

**WRITTEN COMMENTS BY AXEL SPRINGER SE IN RESPONSE TO  
U. S. COPYRIGHT OFFICE'S**

**PUBLISHERS' PROTECTION STUDY: NOTICE AND REQUEST  
FOR PUBLIC COMMENT, 86 FED. REG. 56721 (OCT. 12, 2021)**

**November 26, 2021**

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This submission by Axel Springer SE is made in response to the above-captioned Federal Register Notice of Inquiry seeking public input to assist the Copyright Office in the preparation of the “Publishers’ Protection Study” as requested by Congress.

Axel Springer SE wishes to thank the United States Copyright Office for the opportunity to comment on the topic of protection for press publishers. And Axel Springer SE is looking forward to supporting the Copyright Office on any question related to this topic and to provide any additional information that can be helpful for the Copyright Office regarding its study.

#### **Author of this Response**

Axel Springer SE is a media and technology company and active in more than 40 countries. By providing information across its diverse media brands (amongst others INSIDER, POLITICO, BILD and WELT) and classified portals (StepStone Group and AVIV Group), Axel Springer SE empowers people to make free decisions for their lives. Today, the transformation from a traditional print media company to Europe’s leading digital publisher has been successfully accomplished. The next goal has been set: Axel Springer aims to become global market leader in digital content and digital classifieds through accelerated growth. The company is headquartered in Berlin and employs more than 16,000 people worldwide. In 2021, Axel Springer completed its acquisition of POLITICO, one of the world’s most influential sources for political news.

Axel Springer took its first steps into paid content in 2009 with paid subscription models for their iPhone apps of BILD and WELT as part of its Premium Initiative. In 2012, WELT became one of the first German media brands to launch a digital subscription, WELTplus. BILDplus followed about half a year later and now ranks among the top 10 media brands internationally with the most digital subscribers. Axel Springer’s journalistic offerings in Europe exceeded a total of one million digital subscriptions for the first time in May 2021.

For this Response Axel Springer SE has used the advice of Dr. Ole Jani, lawyer (Rechtsanwalt) and partner at CMS Germany ([www.cms.law](http://www.cms.law)).

## **Executive Summary**

European publishers have been facing a similar crisis regarding the scope of protection for the content produced by them and their ability to effectively enforce their rights. Also in Europe the problem has been particularly caused by the use of publishers' original content by the dominant online platforms without a fair and appropriate compensation. In response to this crisis of the press publishers, the European Union adopted an enforceable exclusive press publishers' right which entitles press publishers to remuneration for their news content. In the light of the European experience, we believe that an exclusive and enforceable right (*sui generis right*) would be the effective tool to ensure a fair remuneration for the use of journalistic content in the United States, too. In the following comments we outline the essential aspects of the exclusive right for press publishers and the first positive effects of the new European press publishers' right on the market.

## **Comments**

### **I. Introduction**

In the digital world journalism is experiencing a paradox: while the demand for news soars, and the possibilities to reach large audiences have never been better, the economic basis for professional, diverse, and independent journalism as a sustainable business model with qualified journalists is in jeopardy. Press publishers at all levels – national, regional, and local – are facing these challenges.

This trend is exacerbated as publishers not only battle to attract the advertising revenues needed to fund investments in the face of an enduring shift of revenues to platforms, but also to attract paying subscribers in the face of content being widely available for free – often publishers' content is monetized by market dominant platforms mainly through advertising revenues for themselves.

In the digital environment publications are systematically crawled, copied and redistributed in particular by news aggregators and search engines mostly without agreements on terms or fair payment. And it is this unsustainable trend that should be addressed by a new exclusive right for press publishers.

Independent journalism is the cornerstone of free and democratic societies. But a free press can only survive in the digital world if it has a chance to earn a return on its investments. Needless to say, press publishers just like any entrepreneur in other industries have to find their own business solutions to the challenges of a digitized world and to meet the demands of their own readers. Innovation by publishers has brought new accessible ways of enjoying press content across many platforms and devices of choice.

However, the entrepreneurial spirit and endeavor of the press publishers requires a level playing field. But in the digital world such a level playing field has been elusive. The platform economy of the internet with its network effects results in a change of paradigm: Online companies become monopolies by design, and the online world is a winner-takes-

all-world. These network effects draw audiences and resources to very few market players which are using the press publishers' investments without proper negotiation on terms and conditions let alone equitable payment through lack of bargaining power. If the publishers receive anything at all, it is at the platforms' discretion. Online companies argue this is a win-win-situation because they create traffic for online news to the immediate benefit of the press publishers. However, figures show that this is not the case. Instead, we see that online services are preying on press publications to create the basic value proposition for their own business model which needs interesting content, and large data sets about who is reading it to attract the large audiences which in turn create an attractive proposition for advertisers. The content created by press publishers and journalists thereby becomes a considerable part of the fuel on which the large online services run their engines.

## II. The Market Impact of Current News Aggregation Practices

***Copyright Office Question: What is the market impact of current news aggregation practices on press publishers? On the number of readers? On advertising revenue?***

Even though the newspaper and magazine press publishing industry is reaching more consumers than ever, as readers shift media consumption from print to digital, press publishers are facing difficulties to receive adequate returns on their investments, because under present regulation they lack adequate and enforceable statutory protection of their digital assets.

Revenue yields for publishers' digital content are much lower than advertising revenues in connection with the publication of content alone. This is because (1) freely available content, which includes content originating from press publishers found on third party sites, creating a substitution effect, (2) publishers are competing with dominant digital tech companies for digital advertising revenues.<sup>1</sup>

The majority of Google and Facebook's revenues come from digital advertising services, and today the two companies together account for almost 55 percent of the digital advertising market in the United States, in addition to capturing the vast majority of all digital advertising growth.<sup>2</sup> In the case of Google, more than 90 percent of all internet searches go through Google or one its services, while the company is involved in nearly 70 percent of all online advertising technology transactions.<sup>3</sup> These platforms have grown exponentially. Today, they dominate the digital advertising ecosystem.

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<sup>1</sup> EMMA, ENPA, EPC, NME (2016): The economic case for a publisher's right at EU level, p. 1f.

<sup>2</sup> <https://www.cnbc.com/2021/04/07/digital-ad-spend-grew-12percent-in-2020-despite-hit-from-pandemic.html> (23.11.2021); <https://www.wsj.com/articles/amazon-surpasses-10-of-u-s-digital-ad-market-share-11617703200> (23.11.2021).

<sup>3</sup> Desktop & Mobile Search Engine Market Share United States of America, January 2009 to September 2020, Statcounter, available at <https://gs.statcounter.com/search-engine-market-share/desktop-mobile/unitedstates-of-america/#monthly-200901-202009>; <https://www.businessinsider.com/how-google-retains-more-than-90-of-market-share-2018-4?r=US&IR=T>; <https://www.newsmediaalliance.org/google-ad-revenue-op-ed-70-percent/> (23.11.2021).

News aggregators and other online services, including search engines, are using publishers' content often without a fair and appropriate compensation. This uncompensated use of excerpts, or in some cases even full-text articles, allow users to obtain the core of the news story without clicking on the link and accessing the publisher website. The online platforms arguably use press publishers' content in violation of publishers' copyrights but often justified by the services as fair use.<sup>4</sup> According to recent research, 65 percent of searches on Google do not lead to clicks.<sup>5</sup> Even if the user does click on a link, in some cases the services give preference to publishers who have adopted their proprietary or preferred format for displaying publisher content that keeps the user within the platform's ecosystem. This deprives the publisher of valuable traffic and data.<sup>6</sup>

The use of high-quality press content by news aggregators and other online services not only harms press publishers but has severe societal effects. A free and independent press is key to a functioning and stable democracy. To serve this purpose, press publishers must be able to develop a sustainable business model. This requires a reliable regulatory framework based on exclusive and enforceable rights which secure the investment of press publishers.

**For a detailed analysis and description of the market impacts of news aggregators and other online services on press publishers, reference is made to the written comments by the filing of News Media Alliance written and annexed documents to this filing as this analysis is transferable to the European situation concerning news aggregators.**

Due to the global dominance of the large tech companies, the market impact of these companies and the jeopardies for press publishers resulting from this impact are a global phenomenon. In Europe, individual countries like Spain and Germany have acknowledged the need for regulatory action already in 2009. The European Union has first addressed the issue in 2016 and eventually created additional regulation in the form of a new ancillary right for press publishers.<sup>7</sup>

In the European Union news aggregators and other digital services have become the main source for consumers to receive news. In 2016, social media (22 percent), news aggregators (14 percent) and search engines (21 percent) accounted for 57 percent of such use. In 2016, 47 percent of this use has not led to clicks to the online offering of the respective press publisher.<sup>8</sup> These figures have gone up since. The dominance of online services and the impact these services have on press publishers in Europe today are even greater. Relief will come with the new press publishers' right.

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<sup>4</sup> <https://www.newsmediaalliance.org/copyright-white-paper/> (23.11.2021).

<sup>5</sup> <https://www.forbes.com/sites/johnkoetsier/2021/03/23/5-trillion-searches-show-google-keeps-65-of-visits-to-itself/?sh=d38cdc6584ac> (23.11.2021); see also: Frankfurter Allgemeine Zeitung, "Gefangen im Netz von Google", November 14, 2021, p. 39.

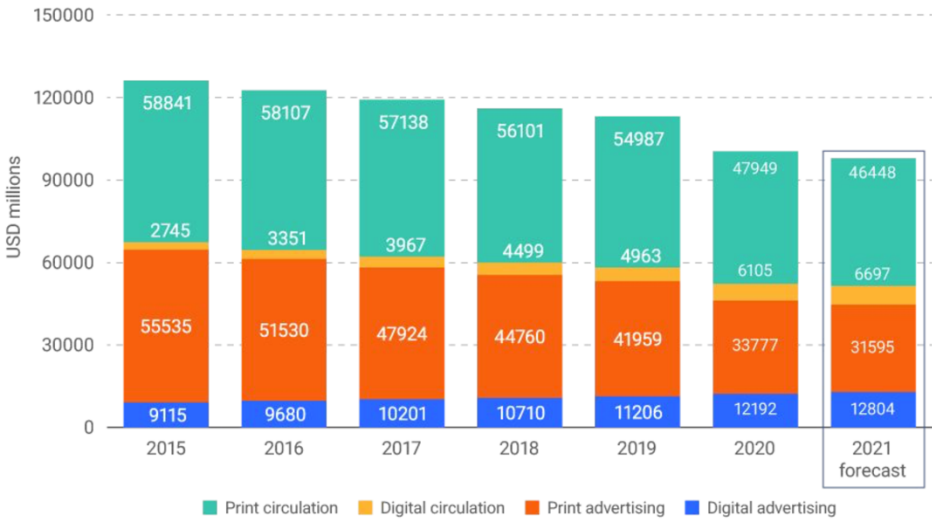
<sup>6</sup> <https://www.newsmediaalliance.org/copyright-white-paper/> (23.11.2021).

<sup>7</sup> See section IV. of this filing.

<sup>8</sup> European Commission (2016): Impact Assessment on the modernization of EU copyright rules – Part 1. Online available: <https://digital-strategy.ec.europa.eu/en/library/impact-assessment-modernisation-eu-copyright-rules> (12.11.2021), p. 157.

According to current studies, we see that forwarding traffic in a fair way is still one of the major challenges. In Europe, Google remains dominant in digital news ecosystem. Google provides 70.6 percent of the traffic for publishers, Facebook 26.8 percent and Twitter 2.5 percent<sup>9</sup> – which is having an immense impact on publishers: 35 percent of users end up remaining in Alphabet offerings after using Google Search. Traffic is preferentially directed to the company's own offerings. Similar numbers are available for Facebook: 36 percent of users end up remaining in the Facebook ecosystem.<sup>10</sup> This is at the expense of the original content providers.

The growth of digital audiences means newspaper and magazine content has been more popular than ever. But digital revenues could not make up for the losses in the print business due to smaller margins driven by competition for digital advertising revenues with news aggregators and social media platforms, as well as difficulty in charging for digital content due to availability of free online sources. From 2015 to 2021 (2021: forecast) worldwide revenues of press publishers have developed as follows<sup>11</sup>:



Source: WPT analysis based on historical data, Zenith (ad expenditure) and the WPT Outlook survey. Figures for daily publications only.

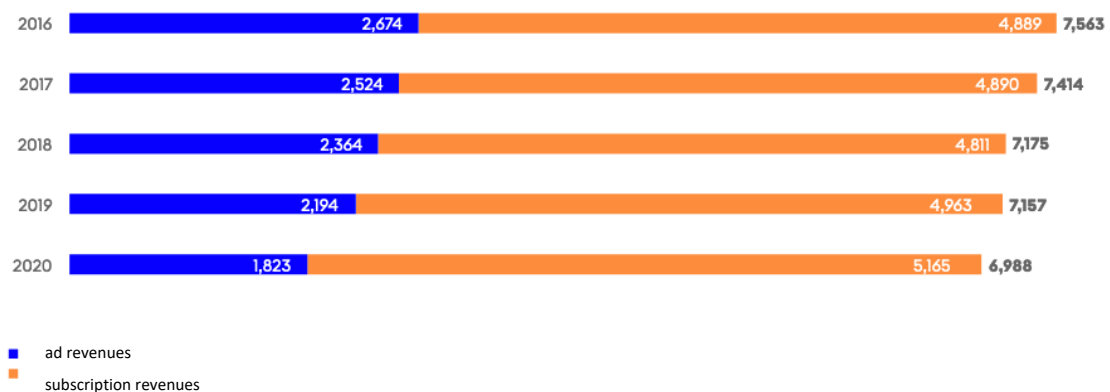
<sup>9</sup> World Press Trends (2019): Media Metrics that Matter. Online available: [http://www.blog.wan-ifra.org/sites/default/files/field\\_article\\_file/World%20Press%20Trends%202019\\_0.pdf](http://www.blog.wan-ifra.org/sites/default/files/field_article_file/World%20Press%20Trends%202019_0.pdf) (11.11.2021), p. 10.

<sup>10</sup> Andree, Martin (2021): Gefangen im Netz von Google. FAS, November 14, 2021, p. 39.

<sup>11</sup> Nel, Francois / Milburn-Curtis, Coral (2020-21): World Press Trends 2020-21- Frankfurt: WAN-IFRA, the World Association of News Publishers, p. 21.



In Germany for example from 2016 to 2020 press publishers' revenues have developed as follows (in billion Euros)<sup>12</sup>:



### III. What Press Publishers in the U.S. Need: An Enforceable Exclusive Right

#### 1. General

***Copyright Office Question: Should press publishers have rights beyond existing copyright protection under U.S. law?***

Yes. We believe that press publishers in the United States need an exclusive right which effectively protects their press publications against the largely uncompensated use of their content by online platforms and other digital service providers, which extends to the use of small parts of a press publication, and which clarifies that online services cannot justify their use as *fair use* without having to pay compensation. This can only be accomplished by way of introducing new rights for press publishers. And this is a question of changing the laws, not about applying existing laws.

If press publishers shall be able to continue their work, they must receive an appropriate reward for the use of their investments to be able to finance these investments. The investment of press publishers that is necessary to produce press publications is considerable. Adequate legal protection of intellectual property rights is necessary to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment.

**To protect press publishers and their investments in the digital world, the law needs an update.**

The creation of an exclusive right for press publishers would be a powerful statement for the protection of the publisher freedom, original journalism and ultimately the freedom of

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<sup>12</sup> BDZV (2021): Zur wirtschaftlichen Lage der deutschen Zeitungen. [https://www.bdzv.de/fileadmin/content/7\\_Alle\\_Themen/Marktdaten/Branchenbeitrag\\_2021/BZDV\\_Branchenbeitrag\\_v2.pdf](https://www.bdzv.de/fileadmin/content/7_Alle_Themen/Marktdaten/Branchenbeitrag_2021/BZDV_Branchenbeitrag_v2.pdf) (18.11.2021), p. 4.

press towards dominant online platforms. The implementation of the publishers' right would foster the development of new digital business models based on licenses and equitable agreements between press publishers and online services. In this way, an exclusive right for publishers would help to establish a level playing field which is key to a free and diverse press in the digital world.

As described in this filing, press publishers are facing a free ride by news aggregators and other online services on their press publications. This use is competitive and substitutive. The current system does not provide adequate protection from such use. We believe existing laws in the United States are at least not sufficiently clear regarding a reliable and enforceable protection of press publications. Even if the use of press publications (and the use of small parts thereof) by news aggregators, search engines and other online services can be considered a *prima facie* infringement of publishers' rights, under the present laws such online services justify their use as *fair use*. News publishers and others strongly disagree that these uses qualify under the fair use defense.

## 2. Equal Protection in Europe and in the United States

***Copyright Office Question: In countries that have granted ancillary rights to press publishers, are U.S. press publishers entitled to remuneration for use of their news content? Would adoption of ancillary rights in the United States affect the ability of U.S. press publishers to receive remuneration for use of their news content overseas?***

Copyright law (including related rights / ancillary rights) is based on the principle of territoriality and on the principle of reciprocity. In any given jurisdiction rights are granted to subject matter (such as sound recordings, broadcasting signals, data) owned by rightholders from third countries based on bilateral or multilateral international agreements. Absent such agreement, subject matter from a third country is not protected. For example, European ancillary right provided for in Directive 96/9/EC ("Data Base Directive") which also is a *sui generis* right (no originality requirement), is not extended to data bases made in the USA.

The protection of press publications as provided for under DSM Directive Article 15<sup>13</sup> is not based on international copyright regulation. Because a press publication by definition is not a work within the meaning of international copyright treaties (Berne Convention, WIPO Copyright Treaty), reciprocity between Member States of the European Union and third countries can therefore not be established under the terms of the Berne Convention or the WIPO Copyright Treaty. No other international agreement applies.

A protection of U.S. press publishers which are not based in Europe would regarding online use of their press publications in Member States of the European Union pursuant to DSM Directive Article 15 require a protection of press publications under U.S. Federal Law which

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<sup>13</sup> See section IV. of this filing.

is substantially equal to the protection granted to press publishers in the Member States of the European Union. At present, such equal protection is not in place.

To set the stage for an international agreement between the United States and the European Union about statutory protection of press publications owned by U.S. publishers under DSM Directive Article 15, additional legislation is required, which creates statutory protection of press publications, which is functionally equivalent to the European publishers' right.

To this end a new exclusive right for press publishers which is governed by the principles outlined in the following section of this filing, is needed.

### 3. An exclusive right for press publishers

**Copyright Office Question: What should be the nature of any such right—an exclusive copyright right, a right of remuneration, or something else?**

Press publishers should be granted an exclusive right with respect to their press publication. This right which would complement the copyright in the article of a press publication should best be **a sui generis right** which adopts certain principles of copyright but is not the same as copyright and has different protection requirements. The principles which should govern such a sui generis right are explained in the following section III.4. of this filing.

A mere remuneration right would not give press publishers the legal sufficient protection. The use of press publications or parts thereof by online services such as news aggregators can impact digital business models of the press, even if the publisher receives a compensation. Therefore, such uses should only be lawful if they have been authorized by the press publisher. Whether the press publisher grants a license should be in the sole discretion of the press publisher. In this respect there is a parallel with copyright law.

### 4. Key Elements of an Exclusive Right for Press Publishers

The right for press publishers should be an exclusive right governed by the following principles.

#### a) No Registration Requirement

The exclusive right for press publishers represents a sui generis right that would be in many ways different from copyright and its protection of original works of authorship. One such difference would be the lack of any registration requirement. Press publishers can hardly meet such a registration requirement regarding their online press publications since such content changes fast and is therefore not suitable for registration.

As a result, protection under the exclusive right for press publishers should become effective without the need of a registration of the press publication with the Copyright Office. Instead, the protection should become effective as soon as the press publication

is being published. Such publication can be assumed the moment the publication is made available to the public in print or in an online format.

b) Sui Generis Right – No Originality Threshold

The exclusive right for press publishers will constitute a sui generis right which is different from the copyright awarded to works of authorship. Whereas copyright protection requires a certain level of originality, the sui generis right would be awarded for a specific economic, organizational, or technological achievement. The right would protect the press publisher's investments in the press publication.

To be regarded a press publication within the meaning of the law, the press publication should therefore **not be required to be an original work of authorship**. Nor should it be required that the press publication contains (mainly) literary works. To provide press publishers with adequate and proportionate legal protection of their investment, it should be irrelevant whether the compilation (the press publication) itself or the items contained in the press publication are the expression of an intellectual creation. The only requirement for the press publication to be protected under the new right should be its publication. The right shall be granted for press publications irrespective of their originality. This said, the protection should extend to smallest parts of the press publication, including headlines and ledes to whom the originality requirement does not apply either.

To the extent the content (articles) included in the press publication are works of authorship and as such protected by copyright, this protection would not be affected by the additional protection of the press publication.

c) Protected Subject Matter: Press Publication

**Copyright Office Question: What content should be protected? Should it include headlines?**

The protected subject matter should be called "press publication". **The definition of a press publication must be broad.** Press publications include but are not limited to news publications.

A publication will qualify as a press publication if the publication is produced and made available to the public under the initiative, the editorial responsibility, and the control of a service provider (i.e., the press publisher) under a single title (brand).

There should be no quantitative threshold, nor should there be any restrictions regarding the content (general interest, academic etc.), the targeted audience (the general or special interest, science, and academia etc.), the language (including foreign language publications), the business model (free access, subscription-based, ad-based, news websites etc.), or the medium (analogue or online). A press publication may typically contain mostly text (literary works) but it may also include other types of works and other subject matter, such as photographs, videos, and audio.

A press publication must be a periodical publication. Any publication on a recurring basis should be regarded as periodical, for example daily newspapers, weekly or monthly magazines and notably regularly updated online offerings such as news websites.

Subject of protection should be the press publication as a whole (the compilation) as well as **small parts** of the publication. Because press publishers need protection of their press publication against the use of small parts, the scope of the exclusive right must include the use of small parts of the press publication as well as the use of **headlines** which are typically an expression of the investment made by the press publisher. A substantial share of the users does not click through from the excerpt displayed by the aggregator to access the article on the press publishers' website. This substitutional effect deprives the press publishers of traffic and advertising revenue. Therefore, effective protection of small parts of a press publication is key to an effective protection of press publishers from the unauthorized and uncompensated use of their press publications by online services, in particular by search engines and news aggregators. Legislation must state that the use of small parts of a press publication cannot be excluded from the scope of protection by case law or by way of existing statutory exceptions to copyright law.

d) Rightholder: Press Publisher

**Copyright Office Question: How should "press publishers" be defined?**

Any publisher of a press publication would be regarded as a "press publisher" within the meaning of the new exclusive right for press publishers. Hence, the question is not "what is a press publisher?" but "what is a press publication?". Publication means that the press publication is produced and made available to the public under the initiative, the editorial responsibility, and the control of the press publisher. The definition of "press publication" defines the notion of "press publisher".

e) Scope of Protection

**Copyright Office Question: What activities or third party uses should the right cover?**

The right should cover any form of **online use** by any online service provider. Online use is any non-linear use (i.e., a use at the request of the user) at a distance by electronic means (**public display**), including but not limited to services brought to the user over the internet such as news aggregation, search, and social media, regardless of the business model and of whether such services are available to the user free of charge or subject to a payment by the user. Protection should extend to small parts of a press publication including but not limited to headlines and ledes since they are an expression of the investment of the press publisher.

The notion of online use should include the display of a press publication or extracts from a press publication in networks which are not public (such as intranets with a limited number of users), and in a point-to-point communication (such as newsletters delivered to individual users by e-mail). The right should also cover any **reproduction** of the press publication.

f) Term of Protection

**Copyright Office Question: How long should the protection last?**

The term of protection may be substantially shorter than the duration of copyright. But the term must acknowledge the specific needs of press publishers, it must take into account the typical investment of the press publisher in his publication and it must support an effective protection of press publications in the online environment. This said, the term of protection should not be less than four years.

g) Remuneration Right of Authors

**Copyright Office Question: Should authors receive a share of remuneration, and if so, on what basis?**

Authors who contribute to the press publication should receive equitable compensation for the material they have created and which is used by the press publisher as part of the press publication. However, to the extent such compensation is part of existing agreements for the use of the authors' work (as work-made-for-hire doctrine or under a license agreement) the introduction of an exclusive right for press publishers would not justify additional compensation as this would result in double payment.

h) Unwaivability

The publishers' right should be unwaivable. The press publisher may transfer ownership of the right, but he may not waive the exercise of the right

i) Arbitration Mechanism

By definition, exclusive rights give the rightholder a strong position vis à vis those who want to use the protected subject matter. However, with respect to press publications the bargaining power attributed to the press publisher through his exclusive right is eliminated by the online services' market dominance. To mitigate this effect, additional tools are required which prevent online service providers from taking advantage of their market power in negotiations with press publishers and thus refusing to pay fair and proportionate license fees. This could be accomplished by way of additional legislation which provides for an "arbitration mechanism". Such a mechanism would grant public administration (e.g., the Federal Trade Commission) subject to judicial review, the authority to determine the amount of such fair compensation if no agreement was reached between the press publisher and the online service provider, whereby the conclusion of an agreement first would have to be attempted.

5. The Idea/Expression Dichotomy

The introduction of the press publishers' right would not lead to the monopolization of ideas, news and facts. Ideas, news, and facts remain freely accessible. Although the press publisher right protects a press publication in its entirety, it does not prevent third parties

from citing, summarizing, or rephrasing the content of the respective news publication in many different ways subject to the laws in place.

Pursuant to *Feist Publications, Inc. v. Rural Telephone Service*<sup>14</sup>, facts are neither alone nor as part of a compilation copyrightable. Similarly, 17 U.S.C. § 102 (b) states that copyright protection does in no case "extend to any idea, procedure, system, method of operation, concept, principle, or discovery". The idea/expression dichotomy as laid down in *Baker v. Selden*<sup>15</sup>, purports that only expressions can be copyrightable but not the ideas that these expressions convey. Before granting an exclusive right to an expression it is therefore necessary to assess whether all possible expressions of one idea are so similar that the exclusive right would effectively exclude others from using or expressing such idea (*New York Mercantile Exchange, Inc. v. Intercontinental Exchange, Inc.* – 2nd Cir. 2007). Consequently, where there is only one way of expressing an idea, this expression cannot be copyrightable (merger doctrine).

Although a new right for press publishers would protect the press publication in its entirety so that the reproduction or making publicly available even of small parts can constitute an infringement of that right, the press publisher right would not prevent third parties from reporting or covering the news that are described in the press publication by way of citing, summarizing, or rephrasing the press publication. This is because there are numerous ways of expressing a news story, not just one. There is therefore no need for third parties to copy the press publication verbatim to convey a news story to the public.

If, however, the third party wishes to convey a news story by reproducing or making publicly available the press publication verbatim, e.g., by way of news aggregation, that party would have to acquire a license from the press publisher.

## 6. The Interaction Between Any New Protections and Existing Rights, Exceptions and Limitations

### a) Authors' Rights

**Copyright Office Question: Would granting additional rights to publishers affect authors' ability to exercise any rights they retain in their work? If so, how?**

Since the right granted to press publishers in their press publication protects a subject matter which is different from the works included in the press publication, this right would stand next to the authors' rights in their work. Hence the rights granted to press publishers would in no way limit or otherwise impair the authors ability to exercise any rights they retain in their work.

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<sup>14</sup> 499 U.S. 340, 350 (1991).

<sup>15</sup> 101 U.S. 99, 103 (1880).

b) Users' Rights

**Copyright Office Question: Would granting additional rights to press publishers affect the ability of users, including news aggregators, to rely on exceptions and limitations? If so, how?**

In principle, exceptions, and limitations (copyright restrictions) which entitle users to use protected content without a license from or authorization by the rightholder should also apply to the right for press publishers regarding the use of the press publication. However, the use of small parts of a press publication by such online service providers, including but not limited to the use of headlines and ledes, should in any case require prior consent (a license) from the press publisher.

7. The Interaction Between Any New Protections and International Treaty Obligations

**Copyright Office Question: Would granting additional rights to press publishers affect United States compliance with the Berne Convention or any other international treaty to which it is a party?**

Pursuant to the Berne Convention, member states of this treaty must not grant authors from other countries less protection than they grant their own nationals.<sup>16</sup> The Berne Convention thereby defines in many different aspects a standard of protection to which a member state has to adhere to when it comes to the protection of foreign authors.<sup>17</sup> In this regard the Berne Convention excludes certain subject matter from its protection:

Art. 2(8) of the Berne Convention declares that

[t]he protection of this Convention shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information.

Scholars conclude that both facts and the mere recounting of facts are excluded from the protected subject matter.<sup>18</sup> However, for the following reason, this exclusion of subject matter does not prevent the United States from introducing an exclusive right for press publishers:

The Berne Convention does not prohibit nations to protect press publications under a different kind of rights regime, i.e., a regime that is different from copyright. Under Berne, it is therefore possible to introduce a sui generis right which would protect press

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<sup>16</sup> Ginsburg, *Minimum and Maximum Protection Under International Copyright Treaties*, 44 Colum. J. L. & Arts 1, 2 (2020).

<sup>17</sup> Ginsburg, *Minimum and Maximum Protection Under International Copyright Treaties*, 44 Colum. J. L. & Arts 1, 2 (2020).

<sup>18</sup> Ginsburg, *Minimum and Maximum Protection Under International Copyright Treaties*, 44 Colum. J. L. & Arts 1, 2 (2020).



publications.<sup>19</sup> Again, such a right would not be available to foreign authors (at least not under the Berne Convention). However, the U.S. is free to introduce such a right.

#### 8. The European approach as a model for the United States

***Copyright Office Question: Would the approach taken by the European Union in Article 15 of the CDSM [the DSM Directive], granting “journalistic publications” a two-year exclusive right for certain content, be appropriate or effective in the United States? Why or why not?***

The European publishers' right could serve as a model (not a blueprint!) for future regulation in the United States which is based on the principles described in this filing, because the European publishers' right is governed by the same principles which ensure that press publishers have the same protection that is needed for press publishers in the United States. Furthermore, a right which is functionally equal to the European publishers' right would clear the way for protection of U.S. press publishers in Europe based on reciprocity.

### IV. What Europe has achieved: The European Publishers' Right

#### 1. Rationale

The European Commission has identified the introduction in EU law of a related right for press publishers which covers the digital uses of their press publications as the preferred option "to increase their legal certainty, strengthen their bargaining position and have a positive impact on their ability to license content and enforce the rights on their press publications."<sup>20</sup> The preferred option would also increase legal certainty for all publishers as regards the possibility for them to receive a share in the compensation for uses under an exception.

This new exclusive right has been introduced in the law of the European Union through Article 15 of the Directive (EU) 2019/790 of the European Parliament and of the Council of April 17, 2019 on copyright and related rights in the Digital Single Market (hereinafter: "**DSM Directive**").<sup>21</sup>

DSM Directive recital 55 summarizes the concept of the European publishers' right and its rationale as follows:

The **organisational and financial contribution of publishers in producing press publications** needs to be recognised and further encouraged to ensure the sustainability of the publishing industry and thereby foster the availability of reliable information. It is

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<sup>19</sup> Ginsburg, *Minimum and Maximum Protection Under International Copyright Treaties*, 44 Colum. J. L. & Arts 1, 13 – 15 (2020).

<sup>20</sup> European Commission, Commission Staff Working Document – Executive Summary of the Impact Assessment on the Modernisation of EU copyright rules Accompanying the document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, SWD (2016), 302 final, p. 3.

<sup>21</sup> OJ L 130, 17.05.2019, p. 92.

therefore necessary to provide at Union level for **harmonised legal protection for press publications in respect of online uses by information society service providers** [...]. Such protection should be effectively guaranteed through the introduction, in Union law, of **rights related to copyright for the reproduction and making available to the public of press publications** of publishers established in a Member State **in respect of online uses by information society service providers** [...] (emphasis added).

The DSM Directive was approved by the European Parliament on March 26, 2019, and by the Council of the European Union on April 15, 2019. It was published in the Official Journal of the European Union on May 17, 2019. Pursuant to Article 31 the DSM Directive has entered into force 20 days after the publication date, i.e., on June 6, 2019.

## 2. Uniform interpretation throughout the European Union

According to the case law established by the Court of Justice of the European Union (hereinafter "**CJEU**"), the need for a uniform application of European Union law and the principle of equality require that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given **an independent and uniform interpretation throughout the European Union**; that interpretation must take into account the context of the provision and the objective of the relevant legislation.<sup>22</sup>

Neither DSM Directive Article 15 nor the corresponding recitals refer to the national law of the Member States regarding the legal protection of press publications as provided for in Article 15. From the case law established by the CJEU it is therefore clear that the protection of press publications under DSM Directive Article 15 must be regarded as an **autonomous concept of European Union law** and hence be interpreted uniformly throughout the European Union. This conclusion is supported by the objective pursued by the Copyright Directive which is to further harmonise the laws of the Member States on copyright and related rights (recital 1). To this end the DSM Directive provides at Union level rules for a harmonised legal protection for press publications in respect of online uses by information society service providers (recital 55).

The enacting terms of a European Union act are inextricably linked to the reasons (the so-called recitals) given for it, so that, when it must be interpreted, account must be taken of the reasons which led to its adoption.<sup>23</sup> The interpretation of Article 15 must therefore take into account the corresponding **recitals 54 to 59**.

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<sup>22</sup> *SENA*, C-245/00 [2003], ECLI:EU:C:2003:68, paragraph 23; *Padawan*, C-467/08 [2010], ECLI:EU:C:2010:620, paragraph 32 with reference to additional case law.

<sup>23</sup> Article 296 (2) TFEU and *Sturgeon*, Joined Cases C402/07 and C432/07, ECLI:EU:C:2009:716, paragraph 42 with reference to further case law.

### 3. Protected Subject Matter

DSM Directive Article 15 provides for protection of the publishers of **press publications**. The term "press publication" is defined in DSM Directive Article 2(4) as follows:

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

In addition, DSM Directive recital 55 provides that

for the purposes of this Directive, it is necessary to define the concept of ‘press publication’ so that it only covers journalistic publications, published in any media, including on paper, in the context of an economic activity that constitutes a provision of services under Union law. The press publications that should be covered include, for instance, daily newspapers, weekly or monthly magazines of general or special interest, including subscription-based magazines, and news websites. Press publications contain mostly literary works, but increasingly include other types of works and other subject matter, in particular photographs and videos. Periodical publications published for scientific or academic purposes, such as scientific journals, should not be covered by the protection granted to press publications under this Directive. Neither should that protection apply to websites, such as blogs, that provide information as part of an activity that is not carried out under the initiative, editorial responsibility and control of a service provider, such as a news publisher.

These provisions give a very detailed list of requirements which must be cumulatively fulfilled for a publication to be considered a press publication within the meaning of DSM Directive Article 15. Member States are not entitled to use their own definition of a press publication.

Literary works within the meaning of European Union law<sup>24</sup> are literary works within the meaning of Article 2 of the Berne Convention<sup>25</sup>. According to the WIPO Guide to the Berne Convention<sup>26</sup> only those productions qualify as works which are intellectual creations.

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<sup>24</sup> See Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version), [OJ L 372, 27.12.2006, p. 12](#).

<sup>25</sup> Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, last amended on 28 September 1979.

<sup>26</sup> Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms, Geneva 2003, available on the [website of WIPO](#), p. 23.

According to the case law of the CJEU<sup>27</sup>, this definition also applies to European Union law. Hence, a publication will only qualify as a press publication within the meaning of DSM Directive Article 2(4) if the larger part of its content ("mainly") qualifies as works of authorship within the meaning of Article 2 of the Berne Convention. The works included in a press publication must be of journalistic nature.

The press publication itself does not have to fulfill any originality requirements. The press publication within the meaning of DSM Directive Article 2(4) is not a work, but a subject matter sui generis.

The definition of a press publication is very broad. Any other type of publication that meets the criteria given in DSM Directive Article 2(4) qualifies as press publications, which are not just traditional periodicals but also include other publications such as online publications which are regularly updated. A regular update within the meaning of DSM Directive Article 2(4) does not require a certain update cycle. Online publications may be updated on an as-needed-basis.

#### 4. Rightholder

The publishers' right is provided to **press publishers**. According to DSM Directive recital 55

the concept of publisher of press publications should be understood as covering service providers, such as news publishers or news agencies, when they publish press publications within the meaning of this Directive.

In other words: Anyone who publishes a press publication within the meaning of DSM Directive Article 2(4) is a press publisher within the meaning of the Directive and enjoys protection of his press publication pursuant to DSM Directive Article 15. The rights provided for in DSM Directive Article 15 are not limited to traditional press publishers or news agencies who are expressly mentioned in the Copyright Directive.

To enjoy protection under the publishers' right, press publishers must be established in a Member State (DSM Directive 15(1)) and have their registered office, central administration, or principal place of business within the European Union (DSM Directive recital 55).

#### 5. Scope of Protection

##### a) Reproduction Right and Right of Making available to the Public

DSM Directive Article 15(1)(1) states that 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 online use of their press publication by information society service providers.

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<sup>27</sup> *Infopaq*, C-5/08 [2009], ECLI:EU:C:2009:465, paragraph 34.

of Directive 2001/29/EC Article 2 provides for the **reproduction right**, and Article 3(2) of this Directive for the **right of communication to the public**. Because DSM Directive Article 15 refers to these provisions of Directive 2001/29/EC, the entire existing and future case law regarding the interpretation of Article 2 and Article 3(2) of this Directive will apply to the press publishers' right. The exploitation rights laid out in Directive 2001/29/EC provide for a harmonized set of exploitation rights at European Union level.<sup>28</sup> The scope of the rights granted to press publishers with respect to their press publications is therefore determined by the case law of the CJEU regarding the interpretation of Article 2 and Article 3(2) of Directive 2001/29/EC. This means that the reproduction right within the meaning of Article DSM Directive Article 15 extends to the reproduction of **smallest parts** of a press publication if these parts are an expression of the investment made by the press publisher and have an economic value, regardless of whether such small part is original the sense of CJEU case law regarding reproduction of works.

#### b) Online Use by Information Society Service Providers

The rights provided for in DSM Directive Article 15 (1) apply to the online use of press publications by information society service providers.

DSM Directive Article 2(5) states that

'information society service provider' means a service within the meaning of point (b) of Article 1 (1) of Directive EU 2015/1535.

Article 1(1)(b) of Directive EU 2015/1535<sup>29</sup> reads as follows:

'service' means any Information Society service any service normally provided for remuneration, **at a distance, by electronic means** and **at the individual request of a recipient of services**. (emphasis added)

For the purposes of this definition: (i) 'at a distance' means that the service is provided without the parties being simultaneously present; (ii) 'by electronic means' means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means; (iii) 'at the individual request of a recipient of services' means that the service is provided through the transmission of data on individual request.

**Information society services** within the meaning of this definition include services which are not remunerated by those who receive them, such as those offering online information

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<sup>28</sup> *Svensson*, Case C-466/12 [2014], ECLI:EU:C:2014:76, paragraph 33; *SGAE*, Case C-306/05 [2006] ECLI:EU:C:2006:764, paragraph 30.

<sup>29</sup> Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society Services, [OJ L 241.17.9.2015, p.1](#).

or commercial communications, or those providing tools allowing for search, access and retrieval of data; information society services also include services consisting of the transmission of information via a communication network, in providing access to a communication network (see recital 18 of Directive 2000/31/EC whose provisions must be taken into account).

By definition, the activities of information society services and their services take place **online** (see recital 18 of Directive 2000/31/EC). Online use means any non-physical use by way of digital technology. Online use does not relate to specific business models. And online use does not require a communication to the public within the meaning of Article 3 (2) of Directive 2001/29/EC. Online use can also take place in networks which are not public (such as intranets with a limited number of users who are not a public within the meaning of CJEU case law), and in a point-to-point communication (such as newsletters delivered to individual users by e-mail).

## 6. Term of Protection

The term of protection granted to press publishers with respect to press publications is **two years**. This is substantially shorter than the term of protection which applies to other related rights. According to DSM Directive Article 15(1), this term shall be calculated from January 1 of the year following the date on which that press publication is published. The term will start to run again when the press publication is updated (e.g., if the press publication is published online), because the update is the expression of a new investment by the press publisher.

## 7. Exceptions and Limitations

### a) Private or Non-commercial Uses by Individual Users.

Pursuant to DSM Directive Article 15(1)(2) the rights provided for in the first subparagraph shall not apply to private or non-commercial uses of press publications by individual users. This exception results from concerns raised by Members of the European Parliament that DSM Directive Article 15 would unreasonably limit the freedom of individuals to use press publications in their communication. But this exception should be of no relevance. Arguably the use of a press publication by information society service providers will hardly ever be private or non-commercial. And information society service providers are not "individual users" within the meaning of European copyright law.

### b) Hyperlinking

According to DSM Directive Article 15 (1) (3) the protection granted under the publishers' right shall not apply to acts of hyperlinking. The Directive lacks a definition of the term "hyperlink" and does not specify which type of link is excluded from the scope of protection. Pursuant to the principle of the autonomy of European Union law<sup>30</sup>, this term

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<sup>30</sup> Section I.2.

must be interpreted uniformly in all Member States. To guarantee the effectiveness of the publishers' right a distinction must be made between clickable links to which the CJEU case law refers and automatic links which automatically display the resource to which the link leads without the need for the user to take any action. Only clickable links shall be excluded.

In several cases the CJEU has ruled that under certain conditions a hyperlink to a work other subject matter which is freely accessible online with the rightholder's consent does not qualify as an act of communication to the public within the meaning of Article 3 of Directive 2001/29/EC.<sup>31</sup> The case law cannot be applied to DSM Directive Article 15(1)(3) because this provision defines the scope of protection under DSM Directive Article 15, not the right provided for in of Directive 2001/29/EC.

c) Individual Words or Very Short Extracts of a Press Publication

DSM Directive Article 15(1)(4) states that

the rights provided for in the first subparagraph shall not apply in respect of the use of individual words or very short extracts of a press publication.

The Directive lacks a definition of the notion of "individual words" and "very short extracts of a press publication". Pursuant to the principle of the autonomy of European Union law, the concept of individual words must be interpreted uniformly in all Member States. Member States are not competent to define "individual words or very short extracts" within the meaning of DSM Directive Article 15(1)(4). Considering the governing principles of European copyright law, individual words or very short extracts **are an absolute minimum of text**. The notion of "individual words" and "very short extracts" may not undermine the investment made by press publishers. Therefore, any part of a press publication which has an economic value to the information society service provider who uses such a part of the press publication (individually or as part of the aggregation) is protected. This means that **headlines and ledes** are not excluded from the scope of protection if they exceed this minimum of text, because they are part of the press publisher's investment which DSM Directive Article 15 aims to protect. Member States have no competence to introduce statutory thresholds in der national laws to determine what is to be regarded very short or individual words.

Since the press publication is not a work within the meaning of international copyright (Berne Convention), the protection granted under DSM Directive Article 15 extends to very small parts of the press publication and the content included in the press publication, regardless of whether such small parts are original (the expression of an intellectual creation) and would therefore qualify as a work.

According to DSM Directive recital 58,

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<sup>31</sup> *Svensson*, Case C-466/12, ECLI:EU:C:2014:76; *BestWater*, Case C-348/13, ECLI:EU:C:2014:2315, *GS Media*, Case C-160/15, ECLI:EU:C:2016:644; *VG Bild-Kunst*, C-392/19, EU:C:2021:181.

taking into account the massive aggregation and use of press publications by information society service providers, it is important that the exclusion of very short extracts be interpreted in such a way as **not to affect the effectiveness of the rights provided for in this Directive**. (emphasis added)

This recital complements Directive 2001/29/EC recital 9 and recital 10. Recital 9 states that

any harmonisation of copyright and related rights must take as a basis **a high level of protection**, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property. (emphasis added)

And recital 10 acknowledges that

if authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as 'on-demand' services, is considerable. **Adequate legal protection of intellectual property rights is necessary in order to** guarantee the availability of such a reward and **provide the opportunity for satisfactory returns on this investment**. (emphasis added)

This standard of a high level of protection is being referred to by the CJEU case law regarding the interpretation of the right of communication to the public (Directive 2001/29/EC Article 3) as well as the reproduction right (Directive 2001/29/EC Article 2). Since DSM Directive Article 15(1) directly refers to these rights, the principles that govern the interpretation of these rights should be considered for the interpretation of DSM Directive Article 15(1).

This said, any interpretation of the exception regarding "individual words of very short extracts" must ensure that the rights provided for in DSM Directive Article 15(1) effectively protect publishers of press publications with respect to their press publications at a high level. DSM Directive recital 58 expressly acknowledges that small extracts from a press publication may have a commercial value, and that they shall not per se be excluded from the scope of protection. And DSM Directive recital 58 leaves no doubt that "the massive aggregation and use of press publications by information society service providers" which typically aims at the use of small extracts of press publications, shall not be excluded from the protection pursuant to DSM Directive Article 15(1)(1).

d) Other exceptions and limitations

Pursuant to DSM Directive Article 15(3), the exceptions and limitations provided for in Article 5 of Directive 2001/29/EC, in Directive 2012/28/EU and in Directive (EU) 2017/1564 shall apply *mutatis mutandis* in respect of the publishers' rights provided for in DSM Directive Article 15(1). Since protection under the publishers' right is limited to the use of press publications



by so-called information society service providers, these exceptions will be of very little (if any) relevance for the publishers' right.

Directive 2001/29/EC Article 5 contains a list of exceptions and limitations to the reproduction right (Directive 2001/29/EC Article 2) and to the right of communication to the public (Directive 2001/29/EC Article 3). Directive 2012/28/EU concerns the use of certain so-called orphan works by publicly accessible libraries, educational establishments, and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations, established in the Member States, to achieve aims related to their public-interest missions. A work is an orphan work within the meaning of the Directive if none of the rightholders in that work is identified or located despite a diligent search for the rightholders.

#### 8. Revenue for authors

DSM Directive Article 15(5) provides

that authors of works incorporated in a press publication receive an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers.

This right is a novelty in European copyright law because the DSM Directive requires that rightholders (the authors) are not just compensated for the use of their own work and the rights herein. In addition, they are entitled to a share of the revenues another group of rightholders (the publishers of press publications) receive from the use of their protected subject matter namely their publishers' right. The authors' revenue share must not result in a double payment for the use of their work as part of the press publication. Hence, only those revenues which are directly attributable to the exploitation of the rights provided for in DSM Directive Article 15 (1) by an information society service provider may be considered.

#### 9. Mere Facts

DSM Directive recital 57 explicitly excludes "mere facts reported in press publications" from the scope of protection. In copyright the exclusion is a manifestation of the idea/expression dichotomy<sup>32</sup> which is a fundamental principle of also of European copyright. Since the press publishers right does not protect an intellectual creation by the press publisher (a work of authorship), but his investment, the exclusion of "mere facts" from the scope of protection means that such facts are not the expression of the investment made by the press publisher. The rights granted to press publishers do not extend to the reproduction and the making available of the facts presented in the press publication.

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<sup>32</sup> See section III.5. of this filing.

## V. Transposition of the Publishers' Right into National Laws

### 1. Harmonized Rules in the European Union

The Directive is based on Article 114 of the Treaty on the Functioning of the European Union (TFEU) which gives the institutions of the European Union the competence to enact appropriate legislation at European Union level to support the establishment and the functioning of the internal market.

The Directive aims to establish **harmonized rules** for the protection of press publications. According to recital 55, Article 15 has the purpose

to provide at Union level for harmonised legal protection for press publications in respect of online uses by information society service providers.

Such harmonization requires Member States to fully endorse the Directive and not to modify or dilute the regulation by way of their own national interpretation. Therefore, we see that the Directive gives Member States very little (if any) leeway as to the exact rules which are required to adopt DSM Directive Article 15. This means that DSM Directive Article 15 must be transposed into national law of the Member States, and that the Member States have **no choice as to how they transpose it**. The national laws will only comply with the DSM Directive if they fully reflect DSM Directive Article 15. Certain provisions of the Directive do leave Member States the choice as to whether they want to transpose the respective provision into their national law ("Member States *may* provide..."). Other provisions *must* be transposed into national law ("Member States *shall* ..."). DSM Directive Article 15 belongs to the latter category. This means, Member States must introduce the right laid down in Article 15 in all its detail.

According to DSM Directive Article 29 (1) Member States must bring into force the laws, regulations, and administrative provisions necessary to comply with this Directive by **June 7, 2021** (transposition of the DSM Directive). It was expected that most of the Member States will fail to complete the transposition of the DSM Directive by this date. There is a general transposition deficit in the European Union regarding Single Market-related directive across all Member States of the European Union with a delay of up to 30 months in some countries.<sup>33</sup>

### 2. Countries that have implemented the Publishers' Right so far

DSM Directive Article 15 has been transposed into national laws so far in the following countries.

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<sup>33</sup> European Commission (2021): Single Market Scoreboard. Online available: [https://ec.europa.eu/internal\\_market/scoreboard/performance\\_by\\_member\\_state/index\\_en.htm](https://ec.europa.eu/internal_market/scoreboard/performance_by_member_state/index_en.htm) (11.11.2021).

a) Germany

Germany has transposed the Publishers' Right into sections 87f to 87k of the German Copyright Act. The new law ("Gesetz zur Anpassung des Urheberrechts an die Erfordernisse des digitalen Binnenmarktes") was published in the Federal Law Gazette on June 4, 2021<sup>34</sup> and entered into force on June 7, 2021.

b) Netherlands

The Dutch legislator has implemented the DSM Directive with a single implementation act which was published in the official journal on December 12, 2020, and entered into force on June 7, 2021.<sup>35</sup>

c) Hungary

On April 28, 2021, the bill to implement the DSM Directive passed the Hungarian Parliament and was published in the official journal on June 6, 2021.<sup>36</sup>

d) France

In France, the DSM Directive will be implemented by different legislative acts. The "LOI no. 2019-775 du 24 juillet 2019 tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse" implements DSM Directive Article 15. The French legislator adopted this law on October 25, 2019.<sup>37</sup>

e) Denmark

In Denmark, the transposition of the DSM Directive into national law will take place in two legislative acts. The first act, which has already been concluded, transposed DSM Directive Articles 15 and 17 into Danish law. The Danish parliament adopted the law on June 3, 2021.<sup>38</sup>

f) Malta

In Malta, an implementation decree which transposes the DSM Directive into national law was published in the official journal of the Maltese Government.<sup>39</sup>

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<sup>34</sup> [Bundesgesetzblatt 2021, Part I, No. 27, p. 1210-1211](#).

<sup>35</sup> See DSM Directive Implementation Tracker for Netherlands, online available at <https://www.notion.so/Netherlands-6681f3a8fc4d4d079648f4cff20dc29d>.

<sup>36</sup> See DSM Directive Implementation Tracker for Hungary, online available at <https://www.notion.so/Hungary-eeb8667832a04688b7beb7d6df89b57e> (23.11.2021).

<sup>37</sup> See DSM Directive Implementation Tracker for France, online available at <https://www.notion.so/France-de309aa9cdb040e4a72d58cb9749ff18> (23.11.2021).

<sup>38</sup> See DSM Directive Implementation Tracker for Denmark, online available at <https://www.notion.so/Denmark-494a7f08c24d45588b3810aa1b1b7212> (23.11.2021).

<sup>39</sup> See DSM Directive Implementation Tracker for Malta, online available at <https://www.notion.so/Malta-84eefd61cb9843c3adc0c16176a53797> (23.11.2021).

g) Croatia

In Croatia, the law implementing DSM Directive Article 15 was adopted on October 1, 2021.

h) Italy

The Legislative Decree which transposes the DSM Directive into Italian has been approved by the Council of Ministers on November 5, 2021; publication in the Italian Official Journal (Gazzetta Ufficiale) is expected to follow shortly.

i) Spain

Spain has transposed the DSM Directive by way of a Royal Decree law, which was published in the Official Gazette<sup>40</sup> on November 4, 2021, and the implementation entered into force on the same day.

Belgium, Czech Republic, and Sweden have kicked off the legislative process. The remaining Member States will follow soon.

3. Effects of the European Publishers' Right on the Market so far

***Copyright Office Question: In countries that have granted ancillary rights to press publishers, what effect have those rights had on press publishers' revenue? On authors' revenue? On aggregators' revenues or business practices? On the marketplace?***

Since the DSM Directive entered into force in June 2019 and with transposition of DSM Directive Article 15 completed now in several countries, among them France and Germany, press publishers see that the tide is beginning to turn. The DSM Directive will eventually be implemented in all member states of the European Union as required by European law. It will take some time until the new right has been fully enforced and complete effect is shown. But this is normal. For comparison, after the cable re-transmission right had been established in Europe it took broadcasting companies several years to settle agreements with cable operators who refused to accept that under the new law their operations would require a license. This is history. The same goes for the publishers' right. And there is evidence that the publishers' right is already changing the paradigm on the European market. And it is providing the tailwind press publishers need to accomplish their digital transformation.

It is not a coincidence, that platforms have closed bilateral deals with certain press publishers before the Directive's transposition into national laws. With the press publishers' right in force it has become easier to conclude content contracts with the major platforms.

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<sup>40</sup> [BOE núm. 263. de 3 de noviembre de 2021. p. 133204 – 133364.](#)

As observed in France, the legal requirement that platforms negotiate a fair and reasonable price with publishers has had a positive impact: In October 2021, Facebook and the French Publishers' Association Apig reached an agreement.<sup>41</sup> In November 2021, Google and the news agency Agence France-Presse (AFP) signed an agreement on the remuneration of the international news agency's content used by the search engine operator, covering all the countries where it is active. The five-year agreement is the first signed by a major news agency under the DSM Directive regarding the new press publishers' right.<sup>42</sup>

Without the publishers' right it would have been more difficult to agree on any licenses. The pressure on platforms has since increased to reach an agreement between platforms and publishers. In Germany, Google has now accepted that the publishers' right requires licensing agreements.

For Axel Springer, it was crucial that no deal would jeopardize the applicability and effectiveness of the publishers' right in Germany. In May 2021, Axel Springer and Facebook agreed on a global cooperation aimed mainly at contribution. The agreement explicitly excluded the ancillary copyright for press publishers.

The relationships between content providers and platforms have since become fairer and more predictable for platforms as well as publishers. The likelihood of more balanced agreements between the big platforms and the publishers has increased considerably. Only the adoption of the Directive and the upcoming implementation into national legislation has created the necessary tailwind for concluding fair deals.

The collecting society Corint Media which represents the rights of press publishers is currently negotiating a license agreement with Google on behalf of its members. For the use of press content such as headlines, short article excerpts and thumbnails in the search engine, Corint Media is claiming a license fee of 420 million Euros for the year 2022 – in Germany alone. Since Corint Media currently manages the rights of approximately 200 rightholders in the German market, the license fee is reduced accordingly. This shows that the value of the market only for independent and free journalism is immense – not including license agreements with other mega platforms with which negotiations are in progress. For Google, the revenues generated from operating the search engine in Germany are estimated at around 9 billion Euros in 2020.

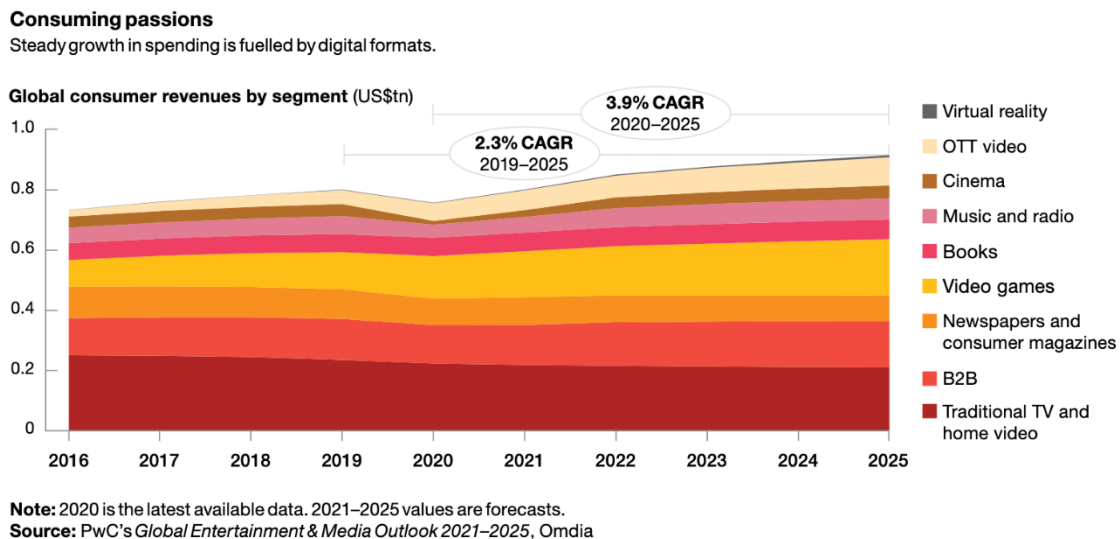
In Germany, where the publishers' right was transposed into national law in June 2021, press publishers are optimistic: For 2021, press publishers were confident that their digital business will continue to grow strongly: they expect sales revenues from e-paper to increase by 17 percent, from paid content by 44 percent, and from advertising by 6

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<sup>41</sup> <https://www.sueddeutsche.de/wirtschaft/medien-facebook-lizenz-vereinbarung-mit-franzoesischen-verlagen-dpa.urn-newsml-dpa-com-20090101-211022-99-692835> (23.11.2021).

<sup>42</sup> <https://www.sn.at/panorama/medien/afp-schliesst-bahnbrechende-verguetungsvereinbarung-mit-google-ab-112657501> (19.11.2021).

percent.<sup>43</sup> Moreover, a study shows that by 2030, 60 percent of press publishers in Germany expect to cover editorial costs with their digital subscription revenues. 18 percent of press publishers expect similar developments as soon as 2025.<sup>44</sup> Against the background of the new legislation, 58 percent of publishers in Germany expect to compensate for their print declines with digital revenues over the next five years.<sup>45</sup> Current forecast predicts a stable growth in spending for digital formats – also including newspapers and consumer magazines<sup>46</sup>:



In general, one of the top priorities now among publishers is the acceleration of the digital transformation strategy. For most companies the specifics of digital transformation are increasingly audience-first, reader revenue, data, and product development.<sup>47</sup> Moreover, one of the most important aspects for the future of journalism are the investments in the reader revenue. This includes investments in the paid-for digital content, technology, and data for reader revenue strategies, developing skillsets in the newsroom and product development. A reliable legal framework for publishers' content in the digital era makes print production and its distribution less important in the future.<sup>48</sup>

Digital subscriptions form a core strategy. Surveys show that readers and consumers are increasingly willing to pay for independent and diverse online news content. While 12

<sup>43</sup> BDZV (2021): Zur wirtschaftlichen Lage der deutschen Zeitungen. Online available: [https://www.bdzv.de/fileadmin/content/7\\_Alle\\_Themen/Marktdaten/Branchenbeitrag\\_2021/BZDV\\_Branchenbeitrag\\_v2.pdf](https://www.bdzv.de/fileadmin/content/7_Alle_Themen/Marktdaten/Branchenbeitrag_2021/BZDV_Branchenbeitrag_v2.pdf) (11.11.2021), p. 15.

<sup>44</sup> Schickler / BDZV (2021): Trends der Zeitungsbranche 2021. Online available: [https://www.bdzv.de/fileadmin/content/6\\_Service/6-1\\_Presse/6-1-2\\_Pressemitteilungen/2021/PDFs/BZDV\\_Schickler\\_Trendumfrage\\_2021\\_Praesentation\\_2021-02-09.pdf](https://www.bdzv.de/fileadmin/content/6_Service/6-1_Presse/6-1-2_Pressemitteilungen/2021/PDFs/BZDV_Schickler_Trendumfrage_2021_Praesentation_2021-02-09.pdf) (11.11.2021), p. 17.

<sup>45</sup> Ibid., p. 18.

<sup>46</sup> PwC (2021): Perspectives from the Global Entertainment & Media Outlook 2021-2025. Power Shifts: Altering the dynamics of the E&M industry. Online available: <https://www.pwc.com/gx/en/entertainment-media/outlook-2021/perspectives-2021-2025.pdf> (11.11.2021), p. 6.

<sup>47</sup> Nel, Francois / Milburn-Curtis, Coral (2020-21): World Press Trends 2020-21. Frankfurt: WAN-IFRA, the World Association of News Publishers, p. 27.

<sup>48</sup> Nel, Francois / Milburn-Curtis, Coral (2020-21): World Press Trends 2020-21. Frankfurt: WAN-IFRA, the World Association of News Publishers, p. 29.

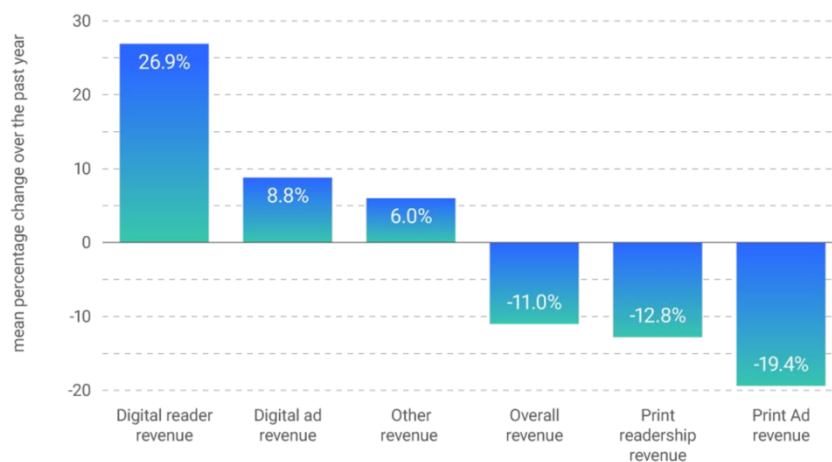
percent (U.S.) and 9 percent (Germany) of consumers already paid for online news, 45 percent (U.S.) and 38 percent (Germany) are willing to pay for online news in the future.<sup>49</sup> Reliable, trustworthy, well researched and independent news have generated great demand. Especially younger users are much more open to online media payment models.<sup>50</sup>

The legal framework provided for by DSM Directive Article 15 benefits press publishers by providing greater legal certainty and helping to secure investments for further growth and development in the media sector.

In Germany, 85 percent of publishers see paid content as existential for the future and the most important business model. The growing importance of the technology landscape is underpinned by stronger investments. Current surveys of 2021 backed by the new legislation show that 90 percent of publishers plan to invest more in their technology in the future.<sup>51</sup> Subscriptions were already soaring in recent years but have seen even greater success since 2019. A survey shows that more than 60 percent of the participating publishers see their content strategy significantly connected to subscription growth and subscription retention. Particularly, their digital reader revenue stream changed over recent years.

#### Change of revenue streams over the last 12 months (2020-2021).<sup>52</sup>

Question: How have your revenue streams changed over the last 12 months?



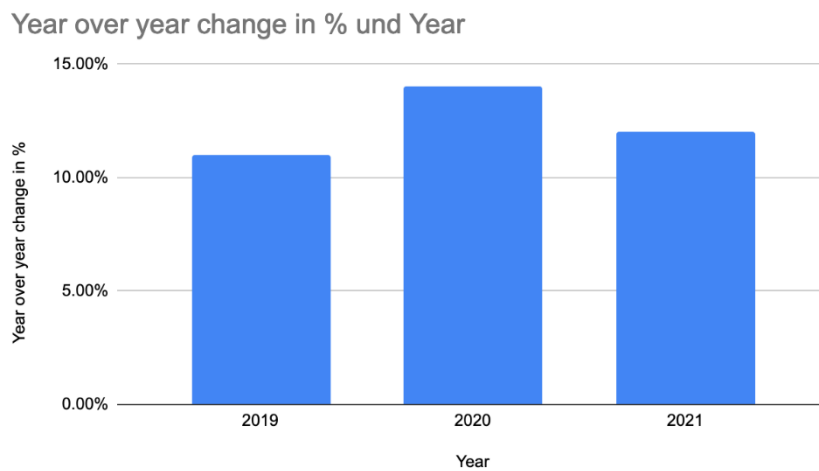
<sup>49</sup> World Economic Forum (2020): Understanding Value in Media. Perspectives from Consumers and Industry. Online available: [https://www3.weforum.org/docs/WEF\\_Understanding\\_Value\\_in\\_Media\\_Perspectives\\_from\\_Consumers\\_and\\_Industry\\_2020.pdf](https://www3.weforum.org/docs/WEF_Understanding_Value_in_Media_Perspectives_from_Consumers_and_Industry_2020.pdf) (18.11.2021), p. 10.

<sup>50</sup> PwC (2019): Ergebnisse: Bevölkerungsbefragung zur Nutzung von Online-Medienangeboten. Online available: <https://www.pwc.de/de/technologie-medien-und-telekommunikation/pwc-befragung-nutzung-online-medienangebote.pdf> (11.11.2021), p. 9.

<sup>51</sup> Schickler / BDZV (2021): Trends der Zeitungsbranche 2021. Online available: [https://www.bdzv.de/fileadmin/content/6\\_Service/6-1\\_Presse/6-1-2\\_Pressemitteilungen/2021/PDFs/BDZV\\_Schickler\\_Trendumfrage\\_2021\\_Praesentation\\_2021-02-09.pdf](https://www.bdzv.de/fileadmin/content/6_Service/6-1_Presse/6-1-2_Pressemitteilungen/2021/PDFs/BDZV_Schickler_Trendumfrage_2021_Praesentation_2021-02-09.pdf) (11.11.2021), p. 23 and p. 30.

<sup>52</sup> Nel, Francois / Milburn-Curtis, Coral (2020-21): World Press Trends 2020-21. Frankfurt: WAN-IFRA, the World Association of News Publishers, p. 30f.

## Subscriptions WELT+ and BILD+ - Year over year change (in percent)<sup>53</sup>



### 4. Outside the United States and Europe

The approach taken by the European Union to empower press publishers to get fair value back from large platforms have attracted huge interest in the world. Recently, press publishers from Canada, Mexico, Colombia, Brazil, Argentina, and Chile have signed a joint declaration for copyright and antitrust to defend the values of independent journalism in the digital ecosystem.<sup>54</sup>

#### For further questions reach out to:

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<sup>53</sup> Axel Springer SE, 2021.

<sup>54</sup> Media Sipiapa (2021): Media of the Americas Call for the Defense of the Values of Professional Journalism in the Digital Ecosystem. Online available: <https://media.sipiapa.org/adjuntos/186/documentos/001/841/0001841427.pdf> (11.11.2021).