge for readers and publishers. The lack of transaction costs for finding and accessing news tends to increase the demand for information (“market expansion effect”).¹¹⁵ In summary, search engines contribute to the structural shift from a linear “value chain” with publishers of printed newspapers and magazines at the top to a digital network of large numbers of highly diverse information sources.

- 41 Whereas the effects of a search engine on intra-media competition are substantial, general web search engines are in no way a substitute for the service of press publishers on the Internet. They do not provide journalistic content but help potential readers to find and access the content that others have published.¹¹⁶ Accordingly, they do not operate in the same market as press publishers. An empty (!) search form is not a substitute for a journalistic article.
- 42 Nor is the result list generated upon an individual search request a substitute for a press publication.¹¹⁷ The web search engines available today do not display the results of a news-sensitive request in a way that allows users to satisfy their demand for journalistic content directly without clicking through to a publisher’s website. Firstly, the result list in news-sensitive searches predominantly includes non-journalistic websites, in particular the primary informational source, for example one or several websites of the European Commission. Secondly, the search results contain too little information in order to be a substitute for visiting the publisher’s website. A web search result commonly consists of a hyperlink (the “header”), which the website operator has chosen as the “title tag”,¹¹⁸

¹¹⁴ European Commission 2016e:28.

¹¹⁵ Dewenter/Haucap 2013:4; NERA 2015, 18 et seq.

¹¹⁶ Stieper 2013:12.

¹¹⁷ With regard to book and scientific publishers see Max Planck Institute 2016: paras 21, 24.

¹¹⁸ E.g. “Copyright | Digital Single Market”.

the source URL,¹¹⁹ and an automatically generated excerpt of the text available on the respective website – the “snippet”.¹²⁰

- 43 The purpose of this snippet is not to provide the information searched for but some *context* so that the user can decide whether the result is relevant for her (“Keyword in Context”). On the one hand, snippets are kept as short as possible in order to allow the display of many results on one screen. On the other hand, a snippet is meant to give the user just enough information so as to be able to decide which source is the right one. In the interest of both the user and the search engine operator, snippets are supposed to minimize the number of clicks to reach the desired result and to avoid repeat searches. The shorter the snippet, the greater the likelihood of “bad” clicks that eventually do not lead to the desired information. Users therefore prefer search results with informative snippets. Results without a snippet are clicked on much less frequently than those with snippets.¹²¹ Nevertheless, users do not expect a search engine to directly answer the substantive question that triggered the search request. The reason is that they only enter a few abstract words with potentially numerous meanings into the search engine. In most cases, it is simply impossible to deduce the precise informational interest from this meagre basis. Consequently, the result list is based on an algorithmic calculation of probabilities. In order to improve the structure of the often highly diverse sources, some search engine operators display journalistic sources related to a general web search request separately from the rest of the results (so called “News Universals”). But again, these links are only intended to help the user find the desired content as quickly as possible.
- 44 Accordingly, the effect of a general web search covering press publications is that it channels readers to press publishers’ websites without being a substitute for their services. The seemingly contradictory finding reported by the European Commission that “47 % of consumers browse and read news extracts on these websites without

¹¹⁹ E.g. <https://ec.europa.eu/digital-single-market/en/copyright>.

¹²⁰ E.g. “09.12.2015 - Adapting the EU copyright rules to the realities of the Digital Single ... proposals will follow, as set out in the Commission Communication”.

¹²¹ See Landgericht Berlin 92 O 5/14, 19.2.2016 *VG Media/Google*, BeckRS 2016, 10612.

clicking on links to access the whole article in the newspaper page”¹²² is inconclusive and misleading because it includes search engines, news aggregators and social media, which have different news-related functionalities. In addition, this finding only demonstrates a lack of interest on the side of the user, not a substitution effect. The referral traffic, in contrast, is very significant. A German press publisher who objected to the use of regular snippets in the general web search of Google experienced a 40 % reduction of traffic on its websites.¹²³ The European Commission cites a study according to which 66 % of visits to newspapers’ websites in four Member States consist in referral traffic.¹²⁴ Thus, press publishers are able to reach a much wider readership than in the printing age because of search engines. Publishers benefit from this investment-sensitive service *free of charge*. In addition, Google and other online service providers actively cooperate with press publishers in order to further improve readers’ experience and generate higher advertising revenues for publishers.¹²⁵

- 45 Therefore, the referral traffic already represents the “fair share of value” that can be attributed to the provision of journalistic content by publishers and to the reproduction and communication of snippets of this content by search engines.¹²⁶ It is fair because it results from a voluntary exchange between publishers and readers, who are brought together by search engine operators. In the Internal Digital Market, value and profit is allocated by market transactions, not by the intervention of the EU legislator.¹²⁷
- 46 The relationship between search engine operators and content providers is thus a symbiotic one. Without content, there is no need for a search engine. Without a search engine, most content would never be accessed.¹²⁸ If one compares, however, the use value of a search engine for a particular publisher and even all press publishers and vice versa, the former is clearly more important for the latter than the other way round. In the light of the vast number of websites that a general web search engine indexes,

¹²² European Commission 2016a:157 with reference to European Commission 2016e:32.

¹²³ Landgericht Berlin 92 O 5/14, 19.2.2016 *VG Media/Google*, BeckRS 2016, 10612.

¹²⁴ European Commission 2016a:157.

¹²⁵ European Commission 2016d:157; European Commission 2016e:193 et seq.

¹²⁶ Cf. European Commission 2016d:3.

¹²⁷ Cf. recitals 10, 33 s. 3 AVMSD 2010/13.

¹²⁸ Bundesgerichtshof I ZR 259/00, 17.7.2003 *Paperboy*, GRUR 2003, 958, 962; Max Planck Institute

the value generated by the traffic that it drives to publishers – which has been estimated to be €746 million in FR, DE, UK and ES alone¹²⁹ – is significantly higher than the value that a search engine derives from the inclusion of a particular source and even from all news publishers.¹³⁰ This value relationship is confirmed by the fact that no search engine operator is paying any content provider for being allowed to index the respective source. Even after the introduction of the German RRPP, all relevant press publishers consented to the continued coverage of their news portals by Google’s web search and the Google News service without requesting payment.¹³¹ This reaction confirms that press publishers themselves consider the referral traffic as the fair share in the total value created by freely accessible journalistic content online. As explained by the Landgericht Berlin, a search engine creates a “win-win” situation for all stakeholders. The court held that the balance of this system is “disturbed” by the German RRPP because publishers now demand payment for a service that benefits them economically.¹³² Indeed, an RRPP is a lose-lose proposition.

- 47 All of this is particularly true from the perspective of new, e-only and specialized news providers. They are more reliant on being easily accessible than well-established media brands with comprehensive news coverage because readers will rarely access these sources directly.¹³³ If maximum visibility on search engines was impeded or even excluded, these “other” publishers would be placed at a clear disadvantage in comparison to well-known “press” publishers, which is incompatible with Art. 11(2) of the Charter.¹³⁴
- 48 Moreover, press publishers do not appear in search lists against their will. By employing the robot exclusion protocol (robot.txt) and meta tags, content providers are able to

2012:3; Schack 2015:para 718a; Nolte 2010:189; Ohly 2012:48.

¹²⁹ European Commission 2016a:157.

¹³⁰ Bundeskartellamt B6-126/14, 8.9.2015 *Google Inc. et al*, BeckRS 2016, 01138 para 217; Dewenter/Haucap 2013:35; NERA 2015:22-29.

¹³¹ Landgericht Berlin 92 O 5/14, 19.2.2016 *VG Media/Google*, BeckRS 2016, 10612; European Commission 2016a:151.

¹³² Landgericht Berlin 92 O 5/14, 19.2.2016 *VG Media/Google*, BeckRS 2016, 10612 .

¹³³ Bundeskartellamt B6-126/14, 8.9.2015 *Google Inc. et al*, BeckRS 2016, 01138 paras 32 et seq. See also European Commission 2016e:35 (importance of the good reputation of a newspaper or magazine when choosing the service to read news online).

¹³⁴ *Infra* IV 4 b bb.

communicate on the level of software with web crawlers and other web robots which areas of a website shall not be processed or scanned. All search engine operators and news aggregators recognize the relevant software standards. On this basis, a press publisher is able to “disallow” (refuse to accept) being indexed by search engines completely. It may also exclude the use of snippets (meta tag “nosnippet”).¹³⁵

- 49 Finally, it is worth mentioning that in most cases news-sensitive search requests like “European Commission Copyright” do not trigger advertisements on the website of search engines.¹³⁶ The reason is that advertisers normally have no incentive to register terms like “European Commission” or “copyright” as keywords because there is no close link between these terms and goods or services that the user of the search engine might be interested in. Consequently, search engine operators hardly generate any revenue with crawling, indexing and displaying news and other journalistic content.

(2) News aggregators

- 50 The situation is similar with regard to news aggregators, who are the primary target of the German and Spanish RRPP, and who have been expressly mentioned by the European Commission as potential addressees of EU intervention.¹³⁷ News aggregators like Google News or Bing News can be regarded as specialised search engines dedicated to news and other journalistic content. They only crawl and index a small subset of all websites, namely those which offer timely, original, and accountable reporting on matters of public interest. With that special focus, news aggregators are more closely related to the business of news publishing than a general web search that covers all available online content. In contrast to general web search operators, news

¹³⁵ Bundeskartellamt B6-126/14, 8.9.2015 *Google Inc. et al*, BeckRS 2016, 01138 para 17, 128 et seq.; Landgericht Berlin 92 O 5/14, 19.2.2016 *VG Media/Google*, BeckRS 2016, 10612; Landgericht München I 37 O 23580/15, 5.2.2016, ZUM 2016, 558, 563; Max Planck Institute 2016:paras 7 et seq.; Höppner 2013:77-8.

¹³⁶ This is one reason why many EU Internet users consider this service attractive; see European Commission 2016e:35.

aggregators also provide a thematically structured overview about current news topics even before a user conducts a search. The content of this front page is generated automatically and updated regularly. It also consists of headers, hyperlinks, and snippets that lead to various news sources. Neither this front page nor the search results on, e.g. Google News display any advertisements, which is one reason why consumers find this service attractive.¹³⁸

- 51 News aggregators amplify the effects of search engines on the online news market described above. News aggregators intensify intra-media competition by grouping links and snippets to several independent sources about the same news topic together. At the same time, they exhibit an additional market expansion effect in that they further reduce search time and make consumers aware of a wider variety of news content, again *free of charge* for both readers and publishers. Consumers very much appreciate the combination of comprehensive news coverage at a glance with the aggregation of a wide variety of news sources.¹³⁹ The referral traffic that news aggregators send to publishers is also very significant. The European Commission refers to a study covering FR, DE, UK and ES, which found that 66 % of visits to newspapers' websites consist in referral traffic, i.e. traffic channeled by other online services, the total value of which has been estimated to be €746 million in the four Member States considered.¹⁴⁰ Other empirical studies likewise show that the increase in the total number of site visits (market expansion) outweighs any substitution effect in the sense that some users are satisfied with the limited information available on the aggregator's site and do not click through to the original source. *Calzada* and *Gil* found that after Google News' shutdown in Spain, Spanish news outlets experienced an 11 % reduction in both search and direct visitors.¹⁴¹ This loss of traffic concerns all types of content providers, but it

¹³⁷ European Commission 2015b:10.

¹³⁸ See European Commission 2016e:35 (40 % of respondents of a Eurobarometer study said that opening or reading an article without interruption by ads is an important criteria when choosing the service for reading news online).

¹³⁹ See European Commission 2016e:35 (32 % of respondents consider this feature important for their choice of news-related service online); European Commission 2016a:169 ("Consumers reap considerable benefits from news aggregators and social media.").

¹⁴⁰ European Commission 2016a:157.

¹⁴¹ Calzada/Gil 2016 with further references to the economic literature; Chiou/Tucker 2015.

predominantly affects specialised and lesser-known news outlets.¹⁴² These findings are again confirmed by the fact even after the introduction of the German RRPP publishers have not imposed restrictions on aggregators or demanded compensation for having their content covered by Google News.¹⁴³

- 52 This assessment remains valid in spite of the fact that news aggregators do not only offer an empty search form but provide an automatically generated, thematically structured overview of what is in the news on their front page. Those readers who are merely interested in a quick overview about what has happened recently might decide to consult the front page of news aggregators instead of the front page of a particular press publisher who also covers a comprehensive range of topics. Nevertheless, economic studies show that news aggregators have a net positive impact on news publishers.¹⁴⁴ The finding reported by the European Commission that 47 % of consumers do not click on links to journalistic content¹⁴⁵ is, in contrast, inconclusive and misleading because it does not distinguish between search engines, news aggregators and social media. Moreover, Internet users who only browse news aggregators are insignificant with regard to “a fair sharing of value”¹⁴⁶ because in many cases this behaviour will only signal that amongst these users there is not sufficient demand for reading any article in full. Therefore, publishers do not lose traffic because they would never have attracted clicks from these users in the first place. Copyright does not guarantee the successful marketing of protected content. It only provides the basis for a *potential* transaction *if* there is demand. The same is true for an RRPP.
- 53 In addition, the services of news aggregators and publishers differ in fundamental ways. Firstly, the link lists that aggregators publish are created automatically. Those users who only trust the selection of human editors will stick to press publishers’ websites.¹⁴⁷

¹⁴² Calzada/Gil 2016:3; Chiou/Tucker 2015:4; NERA 2015:22-29 with further references; contra, without providing evidence, Hegemann/Heine 2009:204; Höppner 2013:74. See also Landgericht Berlin 92 O 5/14, 19.2.2016 *VG Media/Google*, BeckRS 2016, 10612 (reduction of traffic on publisher’s websites by 80% after snippets were blocked on Google News).

¹⁴³ German Association of Law and Informatics 2016:480; Dewenter/Haucap 2013:26.

¹⁴⁴ Chiou/Tucker 2015; Calzada/Gil 2016:3.

¹⁴⁵ European Commission 2016a:157 with reference to European Commission 2016e:32.

¹⁴⁶ European Commission 2016d:3.

¹⁴⁷ This is an important criteria for Internet users, see European Commission 2016e:35 (35 % consider it

Secondly, news aggregators offer an overview of *different* and highly diverse sources. The whole idea of Google News was to allow Internet users to quickly find and compare *different* sources addressing *the same* issue.¹⁴⁸ This is also the purpose of a search on news aggregators' websites. To sum up, news aggregators do not offer a newspaper or magazine, but an *automatically created press survey* – a service that is of high public interest and that has always been lawful under international and EU copyright laws.¹⁴⁹

54 Like in the case of search engines, on the basis of the robot exclusion standard press publishers are furthermore able to “disallow” being indexed by news aggregators completely or to prohibit the use of snippets. Press publishers can even exclude the robots of news aggregators while being searchable on the general web search.¹⁵⁰ None of these measures is taken by press publishers who complain about online services. Press publishers even take *active steps* to appear on news aggregators in a way that promotes traffic. In particular, all publishers who are currently enforcing the German RRPP against Google and who support the introduction of an RRPP on the EU level provide Google News robots with the text fragment that appears as the “snippet” on the news aggregator’s website. They do so by adding a respective “description tag” to the source code of the content website. All relevant press publishers also employ search engine optimization tools.

55 As rightly pointed out by the CJEU, rightholders who make protected content available on the Internet without technical restrictions implicitly include all Internet users as the relevant public.¹⁵¹ According to the German Bundesgerichtshof (Federal Court of Justice), such behaviour also implicitly authorises commercial search engines to reproduce protected content and make it available to the public in so far as these uses – e.g. the making available of preview images (“thumbnails”) by an image search engine –

an important criteria for the choice of news-related online services that the service is offered by a newspaper or magazine with a good reputation).

¹⁴⁸ See the interview with Krishna Bharat, the creator of Google News, published under <http://mediashift.org/2010/02/google-news-to-publishers-lets-make-love-not-war035/>.

¹⁴⁹ European Commission 2016e:35 (important criteria for 32 % of respondents of a Eurobarometer study). On the legal implications of this discrimination against algorithmic news surveys see *infra* IV 4 b aa (2).

¹⁵⁰ *Supra* note 135.

¹⁵¹ CJEU C-160/15, 8.9.2016 *GS Media BV*, ECLI:EU:C:2016:644, para 42.

are common and necessary for an efficient web search.¹⁵² A fortiori, the reproduction and making available of text snippets and preview images that a news provider has *actively* added to the source code of the website for the sole purpose of its use by a news aggregator, is clearly agreed to and thus lawful. An RRPP structured as an exclusive right does not rule out this way of exercising party autonomy.¹⁵³ If it did, it would discriminate against authors and other rightholders contrary to the principle of equality before the law (Art. 20 of the Charter) because these rightholders would still be subject to the doctrine of implied consent, at least under German contract law.¹⁵⁴ Moreover, the Commission only made a case for the harmonisation of copyright and related rights. General principles of contract law as applied by the German Bundesgerichtshof in its decisions on the use of thumbnails in an image search engine are clearly beyond the Digital Agenda of the Commission and indeed the Internal Market competence of the EU in general.¹⁵⁵

- 56 In other words, the overwhelming majority of press publishers wants to appear on news aggregators as favourably as possible. They do this in order to attract referral traffic and avoid competitive disadvantages in the intra-news publisher market.¹⁵⁶ Thus, even if the front pages of news aggregators absorb some traffic of those who quickly browse the current affairs, publishers have complete control of whether they contribute to the existence of this service or not. The robot exclusion protocol empowers them to immediately achieve the effect of an RRPP, namely to prohibit the use of snippets and potentially authorise this use separately afterwards – if there was demand for such authorisation on the side of news aggregators. The implementation of technological measures corresponds to the structure and functionality of the Internet and the online

¹⁵² Bundesgerichtshof I ZR 69/8, 29.4.2010 *Vorschaubilder I*, GRUR 2010, 628 paras 28 et seq; Bundesgerichtshof I ZR 140/10, 19.10.2011 *Vorschaubilder II*, GRUR 2012, 602 paras 16 et seq. It is not clear and disputed whether this jurisprudence is overruled by the German RRPP. Yes: Landgericht München I Case 37 O 23580/15, 5.2.2016, ZUM 2016, 558, 563-4; Spindler 2013:974; Ohly 2012:47. No: Fricke 2015:§ 87f para 13; Kreuzer 2014a:512.

¹⁵³ European Commission 2016a:167.

¹⁵⁴ Schack 2015:para 718e; Czychowski/Schaefer 2014:§ 87f para 19.

¹⁵⁵ Cf. Art. 3(9) Proposal for a Directive on certain aspects concerning contracts for the supply of digital content, COM 2015/634 final (“In so far as not regulated in this Directive, this Directive shall not affect national general contract laws such as rules on formation, the validity or effects of contracts, including the consequences of the termination of a contract.”).

market for digital goods.¹⁵⁷ Technology is the readily available, adequate, and market-based solution to any problems publishers might face. In addition, online service providers have launched several initiatives to cooperate with news publishers and support technological solutions to improve readers' experience and generate higher advertising revenues.¹⁵⁸ In contrast to an RRPP, this approach also pays due respect to the basic principles governing the Internal Market for media services, such as "free competition, equal treatment, transparency and predictability, low barriers to entry", and, last but not least, "the free flow of information".¹⁵⁹

57 These technological and market-based conditions are also present in Germany, where press publishers have enjoyed an exclusive RRPP since 2013. The experience with this "ancillary" copyright aimed at "commercial providers of search engines or commercial providers of services which process the content accordingly"¹⁶⁰ confirms that press publishers place greater value on their presence on news aggregators' websites than on the option to leave these platforms.¹⁶¹ Many smaller, and in particular e-only, providers of news and other journalistic content, have never enforced their new exclusive right; some have even publicly announced a waiver of this right.¹⁶² Those publishers who authorised the collecting society VG Media to claim protection under the German RRPP eventually agreed to remain on Google search and Google News including the display of snippets without requesting payments.¹⁶³ At the same time, no search engine or news aggregator is willing to change its business model. Rather than agreeing to pay for the authorisation to crawl, index and display press publications, online service providers would rather close their news-related services, delist content providers or renounce the use of snippets.¹⁶⁴

¹⁵⁶ Koenig/Meyer 2014:771 (this article is based on a legal opinion commissioned by VG Media).

¹⁵⁷ Peukert 2015a:378 et seq.

¹⁵⁸ European Commission 2016a:157; European Commission 2016b:193-6.

¹⁵⁹ Cf. recitals 10, 33 sentence 3 AVMSD 2010/13.

¹⁶⁰ See paragraphs 87f-h German CA.

¹⁶¹ For an extensive summary of the German development since 2009 see Bundeskartellamt B6-126/14, 8.9.2015 *Google Inc. et al*, BeckRS 2016, 01138 paras 59 et seq.

¹⁶² bitkom 2015; EDiMA 2015; Heise Zeitschriften Verlag 2013.

¹⁶³ Bundeskartellamt B6-126/14, 8.9.2015 *Google Inc. et al*, BeckRS 2016, 01138 paras 77 et seq.; Landgericht Berlin 92 O 5/14, 19.2.2016 *VG Media/Google*, BeckRS 2016, 10612.

¹⁶⁴ See numerous references in NERA 2015:38 et seq.; EDiMA 2015; bitkom 2015:5-6; Bundeskartellamt

- 58 These facts highlight an inherent flaw in an RRPP structured as an exclusive right to authorise or prohibit certain uses: Such a negative right does not create a legal obligation to acquire a remunerated licence. There is also no obligation to obtain a licence under competition law. Even market dominant addressees of an RRPP are under no duty whatsoever to make use of press publications in a way that is covered by the right and thus potentially infringing.¹⁶⁵
- 59 This effective failure of the German RRPP, which the European Commission is perfectly aware of,¹⁶⁶ is also of legal relevance. For if there is evidence that an exclusive RRPP will not create revenue for press publishers because online service providers would rather reduce their services than obtain a remunerated licence,¹⁶⁷ the creation of such a right is not necessary and thus unjustified in the light of the serious interference of such a right with the freedom to conduct a search engine or news aggregator business, the freedom of information of Internet users, and with media pluralism.

(3) Social Media

- 60 Whereas search engines and news aggregators can be classified as online services “providing access to publications”, the Impact Assessment also refers to a second category of service providers, namely those “distributing content uploaded by end-

B6-126/14, 8.9.2015 *Google Inc. et al*, BeckRS 2016, 01138 paras 77 et seq.; Landgericht Berlin 92 O 5/14, 19.2.2016 *VG Media/Google*, BeckRS 2016, 10612; Max Planck Institute 2012:5.

¹⁶⁵ Bundeskartellamt B6-126/14, 8.9.2015 *Google Inc. et al.*, BeckRS 2016, 01138 paras 187 et seq., 213, 234, 239; Landgericht Berlin 92 O 5/14, 19.2.2016 *VG Media/Google*, BeckRS 2016, 10612; Kersting/Dworschak 2013.

¹⁶⁶ European Commission 2016a:160 (“None of these two recent ‘ancillary rights’ solutions have proven effective to address publishers’ problems so far, in particular as they have not resulted in increased revenues for publishers from the major online service providers”).

¹⁶⁷ VG Media, the collecting society representing German press publishers who enforce the German RRPP, reports to have incurred on that basis EURO 6.516,67 in 2014 and EURO 8.023,62; see VG Media 2015. It is not clear where these minimal revenues come from. In other publications, VG Media claims to have earned EURO 714.540 with the German RRPP; see VG Media 2016b. In any event, these revenues do not result in a net revenue because VG Media also reports to have spent several million Euros for legal proceedings concerning the ancillary copyright, namely EURO 2.499.768,79 in 2014 and EURO 3.331.481,50 in 2015; see VG Media 2015.

users”.¹⁶⁸ Commonly, and also by the Commission, these services are referred to as “social media” that indeed provide an increasingly important way for communicating news online.¹⁶⁹ In the view of the Commission, “the large proportion of press publishers’ content available online has also favoured, over time, the emergence of online service providers, such as social media and news aggregators, which base in full or in part their business models on reusing or providing access to such content.”¹⁷⁰ Indeed, social media are quickly gaining importance even as the *main* source of news online.¹⁷¹ Like search engine and news aggregator operators, social media providers already cooperate with press publishers in order to develop business solutions beneficial to content and host providers.¹⁷²

- 61 In the early days of the German debate about the protection of press publishers online, social media services like Facebook or Twitter had also been mentioned as potential targets of an RRPP.¹⁷³ The version of the RRPP that eventually entered into force is, however, restricted to “commercial providers of search engines or commercial providers of services which process the content accordingly”.¹⁷⁴ The prevailing opinion amongst German legal commentators posits that providers who allow Internet users to upload and share content, including (parts of) press publications, do not process content like a search engine and are thus not covered by the German RRPP.¹⁷⁵ The Spanish RRPP is even more explicit in that it only applies to electronic service providers “de agregación de contenidos”.¹⁷⁶
- 62 In the light of this reluctance of national legislators to subject social media providers to an RRPP, it comes as a surprise that the European Commission proposes such a move. Indeed, social media services differ fundamentally from a search engine or a

¹⁶⁸ European Commission 2016a:132.

¹⁶⁹ European Commission 2016e:30 (22 % of respondents mainly use online social media to access news online).

¹⁷⁰ European Commission 2016a:157.

¹⁷¹ European Commission 2016b:181.

¹⁷² European Commission 2016a:157, 164.

¹⁷³ See, for example Ehmann/Szilagyi 2009:105.

¹⁷⁴ Paragraph 87g(4) sentence 1 German CA. Art. 32.2 of the Spanish LPI

¹⁷⁵ Stieper 2016:§ 87f para 34; Spindler 2013:974.

¹⁷⁶ See Art. 32.2 LPI.

news aggregator and their respective role in online news markets. In particular, the former host content that Internet users, including press publishers, have uploaded, whereas the latter provide tools to search and access content hosted on all kinds of third party websites and platforms. The Impact Assessment does not set out these differences nor the use of social media for news consumption nor the effect of this supposed use on the news market. For this reason, it is extremely difficult to evaluate the purpose of extending an EU RRPP to social media.

63 In any event, an EU RRPP of such scope would be highly problematic. If operators of social media platforms were to become directly liable to obtain a licence and ultimately to remunerate press publishers, this would create the risk of serious inconsistencies with the restrictions on liability that host providers benefit from under Art. 14 of the E-Commerce-Directive 2000/31. For as long as a social media operator takes a neutral position in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores – in this case links to press publications with text excerpts, pictures and video stills –, such a service provider cannot be held liable unless, having obtained knowledge of the unlawful nature of those data or of the platform user’s activities, it failed to act expeditiously to remove or to disable access to the data concerned.

(4) Other online service providers

64 In contrast to the German and the Spanish RRPPs, the Commission proposal does not explicitly refer to any type of online service. Instead, the proposed Art. 11(1) CDSMD grants publishers of press publications an exclusive right “for” any “digital use” of their publications. The Impact Assessment also refers to search engines, news aggregators, and social media as mere examples of “online services involved in the commercial reuse of copyright-protected content”, be it by way of “providing access to publications”

(search engines, news aggregators) or by “distributing content uploaded by end-users” (social media).¹⁷⁷

65 However, the problem with this approach is that the Commission does not explain what other types of online services could be subject to an RRPP.¹⁷⁸ The only other providers mentioned by the Commission are “media monitoring and analysis organisations”, which, however, “already pay licence fees to publishers”.¹⁷⁹ Consequently, these online services do not merit separate intervention by way of an RRPP. The necessity and justification for extending an RRPP to still further, unidentified online services is not demonstrated. Again, this complete lack of explanation is of legal relevance in the light of the need to justify the interference with fundamental rights which an RRPP entails.

ee) The coverage of private news consumption and news sharing

66 Above all, and in stark contrast to the German and Spanish versions of an RRPP, the Commission proposal is not limited to uses for a commercial purpose or uses on a commercial scale. It unconditionally grants press publishers the exclusive rights of reproduction and making available to the public “for the digital use of their press publications” (Art. 11(1) CDSMD proposal). Through the reference to Art. 2 and Art. 3(2) of the InfoSoc Directive 2001/29, non-commercial, private acts of reproduction and making available fall under the scope of the RRPP. Even if one excludes digital *offline* reproductions,¹⁸⁰ the proposal as it stands covers acts of making (parts of) press publications available to the public, and reproductions that occur in the course of browsing or permanently downloading news articles by a natural person for private use

¹⁷⁷ European Commission 2016a:132 (“in particular”).

¹⁷⁸ German Association of Law and Informatics 2016:480 (the RRPP could cover social networks, e-commerce platforms (providing reviews and/or excerpts from offered publications), hosting incl. cloud services, platforms for text (blogging and chat services), audio- and video-content, libraries, archives and databases, and even access providers).

¹⁷⁹ European Commission 2016a:165. Cf. Oberlandesgericht Munich 29 U 953/16, 14.7.2016 *uberMetrics*, BeckRS 2016, 16414.

¹⁸⁰ *Supra* bb.

and for ends that are neither directly nor indirectly commercial.¹⁸¹ In practice, these scenarios concern visits to the sites of online services targeted by the Commission, visits to the sites of press publishers, and active news sharing on social media that often involves links to and excerpts, pictures and video stills from press publications.

67 However, these activities of private EU citizens did not give rise to the proposal for an RRPP in the first place. Instead, the RRPP is meant to address problems that rightholders face “upstream” in the value chain “when trying to licence their content to certain online ... services”.¹⁸² The purpose of the RRPP is to create a “B2B licensing market for online uses of press publications”.¹⁸³ The idea is that commercial online businesses subject to the RRPP will price any revenue due under the new right into their services. In turn, the Commission fails to provide any reason for creating direct liability of consumers under the RRPP. Accordingly, the serious interference that such an intervention would create with regard to the freedom of expression and information of the European population lacks even a rudimentary justification.¹⁸⁴

2. Rewarding and incentivising organisational or financial efforts

68 In summary, the primary aim of achieving a well-functioning market-place for copyright is both circular and economically unfounded. In particular, press publishers already receive a fair share of the value created by the availability of journalistic content on the Internet in that online service providers drive massive amounts of traffic to their websites. But press publishers have a second line of argument according to which “publishers deserve to be at the heart of the future EU copyright acquis”.¹⁸⁵ The European Commission espouses this claim by stating that “the organisational and financial contribution of publishers in producing press publications needs to be

¹⁸¹ Cf. Art. 5(2)(a) InfoSoc Directive 2001/29.

¹⁸² European Commission 2016a:10, 134.

¹⁸³ *Id.*, at 157.

¹⁸⁴ See *infra* IV 3 e.

recognised and further encouraged to ensure the sustainability of the publishing industry.”¹⁸⁶

- 69 The first problem with the aim of recognising efforts as a justification for an RRPP is that this approach again begs the question. The RRPP is the reward that is at stake. The rhetoric that press publishers deserve this reward explains nothing. Like the concept of a “well-functioning market place for copyright”, it is therefore a priori inappropriate to satisfy a general interest purpose of the RRPP under Art. 52(1) of the Charter. But even if one replaces the ex post-perspective on rewarding or recognising efforts by an ex ante, incentive-based argument according to which an RRPP would encourage “substantial investment in creativity and innovation ... both in the area of content provision and information technology”,¹⁸⁷ such justification fails.

a) The lack of evidence concerning the investment of press publishers

- 70 In spite of repeated requests of the European Parliament “that any revision of EU copyright law must be properly focused and must be based on convincing data, with a view to securing the continued development of Europe’s creative industries”,¹⁸⁸ neither press publishers nor the Commission provide concrete evidence for the investment that publishers undertake in order to produce and present news and other journalistic content online.¹⁸⁹ The Commission points out that “the limited availability of data in this area ... did not allow to elaborate a quantitative analysis of the impacts of different policy options”.¹⁹⁰ As a matter of fact, digital technologies have considerably reduced

¹⁸⁵ European Publishers Council 2016:2.

¹⁸⁶ Recital 32 sentence 1 CDSMD proposal; European Commission 2015b:2 (“Copyright rewards creativity and investment in creative content.”); see also Bundesregierung (Germany) 2012:8; Schweizer 2010:8.

¹⁸⁷ Cf. recital 4 InfoSocDir 2001/29.

¹⁸⁸ European Parliament 2015:7 (resolution no 22).

¹⁸⁹ Cf. European Publishers Council 2016:2-3; VG Media 2016a:10; Bundesregierung (Germany) 2012:7.

¹⁹⁰ European Commission 2016a:136.

the costs of producing and publishing journalistic content. Instead of addressing these facts, publishers explicitly refuse to provide evidence.¹⁹¹

- 71 This lack of explanation does not only relate to the circularity of the main normative arguments presented to support an RRPP. The irrelevance of an ex-ante-perspective on fostering investment into news production also comes to the fore in the provision of the CDSMD proposal that sets out its temporal scope of application. For the RRPP “shall also apply to press publications published before” the date the RRPP will enter into force in Member States (Art. 18(2) CDSMD proposal). However, an RRPP cannot encourage press publications that have been published already, indeed up to 20 years earlier. With regard to all these existing publications, the RRPP is nothing but an ex-post reward.

b) The protection of the investment of press publishers under the current copyright acquis

- 72 In addition, all relevant investment by press publishers into the production and presentation of their content online is already effectively and adequately protected under current copyright laws so that a fair participation in the use of press publications online is guaranteed:¹⁹²

¹⁹¹ German Newspaper and Magazine Publishers 2010:1; European Publishers Council 2016:2-3 (“Given the huge investment and resources required to produce professional press and other published content, it is only natural that press publishers should enjoy the same rights as producers from other creative industries ...”).

¹⁹² Rieger 2013:271-2.

aa) The costs of producing or acquiring journalistic content

- 73 Thanks to low-cost digital technologies that have reduced the costs of processing and making journalistic content available on the Internet, a large if not the greater part of the investment undertaken by press publishers concerns the in-house production or acquisition of journalistic content. This assumption is confirmed by the fact that the European Commission bases the proposal for an RRPP on the revenue gap that press publishers have faced with the shift from print to digital.¹⁹³ For a decline in revenue hits those publishers hardest who also offer printed editions of newspapers etc. and who have to finance an editorial staff that was established under conditions of a highly concentrated, analogue “press” (sic!) market.¹⁹⁴
- 74 However, current EU and Member States’ copyright laws protects all kinds of journalistic content and thus all investment in that regard already, be it literary works or other works or subject-matter (Art. 2(4) CDSMD proposal) like illustrations¹⁹⁵ and images.¹⁹⁶ Complete newspaper or magazine articles as a rule qualify for protection as literary works. In *Infopaq*, the CJEU held that also isolated sentences, or even certain parts of sentences may be copyrightable, if the element at stake is, in itself, an expression of the intellectual creation of the author. In the view of the court, even the routine snippet “a forthcoming sale of the telecommunications group TDC which is expected to be bought” may constitute a reproduction in part within the meaning of Article 2 of InfoSoc Directive 2001/29.¹⁹⁷ In line with this case-law, aimed at establishing a high level of protection for copyright, courts in Member States have granted copyright protection against the use of

¹⁹³ Supra III 1 b aa.

¹⁹⁴ European Commission 2016a:156 (“news publishers report that the current decline of the industry has already led to closing down or reducing their editorial teams, in particular in the case of smaller and regional newspapers”).

¹⁹⁵ Paragraph 87f(2) sentence 1 and Landgericht Berlin Case 15 O 412/14, 6.1.2015, MMR 2015, 538 (screenshot of press publisher’s website with photograph protected under paragraph 87f German CA); Bundeskartellamt B6-126/14, 8.9.2015 *Google Inc. et al*, BeckRS 2016, 01138 para 188; Jani 2014:§ 87f para 2; Czychowski/Schaefer 2014:§ 87f para 20.

¹⁹⁶ Art. 32.2 sentence 3 Spanish LPI; Xalabarder 2014:8.

¹⁹⁷ ECJ C-5/08, 16.7.2009 *Infopaq International A/S*, ECLI:EU:C:2009:465 paras 44 et seq.; Peifer 2015:6.

snippets in the Google News service,¹⁹⁸ and against snippets with a length of 30-40 words used by a media monitoring company.¹⁹⁹

- 75 Copyright protection is also available for other types of content that forms part of press publications, in particular photographic works, artistic works such as illustrations, drawings, plans, maps, tables, as well as cinematographic and other audiovisual works.²⁰⁰ In most cases, such journalistic contributions will satisfy the low threshold of an author's own intellectual creation.²⁰¹ In addition, some Member States such as Germany provide protection for photographs and audiovisual content that does not qualify for copyright protection. In these Member States, *any* image or video that is comprised in an online press publication is subject to an exclusive right related to copyright with a term of protection of 50 years.²⁰²
- 76 The European Commission is fully aware of this existing protection for the content that press publishers offer. The Commission confirms that the online services it targets “often engage in copyright-related acts”.²⁰³ It even posits that a long term of protection of the RRPP will not impact service providers in a substantially different manner than a shorter term because “service providers would have in any event to seek authorisation for the use of news content even after the expiry of the publishers' right because they would still need to clear – as it is already the case today – the rights of the authors in press publications (which have a longer term of protection: i.e. 70 years after death)”.²⁰⁴ If an EU RRPP respects the freedom of news of the day and miscellaneous facts having

¹⁹⁸ Brussels Court of First Instance No. 06/10.928/C, 13.2.2007 *Copiepresse SCRL v. Google Inc.*, IIC 2008, 491.

¹⁹⁹ Landgericht München I 37 O 23580/15, 5.2.2016, ZUM 2016, 558, 562. On the availability of copyright protection for text excerpts see also Peifer 2015:6; Ott 2012:559; Schippan 2013:369-70 (strong protection also for short texts). But see Oberlandesgericht Köln 6 U 120/15, 8.4.2016, CR 2016, 457-8 (“Wenn das Haus nasse Füße hat” not a copyrightable work).

²⁰⁰ See Art. 1, 2 and 6 Directive 2006/116 on the term of protection of copyright and related rights.

²⁰¹ Concerning a regular portrait photograph see CJEU C-145/10, 1.12.2011 *Eva- Maria Painer*, ECLI:EU:C:2011:798, paras 85 et seq.

²⁰² See Art. 6 sentence 3 Directive 2006/116 and paragraph 72 German CA (“(1) The provisions of Part 1 applicable to photographic works shall apply mutatis mutandis to photographs and products manufactured in a similar manner to photographs. (2) The photographer shall be entitled to exercise the right according to paragraph (1). (3) The right according to paragraph (1) shall expire 50 years after the photograph was released ...”). The Bundesgerichtshof applies paragraph 72 German CA also to videos; see Bundesgerichtshof I ZR 86/12, 6.2.2014 *Peter Fechter*, GRUR 2014, 363 .

²⁰³ European Commission 2016a:157 with reference to the *Infopaq* judgment of the CJEU.

the character of mere items of press information (Art. 2(8) BC), it will automatically be limited to text excerpts that regularly constitute the expression of the intellectual creation of their authors and are thus literary works.²⁰⁵

- 77 If, however, an RRPP has the very same scope of protection that is already available under current EU copyright law, it obviously cannot have any additional incentive effect on the production of news articles. Instead, an RRPP establishes a redundant double layer of rights in texts, images and illustrations, and videos. Since the rights in this identical subject-matter are independently held by different rightholders, an RRPP creates a risk of conflicts between journalists, photographers and other contributors on the one hand and press publishers on the other.²⁰⁶

bb) The costs of editorial control

- 78 Press publishers exercise editorial control over what is published at what time in what way. This important and indeed crucial task of selecting and structuring news involves costs for the editorial board of a newspaper or magazine who take these decisions.²⁰⁷ The creative and financial efforts to this end are, however, covered by copyright in databases (Art. 4-6 of the Database Directive 1996/9). It is generally acknowledged that the selection and arrangement of contributions to newspapers and magazines – whether offline or online – constitute an editor's own intellectual creation and thus result in copyright protection for these persons.²⁰⁸ In general, editors of a press publication transfer their database copyrights to the entity that is responsible for the whole enterprise, i.e. the press publisher.

²⁰⁴ Id, 169.

²⁰⁵ See infra IV 3 e.

²⁰⁶ On these overlaps of rights see infra IV 3 d.

²⁰⁷ European Publishers Council 2016:7.

²⁰⁸ Oberlandesgericht Hamm 4 U 157/07, 26.2.2008 *Online-Veröffentlichung*, GRUR-RR 2008, 276.

79 On the basis of database copyright, press publishers are entitled to claim remedies, in particular injunctions, for the unauthorised use of a complete newspaper or magazine. The need to prove a chain of title to this end only concerns the acquisition of the one database copyright from the small number of editors of the newspaper or magazine. These rights are thus the available and proper tool to fight acts of piracy in this sector, which are another important motive underlying the introduction of an RRPP.²⁰⁹ At the same time, copyright in databases does not provide protection against the reproduction and the making available of single elements of the database (in this case single articles, excerpts thereof, images, videos, etc.) because it requires a free-ride on the creative effort to select or arrange the content in the database as a whole.²¹⁰

cc) Substantial investment in the obtaining, verification or presentation of journalistic content

80 In addition to and independent from the copyright protection available for the journalistic content as such and the editorial selection and arrangement of that content, press publishers regularly enjoy original protection for their investment in the obtaining, verification or presentation of news content, if this investment is qualitatively and/or quantitatively “substantial” according to Art. 7 of the Database Directive 1996/9. The investment relevant for this sui generis protection concerns the costs of acquiring pre-existing content, the costs of preparing all content for publication (in particular typography and layout) and the costs for setting-up and running a regularly updated news portal on the Internet.²¹¹ Even leaving aside the investment in the in-house creation of journalistic content (which is protected by copyright, see supra), the

²⁰⁹ Cf. European Commission 2016a:166-7 and infra 3.

²¹⁰ Hegemann/Heine 2009:202; Ohly 2012:44.

²¹¹ See, with regard to these costs, European Publishers Council 2016:7.

obtaining, verification and presentation of content on such websites will, as a rule, attest to substantial investment in qualitative or quantitative terms.²¹²

81 However, and similar to the case of the database copyright, the sui generis right in databases is limited to acts that free-ride on the substantial investment that gives rise to the protection in the first place. More precisely, the right only covers those acts that extract or re-utilise all or a substantial part of the contents of the database. It does not, however, extend to the mere consultation of a database by the end user.²¹³ In its *Paperboy* decision,²¹⁴ the Bundesgerichtshof furthermore held that neither placing hyperlinks to news articles that have been made available to the public by the authorised user nor reproducing and publicly communicating snippets of those articles amounts to an infringement of the sui generis right in databases, even if this is done repeatedly and systematically by a search engine operator. The court reasoned that the display of snippets by a search engine is meant to enable users to form an opinion whether a news article is relevant for them. In the view of the court, such use is not a substitute for the service of the content provider, but rather encourages readers to visit the press publisher's website. The Bundesgerichtshof came to the conclusion that such a service does not conflict with the normal exploitation of a database.

82 This finding is not put into question by the *Innoweb* decision of the CJEU, in which the Court of Justice held that providing a "meta search engine" dedicated to searching for car ads as such amounts to a re-utilisation of parts of the contents of a database for the purposes of Article 7(2)(b) of the Database Directive 1996/9.²¹⁵ In its decision, the court made it clear from the outset that this case did not concern "a general search engine such as Google" but a "meta search engine", which runs on other search engines

²¹² See generally CJEU C-203/02, 9.11.2004 *The British Horseracing Board Ltd and Others*, ECLI:EU:C:2004:695, para 28 et seq.; CJEU C-444/02, 9.11.2004 *Fixtures Marketing Ltd*, ECLI:EU:C:2004:697, para 37 et seq. With regard to collections of journalistic content online see Bundesgerichtshof I ZR 259/00, 17.7.2003 *Paperboy*, GRUR 2003, 958, 962 (IIC 2004, 1097); Hegemann/Heine 2009:203; Kauert 2008:126 et seq.

²¹³ CJEU C-203/02, 9.11.2004 *The British Horseracing Board Ltd and Others*, ECLI:EU:C:2004:695, para 54; CJEU C-304/07, 9.10.2008 *Directmedia Publishing GmbH*, ECLI:EU:C:2008:552, para 51.

²¹⁴ Bundesgerichtshof I ZR 259/00, 17.7.2003 *Paperboy*, GRUR 2003, 958, 962 (IIC 2004, 1097).

²¹⁵ CJEU C-202/12, 19.12.2013 *Innoweb*, ECLI:EU:C:2013:850, paras 26 et seq.; Stieper 2016:vor §§ 87 ff. para 17.

without crawling and indexing websites. The Court of Justice added that the activity of the defendant was “not limited to indicating to the user databases providing information on a particular subject”.²¹⁶ Different from a general or even a news-dedicated search engine that only displays short snippets, thumbnails and video stills in order to provide context and improve the efficiency of searches, the meta search engine at issue in the case offered the same advantages as the databases that were covered. End users did not need to go to the website of the database concerned, or to its homepage, or its search form, in order to consult that database, since a search carried out by that meta engine produced *the same list of results* as would have been obtained if separate searches had been carried out in each of the databases covered. A further substitutive effect followed from the fact that Innoweb’s meta search engine grouped duplicate results, i.e. car advertisements published on several platforms simultaneously, together so that a user might well consult the advertisement on another database site. In essence, the Court of Justice considered such a service “close to the manufacture of a parasitical competing product”.²¹⁷

83 None of the special circumstances that support the finding of the CJEU in *Innoweb* are present in the case of general search engines or news aggregators. As correctly pointed out by the Bundesgerichtshof in *Paperboy*, these services do not parasitically substitute press publishers’ databases but provide access to these databases and indeed channel many readers to these websites. Even the front page of a news aggregator does not display the same list of results as a visit to a press publisher’s site. It does group articles on the same news item together, but these articles are not duplicates of each other as in the case of ads offering the very same car for sale. Instead, these groupings constitute an automatically generated press survey, which has always been lawful under international and EU copyright because a strong public interest exists in such overviews.²¹⁸

²¹⁶ CJEU C-202/12, 19.12.2013 *Innoweb*, ECLI:EU:C:2013:850, para 39.

²¹⁷ *Id.*, para 48.

²¹⁸ *Infra* IV 4 b aa (2).

84 To summarize, publishers of online news portals benefit from the sui generis database right. On the one hand, this right covers and thus incentivises all investment in the obtaining, verification and presentation of news content, which thus cannot justify an RRPP. On the other hand, general search engines and news aggregators do not “re-use” the investment of press publishers protected by the sui generis right. Consequently, an EU RRPP that grants press publishers an exclusive right to authorise or prohibit these very activities is inconsistent with the Database Directive 1996/9 and the case-law of the Court of Justice of the EU. It covers ground that the Database Directive deliberately left open. It does not “complement” this Directive,²¹⁹ but contradicts one of its fundamental features.

dd) Technological protection measures and contracts

85 Last but not least, press publishers are able to control the access to and use of their content by applying technological protection measures that are mirrored in their general terms and conditions. Private ordering on the basis of software and contracts is the market-compliant and Internet-compliant way to realise the value of journalistic content on the Internet. It enables press publishers to control the use of their content online. In particular, press publishers have the choice to allow or prohibit the robots of online service providers and individual users access to their sites.²²⁰ Such a measure fulfils the requirements of an effective technological measure as defined in Art. 6(2) of the InfoSoc Directive 2001/29, which must thus not be circumvented. Art. 6(4) subparagraph 4 of InfoSoc Directive 2001/29 reinforces and strengthens the scope of this protection in the event that works or other subject-matter are made available to the public on agreed contractual terms.

²¹⁹ But see recital 4 CDSMD proposal.

²²⁰ Supra III 1 b cc.

86 A purely contract-based regulation of the “use” of a website was the subject of the decision of the CJEU in *Ryanair*. The case concerned the general terms and conditions of Ryanair that inter alia prohibited the employment of automated systems or software to extract data from the websites in question (“screen scraping”) unless the third party had directly concluded a written licence agreement with Ryanair to this end.²²¹ Whereas the court held that the Database Directive is not applicable if the claimant is not eligible for the system of legal protection instituted by that directive, the Court of Justice expressly referred to the possibility of protection of such a database on the basis of the applicable national (contract) law.²²² Whereas this case is still pending before the Dutch courts,²²³ the Landgericht München expressly declared the general terms and conditions of a news portal (Sueddeutsche.de) as relevant for deciding in how far a media monitoring service may or may not reproduce and make publicly available snippets from articles of that website.²²⁴

87 The protection based on technology and contracts closes any loophole that might persist under the current EU copyright acquis. Even if some content or the press publication as a whole does not qualify for copyright protection, press publishers may lawfully restrict access to and use of such services by the application of technological measures.²²⁵ At least from this perspective, there is no investment undertaken by press publishers that does not already enjoy protection against unauthorised use online. This is even true for investment in the marketing and advertising of press publications,²²⁶ which are generally not considered proper justifications for granting new copyrights because they do not relate to the creation of journalistic content but only its subsequent commercialisation.²²⁷

²²¹ CJEU C-30/14, 15.1.2015 *Ryanair Ltd*, ECLI:EU:C:2015:10 para 16.

²²² Id, paras 44-45.

²²³ Hoge Raad 12/0316/, 11.3.2016, ECLI:NL:HR:2016:390.

²²⁴ Landgericht München I 37 O 23580/15, 5.2.2016, ZUM 2016, 558, 563.

²²⁵ Peukert 2012:271 et seq.

3. The improvement of licensing and enforcement

- 88 The third objective that the Commission puts forward to justify an RRPP is the improvement of “licensing and enforcement in the digital environment”, which is said to be “often complex and inefficient”.²²⁸ According to the Impact Assessment explaining the RRPP, a self-standing related right would provide press publishers “with a clearer position in the context of negotiations”, and it would relieve them from “burdensome and time-consuming” efforts to enforce separate rights in journalistic contributions, with regard to which they have to prove a chain of title.²²⁹
- 89 It is true that it can indeed be burdensome for press publishers to demonstrate the acquisition of copyrights from many different journalists, editors, and other contributors.²³⁰ Art. 5 of the Enforcement Directive 2004/48 provides for a presumption of authorship or ownership only for authors of works and holders of rights related to copyright with regard to their protected subject-matter. Under German law, these presumptions additionally apply *mutatis mutandis* to the holder of exclusive exploitation rights in the event of proceedings for temporary relief or injunctive relief.²³¹ However, press publishers often do not benefit from this extended presumption because under e.g. German copyright contract law, the publisher or editor of a newspaper only acquires a non-exclusive exploitation right from authors unless otherwise agreed.²³² This provision is meant to provide journalists with the possibility to publish their article in several newspapers or magazines in parallel.²³³ At the same time, it does not allow publishers to enforce the respective copyrights against infringers because the holder of a non-exclusive exploitation right does not have standing to sue.

²²⁶ Cf. European Publishers Council 2016:7.

²²⁷ European Copyright Society 2016:4; Sprang 2016.

²²⁸ Recital 31 sentence 3 CDSMD proposal; European Publishers Council 2016:2.

²²⁹ European Commission 2016a:166-7.

²³⁰ Bundesregierung (Germany) 2012:6; Schweizer 2010:15; Stieper 2013:12; Schippan 2013:370.

²³¹ Sec. 10(3) German CA.

²³² Sec. 38(4) German CA.

²³³ See also *infra* IV 2.

- 90 An RRPP is, however, not an adequate response to these difficulties. Firstly, the use of a complete newspaper or magazine edition infringes the database copyright or sui generis right held by press publishers. Secondly, the position of press publishers could be further improved by codifying a provision modelled on Art. 5 of the Enforcement Directive 2004/48 according to which a press publisher, in the absence of proof to the contrary, must be regarded as holding exploitation rights sufficient to entitle him to institute infringement proceedings, if his name appears on the press publication in the usual manner, and the author of the work in question has agreed to this publication.²³⁴ Such a presumption could be justified by reference to the fact that press publishers produce a complex product to which many different authors and other rightholders contribute. In that sense, press publishers are in a similar situation to film producers, for whom the EU acquis already contains presumptions of transfers of rights from performers and (optionally) from authors.²³⁵ Since all other justifications for an RRPP do not withstand closer scrutiny (see supra), a solution along these lines would be an adequate measure, all the more because the Commission's proposal enters the field of copyright contract law anyhow.²³⁶
- 91 Another drawback of enforcing derivative copyrights and related rights concerns the fact that on this basis, press publishers can ask for remedies only with respect to individual articles. Any claim is limited to the use of concrete contributions to a newspaper or magazine. It does not extend to the press publication as a whole.²³⁷ Theoretically, infringers could continue illegal uses of journalistic contributions and force press publishers into repeated court proceedings. An RRPP in the press publication as such, i.e. the collection of content under a single title (Art. 2(4) CDSMD proposal), would provide press publishers with a tool to ask for injunctions, damages and further remedies with regard to any use of this publication, whatever article has been used in

²³⁴ See European Commission 2016a:159 with fn. 496 (the transfer of rights from journalists to press publishers "can also be established in a legal presumption in copyright law"); see also Peifer 2010:271; Bundesrat 2012:2; Ehmann/Szilagyi 2009:6; Ohly 2012:43-4; Dewenter/Haucap 2013:43; Rieger 2013:240 et seq.; Spindler 2013:975.

²³⁵ See Art. 3(4) and (5) Directive 2006/115 and CJEU C-277/10, 9.12.2012 *Martin Luksan*, ECLI:EU:C:2012:65, paras 73 et seq.

²³⁶ See Art. 14-16 CDSMD proposal.

²³⁷ Cf. Art. 1(4) CDSMD proposal.

the past or may be used in the future. As a consequence, court injunctions in particular would have a far wider scope than available today. They would prohibit any reproduction and/or making available of any part of a press publication.²³⁸

92 This effect can indeed only be achieved by creating an RRPP. There is, however, no practical need for creating such a legal tool. In contrast to what the Commission insinuates, formally established online service providers like Google, Bing, Facebook or Twitter do *not* “take advantage of the inefficiencies in the enforcement of large numbers of transferred authors’ rights, knowing that they would not face any significant opposition due to the burdensome processes press publishers would have to go through to enforce those rights.”²³⁹ These companies do not base their businesses on continuous infringements and infringement proceedings whose outcome is evident. Experience shows that law-abiding online service providers adapt their business models to copyright decisions, even if the decision deals with a particular content only. More to the point, the experience with the German and Spanish RRPPs shows that online services will reduce their news-related services to a level that avoids any liability under an RRPP.

93 At the same time, rights enforcement against pure pirates will remain difficult with and without an RRPP: these difficulties follow from strategies that avoid any legal liability whatsoever, in particular from the anonymity of those responsible and from a place of business in an infringement haven outside the EU.

²³⁸ See Landgericht München I 37 O 23580/15, 5.2.2016, ZUM 2016, 558, 560 (claim I: „Der Antragsgegnerin wird im Wege der einstweiligen Verfügung [...] untersagt, die nachfolgend wiedergegebenen Textausschnitte öffentlich zugänglich zu machen ...“. Claim II: „Der Antragsgegnerin wird im Wege der einstweiligen Verfügung [...] untersagt, Textausschnitte aus auf der Internetseite

4. Supporting a free and pluralist press

- 94 The fourth and final purpose of an RRPP is to support “a free and pluralist press”, which indeed is “essential to ensure quality journalism and citizens’ access to information”, and which “provides a fundamental contribution to public debate and the proper functioning of a democratic society.”²⁴⁰ The German RRPP has also been justified with reference to a positive obligation of the state to guarantee the freedom of the press.²⁴¹ More precisely, the RRPP is said to foster the continued existence of unbundled newspapers and magazines that contain information about various subjects and that are published by a professional editorial board. These structures, which characterised newspapers and magazines in the printing age, are considered vital for a lively and somewhat structured public debate. Hence, it is argued, they merit protection.²⁴²
- 95 This conservative argument is also unsuited to justify the creation of an RRPP, in particular on the EU level. It is true that under Art. 11(2) of the Charter, the EU shall respect freedom and pluralism of the media. Art. 10 ECHR also implies a positive duty of states to put in place an appropriate legislative and administrative framework to guarantee effective media pluralism.²⁴³ However, this obligation works *against* the introduction of an RRPP:
- 96 According to the Commission, the online news market is constantly evolving, “with more and more players and means of content distribution”.²⁴⁴ This rather general observation is confirmed and specified by a recent study by the German Media Authorities, which also report that the news market on the Internet is less concentrated and more diverse than it was in the printing age. The study demonstrates by evidence that with the growing importance of the Internet, the market share of large media conglomerates has

www.s.de öffentlich zugänglich gemachten Artikeln öffentlich zugänglich zu machen.“).

²³⁹ Contra European Commission 2016a:166-7.

²⁴⁰ Recital 31 sentences 1 and 2 CDSMD proposal; European Commission 2016a:161; European Publishers Council 2016:3.

²⁴¹ Art. 5(1) sentence 2 German Basic Law.

²⁴² Ladeur 2012:422, 425-6; Di Fabio 2016:68-9, 94.

²⁴³ ECtHR 38433/09, 7.6.2012 *Centro Europa 7 S.R.L. and Di Stefano v. Italy*.

decreased. Indeed, the German Media Authorities claim a causal relationship between the rise of the Internet as a source of information for citizens, and a more diverse news market.²⁴⁵ The director of the German Media Authorities considers this a positive development for a pluralist media scene in Germany. It is worth citing his statement at length:

“The Internet with its many distribution platforms makes for more news media usage and a wider choice. Obviously, also the content of newspapers and magazines is becoming more attractive for younger people. Young citizens who search the Internet for information are, according to our study, interested in high-quality content – an encouraging development.”²⁴⁶

- 97 A study by the Bavarian Regulatory Authority for New Media likewise shows that online-portals of well-established publishers and broadcasters still dominate the news market online, but that “other” content providers hold a 41 % share of the news market.²⁴⁷ The study does not give details of which entities are included in this segment, but it definitely also covers e-only publishers who only entered the news market with the Internet and who therefore have never faced the revenue gap that the RRPP is intended to close in the first place. This is confirmed by the TOP 40 list of German press publishers online, which includes e-only news portals like heise.de or motor-talk.de.²⁴⁸
- 98 This unprecedented wealth of information is made accessible by the very services the Commission now considers as problematic. General and specialized search engines allow users to locate information they are actively looking for. On their front page, news aggregators furthermore automatically present links to journalistic content in an organised way. The links and accompanying snippets are arranged according to general criteria, which relate to location (city/country/international) and topic (e.g. sports

²⁴⁴ European Commission 2016a:160. See also recital 3 s. 1 CDSMD proposal.

²⁴⁵ German Media Authorities 2016 (market share of the top 15 media companies in Germany decreased from 77,8 % in 2014 to 76,3 % in 2015).

²⁴⁶ German Media Authorities 2016.

²⁴⁷ Bavarian Regulatory Authority for New Media 2016:27. See also id, 31 (online services like social media are gaining importance as sources of information).

or entertainment). With this service, news aggregators provide the minimum of structure that any public debate requires. They combine this indeed indispensable basis for gathering news with the wealth of information that countless *different* news publishers make available on the Internet voluntarily. Consequently, the RRPP proposal of the European Commission targets the very services that enable a free public debate on the Internet.²⁴⁹

99 But not only the amount and the accessible diversity of journalistic content has increased with the shift from print to digital. There is, moreover, no indication that the “quality” of news or special interest information online (cf. Art. 2(4) CDSMD proposal) has declined. Accurateness and reliability of information remain key for readers. The good reputation of a newspaper or magazine is among the most important criteria when Internet users choose a service to access news online.²⁵⁰ For this reason, well-known news brands are very successful online.²⁵¹ Moreover, the intensity and transparency in the online news market punishes false and redundant publications of information. More than ever, press publishers have to offer high-quality, original journalistic content in order to attract readers.²⁵² An RRPP will not improve this situation. To the contrary:

100 Firstly, the proposed RRPP attaches to any kind of publication, including “special interest magazine[s], having the purpose of providing information related to news or *other* topics” (Art. 2(4) CDSMD proposal, my emphasis). Thus, the information provided by the businesses that benefit from the RRPP can be completely unrelated to the “public debate and the proper functioning of a democratic society” (recital 31 sentence 2 CDSMD proposal) because it may not be addressed to the general public nor related to general-interest topics. Second, the proposed RRPP is not limited to “quality journalism”, i.e. to original and reliable information about issues of general interest. It also applies to publications that are redundant and even misleading. Thus, press publishers who do not contribute to an informed public debate will also benefit from an

²⁴⁸ Bavarian Regulatory Authority for New Media 2016:26.

²⁴⁹ Contra Ladeur 2012:424; European Publishers Council 2016:5.

²⁵⁰ European Commission 2016e:35 (35 % consider this criteria important).

²⁵¹ Bavarian Regulatory Authority for New Media 2016:27; supra III 1 b cc.

²⁵² Supra III 2 b cc.

RRPP. Thirdly, the disconnection between the proposed RRPP and the aim to foster quality journalism cannot be cured on the level of distribution of any revenues an RRPP might create. If the RRPP attaches to the number of clicks a press publisher is able to attract via a search engine etc., it fosters more quantity, but not more quality publications.²⁵³ If the RRPP is administered by a collective management organisation that distributes RRPP revenues per capita, the RRPP subsidises publishers who have nothing or little to contribute to the public debate, and who therefore might long have been forced out of business by competitive forces.²⁵⁴ Fourthly, an RRPP hampers the development of new business models for high-quality journalism online. By sustaining the status quo, it runs contrary to increasingly successful efforts to establish paywalls and B2C digital-subscription offers.²⁵⁵ It is also at best neutral towards new forms of independent journalism like networks of investigative journalists who offer their results to various publishers instead of working only for one newspaper or magazine.²⁵⁶

101 Indeed, an RRPP is not only incapable of fostering a pluralist press. As will be explained in more detail below, it actually distorts intra-media competition to the detriment of lesser-known, in particular e-only, press publishers. Such a discriminatory intervention is incompatible with the guarantee of free and pluralist media under Art. 11(2) of the Charter.²⁵⁷

102 Finally, the EU lacks a separate competence in the area of media regulation. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States (Art. 5(2) TEU). The Charter does not in any way extend these limited competences of the Union (Art. 6(1) s. 2 TEU). The Union may carry out actions to support, coordinate or supplement the actions of the Member States also in the area of culture, but these measures must not entail harmonisation of Member States' laws (cf.

²⁵³ Dewenter/Haucap 2013:27 et seq.

²⁵⁴ Id.

²⁵⁵ Id; Höppner 2013:81; European Commission 2016a:156 ("Paywalls and B2C digital-subscription offers are being increasingly proposed, in particular by the main newspaper and magazine brands ...").

²⁵⁶ See, e.g., the German network of investigative journalists <https://correctiv.org/correctiv/>.

Art. 6 sentence 2 lit. c, 2(5), 167(5) TFEU). Consequently, the European Commission bases its proposal for an RRPP on the Internal Market competence of Art. 114 TFEU. This competence can also be exercised in relation to media markets but in those circumstances it has to be in line and primarily concerned with the principles governing the establishment of the Internal Market.²⁵⁸ It follows that the aim of fostering public debate and the proper functioning of a democratic society cannot, on its own, justify the introduction of an RRPP. It is for the Member States to take measures to this effect. Since all other market-oriented justifications have failed, the argument of sustaining media pluralism therefore cannot save the RRPP from the verdict of not satisfying an object of general interest.

IV. Subject-matter and scope of an RRPP

103 In order to assess the legal consequences of the absence of a convincing justification for an RRPP, it is necessary to specify its precise subject-matter and scope. For only on this basis is it possible to ascertain the effects of an RRPP on the exercise of fundamental rights of third parties and the proportionality of such an intervention. As explained in the preceding section, current EU copyright law already protects all kinds of works of a journalistic nature including text excerpts, the editorial selection and arrangement of this content by editorial boards, and substantial investment by press publishers in obtaining, verifying, and presenting this content on online news portals.²⁵⁹ The far-reaching scope of available protection puts further emphasis on the question as to what subject-matter remains for an RRPP at all and to which uses it may apply in line with its purported aims.

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²⁵⁷ *Infra* IV 4 b bb.

²⁵⁸ *Supra* II.

²⁵⁹ *Supra* III 2 b bb cc.

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1. Introduction: Three versions of an RRPP

105 A comparison between the German, the Spanish, and the proposed EU RRPP reveals that there are several versions of an RRPP with different subject-matters, scopes, and fundamental rights implications. The German RRPP grants the publisher of a “press product”²⁶¹ the exclusive right “to make the press product or parts thereof available to the public”. The right only applies, however, to “commercial providers of search engines or commercial providers of services which process the content accordingly”, and it exempts the making available of “individual words or the smallest of text excerpts”.²⁶² In other words, the German RRPP is an exclusive right of press publishers against providers of search engines and similar operators who make more than the smallest text excerpts of press products available to the public for commercial purposes. The Spanish RRPP differs from the German RRPP in that it does not create an exclusive right but a non-waivable right to equitable remuneration. This right to remuneration

²⁶⁰ Supra III 2 b bb cc.

²⁶¹ Defined as “the editorial and technical fixation of journalistic contributions in the context of a collection published periodically on any media under a single title, which, following an assessment of the overall circumstances, can be regarded as predominantly typical for the publishing house and the overwhelming majority of which does not serve self-advertising purposes. Journalistic contributions shall include, in particular, articles and illustrations which serve to provide information, form opinions or entertain.” See paragraph 87f(2) German CA.

arises if a provider of an electronic content aggregation service makes available to the public “insignificant fragments of content” reported in journals or web sites that are regularly updated and that have the purpose of informing, creating public opinion, or entertaining. The right is granted to the “editor” or, where appropriate, other rightholders, but it may be asserted only by a collecting society.²⁶³

106 The European Commission proposal for a protection of “press publications concerning digital uses” is again of a different, significantly wider scope than its German and Spanish predecessors. Like the German RRPP, it grants press publishers an exclusive right in a “press publication”, which, however, also includes “special interest” publications related to “other topics” than news (cf. Art. 2(4) CDSMD proposal). In contrast to the German and Spanish RRPPs, the Commission proposal is not tailored to particular commercial online services. It also includes the right of reproduction “for digital uses”, and it extends to purely private acts of reproduction and making available by natural persons.²⁶⁴ Finally, the proposal does not exclude minimal excerpts/fragments from its scope.

107 These variations and the problem of identifying the exact subject-matter of the RRPPs are tackled below by distinguishing three possible versions of an EU RRPP. According to the first understanding, an EU RRPP would protect the concrete layout/typographical arrangement of a press publication (infra 2). The second reading is based on the contrary assumption that an RRPP provides a generic protection of journalistic content contained in a press publication irrespective of the layout or format of the infringing use (infra 3). The third version is an RRPP that grants protection only against certain uses with a direct connection to the press publication, namely against hyperlinks to journalistic content that are combined with snippets, thumbnails or video stills (infra 4).

²⁶² Paragraphs 87f(1) sentence 1, 87g(4) sentence 1 German CA.

²⁶³ 32.2 LPI: „La puesta a disposición del público por parte de prestadores de servicios electrónicos de agregación de contenidos de fragmentos no significativos de contenidos, divulgados en publicaciones periódicas o en sitios Web de actualización periódica y que tengan una finalidad informativa, de creación de opinión pública o de entretenimiento, no requerirá autorización, sin perjuicio del derecho del editor o, en su caso, de otros titulares de derechos a percibir una compensación equitativa. Este derecho será irrenunciable y se hará efectivo a través de las entidades de gestión de los derechos de propiedad intelectual.“

²⁶⁴ Supra III 1 b ee.

These alternatives are analysed as to whether they are geared to promoting the aims of an RRPP, and whether they are necessary in the light of their fundamental rights implications.

2. Protection of the concrete layout of the press product

- 108 The first reading draws inspiration from UK Copyright law, which, since 1956, has granted publishers an exclusive right to authorise or prohibit “making a facsimile copy” of a “typographical arrangement of a published edition” of the whole or any part of one or more literary, dramatic or musical works for a period of 25 years from the end of the calendar year in which the edition was first published.²⁶⁵ The right was meant to protect the skill and labour which had gone into the typographical design of fine editions of classical works against appropriation by other publishers who used photo-lithography to make facsimile copies.²⁶⁶ At the turn of the Millennium, UK newspaper publishers tried to invoke this right against press cutting services, without success though. The House of Lords held that a facsimile copy only appropriates the presentation and layout of a newspaper if it comprises a whole page of a newspaper at a minimum.²⁶⁷
- 109 At first glance, the definitions of the “press product” in German law, and of the “press publication” in the proposed CDSMD seem to articulate a similar subject-matter. The German act refers to the “editorial and technical fixation of journalistic contributions”, the proposed directive to “a fixation of a collection of literary works of a journalistic nature ... such as a newspaper or a general or special interest magazine”.²⁶⁸ In its draft proposal, the German Government explained that the “ancillary” copyright attaches to the concrete fixation of the press product as the result of the press publisher’s efforts, and

²⁶⁵ Cf. secs 8, 9(2)(d), 15, 17(5) Copyright, Designs, and Patents Act 1988. Greece and Ireland provide for a similar protection of the typographical arrangement of a published edition; cf. European Commission 2016b:190-1.

²⁶⁶ *Newspaper Licensing Agency v. Marks & Spencer* [2003] 1 AC 551 (HL) para 5.

²⁶⁷ *Newspaper Licensing Agency v. Marks & Spencer* [2003] 1 AC 551 (HL) paras 25-27.

²⁶⁸ *Supra* 1.

not to the literary and other works of a journalistic nature.²⁶⁹ And indeed, the requirement to copy the precise layout of a press publication would allow the identification of the source from which the content has been derived, and would enable the rights of publishers to be clearly distinguished from the rights of journalists and other contributors to the newspaper. It would furthermore reflect the organisational and financial efforts that an RRPP is meant to stimulate.²⁷⁰

110 However, a right with such a limited subject-matter and scope would be effectively useless on the Internet because it would not cover the activities of search engines, news aggregators and social media that are at the heart of the Commission proposal. The reason is that neither search engines nor news aggregators or social media reproduce a news article in its original format. Instead, the content is automatically copied in a plain text format and displayed in the layout used by the online service provider. It is often not even possible to verify which model was used for creating the copy that is made available, i.e., whether the content was crawled and indexed from the website of the press publisher or from another source.²⁷¹

111 Accordingly, an RRPP in the layout of press publications would be largely ineffective. It would improve the enforcement of rights against so-called “rip offs” that mirror a complete web presence of a publisher or provide unauthorised access to electronic editions of newspapers and magazines. These phenomena are, however, not the problem that the European Commission responds to. In so far as they exist, they can be adequately addressed on the basis of existing copyright law.²⁷²

²⁶⁹ Bundesregierung (Germany) 2012:8. See also Stieper 2016:vor §§ 87 ff. para 15; Jani 2014:§ 87f para 2; Kauert 2008:271 (preferring this solution for German law).

²⁷⁰ European Publishers Council 2016:4.

²⁷¹ Nolte 2010:178 with fn 56; Max Planck Institute 2012:4; Spindler 2013:970.

²⁷² Nolte 2010:182-3; Ohly 2012:46. See also Landgericht Berlin 15 O 412/14, 6.1.2015, MMR 2015, 538 (granting an injunction based on the German RRPP against the making available of a single screenshot of an article).

3. Protection of journalistic content as such

112 If an RRPP is meant to cover the activity of search engines, news aggregators and social media, it consequently has to abstract from the precise layout and digital format in which a press publication was published originally. And indeed, the European Commission expressly states that its proposal concerns a “totally different subject-matter of protection” compared to the protection of typographical arrangements in national copyright laws.²⁷³ Whereas an RRPP that attaches to the layout is dysfunctionally narrow, a generic protection of any kind of journalistic content is, in turn, so broad that it is impossible to relate alleged infringements back to a particular press publication. Such an RRPP furthermore creates numerous overlaps of rights and thus conflicts among different groups of holders of rights in journalistic content. Finally, protecting even the smallest parts of journalistic content as such is incompatible with the fundamental right to access and publicly communicate news of the day and other facts (Art. 11(1) of the Charter).

a) Journalistic content as the subject-matter of an RRPP

113 There are good reasons to understand the German and Spanish RRPPs and even more so the Commission proposal as granting rights in any kind of journalistic content as *such*.

114 To begin with, it is precisely this type of “content” that is significant for the public debate and the proper functioning of a democratic society, which RRPPs are meant to foster.²⁷⁴ Under the Spanish act, the “content” published in certain periodicals or on websites is expressly referred to as the primary subject-matter of the RRPP. A right to equitable

²⁷³ European Commission 2016a:173.

²⁷⁴ Supra III 4; Rieger 2013:289-90.

remuneration arises in relation to the making available to the public of “insignificant fragments of [journalistic] content”.

115 In contrast, the German and the proposed EU RRPP attach to the press product/press publication, i.e. the collection of articles etc. published under a single title. This point of attachment seems to suggest that the rights protect the collection, i.e. the newspaper, magazine or online presence of a press publisher as “an individual item” (Art. 2(4) CDSMD proposal). However, all efforts to select, arrange, obtain, verify and present journalistic content under a single title are already protected under the Database Directive in a conclusive manner. Moreover, search engines, news aggregators and social media as the primary addressees of the RRPP do not make use of these database-related efforts and investments.²⁷⁵ Instead, they provide access to individual articles contained in press products/press publications. For this reason, the German RRPP expressly covers the commercial making available of “parts” of press products except for the use of “individual words or the smallest text excerpts”. The protection of parts of press publications under the Commission proposal follows from Art. 2 InfoSoc Directive 2001/29, which defines the exclusive reproduction right as the right “to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part”. The conclusion that the proposed EU RRPP effectively attaches to the journalistic content *as such* also follows from the applicability of limitations and exceptions to copyright, i.e. provisions that allow the use of works and other subject-matter contained in press products/press publications.²⁷⁶ Last but not least, both the German act and the Commission proposal take great pains to clarify that the exclusive right of publishers

“shall leave intact and shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject-matter incorporated in a press publication. Such rights may not be invoked against these authors and other rightholders and, in particular, may

²⁷⁵ Supra III 2 c bb and cc.

²⁷⁶ Art. 11(3) and recital 34 sentence 2 CDSMD proposal; paragraph 87g(4) sentence 2 German CA. The limitations and exceptions to the rights in databases are specifically regulated in Art. 6 and 9 of the

not deprive them of their right to exploit their works and other subject-matter independently from the press publication in which they are incorporated.”²⁷⁷

116 Again, there is only a need for such a conflict rule if indeed the RRPP attaches to the works and other subject-matter contained in press products/press publications. The double layer of rights is exemplified by a recent German court decision that prohibited the making available of text excerpts by a media monitoring company both on the basis of copyright in literary works and on the basis of the German RRPP.²⁷⁸

b) The difference between (rights in) phonograms, films, and broadcasts, and (rights in) press publications concerning digital uses

117 The European Commission repeatedly justifies its proposal for an RRPP by reference to the “comparable role” that publishers play “in terms of investments and contribution to the creative process to film and phonogram producers in their respective industries”.²⁷⁹ A comparison between the neighbouring rights in phonograms, films and broadcasts on the one hand and press publications on the other reveals, however, that these analogies are misguided.²⁸⁰

118 Phonograms, films and broadcasts can be clearly distinguished from the works, performances and other subject-matter (“content”) that they embody. The respective neighbouring rights relate to end products, i.e. to the fixation of sounds on phonograms, to the original and copies of film carriers, and to the fixation of broadcasts in

Database Directive 1996/9.

²⁷⁷ Art. 11(2) and recital 35 CDSMD proposal; paragraph 87g(3) German CA (“The right of the press publisher may not be asserted to the detriment of the author or the holder of a right related to copyright whose work or subject-matter protected under this Act is contained in the press product.”); see Bundesregierung (Germany) 2012:8.

²⁷⁸ Landgericht München I 37 O 23580/15, 5.2.2016, ZUM 2016, 558, 562.

²⁷⁹ European Commission 2016a:159, 166; similarly VG Media 2016b.

²⁸⁰ Wieduwilt 2010:559; Ohly 2012:46; Dewenter/Haucap 2013:18-9; Czychowski/Schaefer 2014:§ 87f para 23; Sprang 2016.

broadcasting signals.²⁸¹ These end products represent the organisational and financial efforts of the producers that justify the neighbouring right.²⁸² The efforts concern the production of a particular fixation of works, performances and other protected and unprotected subject-matter. Only this very fixation is protected against unauthorised reproductions and other uses. The right of the producer does not extend to the content that is fixed on the phonogram, on the film carrier or in the broadcasting signal. Unless the holders of rights in this content transfer their rights to the respective producer, the works and performances can be published and exploited simultaneously as fixed on/in other phonograms, films and broadcasts. For example, and always subject to contractual arrangements to the contrary, a musical composition can be performed and fixed on numerous phonograms in parallel. A performing artist is in principle free to repeat his performance, and these separate performances can be recorded and broadcasted independently from each other.

119 The distinction between content and its fixation in a particular end product also works in the publishing industry if the rights of the publisher relate to the database or to the precise typographical arrangement/format of text.²⁸³ As explained, an RRPP concerning digital uses is, however, only effective if it protects parts and even fragments of the press product, and if it abstracts from the concrete format of the fixation.²⁸⁴ And with this abstraction, the distinction between content and its fixation in a producers' product collapses. Because the only remaining point of attachment for a right in press publications is the content *as such*, i.e. the text, the image, the video, etc. in whatever format. This content is, however, either owned already by someone else or in the public domain.

120 A protection of news content abstracting from the concrete layout of the publication in which it appeared is problematic in several respects. It extends to digital uses that are potentially unrelated to the press publication in question (c), it creates conflicts between

²⁸¹ Cf. Art. 2(c)-(e) InfoSoc Directive 2001/29.

²⁸² *Supra* III 2 a.

²⁸³ *Ohly* 2012:46.

²⁸⁴ Cf. European Commission 2016a:173 (RRPP has a "totally different subject-matter" to national laws protecting typographical arrangements).

publishers and between publishers and holders of rights in the journalistic content (d), and it interferes with core communicative freedoms regarding news of the day and other facts (e).

c) The missing link between digital uses of journalistic content and a particular press publication

121 Art. 11(1) of the CDSMD proposal sets out that Member States “shall provide publishers of press publications with the rights provided for in Articles 2 and 3(2) of Directive 2001/29/EC for the digital use of their press publications.” The first sentence of Recital 34 adds that the rights granted to press publishers “should have the same scope as the rights of reproduction and making available to the public” under the InfoSoc Directive 2001/29, “insofar as digital uses are concerned.” Neither the text of the proposed directive nor the explanatory memorandum shed further light on the notion of “digital uses”. And even if one includes the Impact Assessment into the analysis, the scope of the RRPP remains unclear. In that document, search engines, news aggregators and social media are only mentioned as examples of unspecified further “online service providers”. On top of that, and in contrast to the German and Spanish RRPPs, the Commission proposal is not limited to commercial acts of making available, but also applies to purely private, non-commercial acts of reproduction and of making press publications available to the public.²⁸⁵

122 With this sweeping scope, it will often not be possible to establish a connection between an allegedly infringing use and a particular press publication. Due to the many cases of parallel publications of identical journalistic content, this risk is very real. For example, public statements of politicians, articles provided for by a news agency, images and videos are regularly published on several online news portals. In addition, the German and the proposed EU RRPP expressly allow parallel publications by the author of the

²⁸⁵ Supra III 1 b dd, ee.

journalistic content and by other owners of news content.²⁸⁶ According to one empirical study that examined 84 general information media outlets in France, half of online information is copy-and-paste.²⁸⁷ Further instances of secondary sources concern lawful uses of journalistic content under limitations and exceptions to copyright and the RRPP, in particular citations of news articles in other sources. In fact, little if any content is available on the Internet from only one single source.

123 In this situation, a generic right of press publishers in their press publications is potentially useless. Digital reproductions do not normally show traces of the model from which they were made. They are indistinguishable. In the absence of further indications of a use of the particular press publication of the claimant, it is therefore impossible to know from which source the copy of some journalistic content has been derived. Alleged infringers can claim that they did not make use of the press publication of the claimant but relied on a different source “for” their digital use (cf. Art. 11(1) CDSMD proposal).

d) The creation of conflicts between rightholders

124 Moreover, abstracting from the precise format of a press publication provokes various types of conflicts between independent owners holding rights in the very same content.

aa) Overlaps of RRPPs

125 The first conflict concerns the relationship amongst press publishers. It arises in the highly practical scenario that particular content is published in parallel in several press publications. In this case, *all* publishers acquire independent neighbouring rights in

²⁸⁶ Art. 11(2) CDSMD proposal, paragraph 87g(3) German CA.

“their press publications” – not only the one who first published the content. Since these rights attach to the journalistic content irrespective of its digital format or layout, all publishers hold separate rights in the same subject-matter. There is no rule to decide such a conflict of overlapping RRPPs because no publisher can claim priority.²⁸⁸ This dysfunctionality arises from the paradox that an RRPP is meant to protect concrete products of press publishers but effectively protects the journalistic content as such. If it is impossible to resolve these overlaps of RRPPs, they ought to be avoided. This is only possible by limiting the scope of protection in a way that always allows an unambiguous link to be established between the use in question and a particular press publication.²⁸⁹

bb) Overlaps of RRPPs with other rights in journalistic content

126 The second category of conflicts concerns the relationship between press publishers on the one hand and authors and other holders of rights in journalistic content on the other hand. Authors are granted copyright protection automatically with the creation of the work. In practice, literary works of a journalistic nature are fixed in a tangible medium (e.g. a digital file) and submitted for publication in a newspaper or magazine.²⁹⁰ At this point in time, the work and parts of it are already subject to copyright protection. The same holds true for photographs and performances but also for first fixations of sounds on phonograms, of films, and of broadcasts. If a press publisher wants to exploit these works and products, it has to secure the pre-existing rights. Upon the publication of this content in its press publication,²⁹¹ the press publisher acquires an additional, original

²⁸⁷ Cage/Herve/Viaud 2015:1 (“Most outlets simply echo others work without adding original reporting.”).

²⁸⁸ Peifer 2013:151.

²⁸⁹ Czychowski/Schaefer 2014:§ 87f para 17; infra IV 4.

²⁹⁰ German Newspaper and Magazine Publishers 2010:2.

²⁹¹ Bundesregierung (Germany) 2012:7; European Copyright Society 2016:4. Publication triggers the term of protection of the RRPP; see Art. 11(4) CDSMD proposal; paragraph 87g(2) German CA.

right on top of these pre-existing rights, which attaches, however, to the very same subject-matter.²⁹²

127 Art. 11(2) of the CDSMD proposal resolves this conflict in favour of journalists and other holders of rights in journalistic content. It proclaims that the RRPP “may not be invoked against ... authors and other rightholders 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.”²⁹³ Without this caveat, an RRPP would potentially trump all pre-existing rights online. Journalists and other rightholders would have to ask for permission if they wanted to re-publish their works, which is a particularly common and important practice for free-lance journalists.²⁹⁴ This would amount to a clear violation of the fundamental right of these rightholders to their intellectual property (Art. 17(2) of the Charter).

128 In spite of this conflict rule, an RRPP in journalistic content as such still adversely affects authors, in particular journalists, economically. If one thing is clear, it is the fact that an RRPP cannot increase the demand for and thus the exchange value of an article etc. Instead, by making it more difficult and/or more expensive to find and access content online, it will reduce the demand for and usage of journalistic content. Even if press publishers should be able to make up for this loss by increasing the price for their product, journalists still don't benefit. The reason is that an RRPP grants press publishers an extra share in the total exchange value of a particular journalistic content. This becomes particularly evident in the case of downstream licensing revenues that press publishers might extract on the basis of an RRPP from uses of news archives or from press clipping services.²⁹⁵ The additional participation of press publishers necessarily reduces the share of journalists. The German legislator is apparently of the same view. For otherwise there would be no reason to codify that the author of a

²⁹² Stieper 2016:§ 87f para 13.

²⁹³ Similarly paragraph 87g(3) German CA.

²⁹⁴ Cf. sec. 38(3) German CA (absent a contractual agreement to the contrary, press publishers only acquire non-exclusive exploitation rights in journalistic content); Wieduwilt 2010:559; Nolte 2010:186; Ott 2012:561; Ohly 2012:46.

²⁹⁵ See also Bundesgerichtshof I ZR 255/00, 11.7.2002, GRUR 2002, 963, 966 (exclusive rights against press clipping services does, as a rule, not improve the economic position of journalists who do not

journalistic work is “entitled to an equitable share of the remuneration” gained by the press publisher on the basis of its new neighbouring right.²⁹⁶ In contrast to this explicit provision, the European Commission only articulates the vague expectation that the RRPP “could indirectly have a positive impact on authors ... insofar as publishers transfer part of these benefits to the authors”.²⁹⁷ The contract adjustment mechanism provided for in Art. 15 of the CDSMD proposal is too unspecified and restricted in order to compensate authors for this disadvantage.²⁹⁸

e) Conflict with the freedom of information

129 An exclusive right in the generic commercial and non-commercial use of journalistic content comprised in press publications is finally in conflict with the freedom of information of individual Internet users.²⁹⁹ The interference in this respect is not “limited”,³⁰⁰ but severe. An RRPP with such a broad subject-matter and scope is either invalid due to violation of fundamental rights or, if interpreted restrictively, ineffective for failing to cover the current practice of search engines, news aggregators, and social media.

aa) The freedom of hyperlinking

130 The only concrete reference to the freedom of communication in the text of the CDSMD proposal concerns the freedom of hyperlinking. According to the third sentence of

participate in the revenues of publishers in this respect).

²⁹⁶ Paragraph 87h German CA; Bundesregierung (Germany) 2012:9.

²⁹⁷ European Commission 2016a:168.

²⁹⁸ Also under German copyright contract law, the general bestseller clause under paragraph 32c German CA exists next to the special rule on participation of journalists in the German RRPP (paragraph 87h).

²⁹⁹ Dreier 2015:§ 87f para 4 (danger of monopolising news as such).

³⁰⁰ European Commission 2016d:9.

Recital 33 of the CDSMD proposal, the RRPP “does not extend to acts of hyperlinking which do not constitute communication to the public”.³⁰¹ This effect is achieved through the reference in Art. 11(1) CDSMD proposal to the right of making available to the public in Art. 3(2) of the InfoSoc Directive 2001/29 as interpreted with regard to hyperlinks by the CJEU. According to this case-law, a hyperlink does not communicate a protected subject-matter to the public as soon as and as long as that content is freely available on the website to which the hyperlink allows access with the consent of the rightholder.³⁰² There are two main reasons for this freedom of hyperlinking. First, where the copyright holders of the content referred to have made it available on the Internet without technical restrictions, they have implicitly included all Internet users as the relevant public.³⁰³ Second, the CJEU rightly considers the Internet “of particular importance to freedom of expression and of information”, and adds that “hyperlinks contribute to its sound operation as well as to the exchange of opinions and information in that network characterised by the availability of immense amounts of information”.³⁰⁴

131 It is important to note that this case-law only concerns freely available, authorised online publications. If the press publication has been made available to the public without the prior consent of the rightholder or if the hyperlink circumvents technological protection measures (paywalls), posting a hyperlink can amount to a direct infringement of Art. 11(1) CDSMD proposal under the criteria set out in the *GS Media* decision. Thus, only the current practice of search engines, news aggregators and social media, to which press publishers indeed implicitly or even explicitly consent, benefits from the freedom of hyperlinking, whereas acts of piracy are and remain illegal.

³⁰¹ See also European Commission 2016a:162 with reference to CJEU C-466/12, 13.2.2014 *Svensson and Others*, ECLI:EU:C:2014:76; similarly Bundesregierung (Germany) 2012:1, 6 with reference to Bundesgerichtshof I ZR 259/00, 17.7.2003 *Paperboy*, GRUR 2003, 958, 962 (IIC 2004, 1097).

³⁰² CJEU C-160/15, 8.9.2016 *GS Media* EU:C:2016:644, para 25 et seq.

³⁰³ Id, para 42. See also Bundesgerichtshof I ZR 259/00, 17.7.2003 *Paperboy*, GRUR 2003, 958, 963 (IIC 2004, 1097); Bundesgerichtshof I ZR 69/8, 29.4.2010 *Vorschaubilder I*, GRUR 2010, 628, 632; Bundesgerichtshof I ZR 140/10, 19.10.2011 *Vorschaubilder II*, GRUR 2012, 602, 604.

bb) What constitutes a “part” of a press publication?

- 132 The freedom of hyperlinking may, however, turn out to be a hollow promise because press publishers could claim, and German press publishers already do claim under the current German RRPP, that even a hyperlink per se, which directs the user to the website of a publisher, is subject to the RRPP and thus requires ex ante authorisation.³⁰⁵ This at first sight surprising claim is based on the fact that press publishers regularly choose a URL that contains the title or other keywords taken from the respective article.³⁰⁶ Since these URLs contain several words, often more than five, it is argued that those links already reproduce and make available a “part”, and indeed the most informative part, of the press publication of the claimant.³⁰⁷ The same sort of allegation can be advanced against the use of snippets, preview images (thumbnails) and video stills.
- 133 In order to assess the impact of an RRPP in journalistic content as such on the freedom of information, it is thus necessary to define what constitutes a “part” of a press publication that must not be reproduced and then made available under Art. 11(1) CDSMD proposal. Since all RRPPs are independent from copyright in works of a journalistic nature, the protection of publishers does not require the demonstration of an author’s own intellectual creation. Instead, an RRPP applies to any written or audiovisual “content” that is comprised in a press publication.³⁰⁸
- 134 Whereas the CJEU has handed down a number of rulings on the notion of reproduction “in part” of copyrighted works,³⁰⁹ until now there is no case-law of the EU court in the area of neighbouring rights of producers of phonograms, of films, and of broadcasters. It

³⁰⁴ Id, para 45. See also Bundesgerichtshof I ZR 191/08, 14.10.2010 *AnyDVD*, GRUR 2011, 503 para 22-24.

³⁰⁵ Bundeskartellamt B6-126/14, 8.9.2015 *Google Inc. et al*, BeckRS 2016, 01138 para 203.

³⁰⁶ E.g. <http://www.faz.net/aktuell/wirtschaft/wirtschaftspolitik/guenther-oettinger-wehrt-kritik-an-eu-leistungsschutzrecht-ab-14419895.html>.

³⁰⁷ See Schack 2015:para 718d (no infringement if only the title is copied); Klein 2008:456.

³⁰⁸ Landgericht München I 37 O 23580/15, 5.2.2016, ZUM 2016, 558, 562; Schweizer 2010:12; Stieper 2016:vor §§ 87 ff. para 16.

³⁰⁹ Supra note 197.

is thus an unresolved issue under EU law whether neighbouring rights of producers are subject to a minimum threshold of protection, and if yes, which criteria apply.³¹⁰ Regarding the neighbouring rights of phonogram and film producers, the German Bundesgerichtshof has held that the use of the *smallest fragments* encroaches upon the producer's rights because even extremely short parts of the fixation represent the *total* investment of the producer in the production of the first fixation of the *complete* phonogram or film copy.³¹¹

135 In its draft bill for an RRPP, the German Government applied this reasoning to the protection of press publishers, which was intended to extend to “small parts” of the press product.³¹² According to this view, a press publication is reproduced or made available to the public “in part” even if an extremely short fragment of a sentence and indeed even a single word that appeared in a press publication was reproduced and/or made available to the public. The Spanish RRPP points to the same conclusion. It applies to the making available of “insignificant fragments” of news contents. Since “significant” fragments must not be used at all and thus apparently satisfy the requirements for copyright protection already,³¹³ the Spanish RRPP is clearly directed to the use of text excerpts and other content below this already low threshold of copyrightability.

136 This broad interpretation is furthermore confirmed by an express exception in the German RRPP concerning “*individual words or the smallest of text excerpts*”.³¹⁴ This caveat was added to the text of the German RRPP only during the parliamentary debates. The explanatory memorandum sets out that the purpose of the exception is to allow search engines and news aggregators a short but at the same time proper description of their search results. Without setting a fixed word-limit, the formulation is meant to apply to excerpts that provide context to the search result so that the Internet

³¹⁰ Bundesverfassungsgericht 1 BvR 1585/13, 31.5.2016 *Metall auf Metall*, BeckRS 2016, 46375 paras 112 et seq.

³¹¹ Regarding film producers see Bundesgerichtshof I ZR 42/5, 20.12.2007 *TV-Total*, paras 21-22; regarding phonogram producers see Bundesgerichtshof I ZR 112/06, 20.11.2008 *Metall auf Metall I*, MMR 2009, 253; Bundesgerichtshof I ZR 182/11, 13.12.2012 *Metall auf Metall II*, MMR 2011, 755.

³¹² Bundesregierung (Germany) 2012:7.

³¹³ Max Planck Institute 2016:para 18.

user is able to quickly decide whether a result is relevant to her. It is meant to function as the equivalent to the case-law of the Bundesgerichtshof according to which the operator of an image search engine may reproduce and make publicly available previews of freely available images in a reduced size (“thumbnails”).³¹⁵ The “ancillary copyright” thus only covers commercial service providers who aggregate journalistic content in a way that makes a visit to the website of the press publisher unnecessary.³¹⁶

137 In contrast to an unofficial, leaked version of the CDSMD proposal, which had set out in a recital that the RRPP “should not extend to news of the day as such or ... miscellaneous facts having the character of mere items of press information which do not constitute the expression of the intellectual creation of their authors”,³¹⁷ neither the final text of the CDSMD proposal nor the accompanying documents contain an exception concerning the use of minimal fragments. Since the proposal at the same time also refrains from explicitly covering “insignificant” fragments (like the Spanish RRPP), it is an open question whether the Commission proposal is subject to a minimum threshold of protectability or whether it extends to every part of a press publication, including single words, thumbnails, and video stills.

138 The latter understanding is of course in line with the aim of providing a high and effective level of protection for press publishers online. If the use of hyperlinks containing the title or other words from a press publication and/or currently common snippets became subject to a requirement of prior authorisation, this would fit with the structural purpose of the RRPP to re-establish a linear value chain for news production and distribution on the Internet, with press publishers at the top. For the less useful a search engine or news aggregator is with regard to accessing journalistic content, the more likely it is that Internet users will return to the practice of consulting only one or few web portals they know in order to satisfy their demand for news.³¹⁸ The Spanish RRPP has already produced these consequences with an unwaivable and unconditional right

³¹⁴ Paragraph 87f(1) sentence 1 German CA.

³¹⁵ Supra note 152.

³¹⁶ Bundestag 2013:4-5.

³¹⁷ Available at <http://ipkitten.blogspot.de/2016/08/super-kat-exclusive-heres-draft.html>

³¹⁸ Höppner 2013:81.

for remuneration that arises in respect of any commercial making available to the public of insignificant fragments of news articles of whatever length. The effect of this law was that many online service providers closed down, including Google News.³¹⁹ Finally, a broad reading of the notion of a protected “part” of a press publication avoids downgrading the RRPP to a redundant, additional layer of protection for journalistic content that is already available under existing EU and national copyright law.³²⁰

cc) The protection of the smallest fragments of press publications is incompatible with Art. 11(1) of the Charter

139 Subjecting hyperlinks and/or snippets to an exclusive right of press publishers would mean that the current practice of searching for, accessing, and sharing news on the Internet could not continue. An RRPP with this effect would not only interfere with the fundamental right of online service providers to conduct a media-related business (Art. 16 in connection with Art. 11(2) of the Charter).³²¹ It would also entail a far-ranging and particularly serious interference with everyone’s fundamental right to freedom of expression, which includes the freedom to receive and impart information and ideas without interference by public authorities and regardless of frontiers (Art. 11(1) of the Charter).³²²

140 According to the case-law of the European Court of Human Rights, the parallel freedom of expression under Art. 10 ECHR applies to the Internet as a means of communication whatever the type of message and even when used for commercial purposes.³²³ The ECtHR has furthermore observed that the Internet, “in light of its accessibility and its capacity to store and communicate vast amounts of information ... plays an important

³¹⁹ NERA 2015. For the economic reasons for this reaction see supra, III 1 b.

³²⁰ Supra III 2 b.

³²¹ See infra 4 b aa (1).

³²² See, by analogy, CJEU C-293/12 and C-594/12, 8.4.2014 *Digital Rights Ireland*, ECLI:EU:C:2014:238, para 65.

³²³ ECtHR no. 36769/08, 10.1.2013 *Ashby Donald and Others v. France*; ECHtR no. 64569/09, 16.6.2015

role in enhancing the public's access to news and facilitating the dissemination of information generally",³²⁴ and that "the Internet is an information and communication tool particularly distinct from the printed media".³²⁵

141 Indeed, without the freedom to communicate news and miscellaneous facts expressed in works of a journalistic nature, the public debate could not function properly, be it offline or online. This is why for the purpose of short news reports, any broadcaster established in the Union has access on a fair, reasonable and non-discriminatory basis to events of high interest to the public which are transmitted on an exclusive basis by a broadcaster under their jurisdiction.³²⁶ Without search engines, news aggregators and social media platforms, it would become effectively impossible to locate, access and share the highly diverse wealth of journalistic content that is available on the Internet. An RRPP thus reduces the diversity of journalistic content that readers will experience, and prejudices media pluralism in general.³²⁷ A copyright-related measure that affects "the possibility of Internet users lawfully accessing information" amounts to unjustified interference in the freedom of information of those users.³²⁸

142 In addition, the European Commission proposal directly affects the online communication of the ordinary European population. In contrast to the German and Spanish RRPPs, it is not limited to certain commercial actors but also covers any non-commercial act of reproduction and making available to the public of journalistic content (cf. Art. 11(1) CDSMD proposal). This broad scope is actually necessary in order to cover "digital uses" of press publications on social media, where private Internet users recommend and post many links to and snippets of news articles, and comment on these.³²⁹ This form of non-commercial online communication is becoming an ever more important element of the public debate. An increasing number of EU citizens primarily participate in this debate via social media, where they receive and impart information

Delfi AS v. Estonia.

³²⁴ ECtHR no. 64569/09, 16.6.2015 *Delfi AS v. Estonia*.

³²⁵ ECtHR no. 33014/05, 5.5.2011 *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, § 63.

³²⁶ Art. 15 AVMS Directive; CJEU C-283/11, 22.1.2013 *Sky Österreich*, ECLI:EU:C:2013:28, para 51.

³²⁷ Ott 2012:560; NERA 2015:43-47; Dewenter/Haucap 2013:39-40.

³²⁸ Cf. CJEU C-484/14, 15.9.2016 *Mc Fadden* ECLI:EU:C:2016:689, para 93; Bundesverfassungsgericht 1 BvR 2136/14, 10.10.2016 *Yahoo*, BeckRS 2016, 54705, para 15.

and ideas.³³⁰ As the ECtHR recently pointed out, the continued functioning of these platforms is already indispensable for the proper functioning of the democratic society (cf. Recital 31 sentence 2 CDSMD proposal). The Strasbourg court held that social media platforms like YouTube constitute a unique and popular tool to receive and impart information of general political interest that is sometimes ignored by “traditional media”, and that these platforms allow for the emergence of “citizen journalism”.³³¹ The outstanding importance of social media platforms is furthermore confirmed by various recent measures undertaken by the EU together with IT companies to combat illegal online hate speech on these platforms, which poses a threat to the public debate.³³² If social media providers put an end to the possibility of sharing journalistic content in order to avoid direct or indirect liability under the RRPP, this intervention would seriously interfere with the fundamental right to freedom of expression and information of a large and growing segment of the European population.³³³

143 The importance of the freedom to communicate news is also confirmed by international copyright treaties. According to Art. 2(8) of the Berne Convention (BC), the protection of this Convention, with which the EU is obliged to comply,³³⁴ “shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.” In and of itself, Art. 2(8) BC is not an absolute prohibition on granting some form of protection to news or other press information.³³⁵ Nevertheless, the provision clearly indicates the will of all members of the Berne Union that news of the day and miscellaneous facts ought to be free from private exclusive rights. At a minimum, Art. 2(8) of the Berne Convention emphasises the general principle that copyright protection

³²⁹ Supra II.

³³⁰ European Commission 2016b:181; Bavarian Regulatory Authority for New Media 2016:31.

³³¹ ECtHR no. 48226/10, 1.12.2015 *Cengiz and others v. Turkey*, §§ 51-52, 56.

³³² See Code of Conduct on illegal online hate speech, 31.5.2016, http://ec.europa.eu/justice/fundamental-rights/files/hate_speech_code_of_conduct_en.pdf; recitals 28-30 and Art. 3(8), 28a AVMSD amendment proposal, COM(2016) 287 final.

³³³ Compare, by analogy, CJEU Joined Cases C-293/12 and C-594/12, 8.4.2014 *Digital Rights Ireland*, ECLI:EU:C:2014:238, para 56.

³³⁴ CJEU C-510/10, 26.4.2012 *DR, TV2 Danmark A/S*, ECLI:EU:C:2012:244, para 29; see also CJEU C-306/05, 7.12.2006 *SGAE*, ECLI:EU:C:2006:764, para 35; CJEU C-5/08, 16.7.2009 *Infopaq International A/S*, ECLI:EU:C:2009:465, paras 32-34.

³³⁵ Supra note 23.

should extend to expressions and not to ideas and other articulations of facts.³³⁶ According to another understanding, the provision actually limits copyright protection in works that express news of the day or miscellaneous facts. This interpretation forms the basis of Paragraph 49(2) of the German copyright act, according to which it is permissible to reproduce, distribute and publicly communicate “public miscellaneous news items of a factual nature and news of the day which have been published via the press or broadcasting”. The general interest purpose of the provision is to allow a quick distribution of news without the need to distinguish whether or not the text in question is exceptionally protected as a literary work.³³⁷ The mandatory (!) exception for “press summaries” under Art. 10(1) of the Berne Convention pursues the same objective.³³⁸ The normative significance and power of the public interest in the free communication of news is ultimately confirmed by the fact that an unfair competition cause of action against the misappropriation of “hot news” could never gain traction in national laws.³³⁹

144 Even if one assumes, for the sake of argument, that an RRPP genuinely satisfies an objective of general interest – which, in fact, it does not³⁴⁰ –, interference with the freedom of expression and information has to be appropriate for attaining these objectives.³⁴¹ Any measure limiting access to information and ideas on matters of public interest that the public is entitled to receive must be justified by particularly compelling reasons.³⁴² The experience with the German and the Spanish RRPPs demonstrate, however, that an EU RRPP will not create any revenues for press publishers because online service providers would rather close down or reduce their news-related services in order to avoid any liability under an RRPP than change their business model completely and for the first time ever pay for content that they make accessible.³⁴³ Consequently, an RRPP is inappropriate for attaining its objective, i.e. to improve the

³³⁶ Ricketson/Ginsburg 2006:paras 8.104-8.106; Art. 9(2) TRIPS, 2 WCT.

³³⁷ Bundesregierung (Germany) 1962:66; Prantl 1983:19 et seq.

³³⁸ See infra IV 4 b aa (2).

³³⁹ Cf. Reichsgericht II 355/29, 29.4.1930 *Graf Zeppelin*, RGZ 128, 330; Bundesgerichtshof I ZR 12/08, 1.12.2010 *Perlentaucher*, GRUR 2011, 134 Rn. 67; Kauert 2008:144 et seq.; Fahl 2010:158 et seq.

³⁴⁰ See supra III.

³⁴¹ CJEU Joined Cases C-293/12 and C-594/12, 8.4.2014 *Digital Rights Ireland*, ECLI:EU:C:2014:238, para 46 with further references.

³⁴² ECtHR no. 42864/05, 27.11.2007 *Timpul Info-Magazin and Anghel v. Moldova*.

³⁴³ Supra III 1 b.

market position of press publishers who face a revenue gap as a result of the shift from print to digital. This observation is valid irrespective of whether an EU RRPP is structured as an individual exclusive right (as in Germany), as an unwaivable right to remuneration administered by a collecting society (as in Spain) or as a kind of hybrid between those two versions, e.g. as an exclusive right that is mandatorily administered by a collecting society that in addition benefits from some form of presumption regarding its repertoire (extended collective licensing scheme). Since the EU online news market is characterised by the same competitive conditions that have also been present in Germany and in Spain, there is no reason to believe that the mere size of the EU Digital Single Market will make a difference.³⁴⁴

145 In addition, interference with the fundamental right to freedom of expression must be strictly limited to what is appropriate and necessary “in a democratic society”.³⁴⁵ An RRPP that hampers the communication of news and other facts on the Internet also fails to meet these requirements. First, press publishers can rely on existing copyrights and neighbouring rights, and moreover on technological measures in order to control access to their publications and the use of snippets.³⁴⁶ They are thus not in need of intervention by the EU legislature. Secondly, the communicative practices targeted by the RRPP do not prejudice the economic interests of press publishers. To the contrary, press publishers *benefit* from links to and snippets of their publications because these references increase the attention that the individual content can attract, and they channel many readers to publishers who would otherwise never had taken notice of this service.³⁴⁷

146 As the German Bundesverfassungsgericht (Federal Constitutional Court) recently observed in relation to soundtrack samples, the possibility of obtaining a licence does not provide an equivalent degree of protection of the freedom of expression. A right to be granted a licence to use a hyperlink to or snippet of a press publication does not

³⁴⁴ Contra European Commission 2016a:161, 167.

³⁴⁵ See in general CJEU Joined Cases C-293/12 and C-594/12, 8.4.2014 *Digital Rights Ireland*, ECLI:EU:C:2014:238, para 46 with further references; on Art. 10 ECHR see, e.g., ECtHR no. 5493/72, 7.12.1976 *Handyside v. the United Kingdom*, Series A no. 24.

³⁴⁶ Supra III 1 b cc.

exist. The press publisher may demand the payment of a licence fee, the amount of which it is free to determine. It may also simply deny an authorisation without giving any reasons for this. In addition, it is practically impossible for private users and even commercial online providers to obtain a licence for each and every hyperlink or snippet.³⁴⁸

147 In conclusion, an EU RRPP that provided protection against any commercial and non-commercial “online use” of journalistic content in whatever form, in particular against hyperlinks to and snippets of journalistic content as used today by search engines, news aggregators and Internet users on social media, would be invalid because the EU legislature would have exceeded the limits imposed by compliance with the principle of proportionality in the light of Articles 11, 16 and 52(1) of the Charter.³⁴⁹

dd) An RRPP compatible with fundamental rights is ineffective

148 As indicated, it is anything but clear how courts will interpret the notion of a “part” of a press publication. The CDSMD proposal explicitly states that it “respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union” (Recital 45 CDSMD proposal). If the EU legislature or, eventually, courts pay due respect to this general aim and strive to save the RRPP from invalidity, they might be willing to introduce certain limits to the protectable subject-matter of an RRPP. If this happens, an RRPP will, however, miss its main targets, namely commercial search engines, news aggregators and social media.

149 There are basically two ways to restrict the subject-matter of an RRPP in a way that avoids unjustified interference with the freedom of expression and information. The first

³⁴⁷ Supra III 1 b cc and dd.

³⁴⁸ See, by analogy, Bundesverfassungsgericht 1 BvR 1585/13, 31.5.2016 *Metall auf Metall*, para 98; Bundesverfassungsgericht 1 BvR 2136/14, 10.10.2016 *Yahoo*, BeckRS 2016, 54705, para 15.

³⁴⁹ Compare, by analogy, CJEU Joined Cases C-293/12 and C-594/12, 8.4.2014 *Digital Rights Ireland*, ECLI:EU:C:2014:238, para 69. See also Ehmann/Szilagyi 2009:10; Schweizer 2010:15; Rieger 2013:309.

option is to exempt certain fragments of journalistic articles from the RRPP. It is with this aim in view that the German RRPP only applies if a search engine or equivalent commercial provider makes more than “individual words or the smallest of text excerpts” publicly available.³⁵⁰ The leaked draft of the Commission proposal articulated a similar exception that in addition articulated its purpose. It stated in a recital that the RRPP should not extend to “news of the day as such or to miscellaneous facts having the character of mere items of press information which do not constitute the expression of the intellectual creation of their authors”.³⁵¹ The regulatory alternative to such exceptions attaching to the journalistic content as such is to limit an RRPP according to its investment-related purpose. This option was mentioned by the German Bundesverfassungsgericht in a recent case concerning the neighbouring right of phonogram producers who claimed that a two-second sample of a soundtrack infringed their rights. The court held that a proportionate balance between the property interests of the phonogram producer and the artistic interest in creativity could inter alia be established by introducing a general minimum threshold of protectability for parts of phonograms. According to this solution, the reproduction and other use of parts of phonograms would only amount to an infringement “if the economic interests of the phonogram producer are substantially prejudiced” by the relevant activity.³⁵²

150 Whatever type of restriction the EU legislature or courts might apply, the effect would be that the current practice of news searching, aggregating and sharing would not fall within the ambit of the RRPP, which would consequently be useless. Neither the news-related online services targeted by the Commission nor acts of news sharing by individual Internet users substantially prejudice the economic interests of press publishers. On the contrary, these activities are beneficial for publishers because they result in direct or referral traffic on their news portals.³⁵³ Thus, there is no reason for prohibiting them. If, alternatively, the use of the “smallest of text excerpts” was declared

³⁵⁰ Bundesverfassungsgericht 1 BvR 2136/14, 10.10.2016 *Yahoo*, BeckRS 2016, 54705, para 15.

³⁵¹ *Supra* note 317.

³⁵² Bundesverfassungsgericht 1 BvR 1585/13, 31.5.2016 *Metall auf Metall*, GRUR 2016, 690 et seq, para 110 with further references; Hanseatisches Oberlandesgericht Hamburg 3 W 38/91, 18.4.1991, GRUR Int. 1992, 390, 391 and 3 U 237/90, 16.5.1991, NJW-RR 1992, 746, 748.

³⁵³ *Supra* III 1 b cc, dd.

to be lawful in so far as this is necessary to communicate news of the day as such or miscellaneous facts,³⁵⁴ the current practice of search engines, news aggregators and social media would also remain beyond the scope of an RRPP limited like this. For neither the link as such nor its “source”, which usually is the web page’s URL, nor commonly used text snippets go beyond what is necessary and proper in order to communicate news/facts *as such*.

151 What search engines, news aggregators and social media communicate is the fact that a news article or other journalistic content on a particular topic exists and is accessible. This is a raw fact that is not copyrightable nor can it become subject to an RRPP that respects fundamental rights. Snippets contain the search term(s) and provide the context that is necessary to enable the reader to decide whether the search result is relevant for him. For that purpose, the snippet has to convey a minimum of information about what the respective website contains. The topic of a newspaper article is, however, again a raw fact. Moreover, snippets are kept as short as possible in order to allow the display of as many results as possible on one screen. Their length depends on a number of criteria that all aim at providing an efficient search tool and at avoiding – in the interest of both the user and the service provider – repeat searches (“bad clicks”). These factors include

- the number of search terms;
- the length of search terms;
- the distribution of search terms on the source website;
- the type of search term – whether it is a function word that has little meaning when standing alone or a content word like a noun or verb;
- the layout and clarity of the search result list;
- the number of results displayed on the search result page;
- the type of search – navigational search of a particular website or informational search for a generic topic;
- the type of device employed for the search.

³⁵⁴ In this sense Bundesverfassungsgericht 1 BvR 2136/14, 10.10.2016 *Yahoo*, BeckRS 2016, 54705,

- 152 Empirical evidence demonstrates that the snippets that are automatically created on the basis of these criteria already constitute the minimum that is necessary to provide context to the search result. If the length of snippets was further reduced, the number of “bad clicks”, where users return to the search engine to continue their search, increases.³⁵⁵
- 153 In summary, the snippets that search operators and news aggregators commonly make available upon an individual search initiated and conducted by the user (!)³⁵⁶ do nothing more than convey the information (raw facts) which source reports about which news of the day or other miscellaneous facts. The length of snippets cannot be pinpointed to a fixed number if this informational tool is to retain its functionality. The minimalistic context provided for by snippets is exactly what ought to remain free from an RRPP that respects the freedom of expression and information.³⁵⁷ The same goes for thumbnails in an image search and video stills in a video search.³⁵⁸
- 154 The overview about current news topics displayed on the front page of some news aggregators differs from search engines in that it is not created upon an individual search, but automatically by the service provider. Accordingly, snippets can have a fixed maximum length.³⁵⁹ Their purpose is, however, similar to that in the case of search results. They inform the user about which current news articles exist, and which news of the day and miscellaneous facts *as such* are being reported. The fact that the snippets on these sites are sometimes longer than the snippets displayed upon individual searches is due to the fact that users need more information about whether particular content is relevant to them if they are not actively searching for particular information. In these circumstances, the provider is not able to point the user directly to parts of the source text which are probably most relevant. Last but not least, snippets on websites

para 15.

³⁵⁵ Koller 2015.

³⁵⁶ Ott 2012:557.

³⁵⁷ Kühne 2013:169.

³⁵⁸ Bundestag 2013:4-5. But see Art. 32.2. sentence 3 Spanish LPI (“En cualquier caso, la puesta a disposición del público por terceros de cualquier imagen, obra fotográfica o mera fotografía divulgada en publicaciones periódicas o en sitios Web de actualización periódica estará sujeta a autorización.”) and Xalabarder 2014:8 (the making available of photographs is subject to authorisation).

³⁵⁹ In the case of Google News, the length of the snippets does not exceed 256 characters.

such as Google News are often actively provided by the respective press publishers who add them to the source code of their website and thus implicitly agree to this use.³⁶⁰

ee) The creation of legal uncertainty to the detriment of innovation

155 As a result, an RRPP is either ineffective or invalid. It is ineffective if the current, news-related practices of Internet users and online service providers is found to be beyond the scope of an RRPP. It is invalid under the principles set out by the CJEU in *Digital Rights Ireland* for violation of fundamental rights if these and further activities become subject to a requirement of authorisation or remuneration. In both scenarios, an RRPP is dysfunctional.

156 What is more, the decision between the two versions of failure will take years and consume many efforts of stakeholders without furthering any of the aims articulated by the European Commission. Three years after the enactment of the German RRPP, it is completely unclear how the notion of the “smallest of text excerpts” will be interpreted. The Copyright Arbitration Board tentatively suggested seven words of context for every search term,³⁶¹ the Landgericht München (Regional Court, Munich) has considered a three- *and* an eight word snippet to satisfy this threshold,³⁶² and commentators disagree as to whether there ought to be a fixed limit to the number of permissible words at all, and if yes, which number is the right one.³⁶³ To date, the German RRPP has resulted in nothing but legal uncertainty and a source of income for lawyers.

³⁶⁰ Supra III 1 b dd (1) and (2); Bundeskartellamt B6-126/14, 8.9.2015 *Google Inc. et al*, BeckRS 2016, 01138 para 17, 128 et seq.; Landgericht Berlin 92 O 5/14, 19.2.2016 *VG Media/Google*, BeckRS 2016, 10612; Kühne 2013:169.

³⁶¹ Copyright Arbitration Board Case Sch-Urh 13/14, 24.9.2015, 30.

³⁶² Landgericht München I 37 O 23580/15, 5.2.2016, ZUM 2016, 558, 564 (“Maschinenbau. Das Studium” and “Integration und Medien – Was Medien für Flüchtlinge senden” are smallest text excerpts).

³⁶³ Cf. Spindler 2013:970; Dreier 2015:§ 87f para 17 (Google search lawful, Google News infringement). See also Bundesverfassungsgericht 1 BvR 2136/14, 10.10.2016 *Yahoo*, BeckRS 2016, 54705, para 19 with further references.

157 These difficulties do not come as a surprise. Indeed, it seems impossible to avoid them, whatever the precise wording of an EU RRPP might eventually be. The reason is that there simply is no passage between the Scylla of monopolizing news of the day or miscellaneous facts on the one hand and the Charybdis of a redundant RRPP that only steps in if copyright is available anyhow. In other words, there is no gap between the public domain of raw facts and copyright in works of a journalistic nature that can be defined with at least some level of certainty in advance.³⁶⁴ News and other facts have to be expressed in language or depicted in photographs and other audiovisual content in order to form part of a press publication. As a rule, this effort already results in a copyright or a neighbouring right. The CJEU has held that a routine text fragment of eleven words and a standard portrait photograph can well be copyrightable, depending on the circumstances of the case.³⁶⁵ German courts have considered a *two-word* sequence a literary work.³⁶⁶ As a consequence, news/facts and copyrightable expression become indistinguishable. In a case involving such a merger of expression and ideas, the CJEU denied copyright protection for authors.³⁶⁷ Where even authors have to forego protection for the sake of free communication, there is indeed no reason to grant press publishers protection instead.³⁶⁸

³⁶⁴ This reasoning underpins paragraph 49(2) of the German CA; see supra note 337.

³⁶⁵ Supra notes 197-201.

³⁶⁶ Oberlandesgericht Frankfurt am Main 11 U 75/06, 1.11.2011 *Perlentaucher II*, BeckRS 2011, 27257 (“subventionierte Wiederentdeckung” copyrightable).

³⁶⁷ CJEU C-393/09, 22.12.2010 *Bezpečnostní softwarová asociace – Svaz softwarové ochrany*, ECLI:EU:C:2010:816, paras 49-50.

³⁶⁸ Spindler 2013:975; Peifer 2015:10.

4. An RRPP limited to online services that provide hyperlinks to press publications

a) Explanation of the concept

- 158 The preceding section provided an analysis of an RRPP that grants press publishers exclusive rights in fragments of journalistic content as such, irrespective of the layout or digital format in which this content was published in a newspaper or magazine. The fundamental problem with this approach is that it does not provide a basis for establishing a connection between the online use in question and the press publication of the claimant in question. As a result, the RRPP will in practice often be unenforceable. In addition, this version of an RRPP leads to irreconcilable overlaps of independent rights of press publishers in identical journalistic content. For these reasons alone, an RRPP with such a generic subject-matter and scope deserves to be dismissed.³⁶⁹
- 159 In contrast to the Commission proposal, the Spanish and at least arguably the German RRPP try to avoid this flaw by limiting the scope of the respective RRPPs to certain online (note: online, not digital!) uses that are clearly connected to a particular press publication because they always contain a hyperlink to their respective source.³⁷⁰ All other digital uses of journalistic content would continue to be subject to the existing copyright acquis. This third and final version of an RRPP appears to be an exclusive right in press products/journalistic content, but like an unfair competition tort, it only applies to certain commercial practices.
- 160 This effect is firstly achieved by restricting the RRPP to the making available right to the exclusion of the reproduction right. This limitation is motivated by the insight that in the digital age, it is impossible to identify the source of a copy and thus the genealogy of the

³⁶⁹ Supra IV 3 c.

³⁷⁰ Czychowski/Schaefer 2014:§ 87f para 18.

alleged infringement.³⁷¹ The German legislation also deliberately avoided the terminology of the Database Directive 1996/9, according to which any transfer of material from a protected database to another database is capable of constituting an act of “extraction”.³⁷²

161 Secondly, the German and Spanish acts are specifically tailored to a particular group of online service providers that provide hyperlinks to press publications. The German act establishes an exclusive right only against “commercial providers of search engines or commercial providers of services which process the content accordingly”.³⁷³ Search engines are characterised by the fact that they automatically crawl, index, and make searchable online content, which the user can select by clicking on a hyperlink, which will refer him to the respective source. Accordingly, the use of hyperlinks is a core feature of all online services that are covered by the German RRPP, in particular news aggregators – which are expressly mentioned in the Spanish legislation³⁷⁴ – and media monitoring services.³⁷⁵ The German legislator posits that these commercial actors systematically base their business models on the content produced by press publishers whereas all other uses of journalistic content by other enterprises and by private users remain unaffected by the RRPP.³⁷⁶ By limiting the RRPPs to certain commercial acts of making available, the German and the Spanish acts automatically exempt all types of private information sharing on social media platforms from the scope of publishers’ rights.³⁷⁷

162 In summary, the commercial online services that the German and Spanish RRPPs target are characterised by the fact that they provide hyperlinks to press publications. If

³⁷¹ Bundesregierung (Germany) 2012:7.

³⁷² Cf. CJEU C-304/07, 22.12.2010 *Directmedia Publishing GmbH*, ECLI:EU:C:2010:816, para 60 and Nolte 2010:178; Stieper 2013:14.

³⁷³ Paragraph 87g(4) sentence 1 German CA.

³⁷⁴ Art. 32.2. sentences 1 and 2 Spanish LPI (“prestadores de servicios electrónicos LPI de agregación de contenidos de fragmentos no significativos de contenidos”).

³⁷⁵ Bundesverfassungsgericht 1 BvR 2136/14, 10.10.2016 *Yahoo*, BeckRS 2016, 54705, para 3; Kreuzer 2014b:550; Peifer 2015:11 (reddit.com potentially covered by the German RRPP). On media monitoring services see Landgericht München I 37 O 23580/15, 5.2.2016, ZUM 2016, 558.

³⁷⁶ Bundesregierung (Germany) 2012:1, 6. But see Landgericht Berlin 15 O 412/14, 6.1.2015, MMR 2015, 538 with critical comment by Rieger (ignoring this limitation).

³⁷⁷ Supra III 1 b ee.

these operators use journalistic content independently from a hyperlink, for example during the processes of crawling and indexing content, the RRPPs do not apply. The strict focus on acts of making journalistic content available to the public that include hyperlinks to the respective source guarantees that it is always possible to identify which press publication and thus which press publisher is concerned. An RRPP limited like this avoids irreconcilable conflicts between different press publishers marketing the same news content and overlaps of rights of press publishers on the one hand and authors and other contributors of journalistic content on the other.³⁷⁸ Since the latter do not belong to the group of addressees of the RRPPs, they are, subject to the contract with the press publisher, free to authorise parallel uses of their articles etc. Such a duplicative publication is also not covered by the RRPP of the first publisher. Instead, both publishers acquire independent rights in their respective publications. They can decide independently from each other whether their product is available on the Internet and under which conditions. They can also pursue different business strategies as regards their visibility on search engines and news aggregators.

b) Incompatibility of such an RRPP with fundamental rights

163 However, even if an EU RRPP was tailored to online services that provide hyperlinks to press publications, it would still involve serious and indeed unjustified interferences with the fundamental rights of online service providers, Internet users, and last but not least e-only press publishers who are far more dependent on the continuity of the current practice of search engines and news aggregators than the well-known press publishers who strongly lobby for an RRPP. Due to these violations of the Charter, an RRPP of this type would be invalid too.³⁷⁹ It is thus not a viable solution.

³⁷⁸ German Newspaper and Magazine Publishers 2010:2-3.

³⁷⁹ Compare, by analogy, CJEU Joined Cases C-293/12 and C-594/12, 8.4.2014 *Digital Rights Ireland* ECLI:EU:C:2014:238, paras 38 et seq.

aa) Interference with fundamental rights of online service providers

(1) The freedom to conduct an online media business

164 Doubtlessly, an RRPP affects the freedom of operators of search engines, news aggregators, and similar online services to conduct a business under Art. 16 of the Charter. The freedom to exercise a commercial activity is closely related to the “principle of an open market economy with free competition”, which the EU has to comply with in exercising its competences in economic matters (Art. 119(1) and (3) TFEU).³⁸⁰ Already under these economic rights and principles, a search engine enjoys a considerable discretion in the compilation, processing, and presentation of search results.³⁸¹

165 In addition, the enterprises targeted by the Commission do not exercise a mundane commercial activity that is unrelated to the public debate and the functioning of the democratic society. It is true that the operators of search engines, news aggregators and social media do not produce and publish journalistic content themselves. Nor do they exhibit editorial control about what is published on the Internet.³⁸² Nevertheless, they provide a *media service* that is significant for finding, accessing and sharing news of the day and other miscellaneous facts and information on the Internet.³⁸³ As the very debate about the RRPP demonstrates, their commercial activity has important implications for everyone’s right to freedom of expression and the freedom and pluralism of the media on the Internet. Without these services, the structural shift from print to digital, from value chains with press publishers on the top to a highly diverse network of information sharing, could not and would not occur.

³⁸⁰ Praesidium of the European Convention 2007:23; see also Art. 3(3) sentence 2 TEU (“highly competitive social market economy”).

³⁸¹ Bundeskartellamt B6-126/14, 8.9.2015 *Google Inc. et al*, BeckRS 2016, 01138 para 181.

³⁸² Stieper 2016:§ 87f para 14; Rieger 2013:355.

³⁸³ Nolte 2008:94 et seq. See also Bundesverfassungsgericht 1 BvR 2136/14, 10.10.2016 *Yahoo*, BeckRS 2016, 54705, para 14.

166 The function of these services is akin to that of wholesalers of printed editions of newspapers and magazines in the pre-Internet era. Like these businesses, search engines, news aggregators and social media enable consumers to access journalistic content and thus participate in the public debate. The German Bundesverfassungsgericht has held that the commercial activity of independent wholesalers of newspapers and magazines falls within the scope of the freedom of the press because and insofar as it is directly related to the press, it is necessary for the functioning of free and pluralist media, and the regulation at hand restricts the dissemination of information and opinions.³⁸⁴ By analogy, an RRPP affects the freedom of online service providers to offer press-related information location and search tools, which accordingly fall within the ambit of the protection afforded by Art. 11(2) of the Charter and Art. 10 ECHR.³⁸⁵ With regard to general web search engines, this concerns the coverage of press publications in the search, i.e. the acts of crawling and indexing the websites of press publishers, the use of hyperlinks to the search result, including URLs that contain the title of the respective article, and the use of snippets to contextualise search results.³⁸⁶

167 News aggregators like Google News only include news content, i.e. the timely reporting on matters of general interest that satisfies journalistic standards of originality, readability, accountability and honest attribution.³⁸⁷ With regard to their search tool, they function as a specialized search engine dedicated to this type of content. The service offers an efficient link structure that enables users to find coverage *of the same news topic from different sources*.³⁸⁸ The factors determining the automated ranking of the sources include the freshness, the diversity, the text orientation and the originality of the source. Inclusion and ranking are free and independent from the participation in advertising programs. News aggregators expressly refuse to accept payment to

³⁸⁴ Bundesverfassungsgericht 1 BvR 1548/82, 13.1.1988 *Presse-Grossisten*, NJW 1988, 1833.

³⁸⁵ Ladeur 2012:426.

³⁸⁶ See supra III 1 b dd (1), IV 3 c cc (3).

³⁸⁷ See, e.g., “Getting into Google News”, <https://support.google.com/news/publisher/answer/40787?hl=en>.

³⁸⁸ Google News was developed in the aftermath of the 9/11 terrorist attacks when a developer at Google tried to gather information about the Taliban from various press publications; see Glaser 2010.

expedite inclusion or to improve a site's ranking.³⁸⁹ This type of online service is not only related to the media business, it is indeed crucial for realising the potential of the Internet to enhance the public's access to news and to facilitate the dissemination of the vast amount of information available.³⁹⁰ In other words, news aggregators are at the heart of the public debate on the Internet. They function like traditional press surveys or press summaries that also present an opportunity to gather a quick overview about what *different* press publishers have to say about *one* particular issue. The automatically created front page of news aggregators like Google News affords users this functionality without the need to initiate a search. This additional service is indispensable because users might not yet know about a particular fact. Furthermore, users are presented an organised overview about different general themes like international politics, sports or entertainment. This broader picture prevents the public debate on the Internet from falling apart into tiny circles of special interest. It provides the basis for the formation of a widely shared information background that is far more diverse and rich than a public debate where readers, as a rule, derive their information from one newspaper or magazine alone. In other words, news aggregators allow the public debate to move from a linear one-person-one-source structure to a network structure where readers consult, share and comment on a huge variety of different sources.³⁹¹

168 An RRPP is capable of preventing this structural shift from occurring. At the same time, it seriously interferes with the freedom of search engine operators and news aggregators to conduct their media businesses (Art. 16 and 11(2) of the Charter). These services are provided free of charge. They are financed by the display of advertisements, which are, however, rarely triggered in the case of news-related searches on the general web search. News aggregators like Google News are even completely ad-free. Since the revenue that can be attributed to press-related services is very small if not zero, search engines and news aggregators of all sizes would rather reduce or even completely stop their relevant activity than agree to pay any remuneration to press publishers for

³⁸⁹ <https://support.google.com/news/publisher/answer/68292?hl=en>.

³⁹⁰ Cf. ECtHR no. 64569/09, 16.6.2015 *Delfi AS v. Estonia*, § 133.

³⁹¹ Contra *Ladeur* 2012:423 (traditional mass media have to provide this service).

sending referral traffic to their sites.³⁹² Accordingly, an RRPP effectively works as a prohibition on providing such services in the first place. However, as the CJEU reiterated in *Mc Fadden*, a copyright-related measure that hampers “the possibility of Internet users lawfully accessing information” constitutes an unjustified interference with the freedom of information of those users.³⁹³

169 If, alternatively, press publishers agree to be included free of charge in the most important search engines and news aggregators but enforce the RRPP against other online services, the RRPP distorts competition in the market for online services and hampers innovation.³⁹⁴ In this context, it is again important to recall that the EU is under a constitutional obligation to “promote ... technological advance” (Art. 3(3) sentence 3 TEU) and that the CJEU has pointed out that copyright must not impede the spread and contribution of new technologies.³⁹⁵

170 This interference with the fundamental rights of online service providers under Art. 16 and 11(2) of the Charter cannot be justified. The experiences in Germany and Spain prove that neither an individual exclusive right to authorise or prohibit the use of snippets nor an unwaivable right to remuneration administered by a collecting society will create a source of revenue for press publishers.³⁹⁶ In contrast to the expectations of the European Commission,³⁹⁷ the mere fact that the EU digital news market is larger than the German and the Spanish markets will not make a relevant difference. The reason is that the EU news market online functions under the very same structural conditions as those which exist in these two countries, namely “tough” competition among press publishers, the wide availability of free-access news,³⁹⁸ and the fact that

³⁹² See supra III 1 b dd and the numerous references in NERA 2015:38 et seq.; EDiMA 2015; bitkom 2015:5-6; Max Planck Institute 2012:5; European Copyright Society 2016; Beuth 2016. The German Copyright Arbitration Board considered the tariff for the German RRPP that was unilaterally defined by VG Media as inadequate; see Case Sch-Urh 13/14, 24.9.2015, 30.

³⁹³ Cf. CJEU C-484/14, 15.9.2016 *Mc Fadden* ECLI:EU:C:2016:689, para 93.

³⁹⁴ Dewenter/Haucap 2013:27; Max Planck Institute 2016:para 16. See also Bundeskartellamt B6-126/14, 8.9.2015 *Google Inc. et al*, BeckRS 2016, 01138 para 109 (complaint by Yahoo!).

³⁹⁵ CJEU Joined cases C-403/08 and C-429/08, 4.10.2011 *Football Association Premier League Ltd and Others and Karen Murphy* ECLI:EU:C:2011:631, para 179.

³⁹⁶ The European Commission is fully aware of this fact; see European Commission 2016a:145.

³⁹⁷ European Commission 2016a:151.

³⁹⁸ European Commission 2016a:149.

search engines, news aggregators and social media would rather abstain from providing news-related services at all or limit these services to an extent that avoids any liability under an RRPP than change their global business model fundamentally to the effect that they remunerate a selected group of content providers for making their websites accessible and sending referral traffic to their websites.³⁹⁹ These structural conditions will result in a failure of an RRPP, whatever its precise configuration (exclusive or remuneration right/waivable or unwaivable/mandatory, extended or optional collective management) and geographical scope.

171 And even if an RRPP resulted in such income, it would not support a pluralist and high-quality media scene.⁴⁰⁰ On the contrary, an effective RRPP would distort media competition by diminishing the chances of smaller, in particular e-only news publishers to attract traffic via search engines and news aggregators.⁴⁰¹ It would at the same time prejudice the interest of the European population in accessing and benefitting from the media pluralism that has evolved on the Internet. There simply are no “particularly compelling reasons” to limit access to information and ideas on matters of public interest.⁴⁰²

(2) Discrimination against providers of algorithmic press reviews compared to other commercial providers of press reviews, in particular “the press”

172 An RRPP aiming at search engines and news aggregators would furthermore be incompatible with the principle of equality before the law (Art. 20 of the Charter) and the guarantee of equal opportunities for media companies (Art. 11(2) of the Charter) because it treats these online services less favourably than other commercial actors

³⁹⁹ Supra III 1 b.

⁴⁰⁰ Contra European Commission 2016a:145; Ladeur 2012:425-6; Di Fabio 2016:68-9, 94.

⁴⁰¹ Infra bb.

⁴⁰² Cf. ECtHR no. 42864/05, 27.11.2007 *Timpul Info-Magazin and Anghel v. Moldova*.

who provide functionally equivalent services without having to acquire a licence or otherwise remunerate publishers.

173 As explained above, news aggregators but also general search engines offer automated or search-initiated, structured overviews about which sources contain information about a particular news topic. This service has also been known in the analogue world of printed newspaper and magazine editions. It is the press summary or press review that press publishers make available to the public. This commercial activity is permissible under current copyright law without a need to remunerate the publisher whose article has been reproduced, distributed and/or communicated to the public. Both the Berne Convention and the EU copyright acquis allow Member States to permit the reproduction *by the press*, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, unless such use is expressly reserved, and as long as the source, including the author's name, is indicated.⁴⁰³ Germany implemented this option to the benefit of “newspapers or information sheets of this kind” that may communicate “commentaries, articles and illustrations to the public, if they concern current political, economic or religious issues and do not contain a statement reserving rights”. Authors are entitled to claim equitable remuneration for this use, unless, however, “the reproduction, distribution and communication to the public is of *short extracts of several commentaries or articles in the form of an overview*”. Consequently, the limitation for press surveys by the press is not subject to a right of remuneration.⁴⁰⁴

174 The same result can be derived from Art. 10(1) of the Berne Convention, which sets out a mandatory limitation

“to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose,

⁴⁰³ See Art. 10^{bis}(1) Berne Convention; Art. 5(3)(c) Infosoc Directive 2001/29; v. Lewinski/Walter 2010:para 11.5.55. See also Art. 10(1)(b) Rental and Lending Rights Directive 2006/115 (“Member States may provide for limitations ... in respect of ... use of short excerpts with the reporting of current events.”).

⁴⁰⁴ Bundesgerichtshof I ZR 255/00, 11.7.2002 *Elektronischer Pressespiegel*, GRUR 2002, 963; critical v.

including quotations from newspaper articles and periodicals in the form of press summaries.”

175 The official WIPO guide to the Berne Convention explains the inclusion of press summaries in the provision on quotations as an “echo of the past” because already in the 1970ies,

*“the role of such a review is to give a selection of extracts from a number of publications, leaving it to the reader, listener or viewer (since sound and television broadcasts also include press reviews) to form his own opinion”.*⁴⁰⁵

176 The leading treatise on the Berne Convention provides a similar explanation by referring to the wording of the French text of the Berne Convention (“revue de presse”), which it defines as

*“not really a summary of an article appearing in a newspaper; rather, it is a collection of quotations from a range of newspapers and periodicals, all concerning a single topic, with the purpose of illustrating how different publications report on, or express opinions about, the same issue.”*⁴⁰⁶

177 Conscious of the fact that “the Internet is an information and communication tool particularly distinct from the printed media”,⁴⁰⁷ search engines and news aggregators provide a service that is functionally equivalent to such a traditional press review.⁴⁰⁸ They offer an efficient link structure that enables users to find coverage of *the same news topic from different sources*.⁴⁰⁹ The functional equivalent to a reservation of copyrights that excludes the applicability of the limitation for press reviews is the robot exclusion protocol. Spanish law confirms the close relationship between news

Lewinski/Walter 2010:para 11.5.55.

⁴⁰⁵ WIPO 1978:59 (my emphasis).

⁴⁰⁶ Ricketson/Ginsburg 2006:para 13.41.

⁴⁰⁷ ECtHR no. 33014/05, 5.5.2011 *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, § 63.

⁴⁰⁸ Xalabarder 2014:29 (“Is there any better way to explain what online news aggregators and search engines do?”).

⁴⁰⁹ Glaser 2010.

aggregators, lawful press reviews, and the RRPP in that it regulates all these issues in one single provision, namely Art. 32 LPI.⁴¹⁰

178 In spite of the functional equivalence of press reviews and link lists to freely available news articles, only the former benefit from existing copyright limitations. The reason is that search engine operators and news aggregators do not belong to the “press” because they do not exercise editorial control about the content they make accessible.⁴¹¹

179 At first sight, the fact that search engines and news aggregators do not produce and publish journalistic content seems to justify their exclusion from the group of commercial (!) actors who are free to market thematic overviews with excerpts from articles of other publishers without having to acquire a licence or pay a statutory remuneration. The copyright system of the printing age only benefitted those actors, namely “the press”, whose content was at the same time used in press summaries of other publishers. The public debate took place in newspapers and magazines, and only there. Thus, there was no need to consider outsiders.⁴¹²

180 This situation has, however, changed fundamentally with the advent of the Internet.⁴¹³ The number and diversity of sources of information and opinions of public interest has exploded. These sources include the websites of publishers who were already active in the printing age, e-only and often specialised information portals and blogs, user generated content platforms (“social media”), the web presence of public authorities, political parties, civil society organisations, etc. No press publisher is able to oversee and edit this vast amount of information. The public debate nowadays takes place on countless websites, and not in a small circle of newspapers or magazines. However, this vast and essentially global communicative sphere can only contribute to the proper functioning of a democratic society, if it is processed in a way that allows users to gather

⁴¹⁰ Xalabarder 2014:4 et seq.

⁴¹¹ Bundesgerichtshof I ZR 69/08, 29.4.2010 *Vorschaubilder I*, MMR 2010, 475 et seq., para 27; Brussels Court of First Instance Case No. 06/10.928/C, 13.2.2007 *Copiepresse SCRL v. Google Inc.*, IIC 2008, 491; Spindler 2013:971; Fricke 2015:§ 87f para 6. But see Xalabarder 2014:29 et seq.

⁴¹² Bundesregierung (Germany) 1962:66.

⁴¹³ ECtHR no. 33014/05, 5.5.2011 *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, § 63.

a structured overview. Search engines and news aggregators provide this service free of charge. Their link lists with snippets are the press reviews of the Internet age.

- 181 It is one thing to exclude search engines and news aggregators from the scope of application of existing copyright limitations that only favour news overviews “by the press”.⁴¹⁴ It is another, and indeed unjustified measure to establish a new neighbouring right in order to force online service providers to stop offering their services or change their complete business models in fundamental ways. The effort to turn back the clock and again concentrate the public debate within a few well-known news portals ignores the “particularly distinct” character of the Internet and its “role in enhancing the public’s access to news and facilitating the dissemination of information in general”.⁴¹⁵
- 182 In summary, commercial search engines and news aggregators must not be treated less favourably than press publishers when offering overviews about news of the day and other press information that are made available to the public without excluding robots, i.e. without an Internet-compatible reservation of rights. The EU legislature must not create requirements for the lawful provision of online press reviews that only exist for some media businesses (namely search engines and news aggregators) but not for others (namely press publishers).
- 183 This conclusion also follows from a comparison between algorithmic link lists with snippets on the one hand and summaries of newspaper and magazine articles written by natural persons that also include links to these articles on the other.⁴¹⁶ Both services offer a structured overview about where Internet users can find which information, often „with the purpose of illustrating how different publications report on, or express opinions about, the same issue”.⁴¹⁷ They also select and rank press publications according to factors that include journalistic quality. Summaries of news articles are in compliance with copyright law if the summary does not reproduce excerpts that express the author’s

⁴¹⁴ But see Xalabarder 2014:30-34.

⁴¹⁵ ECtHR no. 33014/05, 5.5.2011 *Editorial Board of Pravoye Delo and Shtekel v. Ukraine*, § 63; ECtHR no. 64569/09, 16.6.2015 *Delfi AS v. Estonia*, § 133.

⁴¹⁶ Ohly 2012:43.

⁴¹⁷ Supra note 406.

own intellectual creation.⁴¹⁸ They would also not fall under an RRPP that is tailored to search engines and news aggregators because these summaries are written by humans and only cover a small number of selected articles. Consequently, some businesses may continue to provide commercial, online press summaries without having to pay any remuneration to press publishers, whereas search engines and news aggregators will have to acquire a licence or pay a statutory remuneration fee.⁴¹⁹

184 Again, there is no justification to treat search engines and news aggregators less favourably than these providers of press summaries. The main difference between these two types of online services concerns how the selection, ranking and presentation is accomplished. One group of businesses employs software, the other relies on real people. It is true that by relying on technology, search engines and news aggregators are able to cover a far greater number of sources. The outcome of these processes is, however, similar because the criteria that govern the automated and the individual selection and ranking are similar. This explains why certain press publications that are generally considered of high quality feature frequently on both types of online news “summaries”.

185 Discrimination against search engines and news aggregators compared to press publishers and providers of handmade press summaries is not only problematic with a view to Art. 20 of the Charter. As explained, the news-related features of search engines and news aggregators fall within the ambit of Art. 11(2) of the Charter. The guarantee of media pluralism obliges the EU legislature to establish and maintain a level playing field between different players in the media market. Moreover, it has to make sure that media companies have effective access to the market. An RRPP that creates copyright obligations for search engines and news aggregators but not so for other media companies that offer equivalent services distorts competition in the media market for news overviews and thereby reduces the availability and diversity of

⁴¹⁸ Cf. Bundesgerichtshof I ZR 12/08, 1.12.2010 *Perlentaucher*, GRUR 2011, 134. Regarding the freedom of links see supra note 301-303.

⁴¹⁹ Bundesregierung (Germany) 2012:6. See, for example, www.perlentaucher.de. The situation is less clear under Art. 11(1) CDSMD proposal, which extends to every “digital use” of a press publication.

journalistic content. Such a law is incompatible with Art. 11(2) of the Charter and Art. 10 ECHR.⁴²⁰

bb) Distortion of media pluralism to the detriment of small news publishers

186 Finally, the experience with the German and the Spanish RRPPs demonstrates that an RRPP, even if it is restricted to search engines and news aggregators, distorts the level playing field which currently exists between all news publishers on the Internet to the detriment of a particular subgroup of content providers, namely lesser-known, in particular e-only publishers of journalistic content. Also in this regard, an EU RRPP runs afoul of the guarantee of media pluralism under Art. 11(2) of the Charter.

187 Currently, search engines and news aggregators treat all providers of journalistic content alike. The factors that decide about the automatic selection and ranking apply equally to long and well-established press publishers and to all other content providers, in particular those actors who only entered the news publishing market with the advent of the Internet and who therefore cannot face an alleged revenue gap as a result of the shift from print to digital, which triggered the political demand for an RRPP in the first place.⁴²¹ These two groups also have different opinions about the desirability of an RRPP. Whereas most well-known press publishers support the idea of an RRPP, many smaller, e-only content providers oppose the measure, although they too belong to the group of (future) holders of an RRPP.⁴²² The reason is that lesser-known content providers, in particular those who focus on local or special interest news, depend very much, and indeed more heavily than well-known publishers, on the referral traffic that search engines and news aggregators send to their websites, and which results in

⁴²⁰ See *infra* bb and ECtHR no. 38433/09, 7.6.2012 *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, § 130; Bundesverfassungsgericht 1 BvR 727/84, 6.6.1989, NJW 1989, 2877-8.

⁴²¹ European Commission 2016a:141. See also Mitchelstein/Boczkowski 2013:379.

⁴²² See NERA 2015:47-48 and Art. 2(4) CDSMD proposal (press publications published in any media); Bundesregierung (Germany) 2012:8 (RRPP covers blogs of professional journalists).

advertising revenue.⁴²³ The only alternative to this business model is to implement pay-walls and invest heavily into marketing and advertising in order to attract subscribers. The sustainability of this approach is, however, doubtful. This view is apparently shared by many e-only and small print publishers who do not enforce the German RRPP and instead continue to optimize their web presence to be as visible as possible on search engines and news aggregators.⁴²⁴

188 If an EU RRPP produces the same results as its German and Spanish predecessors, this highly diverse group of “other” publishers, which after all holds a combined share of 41 % (!) of the online news market in Germany and thereby considerably contributes to a more diverse, less concentrated media landscape,⁴²⁵ will be affected negatively. For if search engines and news aggregators reduce or even stop their news-related services, smaller publishers will lose a lot of referral traffic and advertising revenue, which might even force them out of business.⁴²⁶ Publishers supporting the introduction of an RRPP welcome this likely effect,⁴²⁷ whereas Internet users will enjoy less variety of content.⁴²⁸ Eventually, they might return to the practice of accessing news that was prevalent in the printing age: They will consult well-known news portals without noticing or even knowing that other sources also provide relevant journalistic information.⁴²⁹

189 This foreseeable effect of an EU RRPP tailored to search engines and news aggregators is incompatible with Art. 11(2) of the Charter. Under this article, the EU shall respect the freedom and pluralism of the media. The meaning of this principle and the positive duties that follow from it can be derived from the case-law of the CJEU on the fundamental freedom to provide media services, from Protocol no 29 on the system of public broadcasting in the Member States annexed to the TFEU, and from the

⁴²³ Höppner 2013:81; Chiou/Tucker 2015:4, 33; Calzada/Gil 2016:3.

⁴²⁴ Supra III 1 b.

⁴²⁵ Bavarian Regulatory Authority for New Media 2016:27.

⁴²⁶ NERA 2015:47-55.

⁴²⁷ See Koenig/Meyer 2014:771. This article is based on a legal opinion commissioned by VG Media, see fn. *.

⁴²⁸ NERA 2015:43-47.

⁴²⁹ Bundeskartellamt B6-126/14, 8.9.2015 *Google Inc. et al.*, BeckRS 2016, 01138 para 207; Nolte 2008:242.

Audiovisual Media Service Directive (AVMSD).⁴³⁰ The Court of Justice held that radio broadcasting frequencies have to be distributed on the basis of objective, transparent, non-discriminatory and proportionate criteria.⁴³¹ Protocol no 29 of the TFEU proclaims a “need to preserve media pluralism” and on this basis allows Member States to provide for the funding of public service broadcasting only in so far as such funding “does not affect trading conditions and competition in the Union to an extent which would be contrary to the common interest”. The AVMSD is also based on the “fundamental principle” of “pluralism of information”.⁴³² Ever since 1989, a recital of the directive has pointed out that it is

“essential for the Member States to ensure the prevention of any acts which may ... promote the creation of dominant positions which would lead to restrictions on pluralism and freedom of televised information and of the information sector as a whole”.⁴³³

190 With this general objective in mind, the Commission, in its recent proposal for an amendment of the AVMSD, strives for “a *more level playing field* between the different players in the audiovisual media market” by levelling up certain requirements for on-demand services and video-sharing platforms while providing more flexibility to TV broadcasting services on certain rules on commercial communications.⁴³⁴

191 The European Court of Human Rights has developed similar principles in its case-law on Art. 10 ECHR. From the outset, the ECtHR has often stressed that “there can be no democracy without pluralism”.⁴³⁵ In this connection, it has observed that States have a

⁴³⁰ Praesidium of the European Convention 2007:21.

⁴³¹ CJEU C-380/05, 31.1.2009 *Centro Europa 7*, ECLI:EU:C:2008:59, para 116; Woods 2014:Art. 11 para 11.35. See also ECtHR no. 6754/05, 30.9.2010 *92.9 HIT FM Radio GmbH v. Austria* (“the rejection by a State of a licence application must not be manifestly arbitrary or discriminatory and the necessity for any restriction must be convincingly established”).

⁴³² Recital 34 AVMSD 2010/13.

⁴³³ See recital 17 AVMSD 1989/552 = recital 8 AVMSD 2010/13.

⁴³⁴ European Commission 2016f:10.

⁴³⁵ ECtHR no. 13936/02, 17.9.2009 *Manole and Others v. Moldova*, § 95.

positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism.⁴³⁶ To this end, the court considers it

“necessary ... to allow effective access to the market so as to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed.”⁴³⁷

192 The guarantee of equal opportunities in the media market is also at the heart of the case-law of the German Bundesverfassungsgericht on the freedom of the press. It is settled case-law that public authorities must avoid any measures that distort intra-media competition, even if the intervention is not related to any particular opinion or information.⁴³⁸

193 In summary, the EU legislature is under a positive duty to maintain a level playing field in the press publication market, and it has to allow effective market access for all kinds of journalistic content. Search engines and news aggregators provide exactly this. They offer all publishers a highly effective, equal opportunity to reach readers – free of charge. An RRPP distorts this non-discriminatory, market-based framework to the detriment of new e-only providers of journalistic content:⁴³⁹

194 If the EU RRPP is modelled on the example of the Spanish unwaivable right to remuneration – or an equivalent concept like an exclusive right coupled with some sort of mandatory extended collective licensing scheme⁴⁴⁰ – these “other” news providers will indeed be forced to claim remuneration for a service that is provided for them, to their benefit. They lose their preferred competitive option to make their content available on the Internet free of charge and monetise their service differently, for example by

⁴³⁶ ECtHR no. 38433/09, 7.6.2012 *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, § 134.

⁴³⁷ ECtHR no. 38433/09, 7.6.2012 *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, § 130.

⁴³⁸ Bundesverfassungsgericht 1 BvR 727/84, 6.6.1989, NJW 1989, 2877-8; Bundesverfassungsgericht 1 BvR 282/01, 18.3.2008, NJW-RR 2008, 1071; Bundesverfassungsgericht 1 BvR 990/13, 12.4.2013, NJW 2013, 1293 para 20; Ladeur 2012:424-5.

⁴³⁹ Härting 2012:266.

⁴⁴⁰ Cf. VG Media 2016a:5.

advertisements, but also by voluntary contributions of readers.⁴⁴¹ This puts them at a significant disadvantage compared to well-known news brands that are less dependent on referral traffic and have more resources for advertising their services. The problem is exacerbated if online service providers react to such an RRPP by closing down their news-related services, as has happened in Spain with several news aggregators, including Google News. In such circumstances, e-only providers of journalistic content will have great difficulties to make potential readers aware of their services in the first place. If this is not a distortion of online media pluralism, then what is?

195 Conscious of these problems, the European Commission prefers an exclusive right administered individually because this would “leave press publishers a greater margin for manoeuvre to negotiate different types of agreements with service providers” and allow them “to develop new business models in a flexible way”.⁴⁴² The experience with the German RRPP shows, however, that this flexibility comes with too high a price. If “other” publishers refrain from enforcing the RRPP and continue their current business model, well-known publishers will also agree to stay on search engines and news aggregators in order to avoid a disadvantage in the “tough” intra-media competition. As a result, an RRPP that can be administered individually will be ineffective. It will not create revenue for press publishers. Such intervention is unnecessary and thus amounts to unjustified interference with the fundamental rights of the direct addressees of an RRPP.⁴⁴³ In addition, it still negatively affects e-only (“other”) press publishers. The reason is that only large online service providers like Google or Bing have the resources to handle the legal uncertainty that an RRPP brings about. As the German RRPP again proves, small, often innovative operators would rather retreat from news-related services than fight for this business in court for many years.⁴⁴⁴ If search engines and news aggregators, in particular those that specialise in blogs and other e-only sources disappear,⁴⁴⁵ the publishers affected by this will receive less referral traffic and

⁴⁴¹ See, for example, <http://www.golem.de/>.

⁴⁴² European Commission 2016a:151.

⁴⁴³ Supra IV 4 b aa (1).

⁴⁴⁴ See bitkom 2015; EDiMA 2015.

⁴⁴⁵ A prominent victim of the German RRPP was the dedicated blog search engine *Rivva*; see http://blog.rivva.de/rivva_und_das_leistungsschutzrecht_2.

will lose market shares to well-known news brands. Accordingly, an RRPP that can be administered individually or from which publishers are able to opt out distorts intra-media competition in violation of Art. 11(2) of the Charter too.

196 This conclusion also holds true in view of the fact that the German RRPP is limited to “commercial” providers of search engines and similar commercial online services. Accordingly, providers who operate a search engine or a news aggregator without any direct or indirect commercial purpose are still free to link to press publications and make snippets of them publicly available.⁴⁴⁶ The question is, though, what kind of non-commercial entity or organization is able to maintain a news-related online service that matches the services available today. In the light of the investment that is needed to this end, there is probably only one non-commercial candidate, namely an entity that is completely or largely tax-funded and that will therefore involve, on some level, public authorities. For very good reasons, however, news publishing and distribution has always been a private, for-profit business. It is the market where readers demand and publishers offer journalistic content that provides the adequate forum for a free public debate. The shift from print to the Internet does not justify a more active involvement of public authorities in this exchange of information and opinions.

197 On the contrary. The media landscape has never been more diverse and active than today.⁴⁴⁷ Instead of distorting the intense competition in online news markets with an RRPP that favours some publishers and disadvantages others, Member States – or the EU if competent to do so – have other means to foster quality journalism. In particular, tax reductions or tax benefits for press publishers are an effective and non-discriminatory way to support a free and pluralist press.⁴⁴⁸

⁴⁴⁶ Bundesregierung (Germany) 2012:7.

⁴⁴⁷ German Media Authorities 2016 (market share of the top 15 media companies in Germany decreased from 77,8 % in 2014 to 76,3 % in 2015); Bavarian Regulatory Authority for New Media 2016:27.

⁴⁴⁸ Cf. recital 31 CDSMD proposal and Nolte 2010:185 with fn. 79.

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