STUDY

For the JURI committee

European Parliament

Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive

Legal and Parliamentary Affairs

Policy Department for Citizens' Rights and Constitutional Affairs

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POLICY DEPARTMENT FOR CITIZENS' RIGHTS AND CONSTITUTIONAL AFFAIRS

LEGAL AND PARLIAMENTARY AFFAIRS

Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive

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Abstract

This study was commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI committee. It reviews Art 11 and Arts 14-16 of the proposed Directive on Copyright in the Digital Single Market. It outlines criticisms that have been made of the proposals, includes reports of research into the operation and effects of precursors of Article 11 in Germany and Spain, a summary of the cultural economics literature on legal regulation of authors' contracts and analysis of the laws of 7 Member States to see in what way Arts 14-16 would "add value".

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CONTENTS

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
AEEPP	Asociación Española de Editoriales de Publicaciones Periódicas (Spanish Association of Periodical Publications)
AMEC	International Association for the Measurement and Evaluation of Communication
CCIA	Computer and Communications Industry Association
CEDRO	Centro Español de Derechos Reprográficos
CEIPI	Centre for International Intellectual Property Studies, Université de Strasbourg
CIPIL	Centre for Intellectual Property and Information Law, University of Cambridge
CREATe	Centre for Copyright and New Business Models in the Creative Economy, University of Glasgow
CoR	Committee of the Regions
CRIDS	Centre de Recherches en Information, Droit et Société (University of Namur)
CULT	Culture and Education Committee
ECOSOC	Economic and Social Committee
ECS	European Copyright Society
EDIMA	European Digital Media Association
EMMA	European Magazine Media Association
ENPA	European Newspaper Publishers Association
EPubC	European Publishers Council
EPolC	European Policy Centre

FEP	Federation of European Publishers
FIBEP	Federation International des Bureaux des Extraits de Presse
GAFA	Google, Apple, Facebook, Amazon
IGEL	Initiative gegen Ein Leistungsschutzrecht
IMCO	Committee on the Internal Market and Consumer Protection
ITRE	Committee on Industry, Research and Energy
IViR	Institut voor Informatierecht
JURI	Committee on Legal affairs
LIBE	Committee on Civil Liberties, Justice and Home Affairs
MPI	Max Planck Institute for Innovation and Competition Law (Munich)
NLA	Newspaper Licensing Agency (UK)
NME	New Media Europe
OFE	Open Forum Europe
PA	Publishers Association (UK)
SOA	Society of Authors

LIST OF TABLES

EXECUTIVE SUMMARY

With a view to assisting the ongoing deliberations in the Committee on Legal Affairs, and the European Parliament more generally, the Study considers two controversial initiatives contained in the European Commission's proposed Directive on Copyright in the Digital Single Market (2016): the proposal for a press publishers' right **(Article 11)**; and the three draft articles designed to improve the contractual position of authors **(Article 14-16)**.

The proposed right for press publishers **(Article 11)** has proved extremely controversial. Building on two recent experiments in Germany and Spain, the Commission has proposed a harmonized right for press publishers lasting 20 years. There has been considerable lobbying from the press publishers and counter-lobbying from the representatives of the new digital industries.

The proposed Directive contains three provisions on authors' and performers' contracts. The first – the transparency provision **(Article 14)** – would require transferees of copyright to provide authors with details of exploitation of their works, though would leave it to Member States to adapt the general obligation to the different needs of various sectors within the copyright industries. The second – the 'contract adjustment mechanism' **(Article 15)** – would require Member States to empower authors to received 'additional, appropriate' remuneration where they can show that the remuneration they receive is 'disproportionately low' compared with the revenue and benefits generated. The third – the alternative dispute mechanism **(Article 16)** – requires Member States to make provision outside courts and tribunals for voluntary dispute resolution. These three provisions have proved less controversial, but one major criticism has been that they are unduly modest.

Rather than trying to mediate between these conflicting claims of lobbyists for or against Article 11, this report focuses on the academic criticisms and the empirical evidence relating to the national precursors of the proposal. To do so, the Study sought out the latest views from journalists working on online editions of German and Spanish newspapers. The report sets out the criticisms made of the proposal, and the results of interviews with operators in Spain and Germany. In the light of this, the report concludes that there are real concerns surrounding the rather uncertain effects of the right, and many of the problems facing press publishers can be resolved by a much less controversial intervention. We therefore approve the proposal made in the draft JURI Opinion, namely that the press publishers' right be abandoned and replaced with a presumption that press publishers are entitled to copyright/use rights in the contents of their publications.

With respect to the proposals on the positions of authors and performers, we reviewed the laws of **seven Member States** to see how far the proposed new articles would "add value," as well as the literature from the field of cultural economics to help understand how likely these interventions were to be helpful. We conclude that while the laws in many Member States go much further in their attempts to strengthen the weak bargaining position in which most authors and performers find themselves, nevertheless there is actually considerable value in what is being proposed by the Commission.

However, we also note that the economics literature suggests that many of the (financial) problems that face authors relate to the structure of the markets, and will not easily be rectified by legal intervention. While we are sympathetic to some of the additional proposals made in amendments from other Committees of the European Parliament, and indeed, the draft JURI proposal for a generalised right to equitable remuneration, we think that

experience in Member States means that much more thought should be given as to how this might be introduced at EU level. We suggest this might best be achieved by signalling to the European Commission that this should be a priority, rather than trying to introduce such a potentially disruptive proposal by amendment.

1. INTRODUCTION

On 10 May 2017, the consortium consisting of Technopolis Group and Cambridge University, Centre for Intellectual Property and Information Law (CIPIL) was invited to submit an offer for a research paper on 'Strengthening the position of press publishers and authors & performers in the copyright directive".

The desk work has been executed primarily by CIPIL, University of Cambridge, with a subcontract given to Prof. Martin Kretschmer from the University of Glasgow and Head of the CREATe Centre. Technopolis has been responsible for the empirical work.

This report is divided in 4 chapters:

- Chapter 1: The introduction lays out the aim and structure of the study.
- Chapter 2: This sets the scene: the Commission Proposal of September 2016 for a Directive on Copyright in the Digital Single Market
- Chapter 3: Explains the background to the proposed **Article 11,** including the perceived problem, activities in two Member States (Germany and Spain), and examines the proposal in detail.
- Chapter 4: Explains the Commission Proposals in **Articles 14-16,** outlines the criticisms that have been made, and through comparative analysis examines whether they will "add value" compared with national law. The chapter then considers the proposed interventions from the perspective of cultural economics, before offering views on various possible amendments to the proposal.

2. THE PROPOSED DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE MARKET

On September 14, 2016, the European Commission introduced a proposal for a Directive on Copyright in the Digital Single Market.[1] The proposal was supported by an Explanatory Memorandum and three volumes of 'Impact Assessment.'[2]

The Proposal has now been considered:

- (i) By the European Economic and Social Committee, Jan 25, 2017;[3]
- (ii) By the Committee of the Regions, February 8, 2017. The rapporteur was Mauro D'Attis (EPP/It);[4]
- (iii) By the Committee on Culture and Education, which produced a draft Report on February 6, 2017, and an Opinion on 14 July, 2017 (Rapporteur, Marc Joulaud (EPP/Fr).[5]
- (iv) By the Internal Market and Consumer Protection Committee (IMCO), June 14, 2017. The rapporteur was Catherine Stihler (S&D/UK).[6]
- (v) By the Committee on Civil Liberties, Justice and Home affairs (LIBE (rapporteur Michał Boni (EPP/Pol). A draft report was issued on May 22, 2017. Its proceedings are limited to Article 13 of the proposed Directive.
- (vi) By the Committee on Industry, Research and Energy (ITRE) on July 12, 2017.[7] The rapporteur was Professor Zdzisław Krasnodębski (ECR/Pol).
- (vii) By the Legal Affairs Committee, which produced a draft report on March 8, 2017. The rapporteur was Therese Comodini Cachia (EPP/Malta). As far as we are aware 996 amendments to the Commission proposal have been tabled. As Therese Comodini Cachia left the European Parliament in order to take up a seat in the Maltese Parliament, Alex Voss (EPP/Ger) has been appointed as rapporteur for the final report.

Amongst the many reforms, two of the most controversial are **Article 11**, introducing a press publishers' right, and **Articles 14-16**, which deal with regulation of contracts between authors/performers and licensees and transferees who exploit their works/performances. Both sets of provisions are situated in Part 4, on 'measures to achieve a well-functioning marketplace for copyright.'

The two sets of provisions are attempts to respond to two distinct problems, though they are both underpinned, first, by a commitment to the view that copyright is a tool to sustain the availability of a plurality of voices, and, second, by a perception that market operations are (or are no longer) adequate to achieve this. Thus, news publishers are seen as vital to democracy, but suffering under changes associated with digitisation, to an extent to which policy-makers are concerned with the sustainability of these organs. Likewise, independent

[1] COM(2016)593 final at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2016:0593:FIN
[2] https://ec.europa.eu/digital-single-market/en/news/impact-assessment-modernisation-eu-copyright-rules
[3] OJ C 125/27 (OJ April 21, 2017).
[4] SEDEC-VI-019, 121st Plenary Session, 8-9 Feb, 2017; 2017/C207/14 in OJ C 207/80 (OJ, June 30, 2017).
[5] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-595.591%2b03%2bDOC%2bPDF%2bV0%2f%2fEN
[6] PE 599.682v02-00 on http://www.europarl.europa.eu/committees/en/imco/opinions.html
[7] http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fNONSGML%2bCOMPARL%2bPE-592.363%2b02%2bDOC%2bPDF%2bV0%2f%2fEN

authors need to be able to make a living from the exploitation of their works if Europe is to maintain a thriving culture and marketplace of ideas.

Beyond this, however, the two problems are relatively distinct (and the proposals are, according to some commentators,[8] in conflict in so far as the press publishers right would make it more difficult for authors to exercise their rights).[9] It is therefore economical to treat each in turn.

8 van Eechoud, M. (2017), A publisher's intellectual property right: implications for freedom of expression, authors and open content policies, Research paper for OpenForum Europe: http://www.openforumeurope.org/wp-content/uploads/2017/01/OFE-Academic-Paper-Implications-of-publishers-right_FINAL.pdf, 37.
9 Though note various proposals to amend proposed Art. 11 to create an obligation to pay fair remuneration to contributors.

3. THE PROPOSED PRESS PUBLISHERS RIGHT (ART 11)

3.1. Background

Although print publishers have long been able to claim copyright indirectly from the contributions of their journalists, historically, copyright has not been a key part of their business model.[10] For sure, there has been a tradition of licensing so-called "cuttings services", but these revenues have been minor compared with revenues from subscriptions and sales and, especially, advertising.

Digitisation has significantly affected this business model, but, in contrast to the 'copyright industries', such as the record industry, the threat to press publishers does not come from digital piracy or 'peer to peer' copying. Rather, it is changes in advertising practice associated with the Internet that have most dramatically affected print newspapers, as advertisers have reduced expenditure on print in favour of online advertising. In addition, newspapers have tried to move their outlets to the Internet, using different models (freemium, subscription, paywall, advertising) with inconsistent levels of success.[11] This has often brought with it a decline in print sales. Perhaps not surprisingly, declines in sales and declines in advertising revenue frequently mean declines in income and threaten the very existence of some papers.

At the same time, we have seen the emergence of so-called 'news aggregators', Internet-services providing users with collection of links, and sometimes excerpts, from online versions of newspapers. Sometimes these aggregators appear to operate gratuitously, as with Google's GoogleNews service or the Squidapp; sometimes they are paid by clients to identify stories reflecting the client's specific interests (Meltwater, Ubermetrics or the small entity CutBot.)[12] Some publishers have responded to these practices by seeking to extract licence fees, sometimes using litigation. Indeed, a case concerning the Danish operator 'Infopaq' made its way twice to the CJEU.[13] Such litigation has, however, not proved universally successful, though it has operated as an important backdrop to certain voluntary initiatives by Google.[14]

It is in this environment that a number of Member states have sought to develop new rights for press publishers.

In 2013, after 4 years of debate, **Germany** introduced the one-year neighbouring right for press publishers covering the making available for commercial purposes of publications and fragments thereof (but not the smallest text excerpts). This is known as the Leistungsschutzrecht and is found in Sections 87f through 87h of the Copyright Act. A translation, by Ute Reusch, states:[15]

[10] Danbury, R, 'Is Intervention Appropriate?' Evaluating potential legal responses to threats to the production of news in a digital era, University of Cambridge, AHRC project Working paper 2: https://www.cipil.law.cam.ac.uk/projectscopyright-and-news-research-project-2014-16/working-papers
[11] EC, *Impact assessment*, p 156, 160.
[12] On Cut-Bot, see presentation of James McKenzie at CIPIL-IViR (2016).
[13] *Infopaq*, Case C-508, ECLI:EU:C:2009:465 ; Case C-302/10, ECLI:EU:C:2012:16.
[14] CEIPI, 6-7.
[15] http://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html#p0616

The German Neighbouring Right for Press Publishers

Section 87f
Publishers of newspapers and magazines
(1) The producer of a press product (publisher of newspapers and magazines) shall have the exclusive right to make the press product or parts thereof available to the public for commercial purposes, unless it consists of individual words or very short text excerpts. Where the press product has been produced within a company, the owner of the company shall be the producer.
(2) A press product shall be the editorial and technical preparation of journalistic contributions in the context of a collection published periodically on any media under one title, which, following an assessment of the overall circumstances, can be regarded as largely typical for the publishing house and the overwhelming majority of which does not serve self-advertising purposes. Journalistic contributions are, more specifically, articles and illustrations which serve to disseminate information, form opinions or entertain.

Section 87g
Transferability, duration of and limitations on the right
(1) The right of the publisher of newspapers and magazines in accordance with section 87f (1), first sentence, shall be transferable. Sections 31 and 33 shall apply mutatis mutandis.
(2) The right shall expire one year after publication of the press product.
(3) The right of the publisher of newspapers and magazines may not be asserted to the detriment of the author or the holder of a right related to copyright whose work or subject-matter protected under this Act is contained in the press product.
(4) It shall be permissible to make press products or parts thereof available to the public unless this is done by commercial operators of search engines or commercial operators of services which edit the content. Moreover, the provisions of Chapter 6 of Part 1 shall apply mutatis mutandis.

Section 87h
Right of participation of the author
The author shall be entitled to an appropriate share of the remuneration.

In 2014, **Spain** (influenced by recent initiatives in Germany) added a new Article 32(2) to its Copyright Act, modifying the quotation right permitting the use of "non-significant fragments of content available to the public", where the source of the content is 'periodicals or regularly updated websites', and where the material in question 'has the purpose of informing, creating public opinion or entertainment', but rendering the freedom subject to payment of equitable remuneration.[16] Professor Xalabarder has translated the provision:

The Spanish Copyright Act (Art.32(2))

Art.32. Quotations, reviews and illustration for teaching and scientific research purposes.

2. The making available to the public by providers of digital services of contents aggregation of non-significant fragments of contents, available in periodical publications or in periodically updated websites and which have an informative purpose, of creation of public opinion or of entertainment, will not require any authorization, without prejudice of the right of the publisher or, as applicable, of other rights owners to receive an equitable compensation. This right will be unwaivable and will be effective through the collective

[16] Xalabarder, (2014): 'The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government; Its Compliance with International and EU Law' (infojustice.org, 2014) (http://infojustice.org/archives/33346); Xalabarder at CIPIL-IViR, 2016; CREATe, 2016, 20.

management organizations of intellectual property rights. In any case, the making available to the public of photographic works or ordinary photographs on periodical publications or on periodically updated websites will be subject to authorization.

Without prejudice to what has been established in the previous paragraph, the making available to the public by the providers of services which facilitate search instruments of isolated words included in the contents referred to in the previous paragraph will not be subject to neither authorization nor equitable compensation provided that such making available to the public is done without its own commercial purpose and is strictly circumscribed to what is indispensable to offer the search results in reply of the search queries previously formulated by a user to the search engine and provided that the making available to the public includes a link to the page of origin of the contents.

Both initiatives seem primarily targeted at aggregators and, possibly, search engines.

Given this background, and the emergence of such legal initiatives in Member States,[17] the Commission has proposed a 'related right' for press publishers in Article 11 of the proposed Directive.[18] The idea would be to confer on publishers their own 'related right', similar to the 'neighbouring rights' given to other investors in broadcasts, sound recordings and film fixations. The goal is to support 'a free and pluralist press.' As **recital 31** explains:

> "A free and pluralist press is essential to ensure quality journalism and citizens' access to information. It provides a fundamental contribution to public debate and the proper functioning of a democratic society. In the transition from print to digital, publishers of press publications are facing problems in licensing the online use of their publications and recouping their investments. In the absence of recognition of publishers of press publications as rightholders, licensing and enforcement in the digital environment is often complex and inefficient."

The underlying idea is that it is only fair that press publishers are granted their own right in order to relieve them of the burden of having to prove ownership of copyright in each journalistic output. Without such a right, press publishers' abilities to license and enforce rights in the digital environment is unduly complex. This is because they have to rely on assignments and exclusive rights granted by those who contribute to the publications (journalists or photographers).

Article 2(4) of the proposed Directive would define **'press publication'** as

> "a fixation of a collection of literary works of a journalistic nature, which may also comprise other works or subject-matter and 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, having the purpose of providing information related to news or other topics and published in any media under the initiative, editorial responsibility and control of a service provider."

[17] Xalabarder (2014) raised doubts about whether the Spanish approach was compatible with Article 10 of the Berne Convention. For scepticism as to whether either initiative is compatible with EU law, see Rosati, E., 'Neighbouring Rights for Publishers: Are National and (Possibly) EU Initiatives Lawful? (2016) 47 IIC 569.

[18] The idea was first mooted in European Commission, "Public Consultation on the Role of Publishers in the Copyright Value Chain and on the 'Panorama Exception'" (23 March to 15 June 2016), introductory section, "The role of publishers in the copyright value chain"*:* https://ec.europa.eu/digital-single-market/en/news/public-consultation-role-publishers-copyright-value-chain-and-panorama-exception

This complex, multi-clause definition, includes print newspapers – *Le Monde*, *Ekstrabladet*, *La Gazzetta della Sport*, *The Times*, *El Mundo*, *or Frankfurter Allgemeine Zeitung* – whether in their print or online versions. **Recital 33** seeks to clarify the scope, and reiterate its limitation to 'journalistic publications.' It states

> "For the purposes of this Directive, it is necessary to define the concept of press publication in a way that embraces only journalistic publications, published by a service provider, periodically or regularly updated in any media, for the purpose of informing or entertaining. Such publications would include, for instance, daily newspapers, weekly or monthly magazines of general or special interest and news websites."

In contrast

> "Periodical publications which are published for scientific or academic purposes, such as scientific journals, should not be covered by the protection granted to press publications under this Directive."

Thus it would not cover *Annales de chimie: Science des matériaux*, *Cahiers du cinéma, Critical Inquiry*, *Giornale storico della letteratura italiana*, *Nature*, the *New England Journal of Medicine*, *October or Representations*. In between are a large number of online and offline entities that are not clearly within or outside the definition.

Article 11 goes on to detail the right.

The proposed Article 11

Article 11 Protection of press publications concerning digital uses

1. Member States shall provide publishers of press publications with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the digital use of their press publications.

2. The rights referred to in paragraph 1 shall leave intact and shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject-matter incorporated in a press publication. Such rights may not be invoked against those authors and other 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.

3. Articles 5 to 8 of Directive 2001/29/EC and Directive 2012/28/EU shall apply mutatis mutandis in respect of the rights referred to in paragraph 1.

4. The rights referred to in paragraph 1 shall expire 20 years after the publication of the press publication. This term shall be calculated from the first day of January of the year following the date of publication.

It is worth noting from the outset the following key features of the press publishers right:

- (i) This is an exclusive right (like the German law), rather than a condition attaching to an exception (as in Spain);

- (ii) The proposed right would confer two rights: reproduction and making available rights;
- (iii) The rights are limited to "digital uses;"[19]
- (iv) Recital 33 seems to seek to clarify that hyper-linking is not covered. It states '[t]his protection does not extend to acts of hyperlinking which do not constitute communication to the public.' However, as we will see, the effect of this is uncertain, and certainly controversial.
- (v) These rights would be subject to the same limitation as are applicable to copyright under Directive 2001/29/EC (on copyright in the information society);
- (vi) This should mean that the rights can be made subject to an exception that allows quotation;[20]
- (vii) The rights are said not to be capable of being invoked against holders of rights in works and other subject matter incorporated therein. Thus if a photographer takes a creative photograph and it is included in a publication, the new rights could not be used by the publication to prevent the photographer from exploiting the work elsewhere;[21]
- (viii) These would last for twenty years from first publication;

There is nothing to prevent the rights being assigned, administered individually or collectively.

3.2. Controversy in outline

The proposal has attracted considerable criticism and already generated a significant literature.[22] Although some of this literature comes from interested parties,[23] much comes from independent sources, in particular academics from all over Europe. From these sources there is nearly universal criticism of the proposal, with particularly critical interventions from academics based not only in Spain, France, Finland and the UK, but also the country where the right originated, Germany.

One comment, signed by 20 European copyright professors (though before the text of the proposal had been released), advised caution, arguing that rights should only be granted when the case for them had been made out:

> 'IP rights, once created, have proved almost impossible to abolish. In a period of rapid technological and industrial change, the standards of evidence required must be particularly high. A fundamental point relates to the onus of proof. Any new intellectual property right is likely to bring costs. That is the point of rights; otherwise they could not perform an economic function. Someone needs to pay. It is therefore up to the

[19] Proposed Directive, recital 34 adds "The rights granted to the publishers of press publications under this Directive should have the same scope as the rights of reproduction and making available to the public provided for in Directive 2001/29/EC***, insofar as digital uses are concerned***.' (emphasis added)
[20] Proposed Art 11(3); proposed recital 34 ('They should also be subject to the same provisions on exceptions and limitations as those applicable to the rights provided for in Directive 2001/29/EC **including the exception on quotation for purposes such as criticism or review laid down in Article 5(3)(d) of that Directive**.')
[21] Proposed Art 11(2); proposed recital 5.
[22] We are grateful to Natalia Mileszyk for her advice on the debate in Poland.
[23] See e.g., on the one hand, CCIA (Computer and Communications Industry Association), 'The Ancillary Copyright for News publishers: Why Its Unjustified and Harmful'; EDiMA, 'Directive Copyright in the Digital Single Market: The impact of article 11 – Publishers' Right' (both opposed); with all the material endorse by EMMA, ENPA, EPubC and NME on http://www.publishersright.eu (supporting, abd arguing for expansion to cover non-digital uses). However, not all publishers support the proposal. See, for example, the letter to Vice-President Ansnip, dated December 4, 2015, from a group of small publishers.

> proponents of new rights to show what these costs are, who will carry them, and that the costs are necessary and proportionate; and to provide verifiable evidence.'

Once the draft of Article 11 had been published (in September 2016), a further comment signed by 37 academics (based in the UK) went much further, highlighting problems with the proposal and concluding:

> "we believe the proposed right is unnecessary, undesirable, introduces unnecessary uncertainty and is unlikely to achieve anything apart from adding to the complexity and cost of operating in the copyright environment."[24]

Perhaps significantly, others in the sector who have no interest also oppose the right. The UK's Society of Authors, for example, writes:

> "We see no need for the proposed right. It does not seem to be evidence-based and press publishers in the UK are already protected adequately by copyright and database right."[25]

While most commentators question the need for or desirability of an ancillary right, some commentators have even questioned the competence of the EU to intervene in this field.[26]

The Aims of the Proposed Right

The Commission refers to two goals: **securing a sustainable press**; and **making it easier for publishers to conclude licences and enforce rights**.[27] A key question is whether the proposal would likely achieve these goals and/or whether it could do so by a less restrictive means. We examine initially the criticisms made as to the potential for the right to have positive effects, and then consider its social costs, as well as its potential to harm the interests of certain other stakeholder. We then go on to consider a number of other arguments, and in particular whether there are alternative mechanisms that will achieve the second goal (and, indirectly the first) that do not require a new right.

1. Will the Proposal Lead to a Sustainable Press?

One criticism that has been made is that the Commission offers no data on how, or the extent to which, the right would increase revenues of press publishers in a manner that would help achieve the primary goal of sustaining a free and pluralist press.[28]

Indeed, there is little evidence that the decline in newspaper revenues has anything to do with the activities of news aggregators or search engines (that appear as the primary targets

[24] 37 Profs (2016): Bently L et al (2016), Response to Article 11 of the Proposal for a Directive on Copyright in the Digital Single Market, entitled 'Protection of press publications concerning digital uses' on behalf of thirty seven professors and leading scholars of Intellectual Property, Information Law and Digital Economy (5 December 2016): https://www.cipil.law.cam.ac.uk/press/news/2016/12/cambridge-academics-respond-call-views-european-commissions-draft-legislation, p.1.
[25] http://www.societyofauthors.org/SOA/MediaLibrary/SOAWebsite/Submissions/20161205-Submission-to-IPO-on-DSM-directive-dec-2016.pdf
[26] Peukert, A., (2016), An EU Related Right for Press Publishers Concerning Digital Uses, A Legal Analysis, Research Paper of the Faculty of Law, Goethe University Frankfurt am Main No. 22/2016: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888040 [5]-; Ramalho A, 'Beyond the Cover story – An Enquiry into the EU Competence to Introduce a Right for press Publishers,' (2017) IIC (no current or likely future obstancle to cross-border trade, nor an appreciable distortion that could merit intervention).
[27] *Explanatory Memorandum*, p 3; proposed Directive, recital 31.
[28] van Eechoud, M. (2017) 11.

of the new right). In fact, it is widely recognised that there are two reasons for the decline in newspaper revues: changes in advertising practice associated with the Internet (but not especially related to digital use of new material on the Internet); and the decline in subscriptions, which may be in part related to the decision of press publishers to make their products available on the Internet. These are simply changes in the newspaper market that have little, if anything, to do with the supposed « unethical » free riding of other internet operators. In fact, as is frequently pointed out, these Internet operators, particularly search engines, but also news aggregators, often drive readers to the online editions hosted on press publishers' websites. Thus when Google News pulled out of Spain, traffic to Spanish newspapers declined, with studies suggesting by between 6 and 30%.[29] Another study in Germany found that the opt-in policy adopted by the German edition of Google News in October 2014 reduced by 7% the number of visits of the outlets controlled by the publisher Axel Springer.[30]

Given that absence of a press publishers right has not caused this change, the critiques argue that it is far from obvious how the introduction of the proposed right could halt the decline.[31] Moreover, experience with versions of right in the two national jurisdictions, Germany and Spain, have not provided evidence of significant additional remuneration streams for press publishers.[32] When many of these criticisms were written, there had been no licensing or remunerations established under either regime. (In section 3.4, below, we try to assess whether the situation has changed over the last few months).

Furthermore, the critiques do not see much prospect of **Article 11** doing any better than these two national prototypes. In fact, the way the rights are formulated suggests to some that they will confer no more substantive protection on press publishers than they already possess. This is because under the proposed Article 11, as noted, press publishers are to be given a right of reproduction and a right of making available. These rights apply to 'any part' of the subject matter. Recital 33 states 'this protection does not extend to acts of hyperlinking which do not constitute communication to the public.' Article 11(3) indicates that the exceptions and other provisions of the InfoSoc Directive apply to the related right. In so far as the rights are identical to those under the Information Society Directive, 2001/29/EC, the critiques observe that they cannot improve the position of press publishers. This is because most press publishers own or have exclusive rights in the majority of the material they publish. In so far as they are suffering financially even though they have such rights, it is not obvious how adding more rights of the same scope and depth, can help.[33]

This leads to the suspicion that the proposed right is in fact intended to be stronger than conventional copyright. Catalunyan copyright professor, Raquel Xalabarder, was driven to this conclusion:

[29] Athey, S., Mobius M., and Pal, J. (2017), The Impact of News Aggregators on Internet News Consumption: The Case of Localization Stanford Business School Working Paper No. 3353 (Shutdown of Google News in Spain reduced page views by 10%. This decrease is concentrated around small publishers while large publishers do not see significant changes in their overall traffic); Calzada and Gil (2016), What Do News Aggregators Do? Evidence from Google News in Spain and Germany, (Shutdown of Google News in Spain decreased the number of daily visits to Spanish news outlets by 11%.) NERA Economic Consulting (2015) reported 30% traffic decreases to some sites: Impacto del Nuevo Artículo 32.2 de la Ley de Propiedad Intelectual Informe para la Asociación Española de Editoriales de Publicaciones Periódicas (AEEPP), http://www.aeepp.com/pdf/InformeNera.pdf

[30] Calzada J. and Gil R (2016), What Do News Aggregators Do? Evidence from Google News in Spain and Germany, Universitat de Barcelona and John Hopkins Carey Business School Working Paper: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2837553

[31] Indeed, it is not as if, in the absence of such a right, newspapers have been unable to negotiate deals with online service providers. Given the increasing numbers of users who access news through social media, it is notable that Facebook already has arrangements with press publishers: Impact Assessment, Vol 3, 193-197.

[32] Xalabarder and Gruenberger at CIPIL-IViR (2016); Xalabarder, CREATe, pp 16 ff; van Eechoud, 47; 37 Profs, p 5; European Policy Centre (2017), 6-8.

[33] CEIPI 14-15; 37 Profs, p. 5.

> "So, let's be honest: we are not only granting a new related right to the press publisher, we're stating that regardless of the European Court of Justice rulings, search engines, news aggregators, and anyone in social media making a link to available contents should acquire a copyright licence and a related rights licence to link to those contents.'[34]

If the rights are stronger, then a whole new set of objections arise, many relating to freedom of expression. It is on the basis of this assumption that **Article 11** has been caught up in the "Save the Link" campaign.[35]

2. What would be the Costs of a new right?

Even if the new right might improve the financial position of press publishers, critics argue that it would come at a cost, and consideration needs to be given to whether those costs are justified by any potential benefits. One representative of press clippings services has noted that the Spanish law has created "considerable collateral damage to all sectors", and fears the same would be true of an EU wide right.[36] Little effort seems to have been made by the proponents of the right to detail such costs, but the critiques identify a number of different sorts. The European Policy Centre (an independent, not for profit, think-tank) concluded that "[t]he German and Spanish experiences demonstrated that the negative consequences of new neighbouring rights go beyond purely economic considerations."[37]

Recall that, if adopted, the new right will sit alongside three rights already recognised under EU law: copyright in creative material (articles, photographs, illustrations), copyright in newspapers as databases, and the sui generis database right; as well as a number of rights recognised by some EU countries (but not harmonized), including copyright in newspapers as collective works, related rights in non-original photographs, related rights in typographical arrangement of published editions.[38] This kind of layering of rights creates problems. As the European Copyright Society explained:

> "As a general principle, multiple layers of rights should be avoided for at least three reasons:
>
> (1) they increase transaction costs by generating uncertainties and complexities in rights negotiations and clearance;
>
> (2) they create confusion for users with respect to limitations and exceptions, in particular if these are not aligned between neighbouring and authors' rights;
>
> (3) they have distributional consequences that are difficult to foresee. For example, they may diminish the revenues available for each category of right holder, as the same revenues from exploitation will be split in different ways (and the pie may not get bigger). We can be certain that a neighbouring right for publishers will affect the income of authors."[39]

Explaining the transaction costs associated with dealing with the new right, one critical commentary observed:

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[34] Xalabarder 16.
[35] IGEL.
[36] Cristophe Dickès, 'Mr Smith, Google and the EC,' https://www.linkedin.com/pulse/mr-smith-google-ec-christophe-dick%C3%A8s
[37] European Policy Centre, 'Discussion Paper: Rewarding Quality Journalism or Distorting the Single Market?' (May 29, 2017).
[38] CEIPI, 8-9 argues that even were adopted, Member states could still develop yet other rights for press publishers. Indeed, it is not obvious that the Spanish would not be able to retain their press publisher remuneration right.
[39] ECS: Kretschmer et al [2016] EIPR 591, 593. See also 37 Profs, 3 (and noting that given the definitional uncertainties, many operators with no interest in the right will bear additional transaction costs).

> 'The most obvious of these are costs to those who wish to exploit material over which multiple rights might exist. These costs are those involved in identifying and negotiating licences from all rightholders (obtaining permission from only some will not suffice). Multiple rights are associated with clogging and opportunistic behaviour (hold outs) – what Michael Heller called 'the gridlock economy'. Moreover, even were the new right regarded, as the Proposal supposes, as a simplifying measure (simplifying the variations in rules and practices of assigning rights in works and other subject matter contained in press publications), there are nevertheless transaction costs involved in modifying agreements and standard forms to ensure they encompass licences of the new rights. These costs will need to be incurred by the very many operators who have no interest in the right, but fall within the broad definition, who will need henceforth to amend even open-access licences and Creative Commons licences to permit reuses.'[40]

A related set of costs flow from uncertainty around the definition of the subject matter of the press publishers' right. 'Press publishers' are defined in **Article 2** of the proposal. The definition has been heavily criticised.[41] One concern is that it is both complex and vague. Another that it is extremely broad and captures much more than seems intended by the goals outlined in the proposal. In fact, strangely, given the supposed goal of protecting investment, proof of investment (let along 'substantial investment') is not required to establish the right.[42] As a result, one critique suggests it will cover not just daily and weekly newspapers

> "a football fanzine, an auction catalogue…the *IPKat* blog…a multi-edition cases and material book, a research centre website, *Who's Who ?*,…the *Rough Guide to Peru*."

The point is made that protection of these materials has nothing to do with maintaining a 'pluralist press', which is the emotional hook for the proposal. But the real objection to the breadth of the definition, is that it creates uncertainty, and will imposes unnecessary transaction costs.

Another concern is that it is necessary to have a clear definition of subject matter, in order to understand when rights will be infringed. What is a 'part' of a 'press publication' depends on what counts as a press publication. Indeed, the Court of Justice of the EU has linked the scope of rights to the conditions of protection.[43] The objection then is that without a clear definition of subject matter, it is impossible to know when the new ancillary right will be infringed. If protection is afforded to a "collection", it seems unlikely that protection would extend to a snippet from a particular article.[44] Perhaps the CJEU would interpret the application of Article 2 of the Information Society Directive to the subject matter and hold there was only infringement by reproducing 'a part' of a press publication where the use damaged the investment therein. But, as written, it is impossible to know, and many critics argue that the new right might in practice protect tiny fragments from press publications.

Other critiques worry about the costs to innovation. If the right were effective to require licensing and remuneration to flow from all search engines and aggregation services that extract segments from or link too online news websites (and the enormous other sets of materials that might be caught by the vague terms of Article 2) the effect would be to add additional entry costs for new entrants into those markets. In turn, it cements the position of incumbents and reduces incentives to innovate. We return to this criticism in relation to the results of our interviews in Spain and Germany.

3. Potential Damage to Authors

[40] 37 profs, 3.
[41] van Eechoud, M (2017) 33 ff; 37 Profs, Appendix; CEIPI, 3.
[42] Höppner (2017b) notes that this is true of related rights in phonograms, broadcasts and fixations of films. But, of course, it is a requirement for sui generis database right under Directive 96/9/EC, art 7(1).
[43] *Infopaq*, Case C-508, ECLI:EU:C:2009:465.
[44] 37 Profs, 5.

A related criticism is that, despite the language of proposed **Article 11(2)**, the proposed right will in fact be detrimental to authors.[45] One argument is that this is a consequence of how the rights interact; another that this is a necessary consequence of adding new claimants from a single 'pie.'[46] The Strasbourg Intellectual Property Centre, CEIPI makes the point well: "the grant of rights to ever more actors will decrease the economic value of each right covering essentially the same economic use."[47] It notes that while the Impact assessment denies any prejudice to "the rights of authors, it turns a blind eye to any impact of the reform on authors' revenues.'[48] Probably in recognition of this potential impact, a number of proposed JURI amendments to Article 11 would require a fair share of benefits flowing from the right to be conferred on journalists and other rightholders. Similar amendments have been urged by the Committee on Industry, Research and Energy and the Committee on Culture and Education.[49]

4. Will the Proposal Make it easier for publishers to conclude licences and enforce rights?

The second reason the Commission offers for the introduction of **Article 11** is that it is necessary to simplify licensing and enforcement. Because press publications comprise works (literary articles, photographs, cartoons, crossword puzzles) created by third parties, their ability to enforce and license rights in those works is said to depend on organising the transfer of copyright or rights of use. Given the number of items, this is an administratively costly and complex process. The Impact Assessment offers an example of one German publisher having to provide 22,000 contracts with journalists in order to file a law suit.[50] To bring an action against someone illegitimately using material from the publication requires them to act quickly and that requires them to retain a perfect paper-trail. The introduction of a new right in publications, it is argued by the Commission, will relieve the press publishers of those problems.

No one challenges the idea that press publishers will find life easier if they were granted the proposed right. However, the critiques question whether a new right is necessary to achieve this. Some would point to the fact that in some cases the benefit of the copyright of works created by employees vests automatically with the employer, and that contractual practices with freelance journalists and photojournalists are often well-established.[51] Others acknowledge the complexities but point to less intrusive, more proportionate, alternatives. Taking inspiration from Article 5 of Directive 2004/48/EC on the Enforcement of intellectual Property rights, they suggest an alternative approach: a presumption of ownership.[52]

The idea is to introduce a presumption that a newspaper proprietor has relevant rights in the copyright-protected content.[53] This would save a publisher from having to demonstrate it had contractual transfers or use rights in respect of each and every article. On its face, this would neatly answer the second aim of making licensing and enforcement easier. As we will see, this idea has been taken up by the draft report for JURI.

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[45] CEIPI, 2, 12; van Eechoud 35 ff; 37 Profs, p 6.
[46] Xalabarder, 14 (Xalabarder argues that irrespective of Article 11(3) "The minute that you accumulate two exclusive rights, one gives way; and its usually the right of the author that gives way.")
[47] CEIPI, 11.
[48] CEIPI, 12.
[49] ITRE Amendment 46 and CULT Amendment 75.
[50] Impact Assessment, Vol 1, 166 ; Franceschini, L (2016) , Elaboration d'un droit voisin pour les éditeurs de presse, at http://www.culturecommunication.gouv.fr/Documentation/Rapports/Rapport-de-la-mission-de-reflexion-sur-la-creation-d-un-droit-voisin-pour-les-editeurs-de-presse. One might wonder whether the problem raised by this example is not really one of (German) legal procedure.
[51] It is perhaps true that the idea of the right originated in Germany because the problems are different in Germany. In particular, as we explain in the second part of the study, German and Austrian law take the unique view that authors cannot assign their copyright, but only give grants of use.
[52] 37 Profs 2; van Eechoud, 50.
[53] 37 Profs 2; van Eechoud, 50.

5. Is it Right to Give Press Publishers the new right? The Analogy with Related Rights.

Some press publishers argue that as a matter of principle, a new publishers' right should be recognised. After all, they argue, such rights already exist for phonogram producers and broadcasters, and all those actors do is invest in the development and bring together of material for public consumption. Publishers, it is said, should be given equality of treatment.[54] News broadcasters are effectively protected (also by rights in fixations of films), should news print publishers also be? In the impact assessment, the Commission seems to accept such arguments.[55]

A number of academic critiques find the analogy unconvincing. It is one thing to accept that neighbouring rights have often been developed as mechanisms to protect (and incentivise) investment, but quite another to argue that all investment in cultural production or distribution warrants its own neighbouring right. Once it is appreciated that there are plenty of investments that are unprotected, the more pertinent question becomes when do we think it appropriate to protect investment with a neighbouring right?[56] One answer might be where the investor has no protection. However, as Professor Raquel Xalabarder observes, publishers traditionally do have protection:

> "Of course, the investment and the organisational and financial contribution that a producer of a phonogram or the producer of an audio-visual work makes is very different from the one that a publisher is making, even a news publisher. In very many cases, either through employment contracts, collective work structures or works made for hire, the press publishers already own all the authors' copyright from the very beginning, So the contexts are very different.'[57]

Peukert likewise notes that the position of publishers is different because:

> "all relevant investments by press publishers in the production and presentation of journalistic content on the Internet is already effectively and adequately protected under existing copyright laws."[58]

Perhaps more significantly, critics argue, this plea for a publishers' neighbouring right has been made – and heeded - before. In the early 1990s publishers sought a neighbouring right of their own. And they were successful. The EU passed Directive 96/9/EC on the legal protection of databases, creating the so-called 'sui generis' database right to protect investment in collection, verification and presentation of items in a database. The concept of a database encompasses any collection of material where the materials are organised systematically and methodically and are individually accessible. This is a publishers' right.[59] Every 'press publication' is, in fact, already protected as a database both by copyright and by the sui generis database right.[60] Protection granted to the database right is strong.[61] In fact, it is not clear why publishers are dissatisfied with its operation.[62]

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[54] European Publishers Council, 'Publisher's Right in a Digital Age' (2016).
[55] Impact assessment, Vol 1, 159, 162.
[56] Pihlajarinne, T., & Vesela, J., 'Proposed Right of Press Publishers: A Workable Solution?,' (2017) JIPLP forthcoming (noting that if the proposed right is accepted, it will potentially encourage other aspirants).
[57] Xalabarder (2016) 8. See also ECS Opinion: Kretschmer et al (2016) EIPR 591, 593 (doubting analogy and highlighting differences between investments of publishers and other holders of neighbouring rights).
[58] Peukert, 5, 8.
[59] 37 profs, 3.
[60] Peukert, 5 ('Publishers of online news portals furthermore benefit from the sui generis database right.') In fact, Peukert argues that despite recital 4 and Article 1(2) of the proposed Directive, the effect of Article 11 is to create a potential conflict with sui generis database right (which explicitly does not cover rights to consult databases).
[61] van Eechoud 31 ff. The calls for a new right may be an overreaction to the *Fixtures Marketing* cases from 2004, as these were widely viewed as depleting the right of much of its potential.
[62] The European Commission is currently consulting on reform of the Database Directive.

6. If the Ancillary Right is Broader than Copyright: The Effects on Freedom of Expression

Many of the critiques highlight the conflict between the proposed right and fundamental freedoms, in particular, freedom of expression.[63] These problems seem particularly pronounced if the rights extend, as a matter not just of form but the precise manner in which they apply, beyond those that already exist. We return to this question below when we discuss the question of whether hyperlinking is affected by this proposal and the so-called 'save the link' campaign.

Against a background of the right to freedom of expression, the question arises what "pressing social need" the ancillary right seeks to serve, what alternatives there are to the right and thus its proportionality.[64] Academics are sceptical that there is a need for this particular intervention, and, as already mentioned, note the alternatives (copyright, sui generis database right, unfair competition law), in particular the potential offered by the introduction of a presumption of ownership to ameliorate the most obvious problem.

Relatedly, there has been little attempt to explain the choice of a 20 year term, and some suggestion that this is disproportionate.[65] Indeed, the French research centre, CEIPI, says "Given the short commercial cycle under consideration, the proposed 20 years of protection is certainly way too long."

3.3. European Parliament Committee Amendments

Article 11 has already been considered by three committees in the European Parliament:

(i) By CULT, which proposed 10 amendments;

(ii) By ITRE, which proposed 8 amendments;

(iii) By IMCO, which proposed 6 amendments.

The report of IMCO (Catherine Stihler) was very critical of the proposal.

> "The Rapporteur believes that the introduction of a press publishers right under Article 11 lacks sufficient justification. It is true that publishers may face challenges when enforcing licensed copyrights, but this issue should be addressed via an enforcement regulation. Simple changes made to Article 5 of the Enforcement Directive 2004/48/EC, making it also applicable to press publishers, will provide the necessary and appropriate means to solve this matter. The Rapporteur believes that there is no need to create a new right as publishers have the full right to opt-out of the ecosystem any time using simple technical means. The Rapporteur is also concerned as to what effect the creation of this new right could have on the market, it is very likely that the addition of this right will add another layer of complexity to licensing deals. There is also no guarantee provided that any rise in publisher remuneration would flow through to authors. There are potentially more effective ways of promoting high-quality journalism and publishing via tax incentives instead of adding an additional layer of copyright legislation."[66]

[63] Peukert 10 ; van Eechoud (2017); Pihlajarinne, T., & Vesela, J (2017, forthconming).
[64] Danbury R (2016b): van Eechoud (2017).
[65] van Eechoud (2017) 24.
[66] IMCO, Draft Opinion (Feb 20, 2017), Amendments 20-22, 4.

However, the amendments suggested by IMCO in its final opinion seem to reveal a division within that Committee (which clearly did not follow the draft, which had proposed deleting Article 11 altogether),[67] with a few amendments seeming to attempt to strengthen the right, while other amendments would delete the definition of press publication and the retrospective application of the provision to existing press publications. The Opinions of CULT and ITRE seem largely in favour of expanding the right so it encompasses print as well as digital uses, though both also propose an obligation on press publishers to share any remuneration gained by virtue of the new right with contributors.

Table 1: Amendments by Committee

	IMCO	ITRE	CULT
Recital 31	Am 17 (referencing news aggregators and search engines)		Am 23 (referencing news aggregators and search engines)
Recital 32	Am 18 (extending to print uses)		Am 24 (extending to print uses)
Recital 33	Am 19 (clarify exclusion of hyperlinking)	Am 17 (extending to journals)	Am 25 (limiting it to professional journalism)
	(Excluding hyperlinking)		Am 25 (hyperlinking)
33a		Am 18 (excluding not for profit links)	
Recital 34	Am 20 (Extend to rental, lending and distribution)	Am 19 (not just digital uses)	Am 26 (not just digital)
		Am 19 (specifies news aggregators)	Am 26 (exclude individual uses)
			Am 26 (search engines)
Recital 35		Am 20 (ensure fair return for journalists)	Am 27 (fair share)
Article 2(1)(4)	Am 38 (deleting definition)		
Art 11 Title		Am 43 (not just digital uses)	Am 71 (not just digital)
Art 11(1)		Am 44 (not just digital uses)	Am 72
			Am 73 (legitimate private and non-commercial uses)

[67] Opinion (IMCO), 61. The justification offered in the draft IMCO report was that 'This issue should be addressed by an enforcement regulation. Changes made to the Enforcement Directive 2004/48/EC will provide the necessary and appropriate means to solve this matter.'

Art 11(2)			
		Am 45 (hyperlinking)	
Art 11(4)			Am 74 (reduce to 8 years)
Art 11 (4a)		Am 46 (fair share)	Am 75 (fair share)
Art 18	Am 78 (removing application to existing publications)		

The Draft Report for JURI

Like the draft report of IMCO, that prepared for JURI is critical of the Commission proposal on **Article 11**, and proposes a different solution. The draft acknowledges the difficulties facing press publishers:

> "Press publishers face challenges with the digitalisation of business and consumer habits. Digitalisation makes it easier for the contents of press publications to be copied or reused…. The plurality of news and opinions, and wide access to those news and opinions, is important for public debate in a modern democratic society."

However, the draft also recognises the important innovative potential that digitisation presents:

> "Digitalisation also facilitates access to news and press by providing users with a referencing or indexing system for a wide range of sources. Both processes need to be recognised as separate."

The rapporteur emphasises the need for proportionality when reconciling these two sets of interest:

> "Copyright solutions need to be focused and clearly assessed as to their necessity, adequacy and proportionality. These solutions affect not only the rightholders, but all stakeholders who come into contact with the copyright held by rightholders."

The solution the draft report envisages is not a new right, but instead a presumption of ownership. As the problem facing press publishers has been identified as the complexity of entering licensing and enforcement arrangements, the solution should be one which addresses the problem and creates a minimum of knock on effects:

> "Press publishers depend on the enforcement of their derivative rights to protect the investment made in their publication. Measures are needed to strengthen the enforcement position of press publishers, but those measures must not disrupt other industries. Press publishers are thus given the right to bring, in their own name, court proceedings over infringements of the rights of authors of the works contained in their press publication and also to be presumed that they represent the rightholders of those who contribute works to their press publication. This measure is necessary, adequate and proportionate, as it strengthens the rights already held by press

> publishers, and improves their standing when dealing with others making use of their content and thus fosters the value of those rights."[68]

As a result, the draft report contains nine proposed amendments, of which **Amendment 52** is the most important. It states:

> "Member States shall provide publishers of press publications with a presumption of representation of authors of literary works contained in those publications and the legal capacity to sue in their own name when defending the rights of such authors for the digital use of their press publications."

Amendment 53, by way of a new Article 11(1a) would clarify that the presumption does not apply in criminal proceedings. Amendments 54 and 55 would delete Articles 11(3) and (4). Amendment 72 would amend Article 18(2) to provide that the new presumption only applies to press publications published 12 months after the Directive comes into operation. Amendment 17 and 18 would effect a corresponding change to Recitals 31 and 32 while Amendment 20 would delete recital 34 (which becomes otiose).[69]

The draft report explains:

> "It is important that the challenges press publishers face in enforcing the derivative rights upon which they depend to protect the investment made in their publication are addressed in a manner that strengthens the position of press publishers, but does not disrupt other industries.
>
> Press publishers are thus given the right to bring proceedings in their own name before tribunals against infringers of the rights held by the authors of the works contained in their press publication and to be presumed to have representation over the works contributed to the press publication."[70]

The JURI Amendments

126 amendments have been tabled by JURI Members that bear on the proposal (and corresponding recitals).

Support or Against?

The amendments tabled by various members of the European Parliament reflect the controversial nature of the proposal. **On the one hand the most numerous amendments would delete the proposal altogethe**r,[71] while a few seek to modify its effect, as suggested in the JURI draft Report.[72] There are others that would seek to allow a press publishers' right as an option for Member States (harmonizing only the form of the right if adopted).[73] On the other hand, there are a number of attempts to broaden the proposal.

Scope and Definition

The amendments proposed in the draft report do not deal with any of the criticisms as to the uncertainty surrounding the field of application (the definition of press publication in **Article 2(4)**). Nor indeed, do the amendments so far tabled in JURI. While Amendments 518-522

[68] JURI, Draft Report (March 10, 2017), 52.
[69] Recital 19 would amend recital 33 by adding that "This protection does not extend to acts of computation referencing or indexing systems such as hyperlinking."
[70] JURI, Draft Report, (March 10, 2017), 38.
[71] JURI tabled amendments 631, 732, 733, 734, 735, 736; 743, 744, 745, 765, 766, 767, 771, 772, 773, 774, 777, 778, 779, 780. There are corresponding Amendments deleting recitals.
[72] JURI tabled amendments 749 and 754.
[73] JURI tabled amendments 299, 334, 348.

would simply delete the definition in Article 2(4), only amendment 523 deals with definition, adding a condition that the collection must be of literary works "produced by one or several authors." Presumably this is intended to clarify that a single authored publication, such as a personal blog, *is* covered by the right. A further proposed amendment would extend the benefit of the right to 'press agencies'.[74] Other amendments are proposed that delete the exclusion of scholarly journals from the definition of press publication, often by deleting the single word 'not' from recital 33 of the Proposal.[75] One variant is to narrow the exclusion in recital 33 to periodicals which are strictly for scientific, academic or non-commercial purposes (Amendment 317).

Rights Definition

A number of proposed JURI Amendments relate to the definition of the right.

Some amendments would broaden the proposed target and cover print uses as well as digital ones.[76] The reason offered for this is 'equality of treatment' – avoiding signalling that a 'print edition does not merit the same level of protection.' In a similar vein, a few amendments would confer other rights on press publishers, including rental, lending and distribution.[77] The justification offered is equal treatment with related rights holders.[78]

Some amendments recognise the problem of market power, and seek to ensure that the press publishers' claim is not rendered ineffective as a result of the market power of particular operators. For example, one idea is to supplement the rights in Article 11 with an unwaivable right to equitable remuneration.[79] More elaborate still is the scheme proposed in amendments 762-4, (seemingly inspired by the Spanish law), which would allow specified uses by search engines, subject to payment of compensation to rightholders including press publishers to be exercised through collecting societies.

Other proposed amendments relate to questions of private use and hyperlinking, and largely seek to ensure that the new right does not affect the routine acts of the general populace. Some of these are targeted at Articles,[80] others at the notorious clause 33.[81] Another amendment would, it seems, exclude the use of the quotation exception, except in a purely private and non-commercial context (though its precise meaning is unclear).[82]

Term

Perhaps surprisingly, only three Amendments relate to term. Amendment 781 and 783 propose the term be reset at 15 years; Amendment 782 that it be increased to 30 years.

Fair share

A number of amendments seek to ensure that journalists will obtain a "fair share" on revenues accruing to the press publishers as a result of the new right. One would require

[74] JURI tabled amendment 753, and corresponding amendments to the recitals 31,32, 34 and 35 – being JURI tabled amendments 284, 300, 331 and 347.
[75] ITRE Amendment 17 ; JURI tabled Amendments 313, 314, 315, 319, 321.
[76] JURI tabled amendments 737-42, 755-8, and corresponding amendments to recitals 32 (Am 301-306) and 34 (JURI tabled amendments 331-3, 335-337). See also IMCO 18, 43, 44 and CULT 24, 71, 72.
[77] JURI tabled amendments 748, 750 and 752 to Article 11(1) and 331, 333, 335 to recital 34.
[78] Yet none of the proposals suggest adding the Art 8 communication to the public right from, Directive 2006/115/EEC, or other rights (Arts 6, 7) from Directive 2001/29/EC.
[79] JURI tabled amendments 746, 748 (amending Art 11(1); amendment 761 (proposing new article 11(1a).
[80] JURI tabled amendments 759, 770, 785.
[81] JURI tabled amendments 312; 320 322, Am 316, Amendment 318.
[82] JURI tabled amendment 331 (amending recital 34 by adding that "Short extracts of copyrighted press publications constitute reproduction given their economic value. Their unauthorised use should therefore be prohibited unless they are being used in a private and non-commercial context." Confusingly, the next sentence which permits quotation in accordance with Article 5(3)(d) is left intact.

Member states to ensure that a fair share is attributed "to journalists and other employees,"[83] while the other requires Member states to ensure that "journalists authors and other rightholders" have a fair share.[84] CULT Amendments 27 and 75, suggest this should be optional for Member States.

3.4. How is the System Operating in Germany and Spain?

The aim of the empirical part of this study was to establish a better picture of the workings of similar existing press publishers' rights in **Germany and Spain**. The debate about the proposed EU right has been dominated by quite entrenched lobby positions. It was therefore important to reach the editorial teams of the online editions of the quality press in Germany and Spain to access a less filtered view of what is happing in the digital markets for press publishing. It was also important to evaluate licences that had been concluded under the new ancillary right in Germany (§§87f-h UrhG, 2013, Presseleistungsschutzrecht, in force since 1 August 2013) and the new mandatory equitable remuneration relating to the quotation exception in Spain (amendment to quotation right Art.32.2 TRLPI, 2014, in force since 1 January 2015).

Within the time constraints of this study, it was decided (1) to seek interviews with the editorial leads of the top 7 most visited online quality news services, both in Germany and Spain, and (2) to interview the collective management organisations (CMOs) in Germany and Spain that are negotiating licences and collecting and distributing fees for the new ancillary rights.

An interview protocol was devised that focused (for the online editors) on the challenges affecting the business of press publishing and on their views on the operation of the current ancillary right in their country. For the CMOs, the interview protocol focused on the licences that have been under negotiation or concluded (The interview protocols can be found in the Appendix to this Report.)

The interview transcriptions from this sample were supplemented with contextual interviews of informed sources and information that was on public record.

A number of publishers and the Spanish CMO refused to be interviewed, and it is notable that some cited differences of view between the online editions of the quality press and their mother publications as a reason for their reluctance to go on record. This is clearly a highly politicised issue. Still there is considerable agreement about the picture that is emerging. We consider the findings to be robust. In total 8 interviews with 9 interviewees were conducted. In Germany, these included the relevant collective management organisation, VG Media, and 2 major publishers. In Spain these included a major publisher, 3 smaller newspaper (one with regional target readers, and two young digital newspapers), 1 news aggregator, and 1 multimedia communications group. A table documenting the sample selection is attached as an Appendix.

[83] JURI tabled amendment747 to Article 11(1).
[84] JURI tabled amendment 784 introducing Article 11(4a); with parallel Amendment 346 to **recital 35**. See also ITRE Amendment 20, though narrower in Amendment 46 (introducing new Art 11(4a) and referring only to journalists.)

3.4.1. Findings

The business of news publishing is highly dynamic

All interviewees agreed that we are living through a time of dramatic changes to the news business. There is a widespread decline in print circulation and a shift in advertising revenue to search and social media (in Spain they appear to account for 80% of the advertisement market). Online editions typically have wider reach than the print editions but much lower profitability.

The source of readers continues to shift. For the quality press, most readers come directly to their home page (including visits via the official App). Smaller players rely more on traffic directed by third parties. The numbers provided by the interviewees match the #trafficleaks disclosures by the German speaking online press on Twitter in September/October 2016.[85] Roughly, up to two thirds of visitors come directly, the rest is spilt between Google and social media.[86]

Smaller (online only) publishers (such as Vozpópuli.com) are relying more on search engines (Google) and links from aggregators (such as Flipboard, Reddit and Menéame). Even for the established press, visits from social media, mostly from Facebook, are increasing dramatically, and direct visits are declining. Since this is a choice of the algorithms of very few companies, it puts considerable power in their hands. New sources of traffic are also private social networks (such as Whatsapp, Messenger, Telegram), mobile news platforms (such as Apple News or Google Cards) and mobile "personal assistants" (such as Amazon's Alexa, Apple's Siri and Google's Assistant). In general, more than 50% of traffic now appears to come from mobile devices.

There is considerable innovation in the industry. It is difficult to place advertising on a mobile. Micro payment models such as Flattr or "paylater" have not caught on (yet), but there are profitable publications emerging nobody would have anticipated, such as Politico or Quartz.

There is also changing reading behaviour. One expert put it in the following way:

> "The sharing of news articles is rarely just a link. News aggregators or Google also feature the title and an excerpt of the text of the article. The problem is that if too much text of a piece of news is featured, people do not click on it because they have already read enough. Actually, there are many people who only read the title and the featured lines without visiting the newspaper to read more of it. For many people the information given in the title and the featured lines is already enough. This is another problem: people are getting used to read less and less, and they do not realize that they are not really informed."

A news aggregator interviewed gave a different context to the same phenomenon:

> "There is a study that says that an aggregator can either have a substitution effect (e.g. people entering do not visit the page of the newspaper), or an expansion effect (e.g. since a user read visits a piece of news on the aggregator, it follows the link to the page of the piece of news in the website of the newspaper). It could be observed in different analyses, including an analysis conducted internally, that the most common effect is the expansion effect. That means that the aggregator is generating

[85] See e.g. https://twitter.com/search?q=%23trafficleaks%20%23lsr&src=typd
[86] See example for ZEIT online: https://twitter.com/zeitonline/status/781779996473958401

> new traffic to their webpages. The aggregator is creating additional value for the newspapers."

Licences concluded under the ancillary right in Germany and Spain

Germany

Prof. Xalabarder sums up the market response to the introduction of the ancillary right in Germany as follows (Xalabarder 2016 CREATe/ 2017 EIPR):

> Publishers mandated their rights to [CMO] VG Media and set a fee of 6% of aggregators' gross revenues. Google refused to obtain the licence and – after failed arbitration proceedings – VG Media sued Google for abuse of right. Google requested opt-in to be indexed on Google News. Most publishers granted permission to Google for free, but the VG Media members refused and traffic to their websites went down. Shortly after, they also licensed Google … for free. VG Media and the press publishers sued Google for abuse of dominant position and anti-competitive conduct.
>
> These claims were denied both by the German Competition Authority and the Regional Court in Berlin based on the grounds that the opt-in request is justified in order to avoid liability, due to legal uncertainty regarding the linking activity, and that the deal offered by Google is a win-win for both parties since it enhances access to newspapers websites; most importantly, the court stated that the payment of a licence (as intended) would upset this balance. VG Media subsequently filed for a declaratory judgement that Google is infringing sec. 87f since the Google News platform is not covered by the "snippets" exempted from the ancillary right. The case is still pending.

Our interview with VG Media tried to put some details on this story. It was said that –

> VG Media does not assess the new ancillary right to be different than other rights the organisation is managing. At the moment, there are no precedents, therefore, it first needs to be decided what the exact scope of the new right is, which uses are covered and what needs to be remunerated. The next question would then be what remuneration is deemed reasonable. These are the two key questions: Is the use within the scope of the new law and what is an appropriate price.

VG Media currently administers the rights for about 200 digital press offerings.[87] There is a default tariff of 11% of the income derived by users from the commercial use of text snippets. In reality, 6% is charged because the press publications licensed via VG Media amount to about half of total audited circulation. ("Das Rechteportfolio wird auf der Grundlage der von der Informationsgesellschaft zur Feststellung der Verbreitung von Werbeträgern e.V. (IVW-Rubrik Online-Nutzungsdaten) erhobenen Reichweitenmessung berechnet.")

The total income from the ancillary right was reported in the interview as €714,540 (from 5 licences). The largest licence was from the online portal T-Online (http://www.t-online.de/), bought in 2015 by Ströer Media from Deutsche Telekom. According to news sources, VG Media income is currently reinvested into the ongoing litigation focussing on Google[88].

Of the top 7 online offerings of the quality press, only Die Welt (part of the Springer Group) have assigned their ancillary rights to VG Media, though, according to VG Media, "many

[87] https://www.vg-media.de/de/digitale-verlegerische-angebote/berechtigte-presseverleger.html
[88] https://www.golem.de/news/vg-media-jahresbericht-leistungsschutzrecht-bleibt-ein-verlustgeschaeft-1705-127665.html.

publishers are in a wait-and-see position and would become active as a response to positive court decisions". Since the tariff is derived from turn-over, licence fees for start-ups and small firms were characterised as "potentially small", with "introductory discounts" on offer.

In the interview, VG Media proposed as a possible improvement of the German law the introduction of mandatory collective licensing („Verwertungsgesellschaftspflicht"), as well as extended collective licensing enabling VG Media to negotiate on behalf of all press publishers ("Außenseiterregelung").

Spain

The Spanish ancillary right was adopted in 2014 and Art.32.2 TRLPI came into force on 1 January 2015. According to our interviews –

> "German consultants offered advice to Spain for the implementation of the law. Unlike in the German legislation, this team advised to impose a compulsory payment for all news aggregators and social media that link to Spanish newspapers. This means that press editors do not even have the freedom to choose the licence of their own content and give content to Google or other platforms for free".

Since a free licence (as in Germany) was not possible under the Spanish mandatory collective licence, Google decided to close the Google News service in Spain. "This negatively impacted Spanish media because as they disappeared from Google, their online presence and visitors also decreased. Consequently, Spanish media realized that the law was a mistake and began negotiations with Google." (Spanish major publisher)

The Google search engine remained operational, since linking to and displaying news contents available online remained permitted under the statutory exception. Still, studies reported significant traffic decreases to online news publications (between 6 and 30%, see note 28 above).

In Spain, the relevant CMO is Centro Español de Derechos Reprográficos (CEDRO) who did not agree to be interviewed. Although the law has been applicable since 2015, CEDRO only started to negotiate licence fees recently.

A controversial example, mentioned in several of our interviews, was a negotiation with a peer-aggregation website with an annual budget of some €100,000. CEDRO set a tariff of 5 € cents per "effective user" per year that was said to amount to a total licence fee of €2.4 million per year. This was confirmed by the CEO of Menéame who was interviewed for this study, and matches news reports.[89]

The CEO of an aggregator said –

> "Since 2014, the users of our service decided to boycot the press publishers that promoted the law on intellectual property of press publishers. Therefore, the main newspapers in Spain are not linked in our service because users are boycotting them. Nevertheless, we are asked to pay a licence which will compensate those newspapers. This is non-sense because we are not linking them. The newspapers linked by us, such

[89] See Bolsamania (2017). Menéame, amenazado con la 'tasa Google': CEDRO le pide 2,6 millones de euros al año. http://www.bolsamania.com/noticias/tecnologia/meneame-amenzado-con-la-tasa-google-cedro-le-pide-26-millones-de-euros-al-ano--2514734.html (Accessed on 31/08/2017); El Confidential (2017). https://www.elconfidencial.com/tecnologia/2017-02-07/canon-aede-meneame-internet-facebook-agregadores_1327333/ (Accessed on 31/08/2017).

> as *El Diario* or *El Español*, did not promote this law. This is paradoxical because part of the licence that we have to pay will end up in the bank account of newspapers that are not aggregated by us."

On 27 June 2017, it was announced that CEDRO had concluded its first licence under Art.32.2 TRLPI with the German platform "Upday".[90]

Upday is an aggregated news content platform that will be pre-installed on the new Galaxy S7 and S7 edge devices for customers in France, Germany, Poland and the UK. The content is aggregated (machine-enabled) and curated (human-enabled) based on the RSS feeds of publishers and pushes the traffic to the mobile or AMP websites of publishers. The press release of the Springer Group says:

> "The first full service to be borne out of a new strategic partnership formed by Axel Springer and Samsung Electronics last year, UPDAY provides users with two types of content: 'Need to Know' information, which is selected by a local market editorial team; and 'Want to Know' information, an algorithm-based service tailored to customers' individual interests."[91]

It has been claimed that the Springer Group thus appears both as a licensor and licensee on this agreement.[92]

3.4.2. Assessment of effects of the Publishers' Right

If there are new revenues, they will be a drop in the ocean

Several interviewees did see a strong, almost moral justification for compensation from aggregators. For example, a major Spanish publisher said: "News aggregators are making profit of the content that newspapers generate. Therefore, they should compensate newspapers."

But there were immediate doubts if the ancillary right could deliver this. For some interviewees, it had a more symbolic quality. According to a practitioner –

> "It is obvious that the Spanish law is also not the solution to the business challenges of the digital press. The money that press publishers will receive from news aggregators and social media will not solve the crisis of press publishers in Spain. However, these licences were not conceived to be an important revenue stream for press publishers. Their purpose is the protection of the content generated by journalists."

The Director of Communication from a major Spanish publisher continued –

> "The Spanish law on intellectual property for press publishers has not changed the situation for journalists at all. In my opinion, the challenges that digital press is facing should be regulated by the market itself rather than by legislators. The problem of

90 http://www.cedro.org/prensa/notas-de-prensa/nota-de-prensa/2017/06/27/upday (Accessed on 31/08/2017).
91 http://www.axelspringer.de/en/presse/Axel-Springer-and-Samsung-Launch-UPDAY-for-the-new-Galaxy-S7-and-S7-edge_26239882.html (Accessed on 31/08/2017).
92 Xnet (2017). Publishing Industry self-pays the Google Tax to itself in Spain to present the Link Tax idea is feasible. https://xnet-x.net/en/publishing-industry-pays-spanish-google-tax-to-endorse-eu-link-tax/ (Accessed on 31/08/2017).

> laws is that they will always be behind the development of society. Laws are, of course, necessary. For example, laws should protect the universal right of communication and access to information. Instead, protective laws for press publishers might not be necessary."

A German publication criticised the fixation on Google.

> "Everybody thinks the ancillary right is targeted at Google, but all newspapers are using news from other media that might fall under the right. If we take the ancillary right seriously, news publishers themselves who rely heavily on content produced by others (such as focus.de) will be affected."

The CEO of a Spanish news aggregator was convinced that small press publishers will not receive a significant compensation from CEDRO.

> "The activity of any press publisher, both small and major publishers, will not be influenced by such small contributions. I prefer receiving Internet traffic from aggregators and social media, rather that receiving that compensation. Moreover, from a purely quantitative perspective, if the money collected through licenses is divided among all Spanish media, each will receive a very small amount.
>
> The Spanish law will destroy the news ecosystem: The most important aggregators or social media will try to reach individual agreements with major newspapers. This leaves aside smaller players, such as small aggregators who cannot offer individual agreements, as well as small news publishers who are not interesting for big aggregators."

Even the more optimistic voices doubted that the ancillary right will help press publishers "to adapt to an environment in a state of constant flux" (*El País*, Leader 24 March 2017). The publishers' right appears to be "a legal and economic response to the technical behaviour of users that could change at any moment" (*German publisher*).

The ancillary right poses a threat to the nature of news communication

All online journalists we spoke to emphasized that the architecture of the web is built on links, quotations and snippets. There are numerous strong statements to this effect.
According to one editor-in-chief –

> "Paying for links is as absurd as paying for citations in the academic world would be. Citation is a well-established and common practice since centuries both in journalism and in academia. Of course, citations need to properly reference the author and the work. In online journalism, citations are not mere references to additional or more complete information, they also bring benefits for the cited organization or person. Therefore, it is ridiculous to ask for extra money for the person who cites."

In a similar vain, the deputy editor-in-chief of a German publisher said –

> "The principle of the ancillary right is non-sensical. The architecture of the Internet assumes that links indicate what is behind a link. It is inconceivable that requiring a licence can be good idea."

The editor-in-chief of another German publisher sees the ancillary right as an attempt to change the architecture of the Internet in order to address the dominance of one firm, without understanding the consequences.

> "The main issue is that with the introducing of a new ancillary right, far-reaching changes for the whole Internet are risked, and that to the benefit of a relatively small group of market participants (that are indeed under pressure). If one is of the opinion that Google has a monopoly, then this should be tackled via the relevant, existing laws. To argue that one must change the architecture of the Internet to tackle this, is like saying that we drain the sea to fight pirates. One might be able to fight pirates by this, but would also end up without the sea. Overall, the interest of the society are more important than the interests of the publishers. Law is too important to be used for such small tricks. Laws should manage the economy of authors, and possibly, publishers might need more rights to act as creators, but the proposed EU ancillary right seems to surpass this by a large degree."

The ancillary right poses a threat to innovation and new entry

The smaller publishers (who were not part of our core sample) were particularly concerned that the new right would create hurdles to innovation and new entry.

A Spanish online publication specialising in economic and financial news, information of companies and banking, and corruption, said:

> "In the initial debate, news aggregators were portrayed as our enemy; as those who are stealing part of our business. This is the opinion of the major and traditional newspapers. However, this is not the opinion of the new digital newspapers. We (the new digital newspapers) were born in a digital ecosystem, we need to be visible in the web. Therefore, we welcome everything that leads internet users to our content. We are pleased to be linked by *Menéame*, by other aggregators, and to have internet users that share our content in the web. The more of our content that is linked and shared, the better. To sum up, they wanted to make us think that aggregators and newspapers are confronted because of copyright issues, while in fact it is us who decide on the copyright of our content and what we want to share. We only need to make sure that we are properly referenced and that there is a link pointing to our content."

According to the CEO of a Spanish aggregator –

> "The main consequence of this law is that it will hamper the creation and success of new start-ups and existing small companies, therefore, eliminating new and small competitors of Google and Facebook at the same time that it impoverishes the creation of new communities of readers who share news in platforms such as Menéame.
>
> In case of not reaching an agreement with CEDRO, this might lead to shutting down our activity. Apart of the closing of Google News, there has been one start-up that closed and a couple of start-ups that decided not to open due to the legal uncertainty. Therefore, this law is also affecting the Spanish start-up landscape. It puts us in disadvantage to innovate and compete internationally, for example with Flipboard. It is obvious that the next innovative press-related online business will not be grounded in Europe with such a legislation."

Our sample included top 7 quality press publications by circulation in Germany and Spain. They should be in favour of the ancillary right (since the *Leistungsschutzrecht* was specifically designed to benefit them against firm such as Google). Even among this group, there was concern that start-ups will suffer, and that in effect the new right would contribute to maintain Google's dominance. One editor-in-chief said: "In its result, the new ancillary right is more a monopoly-maintaining-device for Google, while small competitors are disadvantaged. That is contrary to what was intended." An example given was the litigation of *Süddeutsche Zeitung* against start-up Ubermetrics.[93]

Another German publisher also pointed out that important innovations, such as personal home assistants (relying on voice recognition and machine learning), may not be covered by the ancillary right at all.

Legal standing and Licences concluded without ancillary right

Several interviewees stated anti-plagiarism as an important governing norm. Copying without attribution should not be tolerated, and all online news publications pay attention to tracking down such activities.

For example, a major publisher said: "We are conducting investigative journalism and a lot of what they publish is written by its team. Therefore, they have a sales department that is not only selling content, but also checking whether their content is being used without permission. They have suffered several cases of plagiarism."

Through the copyright subsisting in the works of the news publishers' journalists, there is already a basis for taking legal action in these circumstances.

There also appears to be sufficient clarity of ownership that news publishers can negotiate with platforms. Often they can achieve a favourable sharing of advertising revenues. *El País*, the number 1 online news publisher in Spain, wrote in its sceptical Leader of 24 March 2017[94]:

> "But anybody who thinks that those rights can be turned into a fortress from which to impose obligatory and inalienable fees is mistaken. This is a model that has been shown to fail in Germany, in 2013, and in Spain in 2014. Then, efforts to impose an obligatory fee on Google for the use of links to news stories provoked a major fall in web traffic for the Axel Springer group and the closure of Google News in Spain.
>
> Past experience and the present reality show that a way forward based on cooperation between the media and technology companies is required, rather than through confrontation. This is a way forward that newspapers such as EL PAÍS have already begun with Google, through projects such as the Digital News Initiative and AMP (Accelerated Mobile Pages), as well as with Facebook, through its Journalism Project. These initiatives show that technology companies increasingly understand the need and importance of an independent, free press, and concomitantly their responsibility when it comes to contributing to the distribution of factual and high-quality news.
>
> The media finds itself at a crucial moment in the construction of our presence in the digital world at a global level. We need freedom of action and flexibility if we are to adapt to an environment in a state of constant flux. This requires regulation that will help us to grow in terms of readers and income, not one that suffocates the process

[93] http://www.zeit.de/digital/internet/2016-07/leistungsschutzrecht-presseverleger-sueddeutsche-zeitung-ubermetrics-snippet-prozess
[94] https://elpais.com/elpais/2017/03/24/inenglish/1490355715_551697.html

> of digital transformation. The entire sector will benefit if agreement can be the basis for the future of the digital information ecosystem."

According to our interview sources, it is likely that the newspaper agreed with Facebook that pieces of news could be featured in the social network for a fee paid by the social network to *El País*. "This is perhaps a good financial solution for this press publisher, but not for all."

Finally, there was considerable support among the interviewees from the top 7 publications for creating more unified rules across the European Union, enable Europe-wide licences, and, in particular, clarify the legal standing of publishers.

One German publisher said –

> "In general, it is good that the EU tries to standardise regulation and to create a single market, e.g. by making it easier to license content cross-border, by tackling the issues of geo-blocking and so on. However, that does not mean that it is a good idea to implement every national law on EU level."

A positive future for European news publishing without the ancillary right certainly seemed feasible.

- A German publisher: „Within the publishing houses, the debate is conducted quite differently. While in our outlet, we can freely voice that we consider the ancillary copyright nonsense and that it goes against the nature of the Internet. In other publishing houses, it was said that there was some pressure to paint a more positive picture of the ancillary copyright. Overall, it seems that it would have been more sensible to have put the money that was invested in the VG Media into in-house innovation projects."
- A Spanish publisher "is optimistic that pay-per-content will be a viable option in the future. For example, nobody in Spain paid for music some years ago, while now people pay to Spotify. Another example is Netflix. Society will realise that although the price for culture and information is becoming cheaper, we still should pay for it."
- Another Spanish publisher reflected on other policy options: "Press publishers do not need additional intellectual property rights. As a legislative measure, it would be possible to decrease taxes of the digital press, which is 21% in Spain. The taxes paid in the printed press is only 4%. Since both have the same informative and cultural mission and activities, both should enjoy the same fiscal benefits."

3.5. Appraisal

The Study considers the criticisms and proposal Amendments in the light of this evidence.

3.5.1. Need and Proportionality

The first issue concerns the intended goals of **Article 11**. As we noted, the Commission refers to two goals: securing a sustainable press; and making it easier for publishers to conclude licences and enforce rights.[95]

We are doubtful that the proposed right will do much to secure a sustainable press. Once one understands the causes of the decline, one can immediately see that, however successful, a

[95] *Explanatory Memorandum*, p 3; proposed Directive, recital 31.

right targeted at aggregators is not likely to achieve much. It is certainly not necessary for publishing entities to enter deals to supply news to social media platforms, as with Facebook Articles.

We think the new right could assist in the process of concluding licences and enforcement in some member states. In most cases, the new right would be entirely unnecessary as the news publisher will have taken relevant copyright assignments or exclusive licences. However, in some countries and circumstances this might not have been possible. Moreover, even in those where it is likely that copyright will have been transferred, the new ancillary right might make matters easier, because the newspaper will no longer need to be able to establish a chain of title from the author of the work. Whether it is proportionate to introduce a new right to achieve this goal is, however, a different matter.

We agree with the draft JURI Report (and a number of academic commentaries) that this could be achieved through a presumption, such as that proposed in Amendment 52 of the Draft Report. On balance, we think that though the evidence does not support a new right, it does support the introduction of a presumption of this sort.

3.5.2. Journals

A number of amendments would broaden the **definition of press publisher so as to include journals**, including academic journals.[96] This move could have serious negative implications for open access policies. When a publishers' right was first mooted in the spring of 2016 (and before the draft proposal was issued by the Commission), 20 copyright scholars in the European Copyright Society issued a warning:

> "A recognition of a neighbouring right for publishers in the final edited layout of the journal might run counter to the open access strategy of the EU research policy and of the researchers themselves. Should a specific and exclusive right be granted to publishers, a contract authorising open access publication would be useless. Indeed publishers would be entitled to oppose any making available of the published versions of the articles, including in open access, irrespective of the contractual provision preserving that right of authors."

It might be said that this problem is avoided because Article 11(3) of the proposal confers an immunity on authors:

> 'Such rights may not be invoked against those authors and other rightholders…and…may not deprive them of their right to exploit their works and other subject-matter independently from the press publications in which they are incorporated.'

However, this authorial immunity does not offer protection to third party operators of repositories or other aggregators of open-source material. The point of open-access is not just to allow academics to post their papers on their own personal website: but to allow them to put the material in institutional repositories or on research networks (such as ResearchGate, SSRN, academia.edu, etc). There are real dangers then that extending the right to journals would undermine the operation of open access policies.

3.5.3. Digital or Print?

[96] This was not even called for by the European Publishers Council who in 2016 asked for the right to cover "all journalistic content." EPubC, 'Publishers' rights in the Digital Age,' 2.

If the Commission's Proposal is adopted, we understand the abstract attraction of **expanding it to cover print as well as digital uses**, and protecting these subject matters in the same way as with other related rights. As a matter of principle, it is usual to treat "like cases alike." Moreover, defining uses by reference to specific technologies has often been regarded as liable to lead to obsolescence (though that seems less likely with the term digital).

However, we see no concrete need to extend the new right in these ways. Bearing in mind that we are still very much at the experimental stage, with little experience of the two national laws, we would caution strongly against any such extension. Indeed, as this has not been part of the proposal, we also note that those who might be affected by such a broadening have likely not been engaged in the policy-making process. Finally, it is notable that in limiting the proposal to digital uses, the Commission was conscious that the competence to intervene depends on a need to remove obstacles to cross-border trade. In the case of print uses, it is not at all obvious what the cross-border aspects might be. Extending intervention in that way might well make the question of competence (doubted by some academics) all the more pressing.[97]

3.5.4. Snippets and Hyperlinks

Under the proposal, press publishers are to be given a **right of reproduction** and **a right of making available**. These rights apply to 'any part' of the subject matter. Recital 33 states 'this protection does not extend to acts of hyperlinking which do not constitute communication to the public.' **Article 11(3)** indicates that the exceptions and other provisions of the InfoSoc Directive apply to the related right.

Will the new Right Prevent the Reproduction of Snippets?

Whether the new right will implicate re-use of fragments of works depends on two matters: first, what is meant by a 'part'? And, second, what exceptions are available to a user?

As to the question of what is a part, this is usually assessed by reference to the subject matter of the right. In the case of regular copyright, works are protected if original, and there is only reproduction of a 'part' where the 'part' itself would be original (or shares in the originality of the whole).[98] In the context of sui generis database right, the question of whether a "substantial part" is taken is similarly linked to the threshold for acquiring database right, substantial investment. There is an extraction of a substantial part if that part represents a substantial part of the investment in the database.

In the case of the press publishers' right things are more difficult. Quite what that standard will be is unclear. As explained, there is no "investment" threshold in the proposed directive that conditions the level of what would count as a 'part,' Possibly, one will be inferred. Possibly, any fragment that is not *de minimis* will infringe. As a result, one commentator has argued that "anyone using the smallest bit of text, image or sound contained in a digital press publication would need prior permission from the publisher."[99] This is an extremely troubling conclusion, raising real questions of freedom of expression.

Even if the threshold of infringement were low, the effects might be reduced if there were broad exceptions. The most important concern "quotation" and whether reproduction of short excerpts might count as quotation.[100] One issue is that Member States may choose not to have a quotation exception at all. Article 5(3)(d) of Directive 2001/29/EC is presented as optional. While the quotation exception for copyright is better viewed as mandatory because

[97] Peukert, [5].
[98] *Infopaq*, Case C-508, ECLI:EU:C:2009:465.
[99] van Eechoud, 2017, 4.
[100] Ibid, 28-29.

of Berne, Article 10(1), this would not be so for the new ancillary right. This is because Berne has no application to the related right. Consequently, the right of quotation is no longer guaranteed and Member States may decide not to implement Article 5(3)(d) in relation to the new right. This presents the possibility that the new right *could* be very significantly stronger than the authors' right and that it will be subject to divergences from one Member State to another. It might be that fundamental rights, in particular Article 11 of the Charter, would come into play, but this would be on a case-by-case basis.[101]

The implications of Article 11 for the re-use of snippets are, in our opinion, extremely serious. If the right is adopted, those concerns would be reduced by (i) adding a clear threshold requirement of substantial investment to the circumstances in which press publishers' rights arise; and (ii) making the quotation exception in Article 5(3)(d) mandatory.

Hyperlinks: 'Save the Link'

Recital 33 states "This protection does not extend to hyperlinking which does not constitute communication to the public." The difficulty with concluding that hyperlinks are per se excluded is that the recital seems to be referencing the existing law (and offering a description of that law). But is it the law that hyperlinking is not communication (or making available)?[102] And will it remain so?

This argument in the light of the evolving CJEU case-law on hyperlinks. In 2014, the CJEU held that there is no communication to the public where a hyperlink is created to material that is already 'freely available on another website', unless that material was behind an access restriction.[103] The explanation is that while linking counts as "communication",[104] there is no violation of the communication to the public right because the hyperlink does not communicate the material to a new public.[105] However, in 2016, the CJEU revisited this holding, holding that if material has not been made available with the rightholder's consent,[106] hyperlinking to such material will be infringing where the linker knows about the status of the material.[107] The linker is presumed to know about the status of the material (and thus, if it fails to rebut the presumption, to be liable) where they operate commercially (i.e. for a profit), because commercial operators are expected to investigate the status of the material to which they link.[108] Persons who are not linking for profit, however, are not liable, absent knowledge of the status of the material.[109]

Presumably then, recital 33 now means that hyperlinking *is* covered by the ancillary right, where what is involved is hyperlinking to material that was not placed on the web with the

[101] CEIPI, 9.
[102] Xalabarder, CREATe, p 11, pp 15-16 (Pointing out that while the proposed recital 33 merely acknowledges that hyperlinks do not "communicate the work to the public", the matter has yet to be considered under the « making available right ».)
[103] *Svensson*, Case C-466/12, ECLI:EU:C:2014:76, [31].
[104] *Svensson*, Case C-466/12, ECLI:EU:C:2014:76, [30] ('the provision of clickable links to protected works must be considered to be 'making available' and, therefore, an 'act of communication',)
[105] *Svensson*, Case C-466/12, ECLI:EU:C:2014:76, [24]-[30] ('must also be directed at a new public, that is to say, at a public that was not taken into account by the copyright holders when they authorised the initial communication to the public,')
[106] In GS Media, Case C-160/15, ECLI:EU:C:2016:644 at [41] the CJEU explained that in *Svensson* "the Court intended to refer only to the posting of hyperlinks to works which have been made freely available on another website with the consent of the rightholder."
[107] *GS Media*, Case C-160/15, ECLI:EU:C:2016:644; *Stichting Brein v Wullems*, Case 527/15, ECLI:EU:C:2017:300.
[108] *GS Media*, [51] ('when the posting of hyperlinks is carried out for profit, it can be expected that the person who posted such a link carries out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead, so that it must be presumed that that posting has occurred with the full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder.')
[109] *GS Media*, Case C-160/15, ECLI:EU:C:2016:644, [47] 'does not pursue a profit, to take account of the fact that that person does not know and cannot reasonably know, that that work had been published on the internet without the consent of the copyright holder..'

rightholder's consent, at least where the hyperlinking is done by for profit. That conclusion (in itself) may be something that is regarded by policy-makers as entirely unproblematic, but it does mean that it is not possible to declare that the ancillary right has nothing to do with linking. Moreover, because the issue turns on the fast-moving (and increasingly convoluted) jurisprudence of the CJEU on communication to the public, no policy-maker can say with much confidence that the ancillary right will never implicate hyperlinking by individual users. To be certain of this (and thus to be sure to 'save the link'), one would need expressly to add an exception or limitation. It seems this is the goal of IMCO Amendment 19 (to recital 33), ITRE Amendment 18 (adding a new 33a) and Amendment 45 (adding Art 11(2a)) and CULT Amendment 25 (to recital 33) and 73.

CULT Amendment 25 seeks merely to clarify that the liability for hyperlinking will, indeed, vary with the mood-swings of the CJEU. It states "This protection does not extend to acts of hyperlinking where such acts do not constitute communication to the public under Directive 2001/29/EC." At the same time, CULT would add a new Article 11(1) stating "The rights referred to in paragraph 1 shall not prevent legitimate private and non-commercial use of press publications by individual users." Unfortunately, this introduces its own ambiguities, particularly the question of when a use is "legitimate" and "private".

IMCO Amendment 19 is the clearest: it states 'This protection does not extend to acts of a computation referencing or indexing system such as hyperlinking.' That seeks to clarify that linking is not covered, but doing this in a recital and not in the substantive text is far from ideal. Recitals are usually intended to aid interpretation rather than be free-standing sources, and a recital in this Directive is hardly likely to determine the meaning of Article 3 of a different Directive (2001/29/EC).

ITRE proposes a different solution: a new Article 11(2a): "The rights referred to in paragraph 1 shall not extend to acts of hyperlinking as they do not constitute communication to the public." Recital 33a would add that "The rights of press publishers should apply without prejudice to the rights of individuals for the reproduction, communication or providing links or extracts of a press publication to the public for private use or not-for-profit, non-commercial purposes." This would probably come closer to saving some links but again has its own difficulties. To begin, the right in Article 11(1) is the making available right – related to, but not identical to "communication to the public." More significantly, recital 33a seems to envisage a different derogation from that described in the proposed new Art 11(2a).

It seems then that none of the Committees have found the ideal solution to the conundrum. As for the JURI amendments, some focus on recital 33, others on Article 11. Some clarify that whether hyperlinking is included simply depends on whether the particular act counts as a communication to the public.[110] Others would prefer a clear statement that the rights never prevent hyperlinking, whatever the state to CJEU jurisprudence on Article 3 of the Information Society might be.[111] Another approach is to declare that hyperlinking shall not constitute communication to the public. This is done in a tabled amendment for a new Article 11(a) which would declare:

> "The provision on a website of hyperlinks to works available on another website, where such links only contain information necessary to find or request the source's content, shall not constitute a communication to the public."[112]

[110] JURI tabled Amendment 317 (does not extend to acts which do not constitute communication to the public as it may be the case with acts of hyperlinking); 318 ('when such acts do not constitute communication to the public').
[111] JURI tabled Amendment, 320 ('This protection does not extend to acts of a computation referencing or indexing system such as hyperlinking'); 312, ('these articles should not extend to acts of hyperlinking, which do not constitute communication to the public.')
[112] JURI tabled Amendment 785. See also 759 (introducing a new 11(1a) would require Member states to ensure that "the private and non-commercial use of content through links and other means, such as citation, are excluded from the provisions and rights laid down in paragraph 1") and 770 (a new Art 11(2a) would state that the rights

If the ancillary right is adopted, it seems clear that some hyperlinking will be implicated. The Parliament needs to decide whether it wants to "save the link" to press publications in all circumstances, or leave the matter to the changing interpretation of the CJEU. If it prefers to clarify, it needs to decide on precisely which links it wants to treat as immune.

3.6. Conclusions and Recommendations on Press Publishers Right

In the light of the criticisms and evidence, our recommendations would be for JURI to adopt the recommendations contained in the Draft JURI Report of March 10, 2017.

referred to in paragraph 1 shall not extend to acts of hyperlinking which do not constitute acts of communication to the public.')

4. AUTHORS AND PERFORMERS CONTRACTS PROVISIONS (ARTICLES 14-16)

4.1. Background

In contrast with the proposal for a press publishers' related right, the question of regulation of creator contracts has a much longer history. In fact, one aspect of the national history of copyright (even in the so-called 'common law' countries) has been the history of attempts to ensure that flesh-and-blood creators benefit financially from copyright. Thus even the famous 'Statute of Anne' of 1710 provided that once the initial term of fourteen years had lapsed, if the author was alive a further fourteen year term should arrive for the benefit of the author. This reversion right would allow the author to renegotiate or negotiate new terms with a publisher.[113] Rather than relying on the reversion of property to benefit authors, other countries sought to regulate the terms of author-publisher contracts directly. Today many countries of the European Union have special laws on authors contracts, covering not only the formal mechanisms for entering such arrangements, but regulating specifically the terms.

The premise of these regulatory regimes is that, in general, authors do not strike good deals with exploiters. This, in turn, can mean that authors cannot access sustainable levels of remuneration, even in cases where their works turn out to be successful. As a result, authorial autonomy might be compromised and with it a thriving culture typified by diversity of views.

Typical examples of such regulation include rules requiring remuneration to be specified for each mode of exploitation licensed (or transferred), rules prohibiting the transfer of rights to exploit by way of unforeseen technological means, rules on termination, rules on construction (*contra proferentem*, purpose-limited etc), rules on duties to provide accounts, rules on equitable remuneration and so-called 'best-seller' clauses.

So far, there has been very little harmonization in this area. The most radical in principle, though not in substance, is the 'unwaivable equitable right of remuneration' conferred on authors and performers after the transfer of their rental rights. However, more significant rights, including a reversion regime, have been conferred on performers (as regards recordings on phonograms) in the provisions associated with the extension of term by Directive 2011/77/EU. It is notable that one such provision includes a right to request accounting information (2006/116/EC, Art 2c).

The limited degree of harmonization is probably for two reasons. First, these were not issues that most seriously implicated the Internal Market, and so were not priorities e.g. in the 1988 Green Paper on Copyright and the Challenge of Technology. Second, these rules were regarded as politically divisive: it being assumed that agreement between 'common law' and other countries might be difficult to achieve. Indeed, even in the Netherlands, it took decades for rules on copyright contracts to find their way on to the statute book (which they did finally in 2016). A third reason for not confronting this thorny task was the significance of conflict of law rules which would in many cases permit the parties to choose which law applies to a particular copyright contract.

In May 2002, a study commissioned by the European Commission and undertaken by Guibault Hugenholtz (IViR, University of Amsterdam) was published under the title *Study in the Conditions Applicable to Contracts Relating to Intellectual Property in the EU.* The Report did not recommend harmonization. While it acknowledged that 'the demand expressed within some member states for a more adequate protection for creators against abusive contractual practices may indeed be quite justified', it concluded that harmonization of the rules on

[113] Bently, L. & Ginsburg, J. (2010), 'The Sole Right...Shall Return to the Authors": Anglo-American Authors' Reversion Rights, From the Statute of Anne to Contemporary U.S. Copyright', Columbia Public Law & Legal Theory Working Papers, Paper 9190, 2010.

copyright contracts was, at that stage, premature. This was because at that point there had been no harmonization of the rules on ownership and moral rights; there was no evidence of any impact of differences in national laws on the Internal Market; and the principle of subsidiarity suggested these issues could best be dealt with at the national level. The Report argued that 'the issues of copyright contract law are best addressed at the national level, since the national legislator is in the best position to reconcile the principles of copyright law, with those of contract law, labour law, and social law, while taking account of the relevant cultural considerations'. Subsequently, the Commission stated that differences between contractual rules were not significant enough to require harmonization (*Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee: The Management of Copyright and Related Rights in the Internal Market* COM(2004) 261 final, Brussels 16 Apr 2004). The 2016 proposals thus represent a significant shift in policy, even if they are rather modest as to content.

Following another study in 2015 (commissioned from Europe Economics and IViR, University of Amsterdam) the Commission has formed the view that contract regulation is now appropriate at the European level. The study entitled "Remuneration of authors and performers for the use of their works and the fixations of their performances" formulated five policy options:

- (1) Specification of remuneration for individual modes of exploitation, which would increase transparency of remuneration arrangements for individual authors and performers.
- (2) Improve cross border transparency of the national systems.
- (3) Limit the scope for transferring rights for future works and future modes of exploitation.
- (4) Create a more conducive environment to the support role of trade unions.
- (5) Facilitate the exercise of the right of making available.

(4. and 5. were said to be beyond the scope of the study.)

Probably this conclusion reflects a number of converging stimuli. For one, Directive 2014/26/EU of 26 Feb. 2014 on collective management of copyright (O.J. 2014 No. L 84), had already sought to regulate aspects of author-collecting society contracts: duties are placed on managers of copyright collecting societies to follow "sound administrative and accounting procedures and internal control mechanisms" while Title IV requires dispute-resolution mechanisms to be available to members of such societies. Second, there is a deepening of harmonization of the field, particularly driven by the Court of Justice, and a growing recognition of the goal of an 'EU copyright law.' While it might be a slow and gradual process, one component would be the harmonization of certain features of contract. Third, the Commission may have recognised that digitisation has changed the marketplace, often to the detriment of creators and performers.

4.2. The Commission Proposal

The proposal is to introduce several provisions that relate to the capacity of authors and performers to obtain remuneration from those who they permit to exploit their works. According to the Explanatory Memorandum

> "authors and performers often have a weak bargaining position in their contractual relationships, when licensing their rights. In addition, transparency on the revenues

> generated by the use of their works or performances often remains limited. This ultimately affects the remuneration of the authors and performers."[114]

The proposal, which aims at "rebalancing contractual relationships between creators and their contractual counterparts while respecting contractual freedom,"[115] has three provisions: one on 'transparency' of exploitation entitling authors and performers, inter alia, to obtain details of monies made by the exploiter with the work or performance; another (the 'bestseller provision') that allows for the terms of the contract to be re-formulated in situations where remuneration under contract turns out to be "disproportionately low"; and third that requires that provision in made for a cheap decision-making regime, outside court structure, to resolve such claims.

4.2.1. Art 14: Transparency Obligations

Proposed **Article 14(1**) sets out the transparency obligation:

> "Member States shall ensure that authors and performers receive on a regular basis and taking into account the specificities of each sector, timely, adequate and sufficient information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights, notably as regards modes of exploitation, revenues generated and remuneration due."

Recital 41 states:

> "Certain rightholders such as authors and performers need information to assess the economic value of their rights which are harmonised under Union law. This is especially the case where such rightholders grant a licence or a transfer of rights in return for remuneration. As authors and performers tend to be in a weaker contractual position when they grant licences or transfer their rights, they need information to assess the continued economic value of their rights, compared to the remuneration received for their licence or transfer, but they often face a lack of transparency. Therefore, the sharing of adequate information by their contractual counterparts or their successors in title is important for the transparency and balance in the system that governs the remuneration of authors and performers."

Eight points are worth making:

- (1) The obligation applies in relation to all exploitation of works by authors and performers (terms that, presumably are to be regarded as autonomous concepts within the EU legal order);
- (2) There are no exceptions, e.g. for industrial designs or works of applied art;
- (3) The right is a right to "receive on a regular basis …, timely, adequate and sufficient information on the exploitation of their works … notably as regards modes of exploitation, revenues generated and remuneration due."
- (4) The right does not appear to extend to a right to see the evidential basis for the accounts (e.g. to inspect), unless this is implicit in the notion of adequacy/sufficiency;
- (5) The right is not in itself a right to ask for information on a one off or ad hoc basis (e.g. in order to invoke a bestseller clause).[116] It might be arguable that such a right

[114] 3. Impact assessment, Vol 1, 175 (imbalance of bargaining power underpinned in part by information asymmetry).
[115] Explanatory Memorandum, 6.
[116] Impact Assessment, Vol 1, 178. At n 551, the IA says a request-based mechanism would not be effective.

to information is implicit, particularly in so far as the obligation might extend beyond direct contracting parties.

- (6) The recital implies the obligation only relates to the exploitation of rights that are harmonized under EU law.[117] Importantly, the Information Society Directive, 2001/29/EC, harmonized the reproduction, distribution and communication rights, but not the right of adaptation. In its current form, the right might not be available to an author with respect eg to film dramatization or translation of their works, as this right has yet to be harmonized;
- (7) The recital states that the provision is especially important "where such rightholders grant a licence or a transfer of rights in return for remuneration." Nevertheless, the right applies to all exploitation contracts, including those that operate gratuitously or for a lump sum.[118] Such information may, of course, be necessary to allow for the use of the "bestseller clause". The recital may implicitly recognise this when it adds that "… authors and performers … need information to assess the continued economic value of their rights, compared to the remuneration received for their licence or transfer, but they often face a lack of transparency."
- (8) Although the Article refers to the information coming "from those to whom they have licensed or transferred their rights," the recital states that "the sharing of adequate information by their contractual counterparts or their successors in title is important for the transparency and balance in the system." It is not clear whether "successors in title" would include all licensee, sub-licensees etc (though the Impact Assessment, which is not normally a source of law, suggested the obligation should only lie with the licensee or a person who replaced it "entirely").[119] It is interesting to compare the Explanatory Memorandum which refers to "those to whom they assign their rights,"[120] and "their contractual counterparts."[121]

Proposed **Art 14(2)-(4)** qualify the circumstances in which the right of information should apply in three respects.

First, Member States may vary the obligation on a sectoral basis (indeed this is also clear from **Article 14(1)**):

> "The obligation in paragraph 1 shall be proportionate and effective and shall ensure an appropriate level of transparency in every sector. However, in those cases where the administrative burden resulting from the obligation would be disproportionate in view of the revenues generated by the exploitation of the work or performance, Member States may adjust the obligation in paragraph 1, provided that the obligation remains effective and ensures an appropriate level of transparency."

Considerable freedom is therefore left to Member States to determine (i) how frequently accounts must be granted (in order to be 'regular'); (ii) how soon after revenues are earned the information should be disclosed ('timely') (though the Impact assessment suggested this should be at least once a year);[122] (iii) how complete the accounts should be (in order to be

[117] "Certain rightholders such as authors and performers need information to assess the economic value of their rights which are harmonised under Union law." This highlights a problem with the whole approach the Commission has taken to harmonization : copyright is a system, and it is difficult, if not impossible, effectively to harmonize piecemeal.
[118] Impact Assessment, Vol 1, 179, n 554.
[119] Impact Assessment, Vol 1, 178. Note also the CRIDs study, 104, (reporting obligations should be imposed to "some extent, on further exploiters").
[120] Explanatory Memorandum, 3.
[121] Explanatory Memorandum, 6.
[122] Hugenholtz, 402-403 (explaining that Dutch Art 25c, giving responsibility to Minister in determination of equitable remuneration, arose from concerns that agreements might otherwise prove problematic under competition law).

'adequate and sufficient'), in particular in what detail the accounts must specify 'modes of exploitation, revenues generated and remuneration due.'

Recital 41 gives an indication as to how Member states are expected to transform the general obligation into sector specific duties:

> "When implementing transparency obligations, the specificities of different content sectors and of the rights of the authors and performers in each sector should be considered. Member States should consult all relevant stakeholders as that should help determine sector-specific requirements. Collective bargaining should be considered as an option to reach an agreement between the relevant stakeholders regarding transparency. To enable the adaptation of current reporting practices to the transparency obligations, a transitional period should be provided for."

One might expect different sets of rules to emerge in relation to book publishing, newspaper and journal publishing, the audiovisual sector, advertising, etc.[123] It seems that Member States may "adjust the obligation," to make it proportionate in the light of the "administrative burden," but that they are not free to eliminate it. This is because the Article requires that "the obligation remains effective and ensures an appropriate level of transparency."

Given that "administrative burden" appears to be the only basis that justifies variations in the intensity of the transparency obligation, one might wonder why it is suggested that "collective bargaining" might be appropriate. It might also be noted that in some Member States 'collective bargaining' by authors associations has been regarded as raising potential competition law issues (at least where pricing issues arise).[124]

Second, Member States may choose not to recognise the right where a contribution is trivial. **Art 14(3)** states

> "Member States may decide that the obligation in paragraph 1 does not apply when the contribution of the author or performer is not significant having regard to the overall work or performance." (emphasis added)

It is not clear whether, if a Member state choses this option, the matter must be left to courts or tribunals to determine whether in any given instance a contribution is trivial, or whether per se rules can be established. For example, might a Member State decide that the contribution of a stage designer or dubbing actor is per se not significant to a film?

Third, proposed Art 14(4) states that paragraph 1 shall not be applicable to entities subject to the transparency obligations established by Directive 2014/26/EU, that is collective management organisations.

4.2.2. Contractual Adjustment Mechanism – Article 15

Proposed **Art 15** is entitled 'contractual adjustment mechanism.' It states

> "Member States shall ensure that authors and performers are entitled to request additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of the rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances."

[123] See the discussion of the French legal system of contract regulation.
[124] Dutch law.

This is frequently described as a 'bestseller clause,'[125] a term used in relation to provision operative in Germany, Netherlands and Poland (see below). Its purpose is explained in **Recital 42**

> "Certain contracts for the exploitation of rights harmonised at Union level are of long duration, offering few possibilities for authors and performers to renegotiate them with their contractual counterparts or their successors in title. Therefore, without prejudice to the law applicable to contracts in Member States, there should be a remuneration adjustment mechanism for cases where the remuneration originally agreed under a licence or a transfer of rights is disproportionately low compared to the relevant revenues and the benefits derived from the exploitation of the work or the fixation of the performance, including in light of the transparency ensured by this Directive. The assessment of the situation should take account of the specific circumstances of each case as well as of the specificities and practices of the different content sectors. Where the parties do not agree on the adjustment of the remuneration, the author or performer should be entitled to bring a claim before a court or other competent authority."

Nine points are worth making:

- (1) This applies to all authors and performers. There are no exceptions. There are no provisions paralleling those of the "transparency obligation" that would allow Member States to exclude the right from certain sector specific contracts.
- (2) The right refers to the "exploitation of the rights", but recital 42 implies this relates to "contracts for the exploitation of rights harmonised at Union level." As with the transparency obligation, it may not be applicable to the (unharmonized) right of adaptation. Thus, the right might not be available to an author with respect eg to film dramatization or translation of their works.
- (3) The right is a right to "request additional, appropriate remuneration." Presumably, though not explicit, the right is a right to "request and be paid." Recital 42 states that "Where the parties do not agree on the adjustment of the remuneration, the author or performer should be entitled to bring a claim before a court or other competent authority."
- (4) Because of the wording ("to request" and "adjustment"), there might be some room for doubt as to whether the right arises to request payments from future revenues only rather than remunerations already received.
- (5) The right is exercisable against "the party with whom they entered into a contract for the exploitation of the rights." It does not appear to be exercisable against successors in title nor their licensees. Nevertheless, this is not completely clear as recital 42 states that the problem the right is intended to resolve is that lengthy contracts offer "few possibilities for authors and performers to renegotiate them with their contractual counterparts or their successors in title."
- (6) Probably, the right cannot be exercised where there is no contract, but just a (gratuitous) licence (or where an author/performer has declared a work to fall into the public domain).
- (7) The right to remuneration arises by comparing "the remuneration originally agreed" with "the subsequent relevant revenues and benefits derived from the exploitation." The recital suggests that the target is changes in the value of

[125] Impact assessment, Vol 1, 180, n 559 (noting the term can be misleading); Impact assessment, Vol 3, annex 14d, 220 (referring to as bestseller clause).

exploitation, particularly in relation to 'contracts for the exploitation of rights …of long duration." Presumably, it is not intended to help an author or performer who inadvisedly enters into a contract that from the start was inequitable (though the Impact assessment seems to have intended the mechanism to work for 'unfair agreements or changed circumstances.)[126]

- (8) The criterion is that the remuneration received is "disproportionately low." This is a rather vague standard compared and likely to introduce quite some uncertainty. Recital 42 states that "The assessment of the situation should take account of the specific circumstances of each case as well as of the specificities and practices of the different content sectors." If not further elaborated during this legislative process, will no doubt demand the assistance of the CJEU.
- (9) Recital 42 states that Article 15 is to be "without prejudice to the law applicable to contracts in Member States." It is hard to see how this could be possible (for example, 'pacta sunt servanda' is necessarily prejudiced by this rule). Presumably. the implication is that the other aspects of contract law applicable in Member States are unaffected. Presumably, too, rules allowing copyright contracts to be renegotiated in other circumstances, are permitted. Given the tendencies of the CJEU to favour harmonization, this point might have been made, however, with greater clarity and force.

4.2.3. Alternative Dispute Resolution (ADR) – Art 16

Article 16 seeks to ensure that legal mechanisms are available in Member States to handle the two new obligations. It states:

> "Member States shall provide that disputes concerning the transparency obligation under Article 14 and the contract adjustment mechanism under Article 15 may be submitted to a voluntary, alternative dispute resolution procedure."

Recital 43 explains

> "Authors and performers are often reluctant to enforce their rights against their contractual partners before a court or tribunal. Member States should therefore provide for an alternative dispute resolution procedure that addresses claims related to obligations of transparency and the contract adjustment mechanism."

It is interesting to note that **Article 16** is not merely intending to state that Member States must not prohibit alternative dispute resolution (that would seem to be no obligation at all), even though that is what it seems literally to say. Rather, as Recital 43 clarifies, Member States must actively take steps to establish ("provide for") such a procedure to address these claims.[127] This procedure must be something other than a "court or tribunal." Elsewhere in EU legislation, "alternative dispute resolution" exclude ad hoc extra-judicial arrangements.

Although a reference to ADR is new to the context of copyright (and IPR), this proposal should be seen in the light of increasing activity of the EU institutions in promoting ADR, particularly in relation to consumer disputes.[128] In 2008, the Council and Parliament adopted Directive

[126] 190.
[127] *Impact Assessment*, Vol 1, 190 (referring to example of UK's publishers association and Art 25g of the Dutch Copyright act (as amended in 2015).
[128] A early as 1998, 98/257/EC: Commission Recommendation of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes.

2008/52/EC on certain aspects of mediation in civil and commercial matters;[129] in 2011, the European Parliament published a Resolution of 25 October 2011 on alternative dispute resolution in civil, commercial and family matters;[130] Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes;131 and Regulation 524 of 2013 on online dispute resolution.[132]

4.3. The Response

These proposals are, in fact, much less controversial than those for press publishers.

4.3.1. The Legal Basis

The legal basis for intervention is far from clear.[133] The whole proposal is said to be justified on the basis of **Article 114 TFEU**.[134] The Impact Assessment, for example asserts that "[t]he problem has a significant European dimension," with "internal market implications".[135] Certainly, others have claimed that intervention is justified at an EU level. With respect to transparency obligations, the CRIDs Study observed "A provision at the European level is indispensable to avoid market distortion."[136] Moreover, as explained above, the EU has already legislated to adjust contracts, in the context of the Rental and term Amendment Directives, and to provide for some rights to information from contracting parties (in the Term Amendment directive). Nevertheless, serious doubts must exist as to the harmonizing effect of Article 16, given the manner in which the specificities are devolved to Member States.[137]

The proposal for **Article 16** might have sought to rely on Article 81 TFEU. This provides

> The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

Paragraph 2 clarifies that

> "For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring:
> …
> (g) the development of alternative methods of dispute settlement."

This would seem the obvious legal basis. However, the proposed directive does not refer to this basis of legislative competence, which in any event might required the proposed intervention be limited to cross-border cases.[138]

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[129] Note the ongoing review of this Directive in JURI: Draft Report on the Implementation of Directive 2008/52/EC, (Match 7, 2017), 2016/2066(INI) (rapporteur Kostas Chrysogonos).
[130] 2011/2117(INI).
[131] and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC.
[132] OJ 2013 L 165/1.
[133] The leading text is A. Ramalho, *The Competence of the European Union in Copyright Lawmaking: A Normative Perspective of EU Powers for Copyright Harmonization* (Springer, 2016).
[134] *Explanatory Memorandum*, 4.
[135] *Impact assessment*, Vol 1, 174- 176.
[136] CRIDS Study, 103.
[137] We are grateful to Dr Ana Ramalho of Masstricht University for offering her thoughts on this question.
[138] Professor Hess on procedure in civil disputes: http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/556971/IPOL_IDA(2016)556971_EN.pdf

Directive 2013/11/EU of 21 May 2013 on alternative dispute resolution for consumer disputes, which applies to both domestic and cross-border is based on Article 114. The Directive draws a link between the need for ADR in consumer disputes and the Internal Market. **Recital 6** states:

> "The disparities in ADR coverage, quality and awareness in Member States constitute a barrier to the internal market and are among the reasons why many consumers abstain from shopping across borders and why they lack confidence that potential disputes with traders can be resolved in an easy, fast and inexpensive way. For the same reasons, traders might abstain from selling to consumers in other Member States where there is no sufficient access to high-quality ADR procedures. Furthermore, traders established in a Member State where high-quality ADR procedures are not sufficiently available are put at a competitive disadvantage with regard to traders that have access to such procedures and can thus resolve consumer disputes faster and more cheaply."

One wonders how far similar arguments can be made in relation to ADR in copyright-contract disputes. Is there any evidence that the availability or otherwise of ADR is affecting, or is likely to affect, the choice of who to enter copyright contracts with and where?

4.3.2. Lack of Ambition

Although doubts might have been raised as to competence, if anything, the major criticism levelled against the proposals in Articles 14-16 is that they are so modest as likely to have minimal effect.[139] This is particularly so because two of the provisions are procedural, and only one goes to the substance of contracts. Moreover, it is said that Article 15 looks like a best-seller clause, and best-seller clauses tend to have little practical impact. In contrast, much more ambitious provisions exist in most member states, and with that experience in mind, had been proposed in the CRIDs Study for the European Parliament and the IViR study for the European Commission. These studies preferred intervention as to the conditions in which contracts are made (what the Commission called "ex ante" regulation), rather than as to conditions for implementation or rectification.

The IVIR Study, for example, described obligations relating to the scope of transfer as being the protective measure with the greatest positive effect.[140] It explained:

> "Obligations on the scope of transfer —the protective measure with the greatest positive effect on the contractual position and the remuneration of authors relates to the obligation imposed on publishers to specify the scope of transfer of rights (in geographical scope, duration and modes of exploitation) together with the corresponding remuneration. This finding was corroborated by the statistical analysis."

It therefore recommended:

> "Policy 1: Specification of remuneration for individual modes of exploitation and respective remuneration
>
> The general principle behind this policy option, designed to empower the author at the contract negotiation stage, would be to introduce the following binding, legal

[139] European Copyright Society 2017; Max Planck Institute for Innovation and Competition (2017).
[140] IViR (2016), 6.

requirements; contracts not adhering to the requirements would then be considered null and void under the law:

- requirement for written contracts (dependant on MS contract legislation);
- specifying which rights and modes of exploitation are being transferred;
- specifying the level and type of remuneration attached to each mode of exploitation; and
- a reporting obligation imposed on the publisher vis-à-vis the author."

The UK Society of Authors has welcomed the proposed Directive, but would also like to see it extended to include provisions that reflect the IViR Study. It writes:

> "We welcome the three policy recommendations proposed in the [IViR 2016] report and would suggest that these also are brought in to EU and UK legislation.
>
> - A legal requirement for written contracts to specify in detail how a work can be exploited and how its author will be remunerated, and a right for the author to receive accounts.
> - Place limits on transfers of rights to future works and future modes of exploitation.
> - Allowing freelancers who work mainly for one or two employers to claim employee status and rights.
>
> Even more important, set Articles 14, 15 and 16 in a context that could achieve the EU's stated policy aim of improving the remuneration received by authors and performers, the Directive should include the overarching principle that authors and performers have the unwaivable right to receive adequate remuneration, (including through collectively managed rights) for each use of their works, and that such remuneration must be specified in their contracts."[141]

The Commission in its *Impact Assessment* said it preferred a purely "ex post" intervention, at least for the moment.

4.3.3. Creative Commons Criticism

A third source of criticism comes from those who advocate for open licences. Building on work by German law professor Axel Metzger, Thomas Dysart has argued

> "Further to Metzger and Jaeger's observations, it is possible to foresee how a right to *additional* equitable remuneration …, both in respect of modes of exploitation that were unknown at the time of the grant and in respect of any unexpected commercial success where the proceeds of exploitation are disproportionate to the initial remuneration (i.e. best-seller clause), might create added uncertainty in FOSS and CC licensing models. Considering the latter as an example, concerns may arise where a given FOSS product or CC work becomes extremely popular or, certainly in the software context, integral in some way, and thus commercially successful. Here, the possibility of a claim being exercised by an author will likely increase commensurate to the extent of the work's commercial success."

Indeed, these concerns are voiced by Creative Commons

[141] http://www.societyofauthors.org/SOA/MediaLibrary/SOAWebsite/Submissions/20161205-Submission-to-IPO-on-DSM-directive-dec-2016.pdf at p 8.

> "Creative Commons has taken the position that these types of regulations would create unnecessary complexity for those who wish to share their works under our licenses because they would deny creators the choice to share as they wish. All Creative Commons licensors permit their works to be used for at least non-commercial purposes. When an author applies a CC license to her work, she grants to the public a worldwide, royalty-free license to use the work under certain terms. And many authors simply want to share their creativity freely under open terms to benefit the public good. For example, educators and scholarly researchers create and share works primarily to advance education and to contribute to their field of study—not necessarily for financial remuneration.
>
> We support authors and creators, and we firmly believe in their right to choose to share, or to seek compensation for all or some uses of their works. At the same time, we must find solutions that also honour those authors who choose to share with few or no restrictions. Mandatory and unwaivable compensation schemes violate the letter and spirit of Creative Commons licensing, and they're a poor substitute for more meaningful and lasting change in service of fair remuneration for those working in the creative industries today."[142]

Two key questions seem to arise from these criticisms.

First, as a matter of justice and ethics, **would it be right for a person who has licensed their work on the basis of a Creative Commons or similar licence to utilise proposed Articles 14 or 15 against licensees?** If a user makes a huge amount of revenue using Creative Commons material, does there come a point where some of that revenue should be shared? Or should entrepreneurs who utilise works that are licensed under CC licences be immune from the regulations placed on parties that use their own standard terms or create bespoke bilateral contracts?

Second, if Creative Commons regimes should be subject to the same regulatory standards as other exploitation arrangements, **what effect will this have on the attractiveness of those regimes?** Will there be a chilling effect, with users reluctant to take advantage of Creative Commons licences?

4.3.4. Labour Markets for Creators: A Cultural Economics Perspective

There is a widely held assumption that granting rights, and regulating the transfer of these rights (ex-ante and ex-post) will inevitably improve the financial position of creators. This is a mistake. **Whenever income is derived from a right, this is a result of the bargaining outcome between parties** contracting over material protected by copyright law and demand in the market for this material. The right itself does not produce any money.

There is a well established literature in cultural economics that analyses the economic organisation of cultural markets, the dynamics of cultural consumption, and in particular the labour markets of creatives. The findings of this literature indicate that, empirically, it is difficult to adjust the bargaining outcome in cultural markets. Reasons include powerful winner-take-all dynamics combined with an oversupply of potential creators.

It is an omission in the preparatory work for Arts. 14, 15 and 16 of the Directive, and in the Commission's Impact Assessment, that it fails to reflect on this knowledge. It is not even acknowledged that there is a body of detailed empirical studies on the economics of artists' labour markets accumulated over a period of more than 20 years.

[142] https://creativecommons.org/2017/07/19/copyright-law-deny-creators-right-share-freely-let-authors-choose/

Rather, a small number of mostly survey based statistics are cited to state (correctly) that "[r]ecent figures suggest that creators face difficulties in securing stable working conditions" (Impact Assessment, Vol 1, p. 175, n. 538). Thus, we have a symptom but no diagnosis that would allow an effective intervention.

Within the constraints of this study, it is not possible to offer a thorough review of cultural markets and of the working conditions of primary creators within the core cultural industries. However, it may be helpful to summarise key findings of this literature in propositional form.[143]

- The cultural and creative industries are a highly diverse sector, ranging from crafts to industrial scale production. There is great variation in employment practices, for example between dance, fashion and video games. Still self-employment and multiple job-holding is characteristic for the working conditions of most authors and performers.

- Many media products, such as sound recordings and films, require sequential inputs and contracts with diverse suppliers. There is therefore pressure to consolidate rights, to prevent what is called in the literature "hold-ups" in exploitation.

- There are many more people motivated to work in creative occupations than the market needs. In part, this can be explained by the "intrinsic satisfaction" derived from creative work. This over-supply of labour drives down prices.

- Cultural products typically are "experience goods" whose quality can only be ascertained after consumption and, even then, this assessment often depends on what other people think. This makes it difficult, if not impossible to predict what will be the next hit.

- Consumption is highly skewed towards bestsellers (who already have received some recognition). This leads to a winner-take-all distribution of earnings. The top 10% of creators receive a disproportionally large share of total income (for literary authors: ~70% of total income; for composers/songwriters: ~80% of total income; Kretschmer et al. 2007, 2011. At the same time, medium (typical) earnings of creators are very low.

[143] Convenient entry points into this literature include: Caves, R. (2000) *Creative Industries: Contracts Between Art and Commerce*, (Cambridge, Mass., Harvard University Press); Kretschmer, M., E. Derclaye, E., Favale, M., Watt, R. (2010), *The Relationship between Copyright and Contract Law: A Review commissioned by the UK Strategic Advisory Board for Intellectual Property Policy* (SABIP), Available at SSRN: https://ssrn.com/abstract=2624945; Towse, R. (2010) *A Textbook of Cultural Economics*, (Cambridge University Press); Handke, Ch., Towse, R. (2013) *Handbook of the Digital Creative Economy*, (Cheltenham: Edward Elgar).

4.4. Comparative Position on Author and Performer Contracts in Member States

The Study examined the laws operating in **7 Member States** to see how far **Article 14-16**, if enacted in unamended form, would add value.

4.4.1. Denmark[144]

There are only a few provisions regulating copyright contracts in the Consolidated Act on Copyright 2014.[145]

> (i) rules on construction of assignments: Art 53
> (ii) termination of assignments for failure to exploit: Art 54
> (iii) rules on the frequency of accounts for royalties and transparency: Art 57. This is extended to the rights of performers, by virtue of the reference to Sec. 57 in Sec. 65(6).
>
> (iv) equitable remuneration for rental: Art 58a (reflecting EU Directive on Rental).

(i) Transparency Obligations

Art 57 of Danish law (in translation) states:

> "If the author's remuneration depends on the assignee's turnover, sales figures, etc, the author may demand that settlement is made at least once a year. The author may likewise demand that the settlement be accompanied by satisfactory information on the circumstances forming the basis of the calculation of the remuneration."

The following aspects of proposed **Article 14** seem more author-protective:

(i) Art 14 applies to all authors, including those who are entitled to no remuneration or a lump sum, not just those with royalty or profit-share agreements. This probably reflects the goal of entitling such authors to information such as would enable them to utilise the proposed bestseller clause. In Denmark, at present, such claimants would need to rely on the regular procedures of courts to obtain access to this information.[146]
(ii) Art 14 does not require a "demand";
(iii) Art 14 seems more general in specifying "modes of exploitation, revenue generated and remuneration due" rather than "turnover, sales figure, etc."

[144] For assistance with the Danish law, we are grateful to Jørgen Blomqvist, PhD, Honorary Professor, University of Copenhagen.
[145] Consolidated Act No 1144 of October 23, 2014. Many of the provisions can be traced back to earlier legislation, in particular section 9 of the Copyright Act 1933. For example: This goes for the general statement of transferability, the separation between transfer of copyright and ownership of the copy and the maxim of speciality (Sec. 53 in the present Act); the obligation to exploit acquired rights (Sec. 54 of the present Act, in the 1933 Act it only dealt with publishing contracts); the presumption against transfer of right to adapt or reassign the work (Sec. 56 of the present Act; as well as - and now to something completely different - moral rights (Sec. 3 of the present Act). Provisions regarding contracts on performing rights were included in Sec. 10 of the 1933 Act (no reassignment, presumption of non-exclusive license, obligation to exploit). The Act also in its Sec. 27 contained rules pretty close to those of Sec. 9 regarding transfer of rights in works of art. and Sec. 34 of the 1961 Copyright Act, a publishing contract, unless agreed otherwise, merely granted the publisher the right to publish the work in an edition of a maximum of 1,000 or 2,000 copies…. Sec. 9 of the 1933 Act was replaced by a number of provisions in the 1961 Act, including its Sec. 34. However, specific provisions on publishing contracts, for example defining the number of copies per edition, were removed in the 1990s, mainly because it was considered unnecessary to regulate such details in the Act, particularly when other areas of copyright contracts were not regulated at all. As Blomqvist explained, "the preference was rather for few, but general, rules."
[146] According to Professor Dr Blomqvist.

However, the Danish law seems to go further than the proposed provision in requiring the provision of supporting evidence. Art 57(2) states:

> "The author may demand that the accounts, bookkeeping and inventory together with certifications by the party who has exploited the work in connection with the annual settlement according to subsection (1) be made available to a state-authorised public accountant or registered accountant appointed by the author. The accountant shall inform the author as to the correctness of the settlement and of irregularities, if any. The accountant shall otherwise observe secrecy about all other matters that become known to him in connection with his review."

Moreover, Danish law specifies that contracts may allow deviations, but only where they favour the author. Art 57(3) states that

> "The provisions of subsections (1) and (2) shall not be deviated from to the detriment of the author."

(ii) Contract Adjustment Mechanism in Denmark

Although Danish Copyright law does not contain a "best-seller clause", the Danish Law on Contracts has something that operates in a similar way. Section 36 declares that:

> (1) A contract may be modified or set aside, in whole or in part, if it would be unreasonable or at variance with the principles of good faith to enforce it. The same applies to other juristic acts.
> (2) In making a decision under subsection (1) hereof, regard shall be had to the circumstances existing at the time the contract was concluded, the terms of the contract and subsequent circumstances.[147]

The provision foresees modification of a contract where the circumstances have changed such that it would be contrary to good faith to enforce the express terms of the contract. One situation where this might be the case is where revenues have altered dramatically. However, despite this potential, the Danish courts have been reluctant to apply the provision as a "bestseller clause".

For example, the Supreme Court refused to apply it in a case concerning the music publishing agreement applicable to Jacob Gade's *Tango Jalousie,* one of the most internationally famous Danish works of all time.[148] An action was commenced by the heirs of Gade, a trust (established in 1956), to modify arrangements under which one party, M, was entitled to all the profits deriving from sales in Denmark. The Court recognised the principle might be applicable:

> "In the light of the fact that copyright has a term of many years, and that after many years a work can be used in a manner or to an extent that could not be expected at the time of the conclusion of the contract, this Court is of the opinion that the departures from the usual distribution formulae or from formulae that follow from the contracts concluded by the relevant organizations can be set aside pursuant to Sec.

[147] Unofficial English translation at http://www.sprog.asb.dk/sn/Danish%20Contracts%20Act.pdf For commentary, see Ewoud Hondius and Christoph Grigoleit (eds), *Unexpected Circumstances in European Contract Law* (CUP, 2011) 198-200; Ruth Nielsen *Contract Law in Denmark* (Kluwer, 2011) 178-180. Before this general rule was enacted in 1975, a number of sector specific laws contained rules to similar effect. These rules were repealed when the Law on Contracts was revised and the general clause inserted.

[148] *March 15, 2002 -- Case No. 129/194, (2004) IIC 974. See also Mads Marstrand- Jørgensen, 'Supreme Court applies Act on Agreements to Copyright Case,' July 22, 2002, at http://www.internationallawoffice.com/Newsletters/Intellectual-Property/Denmark/Norsker-Jacoby/Supreme-Court-Applies-Act-on-Agreements-to-Copyright-Case. For the song, see https://www.youtube.com/watch?v=7mTEh5awKGQ*

36 of the Law of Contracts Act if they are not reasonably justified and apparent to the partners in the individual case."

However, the court was not willing to revisit the terms of an agreement that conferred on the copyright holder an entitlement to all the profits on sales in Denmark. In this respect, the background facts of the case were extremely unusual, the arrangement having derived from unlawful behaviour by the author (who initially licensed a third party to publish the work, in breach of an existing contractual arrangement) and having been approved by a court as part of a settlement of that dispute, and having been confirmed at a time when the success of the song was appreciated.[149] The claimant did succeed in relying on section 36 only to justify the modification of a special provision allowing the publisher a higher share of proceeds from KODA, the performing rights organization, than the share which was normally permitted by the organization's internal rules.

In another case,[150] the Supreme Court refused to apply the provision in a case brought by the translator of Hergé's comic series 'Tintin,' who had translated 23 stories from French into Danish. The first editions of these volumes were published in the period between 1960 and 1976. The agreement concluded between the parties provided for a single non-recurring payment calculated on a 'per page' basis. From 1967 onwards further editions of the individual works were printed, above all in the early 1970s. The claimant raised no objections, nor did he demand further payment. Indeed, in 1984, he translated a further volume. Nevertheless, he later brought proceedings based on Section 36 of the Contracts Act claiming that he should benefit from the subsequent unforeseeable massive and long-lasting sales. As with the Gade case, the proceeding went up to the Supreme Court. It declined to modify the contract.

The effect of this jurisprudence is that while Denmark already could re-open contracts that turn out to disproportionately favour the exploiter at the authors expense, the proposed "best-seller clause" in Article 15 might improve the legal position of some authors. It would send a clear signal that the author is entitled to "appropriate remuneration" and that "appropriateness" is not determined by clear contractual terms.

4.4.2. France[151]

French law has a rather elaborate regime for the regulation of copyright contracts.[152] Apart from general rules in the Code Civil,[153] there are general provisions on copyright contracts plus specific sectoral regulation in greater detail of publishing contracts (reformed in 2014),[154] performance contracts,[155] audiovisual contracts,[156] and advertising contracts.[157]

[149] In 1923, Gade had entered into an agreement with a publishing company, M, whereby he surrendered his copyright to any works produced between 1923 and 1925. However, in breach of this agreement, Gade appointed W to publish *Tango Jalousie*. Acknowledging that this was unlawful, Gade agreed to give any profits from the melody to his original publisher, who in return relinquished its publishing rights. In 1926 the second publisher transferred its global publishing rights to a German publisher, except for its Scandinavian rights.
[150] October 8, 2002 -- Case No. 135/2001, (2004) IIC 348 (English translation).
[151] We are grateful to Professor Pascal Kamina, Université de Franche-Comté, Besançon, and Professor Valérie-Laure Benabou, Aix Marseille Université, for their advice on French law.
[152] Kamina, P., and Lucas, A., 'France', in Bently, L.; CRIDS Study, 118-124; Ginsburg J. and Sirinelli, P., 'Private International Law Aspects of Authors' Contracts: The Dutch and French Examples,' (2015) 30 *Columbia Journal of Law and the Arts* 171, 175-6.
[153] Civil Code (France), Art 1341-1348.
[154] Intellectual Property Code, Art L 132-1 to 132-17 as amended by Ordinance of November 12, 2014 (in particular adding provisions applicable to digital book publishing as new Articles L. 132-17-5 to L. 132-17-7 of the I.P. Code, and concern mainly the conditions of remuneration of authors.)
[155] Intellectual Property Code, Art L 132-18 to 132-22.
[156] Intellectual Property Code, Art L 132-23 to 132-30.
[157] Intellectual Property Code, Art L 132-30 ff.

As far as the general rules are concerned, there are rules prohibiting the total transfer of rights in future works;[158] rules requiring writing and rules requiring that any transfer specifically mention the area of exploitation – its scope, purpose, term and geographical extent.[159] Most significantly, there is a requirement that assignments confer proportional participation in the revenues generated from exploitation of works,[160] with certain permissible situations where lump sums are permitted. Transfers intended to cover unforeseeable modes of communication must be made explicit and stipulate a proportional share of the profits.[161]

(i) Contractual Adjustment Mechanisms: A Right to Proportionate Remuneration and a Bestseller Provision

First, the bestseller clause proposed in **Art 15** seems significantly more limited in scope than the general French rule of proportional remuneration (though this only applies to authors, not performers). Article L. 131-4 of the I.P. Code declares that a transfer by an author of rights to his work must allow the author to participate proportionally "in the receipts resulting from the sale or exploitation of the work." According to Kamina and Lucas, "[t]he goal is to allow the author to share in the commercial success of the work, no matter what the media, and the author's share is generally to be calculated on the basis of the sales price to the public."[162] Quite what is proportionate if left unelaborated,[163] but in relation to digital publishing Article L. 132-17-6 provides that the publishing contract "guarantees to the author a fair and equitable remuneration right on all of the receipts coming from the marketing and the diffusion of a book published in digital form."[164] Article L. 132-17-7 provides that publishing contracts must include a clause permitting review of the financial terms relating to the transfer of the rights of exploitation of the book in a digital form. Only the author may have a contract voided for the absence of proportional remuneration.

Despite the general principle, French law specifically permits lump-sum agreements in certain cases. Some of the situations for which the law specifies that a lump-sum is permissible are quite broad – indeed Kamina and Lucas ventures that "they threaten to swallow the rule."[165] They include the situation where it is impossible, or disproportionate, to attribute particular revenue to the exploitation of the work in question – perhaps because the work is exploited as part of a package of works (for example, songs played at a nightclub),[166] or because the work makes a minor contribution to sales (eg a copyright-protected label attached to a product, such as cheese).[167] With respect to publishing contracts, the specific sectoral provisions identify nine situations where a lump sum might be permissible if the author expressly agrees in writing. These include scientific and technical works; anthologies and encyclopedias; prefaces, annotations, introductions, and presentations; illustrations of a work; translations (though only on the translator's prior request).

However, in some cases where lump sum remuneration is permitted, France does offer a "best-seller" clause.[168] However, according to Professor Kamina, "in practice its application

[158] Intellectual Property Code, Art L 131-1.
[159] Intellectual Property Code, Art L 131-3.
[160] Intellectual Property Code, Art L 131-4.
[161] Intellectual Property Code, Art L 131-6.
[162] Kamina and Lucas, 'France', in Bently (ed), *International Copyright Law and Practice* (LexisNexis, 2016) (annually updated). This commentary draws heavily on their excellent account. Professor Benabou explained to us that despite this, in some sectors, particularly the film sector, exploiters insist on paying a percentage of new revenue – 'recette nette part producteur.')
[163] Intellectual Property Code, Article L. 132-17-8 provides for a mechanism of extension of collective bargaining agreements entered into between publishers and authors' representatives in the field of book publishing. Accordingly, a Decree, adopted on December 1, 2014 and entering into effect on December 10, 2014, recognises a "Code of good practice" in this field.
[164] In the case of publishing agreements for books in electronic form, Article L. 132-5 of the I.P. Code, as modified by the Law of May 26, 2011, provides that the arguably proportional remuneration from exploitation must be "fair and equitable," without further explanation.
[165] Intellectual Property Code, Article L. 131-4
[166] Kamina and Lucas, citing *SACEM*, Cass. civ. I, 10 March 1987, (1987) 133 R.I.D.A. 188.
[167] Kamina and Lucas, citing TGI Annecy, 10 Sept. 1998, (1999) 179 R.I.D.A. 431.
[168] Intellectual Property Code, Article L. 131-5.

is very rare." The French law establishes a specific criterion of disproportion: the revenue must less than 7/12th of what is normal (i.e. what would have been expected in a fair transaction). This is, in part, because it is difficult to say what is normal/expected.

While Article L. 131-4 is inapplicable to performers, certain provisions seek to guarantee (some) performers a share in remuneration. More specifically, under Article L. 212-13, performers whose works are embodied on phonograms are entitled to a minimum remuneration, for each mode of exploitation. This law, which entered into force only in July 2017, anticipates that rates will be agreed collectively to cover the making available of the phonogram by streaming. Failing that, the minimum remuneration would be fixed by a joint commission in order to "fairly associate" the performers with the exploitation of the phonograms.[169] These provisions, however, apply only to performers whose works are fixed on phonograms. Article 15 may, however, add value to French law in so far as it applies to other performers.

(ii) Transparency Obligations in France

A right to access to information provided for in proposed **Article 14**, is already recognised in some respects in specific sectoral provisions.

According to Articles L. 132-13 and L. 132-14 of the I.P. Code, an author can, absent contractual terms to the contrary, require, at least once a year, accounts relating to the exploitation of the work and the information appropriate to confirm their accuracy, including details as to overseas exploitation.[170] These obligations are further elaborated in Articles L. 132-17-3 and L. 132-17-3-1, which detail the conditions under which publishers must provide authors with accounts relating to the exploitation of their books. It also provides that if the publisher fails to satisfy its obligation to render accounts in accordance with the article, the author has a six-month deadline to ask the publisher to proceed to this rendering. If the publisher fails to comply with such a formal notice within a period of three months, the contract is automatically terminated. The *Conseil permanent des écrivains* and the *Syndicat national de l'edition* have alo reached a framework agreement detailing reporting obligations.[171] According to one account, at least once a year, the publisher, irrespective of its size, must provide the authors with an account of the numbers of copies made and sold, royalties paid, as well as any rights transferred to sub-transferees. The account should detail the revenue from each and every digital mode of exploitation.[172] Similar rules apply to audiovisual production agreements.[173]

In each case, the statutory obligation to render accounts is expressly provided for in case of publishing contracts and audiovisual production contracts, to the sole benefit of authors. It is unclear whether it can be claimed directly against subsequent contractors of the publisher or of the producer (unless there is a clause to that effect in these sub-agreements). However, given that the effect of the rendering of incomplete accounts would be rescission of the initial assignment agreement, which in turn would destroy the chain of rights, parties further down the chain have strong incentives to render timely and complete accounts (so the question of legal obligation is not particularly pressing).

Outside publishing and film production agreements, it might be that a contractual obligation to provide accounts to the author can be inferred from the right of proportional remuneration and general principle of contract law (in particular, the principle that contracts be performed

[169] Thanks to Professor Benabou for drawing our attention to this.
[170] Kamina and Lucas, citing Cass. civ. I, 9 Feb. 1994, Bull. civ. I, no. 56, 43.
[171] CRIDS Study, 46.
[172] CRIDS Study, 72.
[173] Intellectual Property Code, Art L.132-28.

in good faith (art 1104 of the Code Civil), etc.).[174] This obligation would probably not affect subsequent assignees, unless a further clause was express included in the agreement.[175]

The following aspects of proposed **Article 14** seem more author-protective:

(i) Art 14 applies in all cases, though details may be varied by sector, so if adopted the current French approach would need to include a general right. Under French standard procedural rules an author would also be able to obtain information as to exploitation from the transferees if necessary (and ask the court to nominate an expert to audit the account, subject to contractual arrangements). But this would only be in support of some other claim (e.g. a right to remuneration from exploitation).
(ii) Art 14, in contrast with Articles L. 132-13 and L. 132-14, does not require a "request."
(iii) Art 14 seems more general in specifying "modes of exploitation, revenue generated and remuneration due" rather than "turnover, sales figure, etc."

French law (on publishing duties) may go further

(i) in requiring the information appropriate to confirm their accuracy;
(ii) in requiring details as to overseas exploitation;
(iii) in offering a procedure if the obligation is not carried out;
(iv) detailing the remedy for non-compliance (termination of the contract).

(iii) Alternative Dispute Mechanisms in France

With respect to proposed **Article 16**, under French civil law it is possible to include a arbitration and mediation clause in contracts and these will be treated as valid. Rules on such proceedings can be found in Article 1528 ff of the Code Civil. According to Professor Kamina, in practice several sectors of the industry operate mediation/arbitration panels, which is widely used in disputes between film authors and producers. One example would be AMAPA (*l'Association de Médiation et d'Arbitrage des Professionnels de l'Audiovisuel*.)[176] The CRIDS Study also stated that in France, a commission of conciliation will resolve dispute about remuneration under publishing contacts.[177]

4.4.3. Germany[178]

German (and Austrian) copyright contract law starts from the position that copyright itself is non assignable. However, the law permits an author to grant a right to another to use the

[174] E-mail correspondence with Professors Kamina and Benabou.
[175] Professor Kamina also adds that "[i]n all cases, standard procedural rules will allow to obtain an order against sub-contractors to communicate information necessary for the calculation of the remuneration. But that would involve bringing the sub-contractor into the suit or launching a separate action. And the author will need to provide for a legitimate reason to do so (for example when the accounts have not been provided to the producer, or are incomplete). So this can be costly, take some time and meet with resistance."
[176] http://lamapa.org/
[177] CRIDS Study, 71 ("the recent Agreement between authors and book publishers provides that any party to a publishing contract may request a review of the remuneration. The Agreement specifies that this possibility applies to counter or correct discrepancies between the contractually-determined remuneration and the evolution of the digital business models in the publishing sector. Parties may call upon a commission of conciliation in case the negotiation process does not succeed.")
[178] Act on Copyright and Related Rights, Copyright Act of 9 September 1965 (Federal Law Gazette I, p. 1273), as last amended by Article 1 of the Act of 20 December 2016 (Federal Law Gazette I, p. 3037). The following relies on the translation of the Act by Ute Reusch, available at https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html, and Gruenberger, M., 'Germany', in Bently, L., *International Copyright*. We are grateful to Vincent Knott from the University of Munich for help in researching German case-law.

work in a particular manner or in any manner - a so called 'right of use' (*Nutzungsrecht*). Such a 'right of use' may be granted as an exclusive right, as well as a non-exclusive right, and may be limited in respect of place, time or content.

German law offers a phalanx of provisions regulating such agreements (and those of performers).[179] These include rules on interpretation,[180] rules on contracts concerning modes of use unknown at the time of the contract,[181] rules on reversion,[182] rules on transparency, rules requiring equitable remuneration and a best-seller clause. The latest batch of amendments to this occurred in 2016. Moreover, the 1901 Publishing Act, applies to publishing contracts.

(i) Transparency Obligations under German Copyright Law

Section 32d (added by the 2016 Amendment) confers a right similar to the transparency right envisaged by **Article 14** of the proposed Directive. German law states:

> "Where a right of use has been granted or transferred in return for payment, the author may once a year request from his contracting party information and accountability in respect of the extent of the use of the work and the proceeds and benefits derived therefrom on the basis of information which is generally available in the ordinary course of business activities."

The following aspects of proposed Article 14 seem more author-protective than German law:

(i) proposed Art 14 applies in all cases, whereas the German right only applies where "a right of use has been granted or transferred in return for payment";
(ii) the German provision envisages a "request";
(iii) the German law requires the information only be provided "once a year", rather than 'on a regular basis, and taking into account the specificities of each sector';
(iv) the derogations permitted from the proposed transparency obligation under Article 14(2) and (3) seem (slightly) narrower than those permitted under Art 32d(2) of German law. The transparency duty is excluded where 'the author has made only a secondary contribution to a work, product or service' or the claim is otherwise 'disproportionate.'

The first exclusion seems broader than proposed **Art 14(3)** which would exclude cases where 'the contribution of the author or performer is not significant having regard to the overall work or performance.' There are two differences worth noting: one between a 'secondary contribution' (German) and an 'insignificant contribution' (EU); and between contributions to the work/performance (EU) and contributions to the 'product or service' (Germany). One could imagine a photojournalists photograph being a secondary contribution to a newspaper, or a book illustrators contribution a secondary contribution to a book. It would be much more difficult to say they are insignificant contributions to the work (they are the work) or even the product/service.

The second exclusion – on grounds of proportionality – also seems broader under the German statute, especially because the focus of the EU provisions seems to be limited to the

[179] Sec. 79(2a) Copyright Act (Secs. 32 to 32b, 32d to 40, 41, 42 and 43 apply *mutatis mutandis* to performers who transfer or grants of rights of use.)
[180] Art 31 (5) articulates the principle of purpose-restricted transfer (*Übertragungszweckgedanke*). If the types of use have not been specifically designated when a right of use was granted, the types of use to which the right extends shall be determined in accordance with the purpose envisaged by both parties to the contract.
[181] Art 31a. These provisions allow for contracts permitting unknown uses, but allow the author to revoke such a right unless, subject to a number of exceptions and qualifications.
[182] Subject to a number of exceptions, an author who has granted an indefinite right of use for a lump sum, is permitted to exploit the work in a different manner after 10 years has elapsed.

'administrative burden,' whereas German law leaves open what might lead to an obligation being disproportionate.

However, current German law goes further in various respects:

(i) in requiring not just the information but also "accountability";
(ii) the information required under the German law is not limited to "revenues" and extends to "the proceeds and benefits derived therefrom";
(iii) in stating that derogations from the transparency obligation to the detriment of the author shall be possible only by an agreement which is based on a so-called 'joint remuneration agreement' or collective agreement;
(iv) most importantly, in extending the duty to parties further down the chain. Section 32e states:

a. Where the author's contracting partner has transferred the right of use or granted further rights of use, the author may also demand information and accountability pursuant to section 32d (1) and (2) from those third parties

i. which essentially economically determine the use processes in the licence chain or
ii. from whose profits or benefits the conspicuous disproportion pursuant to section 32a (2) results.

b. In order to be able to assert the entitlements under subsection (1) it shall be sufficient that there are clear indications based on verifiable facts that their conditions are met.

(ii) Contract Adjustment Mechanism in Germany

Section 32a contains a provision that is similar to the proposed 'bestseller clause' in **Article 15** of the proposed Directive.[183] Entitled 'author's further participation', it states:

> Where the author has granted a right of use to another party on conditions which, taking into account the author's entire relationship with the other party, result in the agreed remuneration being conspicuously disproportionate to the proceeds and benefits derived from the use of the work, the other party shall be obliged, at the author's request, to consent to a modification of the agreement which grants the author further equitable participation appropriate to the circumstances. It shall be irrelevant whether the parties to the agreement had foreseen or could have foreseen the amount of the proceeds or benefits obtained.

This entitlement to further remuneration applies even if the contractually agreed remuneration was equitable at the time when the rights were granted, provided that the agreed remuneration is strikingly disproportionate to the proceeds and benefits derived from

[183] Reber, N., 'The "further fair participation" provision in art.32 a (2) German Copyright Act - claims against a third-party exploiter of a work,' (2016) 11 (5) J.I.P.L.P. 2016, 382-385.

the use of the work.[184] It seems that the provision applies to all types of works, including works of applied art.[185]

Article 32 has been successfully invoked in two high profile cases that made their way to the Federal Court of Justice.[186]

In one case, cinematographer Jost Vacano was awarded close to Euro 300,000 for his contributions to film *Das Boot* (1981) (directed by Wolfgang Petersen), the story of the U-boat U-96 and its crew in the second world war. Vacano was initially given $200,000 by the film production company Bavaria for his work on the film, but he was cut out of the film's profits. The film generated $100 million worldwide and Vacano was nominated for an Academy Award. He commenced a claim in 2008 against Bavaria to take account of the DVD and video sales. After a decision of the Federal Court of Justice that Vacano was entitled to information about the exploitation of Das Boot from before 2002 if this was relevant to establishing that there had been a striking disproportion in revenue,[187] the case returned to the lower courts. The Munich Court of Appeal developed criteria for the determination of "conspicuous disproportion": such as the long period of successful exploitation of the movie concerned in all fields, in relation to the original contractual partner, a film producer, as well to sub-licensees, namely a broadcaster and a DVD producer.[188] Eventually, the Lower Munich Court awarded Vacano an additional remuneration for 2012-2014 of € 205,000 to be paid by the film producer and € 89,000 from its sublicensee.[189]

In another case, the Federal Court of Justice held that a claim under Article 32a could be maintained by Marcus Orff, a German dubbing actor who lent his voice to Johnny Depp, playing 'Jack Sparrow' in the German version of *Pirates of the Caribbean*.[190] Orff had initially been paid Euros 1308 for the first film and Euros 4000 for the sequel and now claimed a supplemental fee of 180,000 Euros. The Federal Court of Justice found that the contribution of a dubbing actor who lends his voice to one of the main characters of a film was not of mere ancillary importance to the overall film and that the fee paid was not a fair consideration for his contribution. Orff's contribution therefore was not merely "marginal". The BGH offered further guidance as to when one may assume a disproportion, in particular where the agreed payment was less than half of what would have been a reasonable payment. The Court confirmed that revenues derived from exploitation of the (dubbed) film abroad could be taken

[184] Art 32a(1) Copyright Act. This replaced former Article 36 that had a bestseller clause, and made two important changes: first, the threshold was moved from "gross" disproportion to "striking" disproportion and, second, the foreseeability or otherwise of the success of the work was now to be treated as irrelevant. See the discussion Senftleben, M., 'Copyright, Creators and society's Need for autonomous Art,' in R. Giblin and K. Weatherall, (eds), *What if We Could Reimagine Copyright* (Canberra: ANU Press, 2017) Ch 2, at 61. See also Thorsten Lauterbach, blog http://ipkitten.blogspot.co.uk/2009/02/will-german-cameramans-compensation.html.

[185] BGH (Federal Court of Justice), Nov. 13, 2013--*Geburtstagszug* (Birthday Train [for Children]), 2014 GRUR 175; BGH (Federal Court of Justice), June 16, 2016--*Geburtstagskarawane* (Birthday Caravan), 2017 ZUM 56.

[186] Gruenberger refers to two cases where the claims were unsuccessful: KG (Court of Appeals) Berlin, May 30, 2012, 2012 ZUM 686 (rejecting claims by film director relating to film of live concert and finding Euro 20,000 fee reasonable when film made Euro 756,000); OLG (Court of Appeals) Munich, March 31, 2011--*Pumuckl-Verwertung* (Exploitation of the *Pumuckl*-Figure), 2011 GRUR-RR 405 (with correction at p. 480) (where TV based on comic had revenue of Euro 9 million, the designer of comic book character on which it based received Euro 23,000 that was well below 50% of the reasonable remuneration of 1%, ie Euro 90,000). In a further case the Higher Regional Court of Munich rejected a claim for additional compensation brought by the designer of the opening credits for specific episodes of one of Germany's most famous TV crime series, Tatort, because the credits were only a 'subordinate contribution': *29 U 2749/10* of 10 February 2011 http://ipkitten.blogspot.co.uk/2011/03/tatort-no-fairness-compensation-for-co.html. Thanks to Vincent Knott for looking into these cases.

[187] BGH (Federal Court of Justice), Sept. 22, 2011--*Das Boot* (The Boat), 2012 GRUR 496 http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&sid=0eec396206a41d5e4590bddd213385e0&nr=59538&pos=0&anz=1

[188] OLG (Court of Appeals) Munich, March 21, 2013--*Das Boot II* (The Boat II), 2013 GRUR-RR 276.

[189] LG (Regional Court) Munich, June 2, 2016, 2016 ZUM 776.

[190] BGH (Federal Court of Justice), case reference I ZR 145/11, 10 May 2012--*Fluch der Karibik* (Pirates of the Caribbean), 2012 GRUR 1248, discussed by Birgit Clark at http://ipkitten.blogspot.co.uk/2013/02/bgh-confirms-fairness-compensation-for.html For a discussion of the lower court decision that was being appealed, see http://ipkitten.blogspot.co.uk/2011/08/court-as-film-critic-no-fairness.html

into account in a situation where the contract was governed by German law. Bearing in mind the success of the film, there was a disproportion between the fee paid and the success of the work. On remand, the Berlin Kammergericht awarded Orff additional remuneration of Euros 67,314.[191]

Other provisions of German law provide useful elaborations that are not present in the Commission's proposal:

First, **Article 15** makes clear that the adjustment is of the contract with the immediate party, but leaves unclear whether the "subsequent relevant revenues and benefits" include those derived from parties further down the chain. In contrast, German law states:

> (2) If the other party has transferred the right of use or granted further rights of use and if the conspicuous disproportion results from proceeds or benefits enjoyed by a third party, the latter shall be directly liable to the author in accordance with subsection (1), taking into account the contractual relationships within the licensing chain. The other party shall then not be liable.

Second, it is not clear whether Member States may allow for Article 15 to be overridden by express terms. In contrast, German law is explicit on this issue:

> (3) There can be no advance waiver of the rights pursuant to subsections (1) and (2). An expected benefit shall not be subject to compulsory execution; any disposition regarding the expected benefit shall be ineffective. The author may, however, grant an unremunerated non-exclusive right of use for every person.

Third, Article 32d(4) indicates that the right to review the contract is not available where the remuneration has been determined in accordance with a joint remuneration agreement (Article 36) or in a collective agreement and explicitly provides for further equitable participation in cases under subsection (1). Although this might appear to be in tension with the right under proposed Article 15, it is perhaps better viewed as clarify mechanisms as to how appropriate remuneration can be determined.[192]

(iii) Alternative Dispute Resolution

As for proposed **Article 16**, this would require a change in German law. According to Professor Gruenberger of the University of Bayreuth:

> "There is no general ADR system under German law. Germany has implemented the Directive 2013/11/EU …[h]owever, the scope of the *Verbraucherstreitbeilegungs-gesetz* is strictly limited to B2C disputes only. Authors who claim fair remuneration under Sec. 32 et seq. Copyright Act in most cases do not qualify as consumers. In my opinion, Art. 16 would require Germany to introduce an ADR procedure for this kind of claims."

(iv) More ambitious Intervention: A Right to Equitable Remuneration

Ultimately, then, the Directive adds little of value to German law. In fact, German law goes well beyond the proposals in the Directive by including a range of other author-protective provisions. The most important of these is Article 32, which in 2002 introduced a general right to equitable remuneration. This states:

> (1) The author shall have a right to the contractually agreed remuneration for the granting of rights of use and permission to use the work. If the amount of the

[191] KG (Court of Appeals) Berlin, June 1, 2016, 2016 ZUM-RD 510.
[192] Our thanks to Professor Gruenberger for this insight.

> remuneration has not been determined, equitable remuneration shall be deemed to have been agreed. If the agreed remuneration is not equitable, the author may require the other party to consent to a modification of the agreement so that the author is granted equitable remuneration.

Article 32 goes well beyond Article 32a, in that it requires equitable remuneration generally, rather than merely offering a remedy in cases of egregious disproportion of benefit. As the German Constitutional Court stated (in a case upholding the constitutionality of Article 32):

> "The legislature did not intend the reform to protect authors merely in cases of the blatant abuse of negotiating power by the exploiters, but to create legal arrangements for bringing about a general and comprehensive balancing of interests between authors and exploiters with regard to remuneration."[193]

An agreement which is not equitable to an author may not be invoked by the other party to the agreement.[194]

Recognising that the prospects of authors suing publishers and other exploiters will often be unappealing (if the author hopes to obtain more work), the German legislation envisages a role for collective bargaining and other "joint remuneration agreements" between authors groups and associations which are representative, independent and empowered to establish such joint remuneration agreements and an associations of exploiters of works or individual users of works.[195] If a relevant collective bargaining agreement exists (for example with film producers),[196] Article 32(4) indicates that the author shall have no right to claim equitable remuneration to the extent that the remuneration for the use of his works has been determined in a collective bargaining agreement. However, there are few such agreements, so few claims will fail at this hurdle. If there is a joint remuneration agreement, the contractually agreed remuneration is treated as equitable.[197]

One such agreement relates to fiction writers,[198] but there are others concerning film production relating to directors, cinematographers and screenwriters. In the absence of either type of arrangement, the courts must determine whether the contractually agreed remuneration id equitable. According to Article 32(2), remuneration is regarded as equitable 'if at the time the agreement is concluded it corresponds to what in business relations is customary and fair, given the nature and extent of the possibility of use granted, in particular the duration, frequency, extent and time of use, and considering all circumstances.'[199] Article 32(2a) states that a joint remuneration agreement may also be used as the basis to determine equitable remuneration in the case of contracts concluded prior to their temporal scope of application, though those cases seem rather limited. As a result the courts are left to determine what is equitable.

In a series of cases concerning the rights of translators, the German Federal Court of Justice noted that what was "customary" was not necessarily "fair": "a given remuneration is only fair when it equally takes account of the interests of authors besides those of the exploiter."[200]

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[193] BVerfG (Federal Constitutional Court), *Destructive Emotions*, Order of the First Senate of 23 October 2013 - 1 BvR 1842/11 - paras. (1-115), 2014 GRUR 169, http://www.bverfg.de/e/rs20131023_1bvr184211en.html

[194] Art. 32(3).

[195] Art. 36(2)(1).

[196] Art. 32(4).

[197] Arts. 32(2)(1) and 36(1)(1).

[198] 'Common Remuneration Rules for Writers of German Fiction,' negotiated between Association of German Writers in the United Services trade union "Ver.di" and publishers, referred to Senftleben, M., 52 ff. More recently, such an agreement was negotiated between the Federation of German Authors and a number of German publishers in relation to translations, and came into force on April 1, 2014. See IVIR Study, https://www.ivir.nl/publicaties/download/remuneration_of_authors_final_report.pdf, at 88

[199] Art. 32(2).

[200] BGH (Federal Court of Justice), Oct. 7, 2009, I ZR 38/07--*Talking to Adison*, 2009 GRUR 1148, [11], quoted in Senftleben, 55.

As a result, the Court indicated if the rights granted are unlimited in time and scope, lump sum arrangements are unlikely to be equitable.[201] Rather, an author's remuneration is only fair if they participate in the economic exploitation of the work, typically by way of a royalty. In deciding what these percentages should be, the Court was heavily influenced by parallel agreements for fiction writers (even though in one of the cases the translators were not translating fictional works).[202]

4.4.4. Netherlands[203]

As a result of legislative reforms which came into effect July 1, 2015, and very much inspired by German precedents, the Netherlands Copyright Act of 1912 now contains a range of provisions designed to protect authors.[204] Film production contracts were already subject to Article 45d of the Copyright Act, though this too was amended.[205]

(i) Transparency Obligations under Dutch Law

While Dutch law does not appear to contain anything equivalent to the proposed transparency obligation in **Article 14** of the draft Directive on Copyright in the DSM, after "a reasonable period" has passed in which to exploit the work, the law entitle the author to be given details of the "the extent of exploitation". The primary purpose of this reporting requirement is to allow an author to avail themselves of the right to terminate the contract for non-exploitation in Art 25e(1). More specifically, Article 25e(4) states that:

> "At the author's request, the other party to the contract will provide him with a written statement about the extent of the exploitation within the period referred to in the third subsection."[206]

It seems that the obligation to disclose the extent of exploitation is much narrower that the obligation to disclose financial dimensions of such transaction. IViR's 2004 report to the Ministry of Justice did propose such a financial reporting obligation as necessary to support a best-seller clause,[207] but according to Professor Hugenholtz, the Dutch Copyright Committee rejected that proposal because of the administrative burdens it would create for exploiters.

(ii) Contract Adjustment Mechanism in the Netherlands

The existing Dutch provisions include something akin to **Articles 15 and 16** of the Commission proposal. Article 25 (d) is something like the "bestseller" provision and offers the author (and performer) a right to additional fair compensation. This claim exists when "having regard to the performances delivered by both parties, the agreed compensation is

[201] Klett, A. (Reed Smith LLP), "'Appropriate remuneration' for translators under German copyright law – German Federal Court of Justice decides in favor of translators,' https://www.lexology.com/library/detail.aspx?g=0876f141-fd6c-467c-8b0a-e1c5783fad8b

[202] Senftleben, M., 'Copyright, Creators and society's Need for autonomous Art,' in R. Giblin and K. Weatherall, *What if We Could Reimagine Copyright* (Canberra: ANU Press, 2017) Ch 2, 52 ff.

[203] The following section draws on van Eechoud, M. 'Netherlands,' in Bently, L; Hugenholtz, P.B., 'Towards Author's Paradise: The New Dutch Act on Authors' Contracts,' in: Karnell, G., Kur, A, P-J. Nordell, P-J. Axhamn, J., Carlsson S. (eds.), *Liber Amicorum Jan Rosén,* (Visby 2016), 397-407; Dysart, T. 'Author-protective rules and alternative licences: a review of the Dutch Copyright Contract Act,' EIPR. We are grateful for additional email correspondence with Professor Hugenholtz at the University of Amsterdam.

[204] Copyright Contracts Act (*Wet Auteurscontracten*) of 30 June 2015, Stb. 2015, 257, in English translation Dutch law firm Visser Schaap & Kreijger (www.ipmc.nl) and is based on a previous translation by Mireille van Eechoud at http://www.hendriks-james.nl/auteurswet/.

[205] Art 45d.

[206] Art 25e(4) (translation by Visser Schaap & Kreijger).

[207] Hugenholtz, P.B. and Guibault, L., (IViR), *Auteurscontractenrecht: naar een wettelijke regeling?*, report commissioned by the WODC (Ministerie van Justitie), June 2004, at https://www.ivir.nl/publicaties/download/auteurscontractenrecht.pdf, p xii (recommendation H) (summary in English).

seriously disproportionate to the proceeds from the exploitation of the work."[208] Importantly, and as with the German law, the market success of the work need not have been unforeseen in order for the claim to exist. Again, like the German law, the claim can be brought against third parties that have acquired the exploitation rights.[209] One commentator foresees that the law will most easily avail authors who have agreed lump sum payments.[210]

(iii) Alternative Dispute Resolution in the Netherlands

The Dutch law also provides for alternative dispute resolution in relation to the bestseller clause (and a number of other provisions). Article 25(g) provides that the Minister can establish a Committee to resolve disputes under Article 25c, first and sixth paragraphs, 25d, 25e or 25f.[211] This provision was, in fact, inspiration for the European Commission's inclusion of Article 16 in the Draft Directive.[212] In the Netherlands, the *Geschillencommissie Auteurscontractenrecht* is now established.[213]

(iv) More ambitious Intervention: A Right to Fair Compensation

In other respects, the Dutch provisions do however go well beyond those in the draft Directive. The "most far-reaching provision" (according to Bernt Hugenholtz) confers on an author the right to "fair compensation" for granting a right of exploitation.[214] Where agreement cannot be reached on what amounts to "fair compensation," a joint request may be made by an association of authors and an exploiter (or an association such as a publishers' association) to the Minister of Education, Culture and Science, who can determine the amount.[215]

The Netherlands operates other rules that protect authors. These include rules on formalities,[216] interpretation,[217] future uses,[218] and termination.[219]

4.4.5. Poland[220]

The 1994 Copyright Act abolished the specific standard contracts and royalty schedules for authors that the prior Polish regime had imposed. However, Articles 41 to 68 contain a number of regulation in relation to copyright contracts.

(i) Transparency Obligations

First, there is a transparency provision analogous to proposed **Article 14**. Art. 47 states that

[208] Van Eechoud (2016). Hugenholtz, (2016), suggests 'seriously' or 'grossly disproportionate' Dysart says 'seriously disproportionate.'
[209] Art. 25d(2). ('If the serious disproportion between the author's compensation and the proceeds from the work's exploitation arises after the other party to the contract with the author assigns the copyright to a third party, the author may issue the claim as referred to in the first subsection against that third party.').
[210] Hugenholtz, 404.
[211] This covers disputes under Article 25c, first and sixth paragraphs, 25d, 25e or 25f.
[212] Impact Assessment, Vol 1, 180.
[213] https://www.degeschillencommissie.nl/over-ons/commissies/auteurscontractenrecht/
[214] Art. 25c.
[215] Art. 25c(2)-(5).
[216] Assignment of copyright and exclusive exploitation licences of copyright must be effected by a signed instrument, specify the rights.
[217] Art. 2(2) contains a 'purpose of grant' provision: an assignment only transfers such rights as it specifically mentions *or* as are necessarily implied from the nature or purpose of the underlying transaction.
[218] Article 25f a grant of rights in future works is voidable if for an unreasonably long or insufficiently determinate period of time.
[219] Article 25e (termination for insufficient exploitation).
[220] We are grateful to Dr Ewa Lastowska-Litak and Professor Anna Tischner for assistance with the section on Poland. For background, see CRIDS Study, 140-145.

> "If the remuneration of the author depends on the proceeds from the use of his/her work, the author shall have the right to receive information and to have access, as necessary, to the documentation being essential to determine such remuneration."[221]

The following aspects of proposed Article 14 seem more author-protective than Polish law: proposed Art 14 applies in all cases, whereas the Polish right only applies where "the remuneration of the author depends on the proceeds from the use of his/her work." It is not clear whether the "remuneration" refers to contractual remuneration or might include remuneration under the Polish bestseller clause (art 44). If the latter, then it might be that the Polish provision is actually as extensive as the EU proposal, and could be used in cases where contractual remuneration is a lump sum or the licence is gratuitous. Moreover, the EU obligation is more specific as to regularity, timeliness, adequacy and sufficiency.

However, current Polish law goes further in various respects:

- in requiring not just the information but the provision of "access, as necessary, to the documentation being essential to determine such remuneration" ;
- the information required under Polish provision is not limited to "revenues" but "extends to information… essential to determine the amount of remuneration";
- in not providing for derogations from the obligation.

(ii) Contract Adjustment Mechanism

Polish law also contains a best-seller clause similar to that proposed in **Article 15** of the draft Directive. Article 44 states:

> "In the event of gross discrepancy between the remuneration of the author and the benefits of the acquirer of the author's economic rights or the licensee, the author may request the court for a due increase of his/her remuneration."[222]

Like the German and Dutch laws, which refer to a "conspicuous" or "serious" disproportion, the Polish law requires a "gross" or "egregious" disproportion.[223] In this respect, it might be narrower than the proposed Article 15 which just refers to the agreed remuneration being "disproportionately low." The Polish law also differs in referring to the "due increase", but it is unclear whether it might suffice to increase the remuneration merely to a level that is not "grossly disproportionate": the EU proposal at least indicates that the remuneration should be "appropriate."

(iii) Alternative Dispute Resolution in Poland

There is no provision on ADR in the current Polish Copyright Act. While the Polish Code of Civil Procedure recognises the possibility of mediation or arbitration (through an arbitration court), it seems that this will not be sufficient for the purposes of implementing the proposed Directive.

[221] Anonymous translation at http://www.wipo.int/wipolex/en/details.jsp?id=3500
[222] Anonymous translation at http://www.wipo.int/wipolex/en/details.jsp?id=3500 "Gross discrepancy" is also the translation at CRIDS Study, 144.
[223] Barta, J. and Markiewicz, R., 'Poland', in Bently, L., ("Article 44 provides that the author may petition a court to increase a royalty in the event of egregious disproportion between the contractually fixed royalty and the benefits ensuing to the assignee or the licensee.")

It is notable that Polish law regulates contracts significantly beyond the proposals in the Directive. There are rules on formalities,[224] specification of field of exploitation,[225] limits on contracts for unknown uses, rights to terminate for non-exploitation,[226] and rights to terminate length or indefinite arrangements.[227]

4.4.6. Spain[228]

(i) Transparency Obligation

Spanish law contains no general transparency obligation. However, like France, it does impose such obligations on a sectoral basis, in relation to publishing contracts and audiovisual productions. Thus Article 64(5) requires annual accounting in relation to publishing agreements, with the possibility for audit. Article 78(5) contains a similar obligation in relation to contracts permitting the performance of works. In each case, the minimum period is annual. Importantly, these obligations apply to transferees.

If **Article 14** is adopted, Spanish law would need to supplement these obligations with a general obligation. A right to request information from a contracting party about remuneration in order to satisfy oneself of ones rights under the Intellectual Property Act is implicit in the obligation of good faith in Articles 1258 and 1256 of the Civil Code.[229]

(ii) Contract Adjustment Mechanism: Proportionate Remuneration and Best-seller Clause

Spanish law, like French law, operates a principle of "proportionate remuneration", with a "best-seller clause" only applying in cases where "lump sum" arrangements are permitted. **Article 47** states:

> "Where in the case of a transfer for a lump sum the remuneration of the author is manifestly out of proportion to the profits obtained by the licensee, the former may apply for a review of the contract and, in the absence of agreement, may apply to the court for the award of equitable remuneration in the light of the circumstances of the case. That faculty may be exercised within the 10 years following the transfer."[230]

The narrow scope of the provision only makes sense once it is clear that Article 46(1) already provides that the author, in transferring exploitation rights, shall receive "a proportionate share in the proceeds of exploitation, the amount of which shall be agreed upon with the transferee." Nevertheless, Article 46(2) permits lump-sum payments in the following cases:

> "(a) when, on account of the manner of exploitation, there is great difficulty in the calculation of the proceeds, or where their verification either is impossible or would incur costs out of proportion to the eventual rewards;
> "(b) where the use of the work is of secondary character in relation to the activity or the material object for which it is intended;
> "(c) where the work, being used with others, does not constitute an essential element of the intellectual creation in which it is embodied;
> "(d) in the case of the first or sole edition of the following, previously undisclosed works:

[224] Art 53.
[225] Art 41.1. But see Barta, J. & Marckiewicz, R., 'Poland'.
[226] Art 57.1.
[227] Art 68.2.
[228] We are grateful to German Bercovitz, (Professor, University of León; Fellow, Royal College of San Clemente, Bologna), Ramon Casas Valles (Professor of Intellectual Property at University of Barcelona) and Raquel Xalabarder Plantada (Professor, Universitat Oberta de Catalunya) for advice on Spanish law.
[229][229] Thanks to German Bercovitz for explaining this.
[230] The translation is from Bercovitz, A., and Bercovitz, G., in Bently, L., International Copyright

- dictionaries, anthologies, and encyclopedias;
- prologues, annotations, introductions, and presentations;
- scientific works;
- material for the illustration of a work;
- translations;
- reduced-price popular editions."

In turn, it is in these cases where the Spanish best-seller provision would bite.
What would the effect of proposed Article 15? It seems likely that Spanish law would

- need to extend the operation of Article 47 beyond "lump sum" cases" to all contracting parties;
- replace the "manifestly out of proportion" test (Spanish law) with that of "disproportionately low";
- replace reference to "the circumstances of the case" with narrower focus required by Article 15 on the remuneration originally agreed and "subsequent relevant revenues and benefits";
- focus the test on "subsequent relevant revenues and benefits" from exploitation rather than the "profits obtained by the licensee";
- align "equitable remuneration" with "additional, appropriate remuneration"
- apply the right to performers, who are currently not covered.

(iii) Alternative Dispute Resolution

Alternative dispute resolution is available in Spain, and used specifically in relation to disputes involving collecting societies. Under Articles 158 and 158 bis, the First Section of the Copyright Commission shall have the functions of "mediation, arbitration, fixing of rates, control" in the field of copyright and neighbouring rights conflicts. According to Professor Bercovitz, it would be relatively straightforward to extend the jurisdiction.[231]

4.4.7. United Kingdom

The United Kingdom has minimal regulation of copyright contracts.[232] For the most part, contractual terms are primarily a matter of the parties. Judicial intervention to reformulate contractual terms only occurs under the general doctrines applicable to cases of unreasonable restraint of trade and undue influence.[233]

(i) Transparency Obligations

Despite the relatively unregulated approach to copyright contracts, such contracts will often include accounting provisions and may also provide for alternative dispute resolution. The Publishers' Association operates a *Code of Practice on Authors Contracts* (2010).[234]

[231] Arbitration or mediation between private parties (e.g., producers and authors) is regulated by Ley 60/2003, de arbitraje and Ley 5/2012, de mediación.
[232] Bently, L., *Between A Rock and a Hard Place*.
[233] These doctrines proved important in the 1970s and 1980s in curbing some very lengthy and one-sided publishing and recording contracts in the music industry.
[234] https://www.publishers.org.uk/resources/guidelines/

Clauses 11, 12 and 13 of the Code relate to accounts. Clause 11 emphasises the importance of accounts being rendered "at least annually", and suggests that publishers might be prepared to disclose sales figures "on condition that the author…agree not to disclose the information to any other party." Clause 13 suggests authors should be provided with details of licensing arrangements, at least as far as the details are not confidential. Proposed Article 14 will place these obligations on a stronger legal footing.

(ii) Contract Adjustment Mechanism

There is no legal mechanism to review the substantive terms of contracts. A famous dictum is that "Equity mends no man's bargains."

However, Clause 5 of the Publishers' Association operates a *Code of Practice on Authors Contracts* (2010) highlighting that normally "the publisher must give the author a proper opportunity to share in the success of the work." It emphases that "in general, the publishing contract should seek to achieve a fair balance of reward for author and publisher." However, there may be circumstances where "royalties and fees may not be affordable"", such as, (it explains) in academic publishing. A low royalty might be justifiable in cases of "exceptional risk" or "unusually high" sunk costs, though there should be provision for an increase in the royalty rate should the work turn out to be successful. The Code of Practice is thus close to recommending proportional remuneration, and an increased share in cases of best-sellers. However, unlike Article 15 of the proposed Directive, it is only a code of practice, and only relevant to publishing agreements.

(iii) Alternative Dispute Resolution

The UK has made considerable efforts to making formal dispute resolution easier and cheaper, particularly for authors, through the small claims track of the Intellectual Property and Enterprise Track. However, there are no "Government-initiated" ADR mechanisms for copyright contract disputes.

The European Commission cited the Publisher Association Informal Dispute Settlement Service as an example from which it developed the idea of proposed **Article 16**.[235] Indeed Clause 7 of the 2010 Code of Practice includes use of the "PAS's Informal Arbitration Procedure." Paradoxically, in January 2017, the Society of Authors declared that the "useful and cost-effective arbitration scheme has become moribund," and set itself a target to revive the scheme.[236] The Publishers Association website prominent recommends that its members consider mediation through the service MEDIAtion.[237]

4.4.8. Do the Proposals Add Value?

This close review reveals that in many cases the Commission proposals do add some value.

The **transparency obligation** in the form of proposed **Article 14** will improve the formal rights of authors in the UK and add a general obligation to the sector specific approach in France and Spain. It will also alter in an author-protective way some of the specific elements of other national laws, for examples, those that premise the obligation on a prior request or

[235] *Impact Assessment*, Vol 1, 180, n 560.
[236] Society of Authors, *Current Strategy*, (Jan 2017) 5 at http://www.societyofauthors.org/SOA/MediaLibrary/SOAWebsite/Documents-for-download/Strategy-January-2017.pdf
[237] https://www.publishers.org.uk/about-us/join-the-pa/pa-member-benefits/mediation-service-for-publishers/

a contract that carries obligations to pay remuneration on a recurring basis. However, it does not go as far as many laws that also expressly entitle authors to audit or verify the information, nor does it preclude contractual terms that seek to limit their obligation.

The **contract adjustment mechanism** in **Article 15** of the proposed Directive would improve the formal position of authors in the UK and Denmark, and performers in Spain and (some) performers in France. However, it is not as ambitious as the general provisions on entitlement to equitable/proportional remuneration recognised in France, Germany, the Netherlands and Spain.

The **alternative dispute resolution obligation** in **Article 16** is something which does not exist in six of the seven Member States surveyed. Those member states do permit ADR, but have not established specific provisions. While therefore this seems to add considerable potential "EU value", it reinforces doubts as to how far this proposal can genuinely be said to be justified by Article 114 TFEU.

4.5. European Parliament Committee Amendments

Article 14-16 have already been considered by three committees in the European Parliament:

(i) By CULT, which proposed 16 amendments;
(ii) By ITRE, which proposed 9 amendments;
(iii) By IMCO, which proposed 8 amendments.

None of the reports offers commentary but one might note that for the most part the amendments add detail. Repeat issues seem to be:

(i) Against whom can the transparency obligation be exercised?

Under **Article 14** in the proposal, the accounting obligation are imposed on "those to whom they have licensed or transferred their rights." As noted above, it does not seem to be limited to situations where the licensee is contractual, or where the author or performer is entitled to receive regular payments (by royalty). It could apply eg to lump sum or Creative Commons arrangements.

CULT proposes an amendment to recital 40 so as to refer to authors' weak bargaining position when they license or transfer their rights "by contract" and to add the word "directly" to Article 14. An inference might be that non-direct and non-contractual licences fall outside the transparency obligations.

(ii) Can transparency obligations affect successors?

We noted earlier certain ambiguities in the Commission proposal as to precisely from whom relevant reporting information can be acquired. The Committees seem to favour widening the obligation.

IMCO Amendment 29 and ITRE Amendment 28 amend recital 40 so as to add that '*The reporting and transparency obligation should follow the work across all form of exploitation and across borders.'* The amendments of **Article 14(1)** by IMCO and ITRE say that the obligation is owed by "from those to whom they have

licensed or transferred their rights, *including subsequent transferees or licensees"*.[238]

However CULT uses different, narrower language "from those to whom they have directly licensed, assigned or transferred their rights."[239] CULT adds a new Art 14(1)(1a) which states that "any relevant successor in title shall provide the beneficiary of a license or transfer of rights with the necessary information to allow that beneficiary to fulfil the obligations" under Article 14(1).

(iii) Should Collective Management entities be absolved from the transparency obligation?

Under recital 41, as proposed by the Commission, the transparency obligation need not apply to agreements with CMOs as they are already subject to Directive 2014/26/EU, Chapter 5 of which lays down a series of reporting obligations. IMCO Amendment 30 would qualify the exemption, so that CMOs are resolved of responsibility under **Article 14** where and 'to *the extent that fully equivalent* transparency obligations *exist* under Directive 2014/26/EU***'*** ITRE Amendment 29 likewise seeks to qualify the exemption of CMOs on condition that the 2014 Directive has been transposed and is effectively enforced.

(iv) How frequent must reporting be?

IMCO Amendment 29 and CULT Amendment 34 amend recital 40 to require reporting be 'regular,' while IMCO Amendment 74 and CULT Amendment 87 require it to be at least annually.

(v) What is the standard of transparency?

CULT Amendment 34 amends recital 40 to require that reporting be 'accurate', while all 3 Committees would amend Article 14(1) and impose an accuracy standard.[240] In addition further amendments by all three committees to article 14(2) require that the level of transparency in every sector should be 'high' (rather than merely appropriate).[241]

(vi) Must reporting cover promotion?

All three Committees amend **Article 14(1)** so that the reporting obligations also include promotion of the work.[242]

(vii) What is the role for standard reporting?

In amendments to recital 41, both ITRE and CULT emphasise the importance of developing standard reporting, and CULT refers to automated processing. Corresponding substantive amendments are proposed in a new art 14(2a).[243] IMCO and ITRE amendments would oblige Member States to ensure that sector-specific standard reporting statements and procedures are developed through stakeholder dialogues.[244]

(viii) Must there be a right to audit?

[238] IMCO Amendment 74, ITRE Amendment 53.
[239] CULT Amendment 87.
[240] IMCO Amendment 74, ITRE Amendment 53, CULT Amendment 87.
[241] IMCO Amendment 75, ITRE Amendment 54, CULT Amendment 89
[242] IMCO Amendment 74, ITRE Amendment 53, CULT Amendment 87.
[243] ITRE Amendment 55, CULT Amendment 90.
[244] IMCO Amendment 75; ITRE Amendment 55.

ITRE amends **Article 14(2)** to confer also a right to audit.[245]

(ix) Should the reporting obligation exist where the contribution is insignificant?

Art 14(3) allows Member states to disapply the transparency obligation where the contribution of the creator is not significant. IMCO would delete the Article and instead make significance of contribution one factor to be considered alongside administrative burden when implementing transparency in accordance with Article 14(2).[246]

(x) For the contract adjustment mechanism to operate must the success be unexpected?

Article 15, as proposed by the Commission, is not just a best-seller clause. Although it involves assessment of the proportionality of the authors remuneration ex post, to take account of revenues received, it would apply if the disproportionality existed from the start. Various amendments by IMCO seem designed to limit the provision to cases where the money made by the exploiter was unexpected. Thus it amends recital 42 to indicate the mechanism is available in cases *of unexpected success* and Article 15(1) so that adjustment is only required "when the remuneration originally agreed is disproportionately low compared to the *unanticipated* subsequent relevant revenues and benefits."[247]

(xi) Does the mechanism apply to successors?

Article 15, as proposed, makes the Contract adjustment mechanism available against 'the party with whom they entered into a contract.' IMCO amendment clarifies that this also includes that persons "*successor in title."*[248]

(xii) Is the significance of the contribution relevant to the contract adjustment?

Under proposed **Article 15**, an appropriate remuneration can be requested where the remuneration is disproportionately low having regard to the revenues 'derived from the exploitation of the work or performance.' An IMCO Amendment to Recital 42 mentions various factors that might be taken into account, which are to include *'the nature and significance of the contribution of the author or performer to the overall work or performance, should be taken into account*.'[249] A CULT Amendment, adding a new Article 15(1)(1a) would allow Member States to exclude the operation of the provision altogether *'when the contribution of the author or performer is not significant having regard to the overall nature of the work or performance.'* [250]

(xiii) What is the award where the revenue is disproportionately low?

The three Committees are dis-satisfied by only the word 'appropriate' in Article 15. IMCO proposes award represent what is 'equitable,' whereas ITRE and CULT choose the term 'fair.' [251]

[245] ITRE Amendment 54. The obligation in paragraph 1 … shall ensure … a right of the author and performer to audit.' The wording could be improved.
[246] IMCO Amendment 76 (deleting art 14(3)); Amendment 30 (adding as factor to be considered when applying Article 14(2)).
[247] IMCO Amendments 31 and 77.
[248] IMCO Amendment 77.
[249] IMCO Amendment 31.
[250] CULT Amendment 94 (and corresponding Amendment 36 to recital 42).
[251] IMCO Amendment 77, ITRE Amendment 57, CULT Amendment 93.

(xiv) What is the relationship between ADR and collective bargaining?

IMCO Amendment 32 to recital 43 states that 'i*t should also be possible to agree upon the dispute settlement resolution in collective agreements.'* CULT Amendment 96 would add a new Article 16(1)(1a) allowing the initiation of the procedure *'by any of the parties to the dispute or through collective action by several authors or performers with the same contractual partner and similar claims, or … on their behalf by a collective organisation representing them.'*

Reflecting the view that the Proposals lack ambition, both CULT and ITRE would add an unwaivable right to remuneration in respect of the making available right, while ITRE seeks to add a right of termination.

CULT and ITRE both propose the introduction of a new article 14a,[252] in these terms

"Unwaivable right to fair remuneration for authors and performers

1. Member States shall ensure that when authors and performers transfer or assign their right of making available to the public, they retain the right to obtain a fair remuneration derived from the exploitation of their work.
2. The right of an author or performer to obtain a fair remuneration for the making available of their work is inalienable and cannot be waived.
3. The administration of this right to fair remuneration for the making available of an authors or performers work shall be entrusted to their collective management organisations, unless other collective agreements, including voluntary collective management agreements, guarantee such remuneration to authors, audio-visual authors and performers for their making available right.
4. Collective management organisations shall collect the fair remuneration from information society services making works available to the public.

Member States shall ensure that authors and performers, or representatives they appoint, are entitled to request additional, fair remuneration from the party with whom they entered into a contract for the exploitation of the rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances."

ITRE Amendment 58 reads:

"Article 15 a
Rights reversion mechanism
1. Member States shall ensure that authors and performers that are in a contractual relationship with ongoing payment obligations, may terminate the contract by which they have licensed or transferred their rights when there is a complete absence of exploitation of their works and performances, a persistent failure to pay the remuneration agreed or a complete lack of reporting and transparency.
2. The right to terminate the contract on the transfer of licensing of rights may be exercised if within a year from the notification by the performer or author of this intention to terminate the contract, the contracting party fails to fulfil its contractual obligation with regards to the payment of the remuneration agreed.

With regards to the absence of exploitation of a work and the complete lack of reporting and transparency the right to terminate the contract on the transfer or licensing of rights may be exercised if within five years from the notification by the

[252] ITRE Amendment 56, CULT Amendment 92. Note also CULT 37.

performer or author of their intention to terminate the contract, the contracting party fails to fulfil its contractual obligations.

3. Member States may decide that the obligation in paragraph 1 does not apply when the contribution of the author or performer is not significant having regard to the overall work or performance."

Table 2: Recitals by Committee

	IMCO	ITRE	CULT
Recital 40			34 contract
	29 regular		34 Regular Accurate
	29 follows transfer	28 transferees	
Recital 41	30 significance	29 standard reporting statements	35 standard reporting statements
	30 CMOD	29 CMOs	35 collecting bargaining
Recital 42	31 unexpected success		36 defines benefits 36 recognises expenditure
	31 significance of contribution		36 significance of contribution
Recital 42a			37 fair remuneration for making available
Recital 43	32 – collective agreements		38 collective claims 38 affordability
Recital 43a			39 Commission to monitor best practice
Art 14(1)	74 at least once a year		87 annual
	Accurate	53 accurate	87 accurate
	Open-readable format		
	Promotion	53 promotion	87 promotion
	Transferees	53 transferees	87 directly licensed
Art 14(1a)			88 associated duty of licensee/transferee
Art 14(2)	75 high level	54 high level	89 high
	Stakeholder dialogue	54 audit	

		54 enforceable	
			89 justifying disproportionate burden
Article 14(2a)		55 sector specific standard reporting	90 automated
Art 14a		56 unwaivable right to fair remuneration	92 unwaivable right to fair remuneration
Art 14(3)	76 delete		
Art 14(3a)			91 collective bargaining
Art 14(4)			
Art 15	77 representative action	57 fair	93 fair
	77 equitable		
	77 successor		
	77 unanticipated		
Art 15(1)(1a)			95 insignificant
Art 15a		58 termination in absence of exploitation	
Art 16		59 anonymously	95 without prejudice to judicial action
			96 collective action

4.6. Proposed Amendments in JURI

Draft JURI Report

The Draft Report is generally positive about the Commission Proposal. It agrees with the general direction of travel, though seeks to include 'a declaration on authors' and performers' right to fair remuneration', alongside the 3 Commission proposals.

Draft Amendment 63 contains the radical change, the insertion of an entitlement to equitable remuneration into **Article 15**:

> "Member States shall ensure that authors and performers are entitled to *equitable* remuneration for the exploitation of *their* works."

The idea of a contractual adjustment mechanism is retained, but it is clarified as a 'best-seller clause' as Art 15(1)(a). More specifically Amendment 64 makes two alterations, to clarify that disproportionality is assessed against the "*unanticipated subsequent relevant net*

revenues and benefits" and that the request can be made by representatives (rather than the creators themselves).[253]

The draft report justifies these changes in this way:

> *"Authors and performers are at the centre of creativity yet often face challenges of making a livelihood and also face challenges to negotiate their rights. Recognising their right to an equitable remuneration for the exploitation of their works as well as the possibility of appointing representatives to seek contract adjustment on their behalf are means of empowering authors and performers without creating an unreasonable claim on the investment done by others."*[254]

The Draft Report explains that the other amendments it proposes (to **Articles 14 and 16**) merely seek to 'ensure clarity and legal certainty.'[255] However, they are not insignificant. To begin, the transparency obligation is to be limited to those in contractual relationship with ongoing payment obligations.[256] This is surprising, as it limits the creators ability to know whether the remuneration is inequitable (for Art 15) or disproportionately low (for Art 15(1a) in cases of eg lump sum contracts. Other amendments are less radical: the reporting is required to be accurate,[257] to include details of promotional activities,[258] and JURI would promote standard reporting.[259] Significance of contribution would be a relevant consideration when Member States decide how to implement transparency obligations.[260] As to article 16, one Amendment would introduce a new Article 16(1a) indicating that representative organisations appointed by authors and performers should be permitted to 'bring proceedings in respect of disputes.'

Tabled Amendments for JURI Committee Meeting

Subsequently, Members of JURI have proposed a wide range of amendments. According to our analysis there are 121 amendments tabled that relate to this section of the proposed Directive. A brief overview might be helpful. We divide them into three sections, corresponding to the three articles.

(a) Amendments Tabled Relating to Transparency (Art 14)

(i) Who Is Entitled to Accounts?

One amendment suggests the reporting obligation should also avail performers, publishers, producers and their successors in title,[261] another that it should include 'bodies that use public money for the purchase of content,'[262] and a third that it should be available to collecting societies.[263] This, of course, is not justified by the rationale of disparity of bargaining power.

(ii) Against whom can the transparency obligation be exercised?

As with the draft report, some amendments seek to limit the transparency obligations to situations of (i) contract and/or (b) recurring obligations.[264]

[253] JURI Draft report, Amendment 27 (to recital 42).
[254] JURI Draft Report, 44.
[255] JURI Draft Report of March 10, 2017, 2016/0280(COD), 53.
[256] JURI Draft report, Amendment 62.
[257] JURI Draft report, Amendment 62.
[258] JURI Draft report, Amendment 62 ('modes of promotion').
[259] JURI Draft report, Amendment 26 (to recital 41).
[260] JURI Draft report, Amendment 26 (to recital 41).
[261] JURI, Tabled amendment 877.
[262] JURI, Tabled amendment 879.
[263] JURI, Tabled amendment 895 (as a new art 14(1a).
[264] JURI, Tabled amendment 878, 880, 884.

(iii) Can transparency obligations affect successors?

Some amendments seek to require that information be available from 'successors in title,'[265] 'subsequent transferees or licensees'[266] or 'any other third party holding such information.'[267] One amendment would remove any limitation (presumably implicitly imposing the obligation on anyone who can be regarded as exploiting the work or performance).[268] Another would add a new clarifying Art 14(1a) applying the obligation to sub-licensees where their usage is substantial.[269]

(iv) Should Collective Management entities be absolved from the transparency obligation?

One amendment proposes to delete Art 14(4), subjecting CMOs also to the transparency obligation.[270]

(v) How frequent must reporting be?

Several amendments propose that reporting is at least annual.[271] One amendment proposes 'once a year at the most.'[272]

(vi) What is the standard of transparency?

A number of tabled amendments require that reporting be 'accurate',[273] while other 'accurate and comprehensive,'[274] 'comprehensive,'[275] 'precise.'[276]

In addition, further proposed amendments to Article 14(2) require that the level of transparency in every sector should be 'high' (rather than merely appropriate).[277]

(vii) Must reporting cover promotion?

A number of proposed amendments suggest amending Article 14(1) so that the reporting obligations also include promotion of the work.[278]

(viii) What revenue must it cover?

One tabled amendment would propose that reporting should cover direct and indirect revenues.[279]

(ix) What is the role for standard reporting?

[265] JURI, Tabled amendment 878.
[266] JURI, Tabled amendment 882, 883
[267] JURI, Tabled amendment 880.
[268] JURI, Tabled amendment 887.
[269] JURI, Tabled amendment 894.
[270] JURI, Tabled amendment 920.
[271] JURI, Tabled amendment 878, 880, 882, 884, 885.
[272] JURI, Tabled amendment 881.
[273] JURI, Tabled amendments 877, 883, 884, 888, 889, 891, 893.
[274] JURI, Tabled amendments 878, 882, 886, 890, 892.
[275] JURI, Tabled amendment 879.
[276] JURI, Tabled amendment 885.
[277] JURI, Tabled amendments 899, 902, 903, 904, 905, 906, 907.
[278] JURI, Tabled amendments 877, 882, 883, 885, 888, 889, 891.
[279] JURI, Tabled amendment 886

In amendments to recital 41, and proposed Art 14(2a) or amended Art 14(3), various amendments support sector-specific standard reporting.[280]

(x) Must there be a right to audit?

Some amendments would explicitly include such a right.[281]

(xi) What Limitations should Member States be able to Impose on the Reporting Obligation?

A number of amendments are proposed to Article 14(2). One is that it be deleted;[282] another would seriously curtail the freedom to limit the obligation because of administrative burdens;[283] a third would require any derogation to be justified.[284]

(xii) Should the reporting obligation exist where the contribution is insignificant?

Art 14(3) allows Member states to disapply the transparency obligation where the contribution of the creator is not significant. One amendment seems to make this mandatory,[285] while others delete the freedom.[286] One would replace significance with relevance;[287] and another with the alternative of there being 'no significant link between the specific work or performance and those obliged to provide remuneration.'[288]

(xiii) Should reporting obligations exist where the contracts have been set by collective bargaining?

Proposed amendments would allow MS to remove reporting obligations 'when reporting obligations have been agreed by the parties, for example through collective bargaining agreements.[289]

(b) Amendments Tabled Relating to the Contract Adjustment Mechanism (Article 15)

(i) Unwaivable Rights to Remuneration

One tabled amendment will require recognition of a right to 'proportionate and equitable remuneration'.[290] An alternative version limits this to 'proportionate remuneration'.[291] A couple of similar proposal would limit the right to particular rights or works. One such proposal is limited to performers and authors of audiovisual works;[292] another to performers and the making available right.[293] One would replace the existing proposal with an obligation on Member States to ensure that authors and performers are entitled to 'an appropriate remuneration for the exploitation of their works or performances.'[294]

[280] JURI, Tabled amendments 908, 917, 918.
[281] JURI, Tabled amendments 902, 903, 904, 905.
[282] JURI, Tabled amendment 898
[283] JURI, Tabled amendments 899 (though it would leave intact the proportionality requirement); 900, 901, 902.
[284] JURI, Tabled amendments 903 (with explanatory justification), 904, 906.
[285] JURI, Tabled amendment 881 ('This claim does not apply to subordinate contributions to works').
[286] JURI, Tabled amendments 909, 910, 911, 912, 913, 917, 918.
[287] JURI, Tabled amendment 914.
[288] JURI, Tabled amendment 916.
[289] JURI, Tabled amendments 914 (with explanatory justification); 915, 919, 921 (amending art 14(4)).
[290] JURI, Tabled amendment 925 (with explanatory justification); 926; 927, 930, 936.
[291] JURI, Tabled amendments 928, 929.
[292] JURI, Tabled amendment 923 (as art 14a).
[293] JURI, Tabled amendment 948.
[294] JURI, Tabled amendment 934

(ii) Contract Adjustment Mechanism

There is a draft amendment proposing that such a mechanism should be optional for Member states.[295]

(iii) Is it Available where the contract is based on collective bargaining?

One amendment suggests it should not be.[296]

(iv) Can it be excluded by contract?

One amendment says contractual provision to the contrary should be null and void.[297]

(v) For the contract adjustment mechanism to operate must the success be unexpected?

Some amendments suggest that the mechanism should be available only in cases of unanticipated success.[298] This would render it a true 'bestseller clause.' One explains, 'The revenues must be unexpected, not only for the author or performer but also the contracting party before a right of renegotiation can be afforded.'[299]

(vi) Does the contract adjustment mechanism apply to successors?

Some amendments propose making it clear that the mechanism is available against successors in title.[300] It is observed that 'rights in completed works and catalogues of works are frequently sold, production companies disappear, and very often the company in control is no longer the production company with whom authors or performers entered into the contract. Therefore it shall be clarified, that they can claim contractual adjustments, including additional remuneration, from the producer's successor in title if this happens.'

(vii) Is the significance of the contribution relevant to the contract adjustment?

One amendment suggests this should be treated as a factor when considering whether remuneration is disproportionately low.[301] Another tabled amendment would be more categorical, prohibiting any claim where the contribution is not significant.[302]

(viii) What is the standard for adjustment?

One suggested disproportionately low or 'unexpected'[303]; another 'clearly disproportionate.'[304]

(ix) What is the comparator?

[295] JURI, Tabled amendments 932, 938, 946.
[296] JURI, Tabled amendment 954.
[297] JURI, Tabled amendment 957.
[298] JURI, Tabled amendments 937, 939, 946, 950
[299] JURI, Tabled amendment 937.
[300] JURI, Tabled amendment 935.
[301] JURI, Tabled amendments 932, 938.
[302] JURI, Tabled amendment 954.
[303] JURI, Tabled amendment 933,
[304] JURI, Tabled amendment 946.

A number of amendments refer to net revenue.[305] One offers an explanation that 'Due costs and investments to the work need to be taken into account when assessing the revenue. In order to avoid legal uncertainty, the special features of different sectors need to be taken into account

(x) Must the claim be made promptly?

One amendment calls for the prompt exercise of the right, indicating that it expires if it is not exercised within a reasonable period from the act of exploitation in question.[306]

(xi) What is the award where the revenue is disproportionately low?

As written, the Commission specifies an 'additional, appropriate remuneration.' Various tabled amendments would replace or add the term 'equitable,'[307] fair,[308] or 'proportionate.'[309]

(xii) Can the claim be brought by representatives?

A number of tabled amendments would extend the action to representative.[310]

(c) Amendments Relating to Article 16

(i) Optional for MS

One amendment would make the mechanism optional.[311]

(ii) Obligatory

One proposed amendment would make the use of alternative dispute mechanisms obligatory rather than voluntary.[312]

(iii) Standards for ADR

One proposed amendment would require that the ADR be in public,[313] while another would set certain other standards.[314]

(iv) Proceedings by representative organisations

Four amendments would specify that the alternative dispute system is to be available to representative organisations for authors.[315]

A few proposals are more ambitious still. One seeks to limit the possibility of transfers that cover rights, territories, technologies, modes of exploitation and uses that were not known at the time the contract was agreed.[316] Others would confer on authors rights to revoke the assignments or transfers, when the other party fails to exploit the work or meet its

[305] JURI, Tabled amendments 937, 946, 950.
[306] JURI, Tabled amendment 933.
[307] JURI, Tabled amendments 931, 935, 940, 941, 947, 955, 956.
[308] JURI, Tabled amendments 937, 939.
[309] JURI, Tabled amendment 945.
[310] JURI, Tabled amendments 935, 939, 941, 942, 944, 950, 951, 955, 956.
[311] JURI, Tabled amendment 966.
[312] JURI, Tabled amendment, 962.
[313] JURI, Tabled amendment 963.
[314] JURI, Tabled amendment 966.
[315] JURI, Tabled amendments 967, 968, 969, 970.
[316] JURI, Tabled amendment 949 (adding a new Art 15(1a)).

obligations.[317] A further proposal would authorise Member States to set the maximum duration of exploitation agreements.[318]

4.7. Tentative Conclusions on Authors and Performers Contracts

In the light of comparative experiences, and cultural economics, we make the following conclusions.

(i) In general, the proposals in **Articles 14-16** of the proposal can be welcomed. From an author protective perspective, at least, they add some value in most of the Member states reviewed.[319] However, they are relatively unambitious, especially when viewed from the context of the laws of Member States. This is recognised in the Draft JURI Report.

(ii) Article 14 is the most important of the three proposals. Certain dimensions of it could do with clarification. Many of the JURI Draft Report and other Amendments seek to do this. Two issues seem particularly important:

(a) Should the right be limited to situations of recurring contractual remuneration?

As pointed out, to do so has the advantage of excluding gratuitous licences, such as Creative Commons arrangements. But as drafted in JURI Draft report Amendment 62, the obligation would not apply to lump sum arrangements.

Ideally, one could differentiate between 'recurring payments' where the party is obliged to render accounts and 'lump sum' cases, where the party is obliged to render accounts only if the creator requests them. In the latter case, a requirement of timeliness of response would also be appropriate.

(b) Should the obligation be imposed further down the chain from the initial contracting party?

This is clearly a troubling issue. There are circumstances where the initial contracting party may not know about the exploitation by someone further down the chain. It might be that the initial contracting party themselves accepted a lump sum to allow certain exploitation and is not entitled to the information. Yet, that information might be regarded as relevant to an assessment of whether what the author receives is disproportionate. One solution might be to allow the creator to request accounts from such sub-licensees, and the creation of a corresponding duty on such third parties.

(iii) Other clarifications to **Article 14** in the Draft JURI report Amendment 62 – requiring the report to be accurate, and to include details of promotional activities - seem relatively uncontroversial. An additional entitlement to see supporting evidence seems appropriate: models for such a rule can be found in Danish, French, German and Polish laws.

(iv) **Article 15** is more difficult to assess.

[317] JURI, Tabled amendments 952 959, 961, 953, 958.
[318] JURI, Tabled amendment *960.*

[319] One might doubt that these are the provisions which most significantly affect the Internal Market.

The economic evidence is that bestseller clauses are of limited effect and often merely assist those who have already acquired the market power to renegotiate existing deals. However, Article 15 may go beyond being a best-seller clause and allow for correction of other contracts that were unfair when they were initially entered. It is, at best, ambiguous.

In the draft JURI report, **Article 15** would be reconfigured clearly to be a bestseller clause, because a new right to equitable remuneration is proposed in a new article 15(1) (Draft JURI Amendment 63). Should that prior proposed amendment be rejected in JURI, it is suggested that the Committee does not adopt proposed amendment 64 from the report, and leave the Commission text substantially intact. It might nevertheless still be useful to indicate that the remuneration to be awarded under the contract adjustment mechanism is to be fair, equitable or proportionate rather than 'appropriate.'

(v) The question arises whether JURI should propose anything more ambitious at this stage, such as Draft Report amendment Article 63. It is notable that this is weaker in tone than the proposals from CULT and ITRE for an *unwaivable* right to remuneration.

A number of difficulties arise from proposing these provisions at this stage, however sympathetic one might be to their aims. If the right is waivable, it will almost always be overridden by contract. If it is unwaivable, some system needs to be considered for deciding *ex ante*, on a sectoral basis, what is equitable. The French and Spanish laws demonstrates that there are many situations where a lump sum agreement may be necessary or appropriate. Even where proportionate income is appropriate, the surrounding mechanisms for implementing such provisions need a lot of consideration, as German experience shows.

While we are sympathetic to the criticism that the Commission should have considered a more ambitious menu of author-protective measures, it did not do so. Introducing dramatic changes via Parliamentary amendment has the potential to cause considerable, unnecessary and unwanted disruption to a field that is both complex, as well as economically and socially important. None of the proposed amendments look sufficiently carefully thought-through to warrant support at the moment.

(vi) Given that many Member States have much more elaborate author-protective provisions, it would be useful for the Directive to make clear that it harmonizes only the specific areas covered (or, indeed, effects minimum harmonization). It needs to be crystal clear that no inference can be drawn from the harmonization of these aspects that Member States may not maintain their own provisions on equitable remuneration, contract duration, termination, reversion, etc.

(vii) For both the transparency and contract adjustment provisions, we think it would be sensible to make it completely clear that such provisions do not apply to Creative Commons and associated 'open' licences. The German model provides that the provisions (of Article 32) do not apply where a creator grants 'an unremunerated non-exclusive exploitation right for every person.' This seems like a good model. The same language might be used to clarify that no accounting obligation arises under Article 14 in such cases.

(viii) **Article 16** may have some practical importance for authors, but it is not clear that this is really an issue that justifies harmonization. Such mechanisms are only starting to emerge in Member states.

(ix) We are concerned that the contract regime says nothing about the mandatory status of these provisions. We would suggest a clause be introduced to clarify that contractual provisions derogating from the obligations should be null and void (unless agreed through collective representation). Useful examples of such clauses already exist in Danish and German laws.

(x) Equally, we are surprised nothing is said about private international law. It would be unfortunate if obligations could be avoided by specifying a different applicable law, and to do so one would expect some specification as to how the rules relate to general principles of choice of law in contract.[320] German and Dutch law seek to make the contractual rules mandatory in certain cases.[321] One possibility would be to provide that the law of the Member State is to be applied if the acts of exploitation take place or should take place wholly or predominantly in the Member States.

[320] Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ 2008 No. L 177.
[321] For various suggestions, see Ginsburg & Sirinelli.

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ANNEX 1 INTERVIEW PROTOCOLS

[Interview protocol for Journalists]

Questions on Proposed EU Press Publishers Right ("Ancillary Right")

The European Parliament is in the process of considering a proposal for a new harmonized EU right for "press publishers", also known as "ancillary" or "neighbouring" right. The Legal Affairs Committee (JURI) have commissioned a study from Technopolis to help inform their discussion.

As you know, the debate is polarised. We are particularly interested to hear from journalists with a differentiated understanding of the trends in online news publishing.

We are contacting a small number of journalists from Spain and Germany because these countries have experience of similar initiatives: in Germany the *Leistungsschutzrecht* in Sections 87f through 87h of the Copyright Act (introduced in 2013); and in Spain by the 2014 modifications of the quotation right that rendered the use of "non-significant fragments of content available to the public", where the source of the content is 'periodicals or regularly updated websites', and where the material in question 'has the purpose of informing, creating public opinion or entertainment' to payment of equitable remuneration.

We would be interested to explore in a short interview your assessment of the functioning of the existing right, and the likely effects of the proposed new EU right.

Specific questions:

What are the big challenges affecting the business of press publishing (in your country, in Europe and globally)? What are the sources of traffic to the online offer of your publication? What are the revenue streams of your online operation, and how are they changing?

What are your views of the operation of the current ancillary right in your country? If you have any knowledge of licences discussed or concluded, we would like to explore these, but it is not expected that details are available.

Will a press publishers right help solve the problems facing the print news industry?
How is the existing right affecting and how do you think the new right will affect news aggregators?
Do you know of any licences that have been concluded? What is the value of the licences that have been concluded? What kinds of users were involved?
Where licences/payments have not been agreed, have any of the users left the market? What effects on Internet traffic have there been?
How is the existing right affecting and how do you think the new right will affect new entrants to the news industry?
How is the existing right affecting and how do you think the new right will affect remuneration of journalists?

[Interview protocol for Collective Rights Management Organisations CMOs Proposed EU Press Publishers Right ("Ancillary Right")]

The European Parliament is in the process of considering a proposal for a new harmonized EU right for "press publishers", also known as "ancillary" or "neighbouring" right. The Legal Affairs Committee (JURI) have commissioned a study from Technopolis to help inform their discussion.

We are contacting a number of interests from Spain and Germany because these countries have experience of similar initiatives: in Germany the Leistungsschutzrecht in Sections 87f through 87h of the Copyright Act (introduced in 2013); and in Spain by the 2014 modifications of the quotation right that rendered the use of "non-significant fragments of content available to the public", where the source of the content is 'periodicals or regularly updated websites', and where the material in question 'has the purpose of informing, creating public opinion or entertainment' to payment of equitable remuneration.

We would be interested to explore in a short interview your assessment of the functioning of the existing right, and the likely effects of the proposed new EU right.

Specific questions:

What are your views of the operation of the current ancillary right in your country?

Will a press publishers right help solve the problems facing the print news industry?

How is the existing right affecting and how do you think the new right will affect news aggregators?

Do you know of any licences that have been concluded? What is the value of the licences that have been concluded? What kinds of users were involved?

Where licences/payments have not been agreed, have any of the users left the market?

What effects on Internet traffic have there been where aggregators leave the field?

How is the existing right affecting and how do you think the new right will affect new entrants to the news industry?

ANNEX 2 SAMPLE SELECTION

Characteristics of approached publisher

	Circulation figures[322]	Online ranking	Political profile
Germany			
SPIEGEL ONLINE	90.281.948 visits	1	Centre-left
FOCUS ONLINE	63.815.739 visits	2	Centre-right
WELT	49.675.896 visits	3	Centre-right
Zeit.de	29,121,144 visits	4	Left-liberal
Süddeutsche.de	26.890.833 visits	5	Left-liberal
FAZ.NET	25.378.146 visits	6	Centre-right
Heise.de	20,186,171 visits	7	Technical scope
Spain			
El País	14,690,000 unique users	1	Centre / Centre-left
El Mundo	14,345,000 unique users[323]	2[324]	liberal
La Vanguardia	12,833,000 unique users	3	Centre (liberal)
ABC	12,265,000 unique uses	4	liberal
El Confidencial		5	liberal
20 minutos	?	6	Centre-left
El Español	> 8,700,000 unique user[325]	7	?--??
Menéame	?	--	--
Vocento[326]	24.2% of total circulation	--	--
Vozpópuli	?	?	liberal
Eldiario.es	> 7,000,000 unique users[327]	?	Left
El Correo	?	?	Centre-right (liberal)

[322] Ranking and circulation figures from June 2017, see: http://ausweisung.ivw-online.de/index.php
[323] https://politica.elpais.com/politica/2017/01/19/actualidad/1484857303_766166.html
[324] http://www.enterat.com/servicios/periodicos-digitales-espana.php
[325] http://www.elespanol.com/espana/20161002/159984561_0.html
[326] Vocento is a multimedia communications group in the Spanish press market with 13 newspapers, such as ABC.
[327] http://www.eldiario.es/redaccion/record-audiencia-comscore_6_615298489.html

This study was commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the JURI committee. It reviews Art 11 and Arts 14-16 of the proposed Directive on Copyright in the Digital Single Market. It outlines criticisms that have been made of the proposals, includes reports of research into the operation and effects of precursors of Article 11 in Germany and Spain, a summary of the cultural economics literature on legal regulation of authors' contracts and analysis of the laws of 7 Member States to see in what way Arts 14-16 would "add value".

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