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PhD thesis

The press publishers' rights in the European Union.
Safeguards for access to information and media pluralism.

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Les mots justes trouvés au bon moment sont de l'action.

H. Arendt

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Michalina Kowala

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List of Abbreviations

AG	Advocate General
AI	Artificial Intelligence
Charter	Charter of Fundamental Rights of the European Union
Copyright and Related Rights Commission	CDADV
CJEU	Court of Justice of European Union
CDSM Directive	Directive EU 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EMFA	Proposal for a regulation establishing a common framework for media services in the internal market, {SEC(2022) 322 final} - {SWD(2022) 286 final} - {SWD(2022) 287 final}
Et al.	Et alia (and others)
Etc.	Etcetera
EU	European Union
InfoSoc Directive	Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society
ISSP	Information Society Service Provider
MFA	Media Freedom Act
P.	Page
Para.	Paragraph
TDM	Text and Data Mining
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TPM	Technological Protection Measures
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
WCT	WIPO Copyright Treaty
WPPT	WIPO Performances and Phonograms Treaty

Abstract
(Polish version)

Głównym założeniem niniejszej rozprawy jest ocena praw wydawców prasy z art. 15 Dyrektywy Parlamentu Europejskiego i Rady (UE) 2019/790 z dnia 17 kwietnia 2019 r. w sprawie prawa autorskiego i praw pokrewnych na jednolitym rynku cyfrowym (Dyrektywa CDSM) w kontekście dostępu do informacji i pluralizmu mediów, rozumianych jako elementy wolności wypowiedzi i informacji.

Przeprowadzane badania dostarczają odpowiedzi na pytanie o to, jakie rozwiązania przyjmowane na etapie implementacji i stosowania prawa służą osiąganiu równowagi między ochroną interesów wydawców a koniecznością zapewnienia swobodnego przepływu informacji i ochrony pluralizmu mediów. Przekrojowe studium nowej regulacji pozwala ocenić, czy przyznanie wydawcom praw wyłącznych co do wykorzystania publikacji prasowych może przyczynić się do osiągnięcia celów wykraczających poza zakres prawa autorskiego i praw pokrewnych takich jak ochrona pluralizmu mediów czy dostępu do informacji. Wybór tematu badawczego uzasadniony jest jego aktualnością i znaczeniem z perspektywy praw użytkowników Internetu do dostępu do informacji.

Opracowanie obejmuje analizę pojęcia publikacji prasowej i prawa pokrewnego wydawców prasy wprowadzonych w dyrektywie CDSM, jak również pierwszej w UE, francuskiej implementacji prawa wydawców oraz polskiej propozycji implementacji. Pomimo faktu, że termin wdrożenia Dyrektywy upłynął w 2021 r., Polska jeszcze tego nie uczyniła. Wnioski wyciągnięte z francuskiej regulacji mogą stanowić zatem wskazówkę dla polskiego ustawodawcy odnośnie tego jak implementować prawo wydawców, zwłaszcza w kontekście zapewniania gwarancji dostępu do informacji i pluralizmu mediów. Analiza została wzbogacona o odniesienia do implementacji art. 15 w Hiszpanii, Włoszech i Belgii co pozwoli na kompleksową ocenę praw wydawców w tym specyficznym kontekście.

W pracy zastosowano formalno-dogmatyczną metodę badawczą z elementami metody prawnoporównawczej. Przeprowadzone badania w istotnej mierze dotyczą prawa UE. Analiza, uwzględniająca jego specyfikę, opiera się o studium prawa pierwotnego oraz prawa wtórnego, obejmującego liczne dyrektywy dotyczące prawa autorskiego i praw pokrewnych, co pozwala nakreślić zakres harmonizacji w tym obszarze. Ocena praw wydawców w szczególnym kontekście dostępu do informacji i pluralizmu mediów została przeprowadzana w oparciu o kryteria wypracowane na podstawie analizy przepisów Europejskiej Konwencji Praw Człowieka, Karty Praw Podstawowych UE oraz orzecznictwa Europejskiego Trybunału Praw Człowieka i Trybunału Sprawiedliwości Unii Europejskiej.

Ujęcie prawa autorskiego i praw pokrewnych w pracy jest systemowe i obejmuje szerszy kontekst relacji z prawami fundamentalnymi, prawem mediów i komunikacji społecznej a także perspektywy rynkowe odnośnie funkcjonowania sektora prasowego i metod rozpowszechniania informacji.

Rozprawa doktorska jest rezultatem badań prowadzonych w ramach Stypendium Rządu Francuskiego na pobyty we francuskich ośrodkach naukowych. Z tego względu, oraz biorąc pod uwagę międzynarodowy zakres badań, jest ona napisana w języku angielskim.

Badania przeprowadzone w ramach rozprawy doktorskiej stanowią wkład w rozwój nauki prawa autorskiego w kontekście dyskusji o relacji między wprowadzaniem nowych praw wyłącznych a zapewnianiem dostępu do informacji, o osiąganiu, w ramach ustawodawstwa prawnoautorskiego celów wykraczających poza ten obszar, takich jak ochrona pluralizmu mediów, czy o wyzwaniach dla prawa autorskiego i praw pokrewnych z perspektywy rozwoju nowych technologii.

Słowa kluczowe: wydawcy prasy, dostęp do informacji, pluralizm mediów, publikacja prasowa, agregatory wiadomości, platformy internetowe

Abstract
(English version)

The assessment of the related rights of press publishers from art.15 of the Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the digital single market (CDSM Directive) in the context of access to information and media pluralism, understood as the elements of freedom of expression and information, constitutes the main purpose of this dissertation.

The research provides an answer to the question of what solutions adopted at the stage of implementation and application of the publishers' rights can serve to achieve a balance between protection of publishers' interests and the need to ensure the free flow of information and to protect media pluralism. A cross-sectional study of the new law allows the determination whether granting publishers the exclusive rights as regards the use of press publications may contribute to the achievement of the objectives beyond the scope of copyright and related rights, such as protection of media pluralism or access to information. The choice of the research subject is justified by its topicality and importance from the perspective of Internet users' rights to access to information.

The study encompasses the analysis of the provisions from articles 2(4) and 15 of the CDSM Directive, their French implementation, being the first in the European Union and the Polish proposal for the implementation. Despite the fact that the deadline for the implementation was 2021, Poland has not implemented the CDSM Directive yet. The lessons learned from the French transposition can be considered as a guidance for the Polish legislator on how to implement the publishers' rights, especially as regards the safeguards for access to information and media pluralism. The analysis, provided in this dissertation is enriched by some references to the implementations of art. 15 of the CDSM in Spain, Italy and Belgium, which allows the comprehensive assessment of the said rights in this specific context.

In the dissertation, the formal-dogmatic research method with the elements of the comparative method are used. The study conducted concerns to a large extent the EU law. The analysis, taking into account its specificity, is based on the study of primary and secondary law, including numerous directives on copyright and related rights, which allows the scope of harmonisation in this area to be outlined. The assessment of the publishers' rights in the specific context of access to information and media pluralism was carried out on the basis of criteria developed through the analysis of the provisions of the European Convention on Human Rights, the EU Charter of Fundamental Rights and the case law of the European Court of Human Rights and the Court of Justice of the European Union.

The approach to copyright and related rights is systemic and covers the broader context of the relationship with fundamental rights, media and social communication law as well as market perspectives on the functioning of the press sector and methods of dissemination of information.

The dissertation is the result of research conducted in the framework of the French Government Scholarship for stays in the French research centers. For this reason, and given the international scope of the research, it is written in English.

This dissertation constitutes a contribution to the development of research on copyright. It is important in the context of discussions about the relationship between extending exclusive rights and providing access to information, about achieving, by using the tools from the area of copyright and related rights, the goals going beyond this area, such as protection of media pluralism, or about the challenges for copyright from the perspective of the development of new technologies.

Key words: press publishers, access to information, media pluralism, press publication, news aggregators, online platforms

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Introduction

Over the past decades, a new model of dissemination of information has become more common. It is based on the use of press publications by information society service providers and supplying them as part of news aggregation or news monitoring services. To illustrate, Google offers to its users services called Google News which provide them with access to numerous articles from various news websites under the form of hyperlink, headline and picture which when clicked, allow the user to read all the content on the original page.

Press publishers[1] considered such practices as conducted in an unauthorised manner, which harmed their interests and have weakened the press sector already facing many difficulties. In response, the related rights of press publishers has been adopted in the Directive EU 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (hereinafter: The CDSM Directive) with the objective of strengthening the bargain power of press publishers and rewarding their investments made to produce the press[2]. To this end, press publishers were granted the exclusive rights to authorise or prohibit the reproduction or making available of press publications by information society service providers. The purpose of the said rights was also to protect free and pluralist press which is essential to ensure the citizens' access to information. Press provides a fundamental contribution to the public debate and the proper functioning of a democratic society[3]. The new rights were intended to have an important role in ensuring the access to information and safeguarding media pluralism.

The main objective of the thesis is to assess the press publishers' rights in the context of the access to information and media pluralism, the latter two being understood as the elements of the freedom of expression and information. The analysis of the press publishers' rights, their holder, scope and subject matter constitutes the core of the research. It aims at examining the adopted mechanisms and identifying the missing safeguards which would be beneficial for the achievement of the objectives in this

[1] European Commission, Online News Aggregation and Neighbouring Rights for News Publishers, Ref.Ares(2017)6256585-20/12/2017, 2017, (unreleased), https://www.asktheeu.org/en/request/4776/response/15356/attach/6/Doc1.pdf, accessed: 06.11.2023.
[2] Recitals 54, 55 of the CDSM Directive.
[3] Recitals 54, 55 of the CDSM Directive.

specific context. A safeguard is understood as the mechanisms, solutions adopted "in order to protect someone or something from harm or damage"[4], to prevent the undesirable effects. For the purpose of this dissertation, it means a measure adopted to protect access to information and media pluralism, being the elements of freedom of expression, from the undesirable effects.

The choice of the research subject of this dissertation is justified by its topicality and importance in the context of the online users' rights to access information as well as changes in the methods of dissemination of information requiring the changes to the legal framework. The research conducted holds relevance from the perspective of the current debate about the golden mean between encouraging investment, protecting intellectual property and enabling access to information, and finally about the effectiveness of the legislation on online platforms. It allows for the examination of the publishers' rights from the perspective of different legislations and in broader context of access to information and media pluralism.

The research aims to provide an answer to the following main research question:

Whether, and if so which safeguards should be adopted by Member States while implementing the publishers' rights, in the context of the objectives of the rights which are the protection of access to information and safeguard for media pluralism.

Answering the following research questions will enable to identify the key elements serving at the final stage of research to formulate an answer to the main research question:

1) *What is the framework for access to information in copyright law before the adoption of art. 15 of the CDSM Directive? To what extent press publication and its elements were protected within copyright law before the adoption of art. 15 of the CDSM Directive?*
2) *What is the subject matter of protection resulting from the publishers' rights, what is the contribution of press publisher, holder of protection, for the press publication to arise?*
3) *What is the scope of the exclusive rights granted to press publishers, what is excluded from the protection?*

[4] Cambridge Dictionary, Definition of safeguard, https://dictionary.cambridge.org/dictionary/english/safeguard, accessed: 10.01.2024.

4) *What safeguards and risks can be identified based on the assessment of the publishers' rights in the context of access to information and media pluralism.*
5) *What are the shortcomings of the French implementation and of Polish proposal for the implementation of art.15 which could potentially impact the effectiveness of the regulation, especially in the context of the free flow of information and the safeguard for media pluralism?*

The research encompasses provisions from articles 2(4) and 15 of the CDSM Directive, the French implementation of the publishers' rights, which was the first in the European Union and the Polish proposal for the implementation. Despite the fact that the deadline for the implementation was 2021, Poland has not yet implemented the CDSM Directive. The lessons learned from the French regulation can therefore constitute a guidance to the Polish legislator on how to implement the publishers' rights, especially as regards the safeguards for access to information and media pluralism. The discussion of the first implementation of the publishers' rights in EU and the proposal of its last[5] implementation in the EU enriched by some references to the implementations of art. 15 of the CDSM in Spain, Italy and Belgium will enable a comprehensive assessment of the said rights in this specific context.

The assessment of the publishers' rights in the specific context of the access to information and media pluralism is conducted on the basis of the assessment criteria developed through:

- the analysis of the provisions from the European Convention on Human Rights[6], the EU Charter of Fundamental Rights[7], and case law of the European Court of Human Rights[8] and the Court of Justice of European Union[9];
- the analysis of the safeguards resulting from the international, EU and national (Polish and French) copyright laws as well as the case law of the CJEU and national courts.

[5] At the time of completion of the research: 07.02.2024 Poland has not implemented the CDSM Directive yet. The planned date for the adoption of the CDSM Directive, according to the information on the website of the Office of the Prime Minister, is the first quarter of 2024. (See: Kancelaria Prezesa Rady Ministrów, Wykaz prac legislacyjnych I programowych Rady Ministrów, https://www.gov.pl/web/premier/projekt-ustawy-o-zmianie-ustawy-o-prawie-autorskim-i-prawach-pokrewnych-oraz-niektorych-innych-ustaw3 , accessed: 05.02.2024.)
[6] Hereinafter: ECHR, Convention.
[7] Hereinafter: Charter.
[8] Hereinafter: ECtHR.
[9] Hereinafter: CJEU.

This dissertation is composed of five chapters. Chapter one, providing introductory remarks, discusses different perspectives of access to information and media pluralism in order to provide the insights on the functioning of the main areas concerned by the press publishers' rights. The context of fundamental rights is analysed with the focus on freedom of expression and intellectual property rights and their interconnections. Then, the legal and economic framework of the activity of press publishers on the basis of the Polish and French examples is studied. Moreover, the role of press from the perspective of enabling access to information and contributing to the protection of media pluralism is explained. The analysis provided in this chapter relates also to the functioning of news aggregators, their impact on press industry and their role in enabling access to information and contributing to the protection of media pluralism.

Chapter two establishes a framework for access to information in copyright law before the adoption of art. 15 of the CDSM Directive. In addition, the copyright protection of press publication, the example of which can be a press article will be discussed. Chapter determines who is the holder of the exclusive rights to it, what is exactly protected, what is the scope of granted rights and what is the legal position of recipients of press publication. This part of research is necessary to enable, at its later stage, the scrutiny of the changes brought by the adoption of the publishers' rights to the legal framework for access to information, especially as regards the protection of the results of press publishing activity.

Chapter three provides a characteristic of the related rights' regime and outlines *the ratio legis* of the publishers' rights. It is crucial to better understand the related rights' regime on which the EU legislator based to regulate the press publishers' issue and to shed more light on the reasons behind the adoption of the publishers' rights. Then, it determines what is protected by the press publishers' rights and what is excluded from the protection. The legal situation of press publishers, holders of protection is presented. The focus is also on the relationship between press publishers and the authors of works and other holders of rights to subject matters included in press publications.

Chapter four discusses the scope of the exclusive rights granted to press publishers. In addition, it provides the characteristic of information society service providers as the entities against whom the publishers' rights apply. The details of the exercise of the publishers' rights are examined. Through a case study of the legal situation of press publishers in France after the adoption of the related rights, the shortcomings of the

French implementation that could potentially impact the effectiveness of the regulation, especially in the context of free flow of information and the safeguard for media pluralism are identified and assessed. Moreover, the chapter sheds more light on the mechanisms implemented in Belgian, Spanish and Italian implementations of art.15 of the CDSM Directive aimed at preventing the circumvention of the regulation.

These considerations, provided in chapters three and four, are of much importance for the final stage of the analysis focused on developing how the implementation of art.15 of the CDSM Directive should look like in order to ensure the effectiveness of the regulation, especially in the context of preserving media pluralism and the free flow of information. It is precedented by the assessment of the publishers' rights from the perspective of market realities, fundamental rights and copyright framework for access to information.

The choice of such a structure for the dissertation allows for a provision of a comprehensive answer to the research questions. This is a study in copyright law regulating the protection of literary and artistic works and in related rights' regime regulating mostly the dissemination of such works. It is rooted also in broader area of information law. The latter regulates "the production, distribution and use of information goods and services"[10] and comprises "a wide set of legal issues at the crossroads of intellectual property, media law, telecommunications law, freedom of expression and right to privacy"[11].

The study of international copyright law is subsidiary to the central study of the EU law and serves as a tool to better understand the context, rationale, purpose and meaning of the solutions adopted later at the EU level. As to the latter, the analysis is rooted in primary law consisting of TEU, TFEU and the EU Charter of Fundamental Rights and the secondary law including numerous directives on copyright and related rights. The analysis concerns also the national solutions adopted and proposed[12] in Poland and France.

Answering the research questions required the use of formal-dogmatic research method with the elements of comparative legal method[13]. The choice of the legal orders

[10]Information Law: Expanding Horizons' IViR Research Program 2012-2016,2012, pp.2-3, https://www.ivir.nl/syscontent/pdfs/80.pdf, accessed: 06.11.2023.
[11] Information Law…, pp.2-3, https://www.ivir.nl/syscontent/pdfs/80.pdf, accessed: 06.11.2023.
[12] In the draft of the act amending Polish Copyright Act and implementing the CDSM Directive.
[13] See: I. Calboli, Comparative Legal Analysis and Intellectual Propoerty Law: A Guide for Research, in: I. Calboli, M.L. Montagnani (eds.), Handbook of Intellectual Property Research. Lenses, Methods and Perspectives, Oxford University Press, 2021, p.48. See also: J. Helios, W. Jedlecka, Wykładnia Prawa Unii

in question (Polish, French, with elements of Spanish, Italian, and Belgian) stems firstly from their relevance to the research being carried out, and secondly is justified by the linguistic skills of the author of this dissertation. The research is rooted in the analysis of EU law, and especially EU copyright law, since this is necessary for a comprehensive discussion of the publishers' rights adopted at the EU level. Emphasis in the analysis are made by the author, the research is divided in sections (1,2,3, etc.) and points (1.1.,1.2., 1.3. etc.).

The research for this dissertation was completed on 07 February 2024. Subsequent developments in the relevant law are therefore not reflected.

Europejskiej ze stanowiska teorii prawa, Prace Naukowe Wydziału Prawa, Administracji i Ekonomii Uniwersytetu Wrocławskiego, no.118, 2018; A. Godek, Zastosowanie derywacyjnej koncepcji wykładni prawa do rozstrzygania spraw ze stosowaniem przepisów unijnych, Ruch Prawniczy, Ekonomiczny i Socjologiczny, LXXIII, no.1, 2011.

Chapter I: Access to information and media pluralism in the technological, economic and legal context – introductory remarks

1. Introduction

Media pluralism has been approached from different perspectives[14] and at many layers.[15] For the purpose of the analysis conducted in this dissertation, I accept the understanding of the term developed by P. Valcke according to which, media pluralism is defined as **plurality and "diversity of media supply, use and distribution**, in relation to 1) ownership and control, 2) media types and genres, 3) political viewpoints, 4) cultural expressions and 5) local and regional interests."[16] Definition of media pluralism is therefore based on several factors. The ownership and control of media should not be concentrated in hands of very limited number of actors, media should be of varying size and of different types to respond to many and divers needs of audience. Moreover, media should represent a plurality of political viewpoints, contribute to cultural enrichment and satisfy global and local information needs.[17] The plurality and diversity of these factors should be ensured at the stage of supply, use and distribution of media.

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[14] See: Council of Europe, Pluralisme des médias et enjeux de la concurrence, IRIS spécial, Une publication de l'Observatoire européen de l'audiovisuel, Council of Europe, 2020, p.11; B. Klimkiewicz, Is the clash of rationalities leading nowhere? Media pluralism in European Regulatory Policies in. A. Czepek, M. Hellwig (ed.), Press Freedom and Pluralism in Europe**.**Concepts and Conditions, Intellect Books, 2009, pp. 45-48; P. Bárd, J. Bayer, A Comparative Analysis of Media Freedom and Pluralism in the EU Member States, Bruxelles : European Parliament's Committee on Civil Liberties, Justice and Home Affairs, 2016, pp. 34-36, https://www.statewatch.org/media/documents/news/2016/oct/ep-study-media-freedom-in-EU.pdf, accessed: 07.01.2022.

K. Jakubowicz refers to the passive perspective of pluralism of media which relates to ability to receive the full variety of content of offer in: K. Jakubowicz, New media ecology: Reconceptualizing Media Pluralism,in: P.Valcke, M. Sükösd, R.G. Picard (ed.), Media pluralism and diversity. Concepts, risks and global trends, Palgrave Global Media Policy and Business Series, 2015, p.32; B. Klimkiewicz dissccuss media pluralism at macro and micro level, see: B. Klimkiewicz, Is the clash …, pp. 45-48; P. Bárd, J. Bayer, A Comparative Analysis of Media Freedom …, pp. 34-36, https://www.statewatch.org/media/documents/news/2016/oct/ep-study-media-freedom-in-EU.pdf, accessed: 07.01.2022.

[15] According to P. Valcke the factors such as supplier diversity, product diversity and exposure diversity make up media pluralism. See: P. Valcke, Looking for the user in Media Pluralism regulation: unraveling the traditional diversity chain and recent trends of user empowerement in European Media Regulation, Journal of Information Policy, no.1, 2011, pp.287-320; K. Karppinen, Rethinking Media Pluralism and Communicative Abundance, McGannon Center Research Resources, no.5, 2009, pp.1-27; E. Brogi *et al*., EU and media policy: conceptualising media pluralism in the era of online platforms. The experience of the Media Pluralism Monitor in: P.L. Parcu, E. Brogi (red.), Research Handbook on Media Law and Policy, 2021, pp.16-31.

[16] P. Valcke *et al*., Independent Study on Indicators for Media Pluralism in the Member States – Towards a Risk-Based Approach, Preliminary Final Report,2009, p.5.

[17] See: P. Valcke, Looking for the user …, pp.287-320.

Media pluralism should be understood in both, external and internal dimensions. It means that it can be internal with various information, opinions and interests expressed within one media organisation or one type of media and external in nature, with an important number of media organisations or types of media.[18]

As to the definition of media, it should be understood as any means of transmission of information and entertainment[19] taking various technical forms and being perceived by sight and hearing[20]. According to the Council of Europe, media encompass "all actors involved in the production and dissemination, to potentially large numbers of people, of content (for example information, analysis, comment, opinion, education, culture, art and entertainment in text, audio, visual, audiovisual or other form) and applications which are designed to facilitate interactive mass communication (for example social networks) or other content-based large-scale interactive experiences (for example online games), while retaining (in all these cases) editorial control or oversight of the contents".[21]

The media ecosystem has evolved over last few years as the result of the societal, technological and economic changes. This evolution is reflected in the emergence of new actors, for example social medial platforms or news platforms[22] whose functioning is increasingly based on the use of algorithms[23], recommending, prioritising and proposing the disseminated content.[24] D. Tambini observes that today everything, and everyone is

[18] Council of Europe, Pluralisme des médias …, 2020, p.11; B. Klimkiewicz, Is the clash …, pp. 45-48; P. Bárd, J. Bayer, A Comparative Analysis of Media Freedom …, pp. 34-36, https://www.statewatch.org/media/documents/news/2016/oct/ep-study-media-freedom-in-EU.pdf, accessed: 07.01.2022.

[19] See: E. Derieux, Le droit des médias, Dalloz, 2019, p.2. See also: K. Klafkowska – Waśniowska, Radio, muzyka, rynek in: I. Matusiak, K. Szczepanowska-Kozłowska, Ł. Żelechowski (eds.), Opus auctorem laudat. Księga jubileuszowa dedykowana Profesor Monice Czajkowskiej-Dąbrowskiej, Wolters Kluwer Polska, 2019.

[20] K. Święcka, J.S. Święcki, Dyferencjacje prawne pojęcia „Media", Roczniki Nauk Prawnych, vol.16, no.1, 2006, p.458, pp.453-464.

[21]Committee of Ministers, Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media, adopted by the Committee of Ministers on 21 September 2011 at the 1121st meeting of the Ministers' Deputies, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cc2c0, accessed: 06.01.2022.

[22] New actors replaced to some extent the traditional media. Their role has also evolved. Limited at the beginning to the service of host, intermediary or auxiliary, they have become gatekeepers and the active players in mass communication editorial process. See: Committee of Ministers, Recommendation CM/Rec(2011)7 …, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cc2c0, accessed: 06.01.2022.

[23] Council of Europe, Pluralisme des médias …, Council of Europe, 2020, pp.18-20.

[24] The use of algorithms by online platforms is increasingly discussed in the context of the impact on media pluralism. See also: E. Brogi, Cascading risks to media pluralism and a European approach to tackle them, Henrich Böll Stiftung, The green Political Foundation, 2022, https://www.boell.de/en/2022/10/10/cascading-risks-media-pluralism-and-european-approach-tackle-them, accessed: 06.01.2022; Council of Europe, Pluralisme des médias …, pp.18-20; I. Engelmann, S. M. Luebke, S. H. Kessler, Effects of News Factors on Users' News Attention and Selective Exposure on a News Aggregator Website, Journalism Studies, vol. 22, no.6, 2011,pp. 780-798; M. Poiares Maduro, F. de

potentially media[25]. Given the significant expansion of means by which information is created, distributed and received one cannot disagree with his opinion[26].

The broad notion of media within the concept of media pluralism encompasses both offline and online media.[27] F. Jongen and A. Strowel propose to group the media into three main categories according to the techniques used: a) written media: press, books and posters; b)audiovisual media: in principle combining image and sound (cinema, television) but which also include the transmission of sound without images (first and foremost radio); c) electronic media, media which do not belong exclusively to one of the two preceding categories or which combine both: (above all, various forms of communication conveyed by the Internet).[28]

K. Karppinen notes that the multiplicity of media and sources of information that are accessible, especially in times of Internet, is not enough to guarantee the media pluralism.[29] What matters is the "democratic distribution of communicative power in the public sphere"[30] to media organisations. In other words, the multiplicity of media should reflect different voices of the society. Internet enables the diffusion of large amounts of information. J. van Hoboken underlines that from perspective of media pluralism in the face of digital transformation it is crucial that information which is "publicly accessible in theory, is actually visible and likely to be encountered by Internet users".[31] The visibility and the real accessibility of information coming from media organisations

Abreu Duarte, Regulating Big Tech will take pluralism and institutions, Euronews., https://www.euronews.com/2021/10/07/regulating-big-tech-will-take-pluralism-and-institutions-view, accessed: 06.01.2023.

[25] D. Tambini, A theory of Media Freedom, Journal of Media Law, vol.13, no.2, 2021, pp.135-152.

[26] J. Oster proposes that 'the media' as a legal term should be broadly conceptualized. See: J. Oster, Media Freedom as Fundamental Rigths, Cambridge Intellectual Property and Information Law, Cambridge University Press, 2015, pp.66-67.

[27] Committee of Ministers, Recommendation CM/Rec(2018)1 of the Committee of Ministers to member States on media pluralism and transparency of media ownership**,** Adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers' Deputies, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680790e13, accessed: 07.01.2023.

[28] F. Jongen, A. Strowel, Droit des médias et de la communication. Presse, audiovisuel et Internet. Droit européen et belge, Larcier, Création Information Communication, 2017, p.21. See also : Committee of Ministers, Recommendation CM/Rec(2007)15 of the Committee of Ministers to member states on measures concerning media coverage of election campaigns**,** Adopted by the Committee of Ministers on 7 November 2007 at the 1010th meeting of the Ministers' Deputies, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d4a3d,accessed: 07.01.2023.

[29] See also: P. Valcke et al., Independent Study …, p.42; K. Karppinen, Rethinking Media Pluralism …, p.23.

[30] K. Karppinen, Rethinking Media Pluralism …, p.23.

[31] J. van Hoboken, Search Engines, Pluralism and Diversity: What is at stake and how to move policy forward in: P. Valcke, M. Sükösd, R.G. Picard (ed.), Media pluralism and diversity. Concepts, risks and global trends, Palgrave Global Media Policy and Business Series, 2015, p.343, see also: R. Badouard, Pluralisme, indépendance, diversité : peut-on encore « sauver les médias » ?, De Boeck Supérieur, Participations, vol.2, no.15, 2016, pp.261-262.

becomes an important factor to conceptualising media pluralism. The mere existence of media and the act of providing an information may mean little, if this information is not visible to the public and consequently does not reach it. In the age of digital communication and infinity of information sources, gaining visibility and being able to reach audiences becomes challenging. Different media are competing to gain visibility and they have to adapt their business models to this end. [32]

In this context, the concept of exposure diversity should be discussed briefly. It relates to the users' dimension of media pluralism. It should be understood as the content that the audience actually chooses as opposed to the content which is available[33]. According to Ofcom, the citizens should be able "to access and consume a wide range of viewpoints across a variety of platforms and media owners."[34] Therefore, what really proves that the media are pluralistic is not the amount of information that potentially circulates, but the amount and variety of information that can actually be accessed and consumed by the user. P.M. Napoli notes that exposure diversity can be understood „horizontally through the distribution of audiences across all available content options, or vertically through the diversity of content consumption within individual audience members".[35] P. Valcke points out that measuring the exposure diversity, setting the precise policy goals and regulating this issue may however be complicated.[36]

Media disseminate information, ideas or opinions. Traditionally, they act as public watchdogs and provide forum for public debate.[37] Media play the role of intermediaries and gatekeepers of communication flow, they are essential medium for the creation and distribution of information. They are the important instrument for authors, to disseminate their works and information contained therein, which then reaches the public. The more numerous and diverse the media are, the greater opportunities for the society to receive information. The existence of pluralistic media is a prerequisite for ensuring public access

[32] See: N. Helberger, Diversity Label: Exploring the Potential and Limits of a Transparency Approach to Media Diversity, Journal of Information Policy, vol. 1, 2011, pp. 337-369.
[33] See: N. Helberger, K. Karpinen, L. d'Acunto, Exposure diversity as a design principle for recommender systems, Information, Communication& Society, vol.21, no.2, 2018, pp. 191-207.
[34] Ofcom, Measuring media plurality Ofcom's advice to the Secretary of State for Culture, Olympics, Media and Sport, https://www.ofcom.org.uk/ data/assets/pdf file/0031/57694/measuring-media-plurality.pdf, accessed: 01.04.2023, p.8.
[35] P.M. Napoli, Deconstructing the diversity principle. Journal of Communication, vol. 49, no.4, 1999, p.26, pp.7–34.
[36] P. Valcke, Looking for the user …, pp.287-320; See also: N. Helberger, Merely Facilitating or Actively Stimulating Diverse Media Choices? Public Service Media at the Crossroad, International Journal of Communication, vol. 9, 2015, pp. 1324–1340.
[37] See: Committee of Ministers, Recommendation CM/Rec(2018), https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680790e13, accessed: 06.01.2023.

to information, which for the purpose of this dissertation is understood as a possibility to receive information. The possibility means that the information is accessible and visible and the audience is able[38] to consult it. An information is understood as knowledge about someone or something, facts or details about a subject.[39] Information, from the perspective of analysis conducted in this dissertation can be either pure, reporting on facts, or transformed, being an element of artistic or literary expression qualified as a work within copyright meaning[40]. Information, in both mentioned forms reaches its audience through media being mere facilitators of communication[41].

The main objective of the first chapter is to provide the insights on the functioning of the main areas concerned by the related rights of press publishers adopted in the CDSM Directive. The analysis conducted in this chapter will serve as a reference and as a starting point for many considerations carried out in the later stages of my research as regards for example the reasons for the adoption of the rights, the way in which it has been done, the objectives of the regulation, scope and subject matter of protection, its exercise and will enable its assessment from different perspectives explored already here.

In this chapter, the different perspectives on access to information and media pluralism will be discussed. Firstly, the context of fundamental rights will be analysed. The focus will be on freedom of expression and principle of intellectual property protection from the perspective of fundamental rights. The study of their interconnections and legal framework for their protection will be provided.

Moreover, the analysis will concern the EU law framework for media pluralism in order to examine the EU competence to legislate in this area. Secondly, the focus will be on the legal and economic framework of the activity of press publishers. The basic concepts arising from Polish as well as French press law will be discussed. Then, in light of impact of new technologies on the press sector, the changing business models of press publishers will be discussed. The analysis will be enriched by numerous examples in particular from Polish and French press sector. Subsequently, the role of press from the perspective of enabling access to information and contributing to the protection of media pluralism will be explained. Thirdly, the functioning of news aggregators, their impact

[38] The issue of availability of technical means to have access to online information is another important problem in the context of media pluralism which will not be further discussed in this dissertation.
[39] The Britannica Dictionary, https://www.britannica.com/dictionary/information, accessed: 01.04.2023.
[40] See chapter 2.
[41] See: J. Oster, Media freedom …, p. 57.

on press industry and its role in enabling access to information and contributing to the protection of media pluralism will be studied.

2. Fundamental rights

2.1. Media pluralism, access to information and protection of fundamental rights

2.1.1. The European Convention on Human Rights

According to art. 10 (1) of the European Convention on Human Rights[42]: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and **to receive and impart information** and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises". Freedom to receive and impart information is explicitly indicated as an element of right to freedom of expression, sometimes called "passive freedom of information".[43]

An important part of The European Court of Human Rights' case law regarding this right is devoted to freedom of access to information in the context of access to documents and administrative procedures.[44] Access to information expressed through media is evoked by the ECtHR more occasionally[45]. Nevertheless, it also constitutes its significant element and it is this perspective that will be subject to further considerations[46].

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[42] European Convention on Human Rights signed in 1950 by the Council of Europe is an international treaty to protect human rights and fundamental freedoms in Europe. All 46 countries forming the Council of Europe are party to the Convention, 27 of which are members of the EU. The EU's obligation to access the European Convention of Human rights arises from the Lisbon Treaty of 2009. The process of accession is ongoing. The ECHR constitutes a catalogue of civil and political liberties whose beneficiaries are natural persons and in some cases the corporations. It requires States to not to interfere with the rights and freedoms of everyone and imposes also a limited set of positive obligations to secure the exercise of the rights, European Convention on Human Rights, https://www.echr.coe.int/documents/d/echr/convention_ENG, accessed: 04.09.2023.

[43] Ch. Grabenwarter, Article 10: Freedom of expression. European Convention on Human Rights: Commentary, Bloomsbury Academic, 2013, p.256.

[44] See for example: ECtHR, Sdružení Jihočeské Matky v. Czech Republic, 19101/03, 10 July 2006; ECtHR, Társaság a Szabadságjogokért v. Hungary, 37374/05, 14 April 2009; ECtHR, Kenedi v. Hungary, 31475/05, 26 May 2009.

[45] R. Bustos Gisbert, The Right to Freedom of Expression in a Democratic Society (Art. 10 ECHR), in: J. G. Roca, P. Santolaya, (eds.), Europe of Rights: A Compendium on the European Convention of Human Rights, Martinus Nijhoff Publishers, 2012, p.386.

[46] See for example: ECtHR, Guerra and others v. Italy, 116/1996/735/932, 19 February 1998, para.53; ECtHR, Khurshid Mustafa and Tarzibachi v. Sweden, 23883/06, 16 December 2008; ECtHR, Cengiz and others v. Turkey, 48226/10 and 14027/11, 1 December 2015.

Everyone who has the right to freedom of expression is understood broadly as natural but also legal persons. [47] Therefore, citizens as well as media service providers and press publishers have a right to access information. The research conducted in this thesis put an emphasis on the perspective of the Internet users' access to information but this perspective will not be of exclusive nature.

The said freedom relates to the media's mission to inform the public[48]. The task of imparting information and ideas should be read in conjunction with the right of the public to receive them[49]. Freedom to receive and impart information protects not only the passive behaviors of receiving information but also an effort to require it[50], limited however to information which is 'publicly accessible'[51]. As to the latter, S. Eskens, N. Helberger, J. Moeller specify that the right to receive information does not mean "a general subjective right of news consumers to request specific information from the government, let alone from news organisations"[52]. **It should be understood as the right to access information which is available to the public.**

Media should be pluralistic to allow all ideas and information to be expressed freely. Although media pluralism is not explicitly mentioned in the provision from art. 10 of the ECHR, its significant contribution to freedom of expression has been widely recognised[53]. The Council of Europe and its advisory committees considered[54] media pluralism as "the most important tool for freedom of expression in the public sphere,

[47] ECtHR, Autronic AG v. Switzerland, 12726/87, 22 May 1990.
[48] S. Eskens, N. Helberger, J. Moeller, Challenged by news personalisation: five perspectives on the right to receive information, Journal of Media Law, vol.9, no.2, 2017, p.262. See: J. Oster, Media freedom …, pp.36-37.
[49] ECtHR, Worm v Austria, 83/1996/702/894, 29 August 1997, para. 50; ECtHR, Handyside v United Kingdom, 5493/72, 7 December 1976, para. 52.
[50] Ch. Grabenwarter, Article 10: Freedom of expression…, p.256.
[51] See: ECHR, Guerra and others v. Italy, 116/1996/735/932, 19 February 1998, paras. 52-53.
[52] S. Eskens, N. Helberger, J. Moeller, Challenged by news personalisation…, p.262. See also: G. Smith, Copyright and freedom of expression in the online world, Journal of Intellectual Property Law & Practice, vol. 5, no. 2, 2010, p.92. See : A. Strowel, F. Tulkens, Freedom of expression and copyright under civil law: of balance, adaptation, and access in: Copyright and Free Speech, J. Griffiths and U. Suthersanen (eds.), Oxford University Press, 2005, p.291, https://dial.uclouvain.be/pr/boreal/object/boreal%3A137558/datastream/PDF_01/view, accessed: 01.03.2023.
[53] According to J. van Hoboken: "Diversity and pluralism are among the most fundamental normative starting points for the regulation of the media and the public information environement more generally." See: J van Hoboken, Search Engines, Pluralism and Diversity…, p.341; P. Ślęzak, Prawo mediów, Wolters Kluwer Polska, 2020.
[54] Recommendations and declarations of the Council of Europe and its advisory committees constitute the soft law and has not binding force for Member States.

enabling people to exercise their right to seek and receive information".[55] Media freedom and pluralism are considered to be central to the functioning of a democratic society as they help to ensure the availability and accessibility of diverse information and views, on the basis of which individuals can form and express their opinions and exchange information and ideas.[56]

The ECtHR reaffirmed the essential role of media pluralism for the functioning of democratic society and considered it as the corollary of the fundamental right to freedom of expression.[57]

The particular importance in disseminating information and ideas on matters of public interests has been attached to press[58]. The Court underlined that press plays a "vital role of "public watchdog"[59] and that freedom of press "affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders and on other matters of general interest."[60] In Társaság a Szabadságjogokért's case, the ECtHR noted that "The function of press includes the creation of forums for public debate". [61] However, according to the Court, the realisation of this function should not be limited for example only to professional journalists[62].

In recent cases, the Court focused on the legal qualification of the "new media". The "advent of new information technology" led to the fact that the protection resulting from freedom of expression and directed towards traditional media must be "expanded" to the "new electronic media".[63] The increasing role of online platforms - new actors in media ecosystem[64] - in disseminating the content and facilitating access to information has been

[55] Committee of Ministers, Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media, 2011, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cc2c0 , accessed: 07.01.2023.
[56] Committee of Ministers, Recommendation CM/Rec(2018)1 of the Committee of Ministers to member States on media pluralism and transparency of media ownership, 2018, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680790e13, accessed: 07.01.2023.
[57]See: ECtHR, Handyside v. the United Kingdom, 5493/72, 7 December 1976, para. 49; ECtHR, Tammer v. Estonia, 41205/98, 6 February 2001, para. 59. See also: E. Komorek, Media pluralism and European Law, Wolters Kluwer Law& Business, 2013, p.63; E. Barendt, Freedom of Speech, Oxford University Press, 2005, p.447.
[58] See for example: ECtHR, Guerra and others v. Italy, 116/1996/735/932, 19 February 1998, para.53.
[59] ECtHR, Observer and Guardian v. The United Kingdom, 13585/88, 26 November 1991, para. 59. See also: ECtHR, Lingens v. Austria, 9815/82, 8 July 1986, para. 44.
[60] ECtHR, Lingens v. Austria, 9815/82, 8 July 1986, para. 42.
[61] ECtHR, Társaság a Szabadságjogokért v. Hungary, 37374/05, 14 April 2009, para.27.
[62] ECtHR, Társaság a Szabadságjogokért v. Hungary, 37374/05, 14 April 2009, para.27.
[63] ECtHR, OOO Regnum v. Russia, 22649/08, 8 September, 2020, para. 60. See also: ECtHR, Magyar Jeti Zrt v. Hungary, 11257/16, 4 December, 2018, para.70; see also: ECtHR, Delfi AS v. Estonia [GC], 64569/09, 16 June, 2015.
[64] See: S. Eskens, N. Helberger, J. Moeller, Challenged by news personalisation: …, p.260.

acknowledged[65] as well as the importance of users' participation in production of content, so called "citizen journalism".[66]

The fundamental right to freedom of expression is not absolute. According to art. 2 of the ECHR: "the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary". The national authorities in specific cases and when all the requirements are met are therefore authorised to interfere with the right discussed. The legal framework of such a legal interference will be discussed in details in section 2.5. of this chapter.

2.1.2. Charter of Fundamental Rights of the European Union

According to art. 11 of Charter of Fundamental Rights of the European Union[67] "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. 2. The freedom and pluralism of the media shall be respected." The provision mirrors art. 10 of the ECHR with one exception, in the second paragraph of art. 11 of the Charter, there is a direct reference to the freedom and pluralism of media. The lack of mention of media pluralism in art. 10 of the ECHR could be explained by the fact that in period preceding the adoption of the Convention, no specific threats to media diversity were identified. It is with the authorisation of privately-owned television and the danger of the monopolisation of the flow of information that the need of protection of media diversity has been expressed explicitly and put on the equal footing

[65] ECtHR, Cengiz and Others v. Turkey, 48226/10 and 14027/11, 1 December, 2015, para. 52; ECtHR, Delfi AS v. Estonia [GC], 64569/09,16 June 2015.
[66] ECtHR, Cengiz and Others v. Turkey, 48226/10 and 14027/11, 1 December, 2015, para. 52. See also: ECtHR, Centre for Democracy and the Rule of Law v. Ukraine, 10090/16, 26 March, 2020, para. 87.
[67] Charter of Fundamental Rights of the European Union came into force in 2009. The charter is legally binding. In accordance with Article 6 of the Treaty on European Union, it has the same legal value as the EU treaties. It applies to EU institutions in all their actions and to EU Member States when they are implementing EU law. According to the Court of Justice of European Union art. 11 of the EU Charter of Fundamental Rights, which guarantees freedom of expression, media freedom and pluralism, should be given the "same meaning and the same scope" as Article 10 of the ECHR, "as interpreted by the case-law of the European Court of Human Rights". See:. https://www.europarl.europa.eu/charter/pdf/text_en.pdf, accessed: 04.09.2023.

with free expression and the free flow of information in the Charter.[68]

Provisions from the Charter should be interpreted in accordance with the provision from ECHR and case law of the ECtHR, since according to art. 52 (3) of the Charter: "in so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection". The CJEU in 2019 confirmed that art. 11 of the Charter should be given the "same meaning and the same scope" as Article 10 ECHR and should be interpreted in light of the case-law of the ECtHR.[69]

The CJEU, like the ECtHR, delivered a broad interpretation of notions relating to the freedom of expression, in particular, of media[70]. The Court noted that "whether it be classic in nature, such as paper or radio waves, or electronic, such as the internet, is not determinative"[71] as to whether an activity is solely for journalistic purposes.[72] Every activity having for "object the disclosure to the public of information, opinions or ideas, irrespective of the medium which is used to transmit them"[73] should be considered as an activity important from the perspective of forming public debate and providing access to information to the public. Therefore, not only the journalistic activities *sensu stricto* but also the provision of access to information through blogs, social media platforms or news aggregators should be considered within the framework of freedom of expression. The particular importance of press in disseminating information and ideas on matters of public interests resounded also in its judgements. In Familiapress v. Bauer Verlag case the CJEU held that "press diversity helps to safeguard freedom of expression".[74]

The rights protected under art. 11 of the Charter are not absolute. According to art. 52(1): Any limitation on the exercise of the rights and freedoms recognised by this

[68] Commissioner for Human Rights, Media pluralism and human rights, Issue Discussion Paper,2011, pp.7-8, https://rm.coe.int/16806da515, accessed: 01.03.2023.
[69] CJEU, Sergejs Buivids v. Datu valsts inspekcija, case C–345/17, 14 February, 2019, para. 65. See also: CJEU, Philip Morris Brands and Others, case C-547/14, 04 May 2016, para.147.
[70] See: CJEU, Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy, Case C-73/07, 16 December 2008, para.56.
[71] CJEU, Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy, case C-73/07, 16 December 2008, para.79.
[72] European Commission, Study on media plurality, 2022, pp.12-13, https://op.europa.eu/en/publication-detail/-/publication/475bacb6-34a2-11ed-8b77-01aa75ed71a1/language-en/format-PDF/source-266738523, accessed: 02.03.2023.
[73] CJEU, Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy, case C-73/07, 16 December, 2008, para.80.
[74] CJEU Familiapress v. Bauer Verlag, case C-368/95, 26 June 1997, para.18.

Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. The interference with the right discussed is authorised in case when the mentioned requirements are met.[75]

2.1.3. French and Polish constitutional order

Poland and France are signatories of the Convention, the Charter applies to them since they are the Member States of the UE. Moroeover, the principle of freedom of expression is enshrined in their constitutional traditions.

According to art.11 of the French Declaration of the Rights of Man and of the Citizen which in 1971 has been recognised as having constitutional value, the free communication of ideas and of opinions is one of the most precious right of man. Any citizen may therefore speak, write and publish freely, except what is tantamount to the abuse of this liberty in the cases determined by law[76]. In 1982, the Constitutional Council considered that the preservation of the pluralist character of socio-cultural expressions in media constitutes an objective of constitutional value.[77] Term 'pluralism' is enshrined in the French Constititution since its amendment in 2008 and according to its art. 34: the law establishes the rules concerning the civic rights and fundamental guarantees granted to citizens for the exercise of public freedoms; the freedom, pluralism and independence of the media.[78] Pluralism is therefore considered as an objective of constitutional value

[75] See section 2.5. of this chapter.

[76] The Declaration of the rights of man and of the citizen, Élysée, https://www.elysee.fr/en/french-presidency/the-declaration-of-the-rights-of-man-and-of-the-citizen, accessed: 02.03.2023. The Declaration has the constitutional or even supra-constitutional value in the French legislative framework, see: J. Morange, La valeur juridique de la Déclaration, 2002, Cairn.info, https://www.cairn.info/la-declaration-des-droits-de-l-homme-et-du-citoyen--9782130529774-page-87.htm, accessed: 04.09.2023.

[77] Conseil Constitutionnel, 27 juillet 1982, décision n°82-141 DC, Loi sur la communication audiovisuelle, cons. 5. In the decision of 11 October 1984, the Conseil Constitutionnel referred to the press sector, namely to the political and general news dailies by recognising the constitutional value of pluralism of the daily newspapers providing political and general information. According to the Conseil, the free communication of thoughts and opinions, guaranteed by Article 11 of the Declaration of the Rights of Man and of the Citizen of 1789, would not be effective if the public to which these daily newspapers are addressed were not able to have access to a sufficient number of publications of different tendencies and character. The objective to be achieved is that readers, who are among the essential beneficiaries of the freedom proclaimed by Article 11 of the Declaration of 1789, should be able to exercise their freedom of choice without private interests or public authorities being able to substitute their own decisions. Translation by the author, see the decision : Conseil Constitutionnel, 11 Octobre 1984, Décision n° 84-181 DC, Loi visant à limiter la concentration et à assurer la transparence financière et le pluralisme des entreprises de presse, para. 38

[78] English version by the author. French version : La loi fixe les règles concernant: les droits civiques et les garanties fondamentales accordées aux citoyens pour l'exercice des libertés publiques ; la liberté, le

and an objective legitimising the legal intervention. It ensures the effectiveness of the freedom of expression and enables its exercise.[79]

According to art.54 of the Polish Constitution, freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone[80]. According to art. 14, The Republic of Poland shall ensure freedom of press and other means of social communication[81]. Polish legislator does not use the term freedom of expression[82]. Instead, it distinguishes between freedom to express opinions and to acquire and to disseminate information which should be granted to everyone.[83] The important element of the said freedom is the existence of independent media, vital for the functioning of a democratic state of law.[84] Despite the fact that pluralism of media is not mentioned explicitly, according to the Polish Constitutional Court "Freedom of media is a subject-specific manifestation of freedom of expression. Freedom of media reinforces freedom of expression by creating a platform for pluralistic discourse enabling the self-realisation of individuals."[85]

To conclude:

- Following the analysis of the ECHR, the Charter and the case law of the ECtHR and the CJEU, the core of the right to receive information is the right of public to be adequately informed, in particular on matters of public interest which means that public has the right to access information which is available and this access cannot be limited in unjustified manner. The right of the public to be adequately informed is linked to the role of media which is to impart such information and

pluralisme et l'indépendance des médias ; les sujétions imposées par la Défense nationale aux citoyens en leur personne et en leurs biens, Constitution du 4 octobre 1958 : Titre V : Des rapports entre le Parlement et le Gouvernement, https://www.legifrance.gouv.fr/loda/article_lc/LEGIARTI000019241018, accessed : 02.03.2023.

[79] Conseil Constitutionnel, 10-11 octobre 1984, décision 84-161 DC, Loi visant à limiter la concentration et à assurer la transparence financière et le pluralisme des entreprises de presse, para. 52. See also: B. Lamy, La Constitution et la liberté de la presse, Les nouveaux cahiers du conseil constitutionnel, vol.3, no. 36, 2012, https://www.cairn.info/revue-nouveaux-cahiers-conseil-constitutionnel-2012-3-page-19.htm#no24, accessed : 02.03.2023.

[80] The Constitution of the Republic of Poland of 2nd April, 1997, as published in Dziennik Ustaw No. 78, item 483, https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm, accessed: 02.03.2023.

[81] The Constitution of the Republic of Poland of 2nd April, 1997, …, https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm, accessed: 02.03.2023.

[82] See:P. Sarnecki, Komentarz do art. 54 Konstytucji RP in: L. Garlicki, M. Zubik (eds.), Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom II, wyd. II, Wydania Sejmowe, 2016, LEX.

[83] The freedom to acquire and disseminate the information has not been subjectively restricted in any way, for example to journalists, see: B. Michalski, Podstawowe problemy prawa prasowego, Elipsa,1998, p.10.

[84] K. Chałubińska – Jentkiewicz, M. Nowikowska, Prawo mediów, C.H.Beck, 2022, p.14. See: P.Sarnecki, Wolność środków społecznego przekazu w Konstytucji Rzeczpospolitej Polskiej, in: Prawo mediów, J. Barta, R. Markiewicz, A. Matlaka (eds.), LexisNexis, 2005, p. 19.

[85] Polish Constitutional Court, 12 May 2008, SK 43/05, OTK-A 2008, no. 4, 57.

ideas to the public. Media should be pluralistic to allow all ideas and information to be expressed freely.

2.2.Intellectual Property rights and protection of fundamental rights

2.2.1. European Convention on Human Rights

According to art. 1 of the Protocol to the Convention for the protection of Human Rights and Fundamental Freedoms, "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

L. R. Hefler notes that the placement of the property rights in the Protocol and not in the main text of the Convention and the fact that the wording of the provision discussed does not include the word 'rights' "reflects a disagreement among European governments over the inclusion of a property rights clause in the treaty as well as the scope and the extent of the protection it provides"[86]. The provision firstly enables the peaceful enjoyment of the possession, secondly, protects against the deprivation of possession and thirdly, allows States to control the use of property in accordance with the general interest. It should be noted that it does not include the explicit reference to the intellectual property rights. It does not follow directly from the quoted provision that intangible goods such as copyright works fall within the scope of the possessions.

However, according to the ECtHR, "the concept of "possessions" referred to in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to the ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision."[87] It means that the intangible goods are protected as property and this applies for example also to

[86] L. Helfer, The new innovation frontier? Intellectual Property and the European Court of Human Rights, in: P.L.C. Torremans (ed.), Intellectual Property and Human Rights. Enhanced Edition pf Copyright and Human Rights, Information Law Series, Kluwer Law International, 2008, p.32.
[87] ECtHR, Anheuser-Busch Inc. v. Portugal, 73049/01, 11 January 2007, para.63.

copyright.[88] The term possessions can be either existing possessions or assets, including claims, in respect of which the applicant has at least a legitimate expectation of obtaining effective enjoyment of property right. [89]

Scholars expressed different views as to the qualification of intellectual property rights as fundamental rights. Ch. Geiger considered it as an important development[90]. For P. Yu, "the inclusion in the human rights debate of a relatively trivial item like intellectual property protection would undermine the claim that human rights are of fundamental importance to humanity."[91] Concerns have also been raised that right discussed may have an overly broad reach bordering on an absolute right[92]. It should be however pointed out that the right from art. 1 of the Protocol to the ECHR is not an absolute right and this is confirmed by both the wording of the provision and the case law of the ECtHR[93]. There is no hierarchy of the rights and freedoms protected by the Convention[94], meaning that no right takes precedence over another right.

2.2.2. Charter of Fundamental Rights of the European Union

According to art. 17 of the Charter: "(1) Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his

[88] ECtHR, Dima v. Romania, 58472/00, 26 May 2005, para. 87. For the historical context of copyright understood within the property perspective see: C. Sganga, EU Copyright Law Between Property and Fundamental Rights: A Proposal to Connect the Dots, in: R. Caso, F. Giovanella (eds.), Balancing Copyright Law in the Digital Age. Comparative Perspectives, Springer, 2015, pp. 1-24.
[89] ECtHR, Kopecký v. Slovakia, 44912/98, 28 September 2004, para.35.
[90] See: Ch. Geiger, E. Izyumenko, Shaping Intellectual Property Rights through Human Rights Adjudication: The Example of the European Court of Human Rights, Mitchell Hamline Law Review, vol. 46, no. 3, 2020, pp. 527-612; Ch. Geiger, The constitutional dimension of intellectual property, in: P.L.C. Torremans (ed.), Intellectual Property and Human Rights. Enhanced Edition pf Copyright and Human Rights, Information Law Series, Kluwer Law International, 2008, pp.114-120.; Ch. Geiger, Constitutionalising Intellectual Property Law? The Influence of Fundamental Rights on Intellectual Property in the European Union', II-C International Review of Intellectual Property in the European Union, vol. 37, no.4, 2006, pp.268 – 280.
[91] P. Yu, Ten Common Questions about Intellectual Property and Human Rights. Texas A&M University School of Law, vol. 23, no.7, 2007, pp.713-714, https://scholarship.law.tamu.edu/cgi/viewcontent.cgi?article=1385&context=facscholar, accessed: 24.03.2023. For the critical view see also: J. Griffiths, L. McDonagh , Fundamental Rights and European Intellectual Property Law: The Case of Art 17(2) of the EU Charter , in: Ch. Geiger (ed.), Constructing European Intellectual Property: Achievements and New Perspectives Edward Elgar Publishing , 2013, p.75.
[92] See: P. Yu, Challenges to the Development of a Human- Rights Framework for Intellectual Property, in: P.LC. Torremans (ed.), Intellectual Property and human rights. Enhanced Edition of Copyright and Human Rights, Information Law Series, Kluwer Law International, 2008, pp.80-81.
[93] See for example: ECtHR, Ashby Donald and others v. France, 36769/08, 10 January 2013.
[94] See: Ch. Geiger, The constitutional dimension …, p.115.See: P. Ducoulombier, Interaction between human rights: Are all human rights equal?, in: Ch. Geiger (ed.), Research Handbook on Human Rights and Intellectual Property, Edward Elgar Publishing, 2016, pp.39-69.

or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. (2) Intellectual property shall be protected."

Contrary to the provision from art. 1 of the Protocol to the ECHR, in art. 17 (2) of the Charter the explicit protection of intellectual property has been recognised which has been explained by "its growing importance and Community secondary legislation"[95]. Intellectual property covers not only literary and artistic property but also *inter alia* patent and trademark rights and associated rights[96]. Despite this difference in wording, the ECHR being connected to the interpretation of the Charter, set the minimum standard of protection which however, "does not prevent the EU from providing more extensive protection"[97]. According to the CJEU, intellectual property rights are designated to fulfill certain social goals.[98] Moreover, their existence has been explained by the economic reasons, namely the necessity to protect the investments [99], economic interests of authors and other entities disseminating art. [100] Taken together, this should be seen as justification for the recognition of intellectual property rights within the framework of fundamental rights and principles.

The attention should be paid to the wording of the provision from art. 17 (2) of the Charter. According to the latter, intellectual property shall be protected. The legislator did not specify who has the rights and what is their scope. It limited itself to general statement that intellectual property should be protected. This is a principle of legal protection.[101]In practice, it means that the provision discussed does not confer any rights,

[95]Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32007X1214(01), accessed: 24.03.2023.
[96] Explanations relating to the Charter of Fundamental Rights, OJ C 303, 14.12.2007 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32007X1214(01), accessed: 24.03.2023.
[97]T. Mylly, Regulating with rights proportionality? Copyright, fundamental rights, and internet in the case law of the CJEU, in: O. Pollicino, G. M. Riccio and M. Bassini (eds.), Copyright versus (other) Fundamental Rights in the Digital Age. A Comparative Analysis in Search of a Common Constitutional Ground, Edward Elgar Publishing, 2020, p.57.; see also: P. L. C. Torremans, Copyright as a Human Right in: P.L.C. Torremans, (ed.), Intellectual Property Law and Human Rights, Information Law Series, Kluwer Law International, p. 233.
[98] CJEU, Martin Luksan v. Petrus van der Let, case C-277/10, 02.02.2012, para.68. See: A. Peukert, Intellectual Property as an End in Itself?, European Intellectual Property Review, vol. 33, 2011, pp. 67-71.
[99] CJEU, Metronome Musik and Music Point Hokamp GmbH, case C- 200/96, 28 April 1998.
[100] CJEU, Phil Collins and Imtrat Handelsgesellschaft mbH, case C-92/92 and C-326/92, 20 October 1993; see: A. Strowel, Copyright strengthened by the Court of Justice interpretation of art. 17 (2) of the EU Charter of Fundamental Rights, in: O. Pollicino, G. M. Riccio and M. Bassini (eds.), Copyright versus (other) Fundamental Rights in the Digital Age. A Comparative Analysis in Search of a Common Constitutional Ground, Edward Elgar Publishing, 2020, pp.28-53.
[101] D. Miąsik, I. Ziulczyk-Nierubca. Komentarz do art. 17 Karty Praw Podstawowych UE in: A. Wróbel (ed.), Karta Praw Podstawowych Unii Europejskiej. Komentarz, 2020, Legalis, points 48-62.

it does not entitle to create the titles of protection, nor does it provide an independent basis for determining the scope of ownership rights. It does, however, offer the possibility of extending the scope of protection to new entities.

It should be specified that on the basis of this provision intellectual property does not enjoy weaker protection compared to the protection granted in art. 17 (1) of the Charter since the EU legislator considers intellectual property as property - subject to the protection under provision from art. 17(1) of the Charter[102]. Article 17(2) of the Charter implies an obligation to protect intellectual property, which is addressed to Union bodies and Member States. So far, this obligation does not translate into an obligation for other entities to prevent third parties from infringing the exclusive rights of right holders.[103]Although in the art. 17 (2) of the Charter the limitations to which other forms of property are subjected in art. 17 (1) are not indicated, it should be assumed that they apply also to intellectual property. According to A. Ohly, "all rules and principles that govern the protection of property in tangible subject-matter will apply *mutatis mutandis* to intellectual property as well"[104]. In this vein, the provision from art. 17 (2) of the Charter should be considered as a specification of art. 17 (1) of the Charter.

In the Charter as in the ECHR there is no hierarchy of the rights and freedoms. The protection resulting from intellectual property rights is not absolute and may be limited in specific cases to balance different interests at stake. This is enshrined in art. 52 (1) of the Charter. The limitations on the exercise of fundamental rights can take place and should comply with the conditions indicated in the Charter[105]. It is reflected also in the CJEU case law. In Scarlet Extended case the CJEU held that "nothing whatsoever in the wording of that provision or in the Court's case-law to suggest that that right is inviolable and must for that reason be absolutely protected."[106] According to art.6 of TEU, the provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties. The rights and principles enshrined therein should be respected, observed and promoted in accordance with the respective powers of the Union as

[102] See: E. Hancox, The Relationship Between the Charter and General Principles: Looking Back and Looking Forward, Cambridge Yearbook of European Legal Studies, 2020, https://www.cambridge.org/core/journals/cambridge-yearbook-of-european-legal-studies/article/relationship-between-the-charter-and-general-principles-looking-back-and-looking-forward/A211AA0828910B38002F4B4805410223, accessed: 18.12.2023.
[103] See: D. Miąsik, I. Ziulczyk-Nierubca. Komentarz …, points 48-62.
[104] A. Ohly, European Fundamental Rights and Intellectual Property, in: A. Ohly, J. Pila (eds.) The Europeanization of Intellectual Property Law, Oxford University Press, 2013, p.151.
[105] See point 2.3. of this chapter.
[106] CJEU, Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), case C -70/10, 24 November 2011, para.43.

conferred in the Treaties on EU institutions, bodies and agencies of the Union and Member States when implementing Union law according to art.51 of the Charter. In other words, in accordance with the scope of powers conferred in the Treaties on EU institutions, the rights and principles of the Charter should be taken into account, namely respected, observed and promoted.

2.2.3. French and Polish constitutional order

In France, the protection of property is based on article 2 of the Declaration of the Rights of Man and of the Citizen of 1789, according to which: the aim of every political association is the preservation of the natural and imprescriptible rights of Man, these rights are liberty, property, safety and resistance to oppression[107] and on art. 17 of the Declaration of the Rights of Man and of the Citizen of 1789, according to which: since the right to property is inviolable and sacred, no one may be deprived thereof, unless public necessity, legally ascertained, obviously requires it, and just and prior indemnity has been paid.[108] Constitutional Council in its decision of 2006, extended the scope of the quoted provisions to the new fields. Among the latter copyright and related rights in the information society are to be found.[109]

According to art. 64 of the Polish constitution: (1) Everyone shall have the right to ownership, other property rights and the right of succession. (2) Everyone, on an equal basis, shall receive legal protection regarding ownership, other property rights and the right of succession. (3) The right of ownership may only be limited by means of a statute and only to the extent that it does not violate the substance of such right[110]. Despite the fact that intellectual property is not explicitly mentioned as inherently linked to the fundamental right, it is considered to be within the scope of the provision discussed.[111]As regards the copyright, according to the Polish Constitutional Court, the legal position of

[107] Art. 2 of the Declaration of the rights of man and of the citizen, https://www.elysee.fr/en/french-presidency/the-declaration-of-the-rights-of-man-and-of-the-citizen, accessed : 26.03.2023.
[108]Art. 17 of the Declaration of the rights of man and of the citizen, https://www.elysee.fr/en/french-presidency/the-declaration-of-the-rights-of-man-and-of-the-citizen, accessed : 26.03.2023.
[109] Conseil Constitutionnel, Decision no. 2006-540 DC of 27 July 2006 Copyright and related rights in the information Society, https://www.conseil-constitutionnel.fr/en/decision/2006/2006540DC.htm, accessed: 26.03.2023. See: S. Dormont, L'élaboration de la norme en droit d'auteur : les discours sur la légitimité, Légipresse, HS2, no.62, 2019, pp.79-87.
[110] The Constitution of the Republic of Poland of 2nd April, 1997,https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm, accessed: 02.03.2023.
[111] See: S. Jarosz – Żukowska, art. 64 in. L. Garlicki (ed.) Konstytucja Rzeczpospolitej Polskiej, tom. II, wyd. II, Wyd. Sejmowe, 2016, LEX.

author is similar to that of the owner[112], therefore, the provisions of this article should also be applied to rights in intangible assets.

To conclude:

- Provision from art. 1 of the Protocol to the Convention does not include the explicit reference to the intellectual property rights. It does not follow directly from the provision that intangible goods such as copyright works fall within the scope of the possessions. The concept of "possessions" referred to in the first part of Article 1 of Protocol No. 1 has however an autonomous meaning so intangible goods are protected as property and this applies to intellectual property.

- The explicit protection of intellectual property has been recognised in art. 17(2) of the Charter. This has been done in form of a principle. In practice, it means that this provision does not confer any rights, it does not entitle to create the titles of protection, nor does it provide an independent basis for determining the scope of ownership rights. It does, however, offer the possibility of extending the scope of protection.

- In both, Polish and French legal orders, due to the interpretation of the constitutional court, the right to property is understood broadly as extending also to intellectual property rights what follows the standards set in art. 1 of the Protocol to the Convention and in the Charter.

2.3.Balancing fundamental rights

Fundamental rights do not exist independently, they interact with each other. This interaction manifests itslef firstly, in the form of **compatibility of rights** which aim to pursue a common goal. D. Gervais notes that according to this compatibility model, "both sets of rights strive towards the same fundamental equilibrium"[113] by dealing with different, specific aspect of "multi-facet public interest."[114] The complementarity reinforces the mutual claims, with the copyright focusing on the materialisation of creative expression and freedom of expression on its circulation and reaching out to the public[115]. E. Derclaye explains that the aim of the rights is to "strike the right balance between giving an incentive to create and innovate whilst insuring the public has

[112] Polish Constitutional Court, judgement of 23 June 2015 r., SK 32/14, point III.6.1
[113] D. Gervais, Intellectual Property and Human Rights: Learning to live together, in: P.L.C. Torremans (ed.), Information Law Series, Kluwer Law International, Intellectaul Property and Human Rights, enhanced edition of Copyright and Human Rights, p.3, pp.3-23.
[114] G. Spina Ali, Intellectual Property and Human Rights: A Taxonomy of Their Interactions, International Review of Intellectual Property and Competition Law (IIC) vol.51, 2020, p.435.
[115] See: G. Spina Ali, Intellectual Property and Human Rights: …, pp.411-445.

sufficient access to such creations and inventions".[116] According to H. C. Jehoram "copyright guarantees the author a share in the marketing of his works, and as such is a means of securing independence of authors from the Maecenas State or some other rich benefactors, who might well influence the subsidized. In this sense, copyright is one of the oldest means of securing freedom of expression and information."[117]

This could lead to the conclusion that the instruments of copyright law can be used to pursue the objectives in the field of freedom of expression, such as protecting media pluralism or improving access to information. In order to determine whether it is reflected in practice, and whether among the objectives identified in the copyright directives, the EU legislator also refers to those concerning freedom of expression, I analysed the EU 's acquis in matter of copyright and related rights.[118] According to the recital 3 of the InfoSoc Directive: "the proposed harmonisation relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest."[119] In recital 54 of the CDSM

[116] E. Derclaye, Intellectual Propoerty Rights and Human Rights: Conciding and Cooperating, in: P.L.C. Torremans (ed.), Information Law Series, Kluwer Law International, Intellectaul Property and Human Rights, enhanced edition of Copyright and Human Rights,2008, p.134.
[117] H.C. Jehoram, Freedom of expression in Copyright and Media Law, GRUR Int. 1983, p.385; see also: B. J. Jütte, The beginning of a (happy?) relationship: copyright and freedom of expression in Europe, European Intellectual Property Review, vol.38, no.1, 2016, pp.11-22.

[118] I analysed the EU's *acquis* in the field of copyright and related rights which consists of: Directive on the harmonisation of certain aspects of copyright and related rights in the information society ('InfoSoc Directive'), 22 May 2001; Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property ('Rental and Lending Directive'), 12 December 2006; Directive on the resale right for the benefit of the author of an original work of art ('Resale Right Directive'), 27 September 2001; Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission ('Satellite and Cable Directive'), 27 September 1993; Directive on the legal protection of computer programs ('Software Directive'), 23 April 2009; Directive on the enforcement of intellectual property right ('IPRED'), 29 April 2004; Directive on the legal protection of databases ('Database Directive'), 11 March 1996; Directive on the term of protection of copyright and certain related rights amending the previous 2006 Directive ('Term Directive'), 27 September 2011; Directive on certain permitted uses of orphan works ('Orphan Works Directive'), 25 October 2012; Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market ('CRM Directive'), 26 February 2014; Directive on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled (Directive implementing the Marrakech Treaty in the EU), 13 September 2017; Regulation on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled (Regulation implementing the Marrakech Treaty in the EU), 13 September 2017; Regulation on cross-border portability of online content services in the internal market ('Portability Regulation'), 14 June 2017; Directive on copyright and related rights in the Digital Single Market ('CDSM Directive'), 17 April 2019; Directive on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes ('Satellite and Cable II'), 17 April 2019 and relevant case law.
[119] Recital 3 of the InfoSoc Directive, 22 May 2001.

Directive, the adoption of the related right of press publishers was justified by the reference to the protection of a free and pluralist press, essential to ensure quality journalism and citizens' access to information and providing a fundamental contribution to public debate and the proper functioning of a democratic society.[120] Therefore, legislation on copyright takes into account and declare to pursue the objectives specific to freedom of expression.

However, the interaction between the fundamental rights may take the form of **conflict**. Especially now, in time of rapid technological development, copyright becomes more economic - centred[121] what in consequence may hamper the achievement of the goals set by freedom of expression[122]. According to Ch. Angelopoulos, "this would understand human rights and intellectual property law as mutually incompatible, so that, in every interaction between them, compliance with one would result in the violation of the other."[123] For example, seeking to broaden the scope of the authors ' rights and to strengthen their protection may result in rendering the access of audience to artistic or journalistic expressions more difficult.

The possible negative impact of intellectual property on freedom of expression have been acknowledged by the European legislator. In recital 70 of the CDSM Directive, the necessity to strike a balance between the fundamental rights laid down in the Charter, in particular, the freedom of expression and the freedom of the arts, and the right to property, including intellectual property[124] has been highlighted. In recital 2 of the Directive on the enforcement of intellectual property right the EU legislator noted that "the protection of intellectual property (…) should not hamper freedom of expression, the free movement of information, or the protection of personal data, including on the Internet."[125] According to art. 7 Directive on certain permitted uses of orphan works, "this Directive shall be

[120] Recital 54 of the Directive on copyright and related rights in the Digital Single Market, 17 April 2019.
[121] B. J. Jütte, The beginning of a (happy?) relationship…, pp.11-22.
[122] See: S. Dormont, L'élaboration de la norme …, pp.79-87; A. Peukert, Intellectual Property as an End in Itself…, pp. 67-71; H.G. Ruse- Khan, Overlaps and conflict norms in human rights law: approaches of European courts to address intersections with intellectual property rights, in: Ch. Geiger (ed.), Research Handbook on Human Rights and Intellectual Property, Edward Elgar Publishing, 2016, pp.70-88.

Opposing view is presented by E. Derclaye in: E. Derclaye, Intellectual Propoerty Rights …, p.134, pp.133-161; N. Netanel, Copyright's paradox, Oxford University Press, 2008; G. Spina Ali, Intellectual Property and Human Rights: A Taxonomy of Their Interactions, International Review of Intellectual Property and Competition Law (IIC), 2020, vol.51, pp.424-425.
[123] Ch. Angelopoulos, European Copyright and human rights in the digital sphere, in: M. Susi (ed.), Human Rights, Digital Society in the digital sphere, Routledge, 2019, pp.243-245.
[124] Recital 54 of the CDSM Directive.
[125] Recital 2 of the Directive on the enforcement of intellectual property right ('IPRED'), 29 April 2004.

without prejudice to provisions concerning, in particular, (…) access to public documents, the law of contract, and rules on the freedom of the press and freedom of expression in the media.[126] A third conceptual framework regarding the relationship between fundamental rights merge the two already discussed[127]. The protection resulting from the intellectual property rights and freedom of expression may both be complementary and conflicting depending on goal pursued.

To conclude:

- Legislation on copyright could pursue the objectives from field of freedom of expression, such as protecting media pluralism or improving access to information. However, the interaction between protection resulting from different fundamental rights may take also the form of conflict or may both be complementary and conflicting depending on the goal pursued.

2.4.Obligation to respect and to protect fundamental rights

The protection of fundamental rights is enshrined in the ECHR and in the Charter. The provisions from the ECHR are addressed to contracting parties – the States[128], the provisions of the Charter are addressed to the institutions, bodies, officies and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law[129].

The ECHR guarantees the protection from unjustified interference by States. According to D. Voorhoof, it provides "a qualified prohibition for the States and public authorities to interfere".[130] However, in some, specific cases the interference with fundamental rights is inevitable and take place. Its criteria will be discussed in details in point 2.5. of this chapter.

In addition to the obligation to respect fundamental rights, an obligation to protect fundamental rights can be extracted from the Convention. According to art. 1 of the ECHR: The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention. The scope of the positive obligation to adopt measures of protection is limited. According to the ECtHR case law,

[126] Article 7 of the Directive on certain permitted uses of orphan works ('Orphan Works Directive'), 25 October 2012.
[127] See: Ch. Angelopoulos, European Copyright …, pp.243-245.
[128] See art. 1 of the Convention.
[129] See art. 51.1 of the Charter.
[130] D. Voorhoof, Critical perspectives on the scope and interpretation of art. 10 of the European Convention on Human Rights, Strasbourg, Council of Europe Press, 1995, p.54.

this role does not extend to guaranteeing "freedom of forum"[131] or access to a particular medium/service.[132]

As to the intellectual property rights, Peter K. Yu notes that States have obligations to fully realise the right to the protection of interests in intellectual creations but points out that "this ability to fulfil these obligations is often limited by the resources available to them and the competing demands of the core minimum obligations of other human rights"[133].

Amongst the measures that could be undertaken, the adoption of legislation or various policy measures should be indicated. The adopted measures should not interfere with fundamental rights, and if so, this interference should be justified[134]. The responsibility of the State may be engaged as a result of not observing its obligation to enact domestic legislation if the unjustified interference with fundamental rights occurs due to it.[135] In Editorial Board of Pravoye Delo and Shtekel v. Ukraine which concerned the lack of sufficient legal framework to ensure the effective protection of journalists, the ECtHR ruled that: " the absence of a sufficient legal framework at the domestic level allowing journalists to use information obtained from the Internet without fear of incurring sanctions seriously hinders the exercise of the vital function of the press as a "public watchdog" [136] and therefore, State should be considered responsible for its failure to act. As to the effect of the ECHR in conflicts between individuals, it is indirect, what should be understood as the possibility of individuals to enforce human rights provisions against other individuals by relying on the positive obligations of the State to protect their rights.[137] In the Özgür Gündem v. Turkey, the ECtHR held that "Genuine, effective exercise of (the right to freedom of expression) does not depend merely on the State's duty not to interfere, but may require positive measures of protection, even in the sphere of **relations between individuals** (…)."[138] Therefore, in case of the violation of fundamental rights by private parties States can be considered as answerable for any violation if they fail to act and do not undertake the preventive measures.[139]

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[131] ECtHR, Appleby & Others v. the United Kingdom, 44306/98, 6 May 2002, para.47.
[132] ECtHR, Haider v. Austria, no. 25060/94, 18 October 1995. See also: ECtHR, Melnychuk v. Ukraine, Decision of inadmissibility of the European Court of Human Rights (Second Section) of 5 July 2005
[133] P. K. Yu, Challenges to the development …, p.81, pp.77-100.
[134] See point 2.5 of this chapter.
[135] ECtHR, Verein gegen Tierfabriken Schweiz v. Switzerland, 24699/94, 28 June 2001.
[136] ECtHR, Editorial Board of Pravoye Delo and Shtekel v. Ukraine, 33014/05, 05 August 2011, para. 64.
[137] P. van Dijk, F. van Hoof, A. van Rijn, L. Zwaak (eds.) Theory and practice of the European Convention on Human Rights, Intersentia,2018, p.15.
[138] ECtHR, Özgür Gündem v. Turkey, 23144/93, 16 March 2000, para. 43.
[139] See also: ECtHR, Remuszko v. Poland, 1562/10,16 October 2013.

The obligation not to interfere with fundamental rights unless the interference is justified, results also from the Charter. According to art. 51 (1): The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights what could be understood as the obligation to not to interfere with fundamental rights. According to the same provision, the enumerated bodies shall observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.

The question arises whether the obligation "to observe the principles and promote the application thereof" from the quoted provision could be considered as a positive obligation for the EU and Member States to act and in consequence, to protect the fundamental rights. It should be noted that according to art. 51 of the Charter read in conjunction with its art.52, the level of protection granted in the Convention should be the same as in the Charter. It applies also to the jurisprudence of the ECtHR.[140] Therefore, since the positive obligations to protect fundamental rights result from the provisions of Convention, they apply also to the addressees of the provisions included in the Charter. The conclusion is that although the doctrine of positive obligations could be considered as less developed under the Charter[141], the scope of its application encompasses both negative and positive obligations. As to the latter, it should be justified by the requirement of effective protection of the EU law, including the rights enshrined in the Charter, which results from art. 4 (3) TUE and 19 (1) TUE as well as from the CJEU's interpretation.

The CJEU in Coty Germany case formulated a requirement of the effective exercise of fundamental rights. The case concerned the refusal of provision of information from bank, following an instance of trademark infringement. The refusal was based on the German law allowing unlimited and unconditional refusal to disclose information. The legal provision allowing for the refusal to disclose such an information had been considered as preventing the effective exercise of the right to property[142]. Since the lack of remedy of disclosing of personal data can infringe the fundamental right to an effective remedy and the fundamental right to intellectual property, the CJEU recognised a positive

[140] CJEU, Sergejs Buivids v. Datu valsts inspekcija, case c–345/17, 15 February 2019, para. 65.
[141] A. Kuczerawy, Private enforcement of public policy: Freedom of expression in the era of online gatekeeping, 2018, KU Leuven,p.147, https://www.kuleuven.be/doctoraatsverdediging/fiches/3H13/3H130125.htm, accessed: 31.03.2023.
[142] CJEU, Coty Germany GmbH v Stadtsparkasse Magdeburg, Case c-580/13, 16 July 2015, para. 39.

obligation to introduce a protective remedy by Member States.[143] The effective protection of fundamental rights needs to be exercised without undue limitation. However, according to the CJEU a fair balance has to be struck between the fundamental rights which must be reconciled.[144]

The positive obligation to ensure effective exercise of the fundamental rights under the Charter applies however not only to Member States while implementing the EU law what has been demonstrated above, but also to EU while acting as legislator. It finds its confirmation in the interpretation provided by the CJEU in Kadi I case, according to which "all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty"[145] or in Schmidberger case, in which the CJEU observed that "measures which are incompatible with observance of the human rights thus recognised are not acceptable in the Community".[146]

The issue of the horizontal effect of the Charter is the subject of ongoing debate. For some scholars, private parties are not enumerated amongst the entities to whom the provisions of this Charter are addressed to, and therefore the provisions of Charter cannot be the source of horizontal effects.[147] On the other hand, the Charter has the status of primary EU law, bearing the same legal values as the Treaties[148], what means that it should be capable to be invoked horizontally if the necessary conditions are met.[149]

As regards the indirect horizontal effect of the Charter, the ongoing debate relates to the relationship between private entities, namely online platforms and their users and the role of online platforms in safeguarding fundamental rights in the digital environment. According to the Advocate General Øe, certain platforms, had become "essential

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[143] M. Husovec, Intellectual Property Rights and Integration by Conflict: The Past, Present and Future, Cambridge Yearbook of European Legal Studies, 2016, p.257.
[144] CJEU, Coty Germany GmbH v Stadtsparkasse Magdeburg, case C-580/13, 16 July 2015, para. 35.
[145] CJEU, Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities (Kadi I), Joined cases C-402/05 P and C-415/05 P, 3 September 2008, para. 285.
[146] CJEU, Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich, C-112/00, 12 June 2003, para. 73.
[147] K. Lenaerts, Exploring the limits of the EU Charter of Fundamental Rights, European Constitutional Law Review, vol.8, 2012, p.377.
[148] Article 6(1) of TEU.
[149] See: D. Leczykiewicz, Horizontal Application of the Charter of Fundamental Rights, European Law Review, vol. 4, 2013, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2328175, accessed: 31.03.2023; E. Frantziou, The Horizontal Effect of the Charter of Fundamental Rights of the EU: Rediscovering the Reasons for Horizontality, European Law Journal, vol. 21, No. 5, 2015, pp. 657–679; K. Lenaerts, Exploring …, p.377.

infrastructures", for the exercise of freedom of online communication[150]. It could explain the approach of the EU legislator to broaden the legal framework of their responsibility justified by protection of fundamental rights[151]. The example of such legal approach is the adoption of the Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC[152]. DSA is considered as "the centerpiece of an expanding and complex puzzle of platform regulation at EU level"[153]. To illustrate, according to recital 3 of the DSA: "Responsible and diligent behaviour by providers of intermediary services is essential for a safe, predictable and trustworthy online environment and for allowing Union citizens and other persons to exercise their fundamental rights guaranteed in the Charter, in particular the freedom of expression and of information, the freedom to conduct a business, the right to non-discrimination and the attainment of a high level of consumer protection."

To conclude:

- According to the ECHR there is an obligation to respect fundamental rights and an obligation to protect fundamental rights. The obligation to secure fundamental rights means that States have the obligation to take necessary measures to enable the effective enjoyment of the rights, to safeguard the rights of individuals. The ECtHR considered State as the ultimate guarantor of the principle of pluralism. However, technological development affecting media landscape implies the changes as regards the framework of engagement of the State in this context. The participation of private actors, intermediaries such as online platforms in information flow is of increasing importance.

- Th obligation not to interfere with fundamental rights unless the interference is justified, results also from the Charter. The positive obligation to ensure effective exercise of the fundamental rights under the Charter applies to Member States while implementing the EU law and to EU undertaking the legislative steps. The EU legislator should respect, observe and promote fundamental rights. The issue of the horizontal effect of the Charter is the subject of ongoing debate. I see a tendency towards increasing the responsibility of platforms to protect

[150]Opinion of Advocate General Saugmandsgaard Øe delivered on 15 July 2021. Republic of Poland v European Parliament and Council of the European Union, Case C-401/19.
[151] See: A. P. Heldt, Merging the Social and the Public: How Social Media Platforms Could Be a New Public Forum, Mitchell Hamline Law Review, vol.46, no.5, 2020, pp.997-1042.
[152] Hereinafter: Digital Services Act)
[153] J.P. Quintais, N. Appelman, R. Ó Fathaigh, Using terms and conditions to apply fundamental rights to content moderation, forthcoming in German Law Journal, 2022, pp.1-34, https://osf.io/f2n7m/, accessed: 31.03.2023.

fundamental rights and establish the indirect horizontal effect of human rights in the relationship between online platforms and their users within the recent legislation in the EU law.

2.5.Interference with fundamental rights

The analysis focuses on the interferences with fundamental rights. Since these rights are not absolute, such an interference may occur[154] but should be based on the specific criteria which will be thoroughly dissccussed in this point. To this end, the hypothetical case of a copyright legislation that is under preparation and could potentially interfere with freedom of expression will be considered. The objective would be to establish what criteria should be taken into account by the legislator while adopting a new law[155].

The aim of this analysis is to determine a check list of factors which legislator should take into account and verify when proposing a new legislation. The provided analysis seeks to set up what factors have to be considered by a legislator in the situation when copyright potentially interferes with freedom of expression.

The legislator, in this hypothetical case, is understood as the EU legislator and the national legislators, therefore the provisions of the Charter will be studied since it applies to EU institutions in all their actions and to EU Member States when they are implementing EU law. Considering that the Charter should be interpreted in accordance with the provision from the ECHR and case law of the ECtHR, the criteria of the interference with freedom of expressions enshrined in these two acts will be discussed jointly.

The focus will be on art. 52 (1) of the Charter read in conjunction with art. 10 (2) of the ECHR. According to art. 10 (2) of the ECHR any interference with freedom of expression by State should a) **be prescribed by law**, b) **be necessary in a democratic society** and c) **have a legitimate aim** which corresponds with the fields of interference enumerated in the art. 10 (2)[156]. The criteria should be understood strictly, the list

[154] The Convention protects the rights and freedoms of everyone from unjustified interference by States what is called the 'duty to abstain' , obligation to respect' or 'negative obligation'. See: D. Voorhoof, Critical perspectives …, p.5.
However, in some cases the interference with fundamental rights by States is justified. This section discusses in details the legal framework of such an interference.
[155] The analysis does not relate to the adoption of specific law. It is based on hypothetical case.
[156] In art. 10 (2) of the ECHR the legitimate aim should correspond with: the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

provided in the provision is exhaustive[157]. According to art. 52 (1) of the Charter: any limitation on the exercise of the rights and freedoms recognised by this Charter must a) **be provided for by law and respect the essence of those rights and freedoms** b) be subject to the principle of **proportionality**, **limitations may be made only if they are necessary** and c) genuinely meet objectives of **general interest** recognised by the Union or **the need to protect the rights and freedoms of others.**

In the following points the requirements of **prescription by law, legitimate aim and proportionality** of the measures to be adopted will be disscussed.

2.5.1. Prescription by law

Any interference with the freedom of expression has to be prescribed by law. It can be a law originally enacted on the initiative of the national legislator, or in case of application of the Charter, the EU law or an implementation of an EU directive conducted by the Member States. CJEU in Facebook Ireland and Schrems emphasised that "The requirement that any limitation on the exercise of fundamental rights must be provided for by law implies that the act which permits the interference with those rights must itself define the scope of the limitation on the exercise of the right concerned."[158] According to the ECtHR case law, the interference should be adequately accessible and foreseeable what means that the law should be formulated with sufficient precision to enable individuals to understand how they should behave and what would be the consequences which a given behavior may entail[159]. However, the ECtHR noted that: "Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice." [160]

This difficulty in defining and foreseeing all the consequences that a law may have is particularly relevant today, in an age of rapid technological change when the new actors and the new business models are emerging, shaping access to information and contributing to the evolution of media landscape.

[157] ECtHR, Sunday Times v. the United Kingdom, 26 April 1979, paras. 194-195.
[158] CJEU, Facebook Ireland and Schrems, case C-311/18, 16 July 2020, para.175.
[159] ECtHR, Sunday Times v. the United Kingdom, 26 April 1979, para 49.
[160] ECtHR, Sunday Times v. the United Kingdom, 26 April 1979, para 49.

2.5.2. Legitimate aim

The interference with freedom of expression must, according to the Convention, be based on at least one of the grounds indicated in art. 10.2 of the Convention. In case of the legislation on copyright it is based on the ground of the protection of the reputation or right of others which can justify the potential interference with freedom of expression. As regards the Charter, the interference must meet the objectives of general interest recognised by the Union. "It covers both the objectives mentioned in Article 3 of the TEU and other interests protected by specific provisions of the Treaties such as Article 4(1) of the TEU and Articles 35(3), 36 and 346 of the TFEU"[161]. According to the CJEU, the restrictions of fundamental rights have to "correspond to objectives of general interest pursued by the measure in question".[162] General interest from the Charter in case of copyright legislation could be understood as protection of holders of copyright and related rights, protection of cultural diversity or innovation.

2.5.3. Proportionality

The interference with freedom of expression has to be necessary. This necessity should be understood from the perspective of a pressing social need[163] and this is the role of legislator to assess whether this pressing social need occurs and whether the interference is necessary[164].

The requirement to justify the interference by its necessity should be seen in the broader perspective of the principle of proportionality[165],being at the core of the protection of

[161] See: EU Charter of Fudnamental Rights, Scope and Interpretation, https://fra.europa.eu/en/eu-charter/article/52-scope-and-interpretation-rights-and-principles, accessed: 29.03.2023.

[162] CJEU, Alassini and Others, Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, 18 March 2010 para.63.

[163] ECtHR, Observer and Guardian v. the United Kingdom, 13585/88, 26 November 1991, para. 57.

[164] Some margin of appreciation is given to legislator, but it should take into account the different interests protected both by the Convention and by the Charter. In case of application of the Convention, the ECtHR has a supervisory role, "limited to reviewing whether or not the particular solution adopted can be regarded as striking a fair balance" (see: ECtHR, Hatton and Others v. the United Kingdom, 36022/97, 8 July 2003, para.123.)

In case of the application of the Charter, it is the role of the CJEU (see: CJEU, Yassin Abdullah Kadi and AI Barakaat International Foundation v Council of the European Union and Commission of the European Communities (Kadi I), Joined cases C-402/05 P and C-415/05 P, 3 September 2008, para.285; CJEU, Tele2 Sverige AB v. Postoch telestyrelsen and Secretary of State for the Home Department v. Tom Watson and Others [GC],Joined cases C-203/15 and C-698/15, 21 December 2016, para. 128.)

[165] See: R. Markiewicz, Zasada proporcjonalności w prawie autorskim Unii Europejskiej, Wolters Kluwer Polska, 2023.

human rights.[166] Understood as a means of interpretation, the principle is generally used to "delimit the substantive content of rights"[167].Test of proportionality includes the assessment of three elements: effectiveness (suitability), necessity and proportionality (in narrow sense) of the interfering measures.

a. Effectiveness/ suitability

The adopted measures should be suitable for achieving the pursued objective. It relates to the relationship between the aims of the measure and the implemented means to achieve these aims. It allows an assessment of whether the chosen measure can actually contribute to the achievement of the expected result. J. Christoffersen points out that if the measure is ineffective, the restriction would benefit no one[168]. However, it should be noted that the perfect effectiveness of the chosen means in pursuing the declared goals can be difficult to achieve and to assess for example due to the factors like those related to unpredictability of human behavior[169] or technological development. Nevertheless, efforts should be made on the legislator's side to choose from among possible measures the one that best achieves the objective.

b. Necessity

The legislator should examine whether there is no measure that could be less intrusive in achieving the legitimate goal and which causes less prejudice to the right the interference with takes place. For example, according to the CJEU the injunction is not precluded by the fundamental rights if the adopted measure does not **unnecessarily deprive** users of lawful access to the information available.[170] The assessment of the necessity of the measure should consist of looking for the alternatives that should be compared and evaluated from the perspective of being the least intrusive and causing less prejudice.

[166] See: J. Christoffersen, Fair Balance: Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights, International Studies in Human Rights, **v**ol.99, 2009, pp.1-30.
[167] J. Christoffersen, Human rights and balancing: the principle of proportionality, in: Ch. Geiger (ed.), Research Handbook in Human Rights and Intellectual Property, Edward Elgar Publishing, 2016, p.19.
[168] J. Christoffersen, Human rights …, p.28.
[169] J. Gerards, How to improve the necessity test of the European Court of Human Rights, *I•CON,* Vol. 11 No. 2, 2013, p.474, p.466-490.
[170] CJEU, UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH, case C-314/12, 27 March 2014, para.63.

c. Proportionality (in the narrow sense)

Proportionality should be understood as balancing different rights and interests to solve the situation of conflicts. Although in the Convention the requirement of proportionality of the interference is not explicitly indicated, according to the ECtHR "an interference must achieve a "fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is reflected in the structure of Article 1 as a whole, and therefore, also in the second paragraph thereof: there must be a reasonable relationship of proportionality between the means employed and the aim pursued. In determining whether this requirement is met, the Court recognises that the State enjoys a wide margin of appreciation with regard both to choosing the means of enforcement and to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question."[171]

The fact, that any limitation on the exercise of the rights and freedoms should be subject to the principle of proportionality is recognised explicitly in art. 52 (1) of the Charter. The CJEU attached high importance to striking the fair balance between different fundamental rights but in relatively few cases the indicators can be found on how to achieve this balance[172]. In Republic of Poland v European Parliament, Council of the European Union, which concerned the annulment of two provisions under Article 17 of the CDSM Directive as regards the liability of online content-sharing service providers for content uploaded by users, the CJEU explained which measures interferening with fundamental rights can satisfy the requirement of proportionality. According to the CJEU, "the legislation which entails an interference with fundamental rights must lay down clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards, so that the persons whose exercise of those rights is limited have sufficient guarantees to protect them effectively against the risk of abuse. That legislation must, in particular, indicate in what circumstances and under which conditions such a measure may be adopted, thereby ensuring that the interference is limited to what is strictly necessary. The need for such safeguards is all the greater where the interference stems from an automated process".[173] In this case, the CJEU ruled that "where

[171] ECtHR, Chassagnou and Others v. France, 25088/94, 28331/95 and 28443/95, 29 April 1999, para. 75.
[172] See for example: CJEU, L'Oréal SA v eBay (…), Case C-324/09, 12 July 2011.
[173] CJEU, Republic of Poland v European Parliament, Council of the European Union, Case C-401/19, 26 April 2022, para.67.

several fundamental rights and principles enshrined in the Treaties are at issue, the assessment of observance of the principle of proportionality must be carried out in accordance with the need to reconcile the requirements of the protection of those various rights and principles at issue, striking a fair balance between them."[174] In Schmidberger's case, the CJEU highlighted that while conducting the balancing exercise, it is important to examine whether the interference does not impair the very substance of the rights guaranteed and to consider all the circumstances of the case in order to determine whether a fair balance was struck[175]. In other words, the core of the fundamental right should be preserved despite the interference.

To conclude:

- The interference with fundamental rights has to pursue a general interest which could be understood as protection of holders of copyright and related rights, protection of cultural diversity or innovation. It has to be prescribed by law.

- Before the adoption of the new legislation, the legislator should assess whether there is a pressing social need justifying the necessity of its adoption. The adopted measures should be suitable for achieving the pursued objective. It should be assessed whether there is no measure that could be less intrusive in achieving of a legitimate goal. The assessment of the necessity of the measure should consist of looking for alternatives that should be compared and evaluated from the perspective of being the least intrusive and causing less prejudice.

- Any interference with fundamental rights should be subject to the test of proportionality understood as balancing of different interests at stake. A thorough analysis of all elements of the proportionality test in all cases of potential interference with fundamental rights would be ideal. However, the comprehensive assessment of the fulfilment of all of its elements in some circumstances may not be possible. In some cases, a general balancing of interests is carried out instead of assessing the individual elements[176]. This does not alter the fact that it is the duty of legislator to examine whether the new regulation interferes with fundamental rights. If the result of this test is positive, it should assess whether this regulation pursues a legitimate aim and is necessary being proportional, the least intrusive and guaranteeing the achievement of the set objective. If at least

[174] CJEU, Republic of Poland v European Parliament, Council of the European Union, Case C-401/19, 26 April 2022, para.66.
[175] CJEU, Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich, case C-112/00, 12 June 2003, paras.80-81.
[176] According to A. Barak, balancing is "an analytical process that place the propoer purpose of the limiting law on one side of the scales and the limited constitutional right on the other, while balancing the benefit gained by the proper purpose with the harm it causes to the right. See: A. Barak, Proportionality. Constitutional Rights and their Limitations, Cambridge University Press, 2012, p. 343.

one of these criteria is not met, the legislator should consider another legal solution, as the assessed one can be considered as unjustified interference with fundamental rights.

3. EU law framework for media pluralism

3.1. Concept of media pluralism

The value of pluralism constitutes one of the founding principles of the European Union expressed in art. 2 of the TEU and art. 11 of the Charter. According to art.11(2) of the Charter, the freedom and pluralism of the media shall be respected. However, the EU legislator does not provide any definition of media pluralism. According to the Council of the European Union, "it encompasses all measures that ensure access to a variety of information and content sources and allow diverse actors with different opinions to have equal opportunities to reach the public through the media".[177] According to the European Commission "Media pluralism is a concept that embraces a number of aspects, such as diversity of ownership, variety in the sources of information and in the range of contents available in the different Member States and ensuring it (…), implies all measures that ensure citizens' access to a variety of information sources, opinion, voices etc. in order to form their opinion without the undue influence of one dominant opinion forming power."[178]

Even if the quoted interpretations of the term correspond with each other or even overlap to a large extent, the lack of a uniform concept of the term in the EU law may lead to doubts as to its interpretation, given the very wide possible scope of its understanding. I see an important need for a legal definition of media pluralism in the EU law which could be adopted for example in the proposed Regulation establishing a common framework for media services in the internal market (hereinafter: EMFA) since it intends to answer the challenges to media pluralism and media freedom online[179].

[177] See: Council of European Union, Council conclusions on safeguarding a free and pluralistic media system, 2020/C 422/08, 2020, p.10, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XG1207(01), accessed: 01.09.2023.
[178] European Commission, Commission Staff Working Document, Media pluralism in the Member States of the European Union, {SEC(2007) 32},p.5, https://ec.europa.eu/information_society/media_taskforce/doc/pluralism/media_pluralism_swp_en.pdf, accessed: 01.09.2023.
[179] See: point 3.2. of this chapter.

To conclude:

- The factors which I identify and which constitute the concept of media pluralism within the EU perception of the term are: variety of information distributed, variety of sources of information and equal opportunities of different actors with diverging opinions to reach the public through the media owned by different entities.

- It is advisable, in my opinion, that the EU legislator introduces a legal definition of media pluralism taking into account the recent technological changes in the field of media.

3.2.Competence of European Union to legislate on media pluralism

This point of the analysis aims at specyfing to what extent the EU is entitled to legislate as regards media pluralism so as not to encroach on the sphere of competence of the Member States. EU should contribute to the flowering of cultures of the Member States and its actions should be guided by the respect and the promotion of cultural diversity according to art. 167 (1)(4) of the TFEU. Its competences are of subsidiary nature and should consists of supporting and supplementing the practices of Member States as regards the dissemination of culture as well as the artistic and literary creation. According to art. 167 (5) of the TFEU, the EU actions in the pursuit of primarily cultural objectives through the approximation of laws and regulations in the Member States are prohibited. The scope of the EU's cultural competences is significantly limited and of marginal importance[180].

The EU legislative steps which concern the aspects of the functioning of media[181] are mainly justified by the reference to the protection of internal market[182]. The aim of establishing or ensuring the functioning of the internal market enshrined in art. 26 of

[180] See: K. Irion, P. Valcke, Cultural diversity in the digital age: EU competences, policies and regulations for diverse audiovisual and online content in: E. Psychogiopoulou, (ed.), Cultural Governance and the European Union, 2014, Palgrave Macmillan, p.76.

[181] Media law, according to J. Oster, "focuses on media as a means to disseminate information and ideas to a mass audience, and the persons disseminating such information and ideas. Media law is thus intrinsically tied to the concept of communication." Media law understood generally encompasses amongst other the regulations concerning print media (I), TV, radio broadcasting (II), dissemination of information and ideas through internet (III), the issues of advertising and copyright protection see: J. Oster, European and International Media Law, Cambridge University Press, 2017, p.2.

[182] The EU Media law is based on the EU's focus on the development of the internal market. "Media goods and services, had, in the first place, been perceived as economic commodities." (J. Oster, European and International Media Law, Cambridge University Press, 2017, p.24.) It remains an essential justification for legislative interference in this area. However, as observed by J. Oster, it has been recognised that media is a factor of public interest going far beyond the market specificities and touching upon diversity of opinions, cultural diversity, right to information or protection of consumers (J. Oster, European …, p.24)

TFUE, and the role of the EU in harmonising the national laws resulting from art. 114 TFUE are given as the basis for the EU action in this field. According to art. 26 (2) TFEU the internal market is "an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties." The legal basis of the establishement and functioning of the internal market would apply where the subject matter to be harmonised has cross-border relevance. However, the legislative measure can pursue other aims, provided that its main goal remains the building of an internal market[183].

The EU has the competences to harmonise the national laws in order to prevent, according to the CJEU, "the emergence of future obstacles to trade resulting from multifarious development of national laws"[184]. However, traditionally, media law remained outside the area of harmonisation.[185]To illustrate, within the legislative works on the Television without Frontiers Directive the argument that cultural and social issues are inherently linked to national sovereignty and constitute a competence exclusive to Member States was raised by the majority of Member States.[186]

To give some examples, as to the legal basis of the Audiovisual Media Services Directive adopted in 2010 and harmonising measures on audiovisual media services, according to recital 5 of the Directive "Audiovisual media services are as much cultural services as they are economic services. Their growing importance for societies, democracy — in particular by ensuring freedom of information, diversity of opinion and media pluralism — education and culture justifies the application of specific rules to these services." The EU legislator bases its legislative steps on establishing an internal market for audiovisual media services, thus on the economic aspects of the convergences and technological transformation in media field but refers also to the cultural context and to pursuit of the objectives of freedom of expression, diversity of opinion and media

[183] See: CJEU Tobacco Advertising case C-376/98, 5 October 2000, para. 78; See also: A. Ramalho, The competence of EU to create a neighbouring right for publishers, Maastricht University, 2016, p.5.
[184] CJEU, British American Tobacco (Investments) and Imperial Tobacco, case C-491/01, 10 December 2002, para. 61.
[185] O. Castendyk, E. Dommering, A. Scheuer, European Media Law, Kluwer LawInternational,2008, p.14; J. Oster, European and International Media Law, Cambridge University Press, 2017, p.24. See: European Parliament, The European Media Freedom Act: media freedom, freedom of expression and pluralism, pp.17-19, https://www.europarl.europa.eu/RegData/etudes/STUD/2023/747930/IPOL_STU(2023)747930_EN.pdf, accessed: 23.10.2023.
[186] P. Papp, The Promotion of European Works: An Analysis on Quotas for European Audiovisual Works and their Effect on Culture and Industry, European Union Law Working Papers, no.50, 2020, https://law.stanford.edu/wp-content/uploads/2020/10/papp_eulawwp50.pdf, accessed: 01.09.2023.

pluralism. The objective of ensuring media pluralism is invoked explicitly in above cited recital 5 of the Directive from the perspective of significance of audiovisual media services and their role. According to P. Valcke "EU legislation in the audiovisual sector is thus motivated by economic integration and internal market objectives, yet emphasises positive synergies for cultural diversity and also media pluralism."[187]

The changing market realities led to the amendment of the Directive in 2018[188] aimed at extending some audiovisual rules to video sharing platforms and social media services as well as increasing obligations to promote European works for on-demand services. In recital 16 of the Directive, the EU legislator points out that "(…) In order to strengthen freedom of expression, and, by extension, to promote media pluralism and avoid conflicts of interest, it is important for Member States to ensure that users have easy and direct access at any time to information about media service providers. (…)." The EU legislator while providing the solutions as regards the freedom to provide services, emphasis the care for media pluralism. However, the latter should be perceived as having accessory nature in relation to the measures undertaken on the economic ground and being a resultant of them rather than an end in itself.

As regards the adoption of the CDSM Directive in 2019, the EU competence is based on art. 114 of the TFUE. In recital 2 of the Directive it is highlighted that "the protection provided by that legal framework of the CDSM Directive contributes to the Union's objective of respecting and promoting cultural diversity, while at the same time bringing European common cultural heritage to the fore. Article 167(4) of the Treaty on the Functioning of the European Union requires the Union to take cultural aspects into account in its action." Although the protection of media pluralism is not invoked explicitly, the role of "free and pluralist press" in recital 54 of the CDSM Directive or importance of promoting cultural diversity in recital 2 of the Directive are mentioned. According to the EU legislator, the harmonised legal framework contributes to the proper functioning of the internal market. The focus, as specified in recital 2 of the CDSM Directive is on stimulation of "innovation, creativity, investment and production of new content, also in the digital environment, in order to avoid the fragmentation of the internal market" but also on "the Union's objective of respecting and promoting cultural

[187] K. Irion, P. Valcke, Cultural diversity …, p.76.

[188] Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32010L0013, accessed: 31.03.2023.

diversity". The objective of promoting the development of cultural heritage and its diversity is pursued in addition to the main objective of protecting and developing the internal market on the basis of the competence form art. 114 TFUE.

The adoption of the Digital Services Act[189] in 2022, aimed at modernising the current legal framework for digital services, was also based on the competence enshrined in art. 114 TFUE. One of its objectives was to set clear obligations for digital service providers, such as social media which play the significant role in distribution of information, impact the media ecosystem and media pluralism.[190] They EU legislator makes reference to media pluralism in order to shape the new obligations of online platforms and to outline the areas that should be particularly protected in terms of their activities. The objective of the regulation is to safeguard and improve the functioning of the internal market in view of practices of providers of intermediary services. Since this activity touches upon the issues related to media pluralism, the EU legislator acknowledges the necessity of its protection and this accompanies or results from the primary objective of the regulation.

To complete the picture of regulations relating to media pluralism at the EU level, the proposal for a Regulation establishing a common framework for media services in the internal market[191], proposed in 2022 and built on the revised Audiovisual Media Services Directive should be mentioned. The EMFA aims at offering a new set of rules and mechanisms to promote media pluralism and independence across the European Union. Its four main pillars are safeguarding the independent provision of media services in the internal market; enhancing regulatory cooperation and convergence; ensuring a well-functioning market for media services and transparent and fair allocation of economic

[189] Digital Services Act, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32022R2065&qid=1666857835014, accessed: 31.03.2023.

[190] The indicated regulations relate to the Digital Single Market Strategy defined as a wide – ranging group of individual legislative initiatives to adapt the European market to the digital age. The Digital Single Market is defined as a market in which the "free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence". See: Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and the Committee of Regions, A Digital Single Market Strategy for Europe, SWD(2015) 100 final, 2015, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52015DC0192, accessed: 03.03.2023.

[191] Also known as the European Media Freedom Act, (EMFA); See: Proposal for a regulation of the European Parliament and of the Council establishing a common framework for media services in the internal market (European Media Freedom Act) and amending Directive 2010/13/EU, COM/2022/457 final, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0457, accessed: 01.09.2023.

resources.[192]The solutions proposed in EMFA are seen as a remedy for the concentration of media ownership at the national level or the threats of politically driven media capture.[193]

Critical voices towards this regulation are numerous. The potential lack of competence of the EU in regulating media pluralism issues is pointed out since the regulation is anchored in cultural aspects, the regulation of which constitutes a national competence. Moreover, some scholars argue that the proposed solutions are not adapted to the cultural and media differences in the respective Member States and tend to introduce the unjustified uniformisation[194].

The EU bases its competence to adopt the regulation discussed on the basis of art. 114 of the TFEU. According to the Explanatory Memorandum, "the proposal aims to address the fragmented national regulatory approaches related to media freedom and pluralism and editorial independence".[195] Therefore, despite the significantly limited scope of competence as regards the cultural issues, the EU legislator declares to pursue the objectives in this field. However, it explains that this legislative step "will foster a common approach and coordination at EU level, ensure the optimal functioning of the internal market for media services, and prevent the emergence of future obstacles to the operation of media service providers across the EU".[196] It is highlighted that "Independent media, and in particular news media, provide access to a plurality of views and are reliable sources of information to citizens and businesses alike. They contribute to shaping public opinion and help people and companies form views and make informed choices."[197] The proposal seeks however, according to Explanatory Memorandum "to tackle a series of problems affecting the functioning of the internal market for media services and the

[192]European Commission, Media freedom and pluralism, https://digital-strategy.ec.europa.eu/en/policies/media-freedom, accessed: 03.03.2023.

[193] FreePressUnlimited, European Media Freedom Act:Does it protect media pluralism and independence in the EU?, 2022, https://www.freepressunlimited.org/en/current/european-media-freedom-act-does-it-protect-media-pluralism-and-independence-eu, accessed: 03.03.2023.

[194] Interview with D. Flisak, June 2022. The proposal has been criticised by press industry being afraid of limitation of the editorial control of press publishers in case of the adoption of the EMFA. See: C. Goujard, We're fine as we are, Press tells EU as Brussels plans media freedom law, Politico, 2022, https://www.politico.eu/article/eu-law-to-protect-media-freedom-scares-off-press-publishers/, accessed: 03.03.2023; see also: Press, Projekt Media Freedom Act w obecnej postaci jest dla wydawców nie do przyjęcia, 2022, https://www.press.pl/tresc/74375,projekt-media-freedom-act-w-obecnej-postaci-jest-dla-wydawcow-nie-do-przyjecia, accessed: 03.03.2023.

[195] European Media Freedom Act, p. 7, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0457, accessed: 01.09.2023.

[196] European Media Freedom Act, p.7, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0457, accessed: 01.09.2023.

[197] European Media Freedom Act, p.1, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0457, accessed: 01.09.2023.

operation of media service providers."[198]

In consequence, the cultural objectives relating for example to the functioning of media that are to be regulated at the national level are "smuggled" in regulations touching on issues relating to the functioning of the internal market and the freedom to provide services, which fall within the competence of the EU.

With regards to the provided analysis, the conclusion could be drawn that European Commission while providing the proposal for EMFA demonstrates a hyper proactive approach despite the lack of clear legal grounds for the legal intervention. The EU while enacting the new legislation should take into account and respect the value of media pluralism, but safeguarding media pluralism falls under the competences of EU Member States.[199]

To conclude:

- EU legislative competences in the field of culture are significantly limited.
- The objectives related to the functioning of media industry and linked to the context of media pluralism are achieved through the legal acts adopted on the basis of the provisions from art. 26 and 114 TFEU.
- The legal justification for the European legislative steps concerning the aspects of the culture and the functioning of media given by the EU legislator is rooted in, or hidden behind, the protection of the internal market, the removal of barriers impacting the investment conditions at the EU level due to different national rules and the limitation of the fragmentation of the internal market.

3.3.Media pluralism and the rule of law

The DSA and the proposal for EMFA are part of European Democracy Action Plan announced in 2020, which according to the European Commission, is designed to empower citizens and build more resilient democracies across the EU by promoting free and fair elections, strengthening media freedom and countering disinformation.[200] Protection of media pluralism is considered at the EU level as a pillar of safeguard for the

[198] European Media Freedom Act, p.1, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0457, accessed: 01.09.2023.
[199] See: Council of European Union, Council conclusions on safeguarding a free and pluralistic media system, 2020/C 422/08, 2020, p.10, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52020XG1207(01), accessed: 01.09.2023.
[200] See: European Commission, European Democracy Action Plan, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/new-push-european-democracy/european-democracy-action-plan_en, accessed: 09.03.2023.

rule of law[201]. The principle of rule of law stems principally from primary law: article 2 and 7 of the TUE and from the Charter.[202] As regards the policies adopted at the EU level concerning the protection of rule of law, it is based on three pillars:

- "the promotion of a rule-of-law culture in the EU, which involves deepening common work to spread understanding of the rule of law in Europe;
- the prevention of rule-of-law problems where they emerge in a Member State, having the capacity to intervene at an early stage and avoiding the risk of escalation, including in particular the European Rule of Law Mechanism, with the annual *Rule of Law Report* at its centre;
- the ability to mount an effective response when a problem of sufficient significance has been identified in a Member State, including the procedure under Article 7 of the Treaty on European Union."[203]

In addition to its involvement in legislation towards strengthened democracy which is based also on the law touching upon media pluralism, the European Union has launched a number of projects to monitor media pluralism and support initiatives to protect it. Amongst them, the Media Pluralism Monitor should be indicated. It is a research tool designed to identify potential risks to media pluralism in the Members States of the EU.[204] Moreover, the EU founds projects such as the Media Ownership Monitor which enhances the transparency of media ownership[205], or the Creative Europe Programme, promoting European cooperation on cultural diversity and industrial competitiveness for the cultural and creative sectors[206]. Annual Rule of Law reports prepared by the European

[201] See: European Commission, European Media Freedom Act: Commission launches public consultation, 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_85, accessed: 04.09.2023. According to European Commission, "Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. Respect for the rule of law is essential for the very functioning of the EU: for the effective application of EU law, for the proper functioning of the internal market, for maintaining an investment-friendly environment and for mutual trust." See:Eur-lex, https://eur-lex.europa.eu/EN/legal-content/glossary/rule-of-law.html, accessed: Rule of Law, Eur-lex, 04.09.2023.

[202] P. Craig, G. de Burca, EU Law: Text, Cases, and Materials UK Version, Oxford University Press, 2020, pp.51-60, https://books.google.fr/books?id=RFbwDwAAQBAJ&dq=all+public+powers+always+act+within+the+constraints+set+by+law,+in+accordance+with+the+values+of+democracy+and+fundamental+rights+and+under+the+control+of+independent+and+impartial+courts&hl=pl&source=gbs_navlinks_s, accessed: 04.09.2023.

[203] Rule of Law, https://eur-lex.europa.eu/EN/legal-content/glossary/rule-of-law.html, accessed: Rule of Law, Eur-lex, 04.09.2023.

[204] Indices ranking freedom of expression, a comparaison between the Media Pluralism Monitor, Reporters without Borders and Freedom House, in:P. Luigi Parcu, E. Brogi, (eds.), Research Handbook on EU Media Law and Policy, Edward Elgar Publishing, 2021, p.367.

[205] European Media Ownership Monitor, https://media-ownership.eu, accessed: 31.03.2023.

[206] Creative Europe Programme, https://culture.ec.europa.eu/creative-europe/about-the-creative-europe-programme, accessed: 31.03.2023.

Commission constitute an assessment of the developments across the Member States, in four key areas for the rule of law: "the justice system, the anti-corruption framework, media pluralism and other institutional issues related to checks and balances".[207]

To conclude:

- The safeguard for media pluralism constitutes an important objective within the EU's policy addressing the challenges to democracy. The latter is based *inter alia* on reporting measures leading to the increased transparency as regards the respect of fundamental values of the EU. The protection/reinforcement of democracy can be a justification for the legislative steps taken at the EU level which touch upon media pluralism.

4. Press publishers and flow of information

4.1. Introductory remarks

At the EU level, the activity of press publishers has been regulated in relation to the use of their press publications by information society service providers (hereinafter: ISSPs) in art. 15 of the CDSM Directive. Being of crucial importance for the analysis provided in this dissertation, the provision will be discussed in details in the following chapters. The EMFA, proposed in 2022, will certainly have an impact on the functioning of press media sector, especially as regards the editorial independence of news media companies and transparency of their ownership and founding. The final outcomes should be however assessed once the regulation is adopted[208].

Specific regulations regarding the functioning of press publishers are to be found in national legal orders out of the scope of the harmonisation. In Poland, this is Ustawa z dnia 26 stycznia 1984r. Prawo prasowe[209] which sets the legal framework of their activity. Polish legislator does not define the concept of publisher,[210] and limits itself to enumerate the examples. According to art. 8 (1) of the Polish press law, a publisher can be a legal or

[207] European Commission, 2022 Rule of law report, https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-law/rule-law/rule-law-mechanism/2022-rule-law-report_en, accessed: 01.09.2023.
[208] At the time of completion of the research, 07.02.2024, the EMFA has not been adopted yet.
[209] Ustawa z dnia 26 stycznia 1984 r. Prawo prasowe, Dz. U. 1984 Nr 5 poz. 24, t.j. Dz. U. z 2018 r. poz. 1914; Act of 26 January 1984 - Press Law, Dz. U. 1984 Nr 5 poz. 24, t.j. Dz. U. z 2018 r. poz. 1914, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19840050024/U/D19840024Lj.pdf, accessed: 08.01.2023, hereinafter: Polish press law.
[210] E. Ferenc- Szydełko, Prawo prasowe. Komentarz, art.8, Wolters Kluwer, 2013, LEX.

natural person or other organisational unit, even if not having legal personality. In particular, a publisher may be a state body, a state enterprise, a political organisation, a trade union, a cooperative organisation, a local government organisation and other social organisation, church or other religious association.[211] The conclusion can be drawn that the press publishing activity may be undertaken by any entity conducting a business.[212] It has been agreed that publisher is the person/entity who/that establishes the editorial office, creates the technical conditions for the preparation of the periodicals, organises the technical process of producing the periodicals and takes care of making it available and advertising it.[213]

Press is defined in art. 7.2 (1) of the Polish press law as periodical publications which appear at least once a year, have a fixed title or name, a running number and a date. These are in particular: newspapers and periodicals, agency services, fixed telex transmissions, bulletins, radio and television programmes and newsreels; the press also includes all existing and technically evolved mass media, including broadcasting stations and company tele- and radio broadcasting services, which disseminate periodical publications by means of print, vision, sound or any other dissemination technique.

The definition is broad. The legislator refers to the traditional, print method of distribution of press as well as to the dissemination by means of vision, sound or any other technique. The online distribution is not explicitly mentioned. However, it should be interpreted within the category of 'any other technique' included by the legislator in the definition. Both in the literature and in case law it has been agreed that the definition of press applies to the distribution of periodicals offline and their online equivalents as well as to the distribution exclusively online or exclusively offline[214]. Whenever the press distributed offline or online, the same are its characteristics, namely **periodicity,**

[211] English version by the author. Polish version: Art. 8. 1. Wydawcą może być osoba prawna, fizyczna lub inna jednostka organizacyjna, choćby nie posiadała osobowości prawnej. W szczególności wydawcą może być organ państwowy, przedsiębiorstwo państwowe, organizacja polityczna, związek zawodowy, organizacja spółdzielcza, samorządowa i inna organizacja społeczna oraz kościół i inny związek wyznaniowy.

[212] J. Sobczak, Prawo prasowe. Komentarz, art. 8, Wolters Kluwer 2008, LEX. The basic feature of business activity is its making profit nature according to art. 3 of Ustawa z dnia 6 marca 2018r. Prawo przedsiębiorców, Dz. U. 2018 poz. 646 t.j. Dz. U. z 2021 r. poz. 162, 2105, z 2022 r. poz. 24, 974, 1570. (Enterpreneurs law). However, M. Ożóg points that the publishing of press may be conducted free of charge e.g. as part of a charitable activity - in such cases the publisher does not conduct a business. See: M. Ożóg, in: E. Traple (ed.), Prawo reklamy i promocji, LexisNexis, 2007, s. 432.

[213] J. Maślanka, Encyklopedia wiedzy o prasie, Ossolineum, 1976, pp. 200–201.

[214] See: J. Barta, R. Markiewicz, Postęp techniczny w mediach in: J. Barta, R. Markiewicz, A. Matlak (ed.), Prawo mediów, LexisNexis, 2005, p. 189; J. Sobczak, Prawo prasowe. …; Supreme Court, Decision of 15 December 2010, III KK 250/10, OSNKW 2011/3/26; Supreme Court, Decision of 26 July 2007, IV KK 174/07, LEX nr 287505.

appearance on the web/ in printed form, fixed title (name), consecutive issues and visible dates. Moreover, regardless of the form of dissemination, the registration requirement must be met.[215]

In the Polish doctrine the tendency towards broader understanding of press should be noted. To illustrate, there is a move away from a restrictive understanding of periodicality as appearing at equal intervals of time, towards understanding of the term as a continuous update, which makes it possible to consider news portals in the category of press, as long as the date of publication of the information appearing there can be determined.[216]

The Polish legislator provides the definitions of a **journal** (art. 7.2. (2)) which is a general-interest periodical print or broadcast by sound and sound and image, appearing more than once a week. It defines a **periodical** (art. 7.2. (3)) which is a periodical print, a transmission by sound or by sound and image differing from a journal in that it is published less frequently. A **press material** (art. 7.2. (4)) is also defined and means any text or image of an informative, journalistic, documentary or other nature published or submitted for publication in the press, regardless of the medium, type, form, purpose or authorship are provided. Journals and periodicals consist of press materials. Journals should be of general interest, topics of periodicals have not been specified.

[215] According to art. 20 of Polish press law: The publication of a daily newspaper or periodical shall be subject to registration with the district court having jurisdiction over the publisher's registered office. The application for registration referred to in subsection shall include:
1) the title of the daily newspaper or periodical and the seat and exact address of the editorial office;
2) personal data of the editor-in-chief;
3) the name of the publisher, his seat and exact address;
4) the frequency of publication of the daily newspaper or periodical.
English version by the author. Polish version of art. 20 of Polish Press law: Wydawanie dziennika lub czasopisma wymaga rejestracji w sądzie okręgowym właściwym miejscowo dla siedziby wydawcy, zwanym dalej "organem rejestracyjnym". Do postępowania w tych sprawach stosuje się przepisy Kodeksu postępowania cywilnego o postępowaniu nieprocesowym, ze zmianami wynikającymi z niniejszej ustawy.
2. Wniosek o rejestrację, o której mowa w ust. 1, powinien zawierać:
1) tytuł dziennika lub czasopisma oraz siedzibę i dokładny adres redakcji;
2) dane osobowe redaktora naczelnego;
3) określenie wydawcy, jego siedzibę i dokładny adres;
4) częstotliwość ukazywania się dziennika lub czasopisma.
3. Postanowienia zarządzające wpis do rejestru sąd uzasadnia tylko na wniosek.
4. Wydawanie dziennika lub czasopisma można rozpocząć, jeżeli organ rejestracyjny nie rozstrzygnął wniosku o rejestrację w ciągu 30 dni od jego zgłoszenia.
5. O zmianie danych, o których mowa w ust. 2, należy zawiadomić niezwłocznie organ rejestracyjny.
See: Supreme Court, Decision of 26 July 2007, IV KK 174/07 OSP 2008, z. 6, poz. 60.

[216] B. Błońska, Komentarz do art. 25 Ustawy o prawie autorskim i prawach pokrewnych in: W. Machałą, R. Sarbiński, Prawo autorskie i prawa pokrewne. Komentarz, Wolters Kluwer Polska, 2019, Lex, point 10.

To give some examples from the Polish press market, Ringier Axel Springer Polska sp. z o.o.[217] is a publisher having the largest circulation of journals and issuing the journals such as "Fakt", "Przegląd Sportowy" and periodicals such as "Newsweek Polska", "Forbes", "Auto Świat".[218] It also publishes the news website "onet.pl"[219], popular in category of information and journalism. Polska Press[220] is known especially for publishing regional newspapers, journals such as "Dziennik Bałtycki", Kurier Lubelski" existing in online and print versions.[221] Agora S.A.[222] publishes amongst other the journal called "Gazeta wyborcza" which is the most popular journal in Poland next to "Fakt". Gazeta wyborcza has its online version, "wyborcza. pl". Bauer sp. z o. o. sp.k.,[223] being part of the German Bauer Media Group holding company, publishes the periodicals like "Pani", "Twój styl", "Show", the first two exist also in online versions. AVT is much smaller and less recoignaisable editor, publishing on rather specific topics. It publishes for example the periodical T3, the print run of which is 34 000 copies.[224] The magazine is also available as an e-edition (PDF), it has a tablet version, and an independently functioning web portal. It should be noted that in Poland, there are still a lot of journals and magazines which do not have an online version.

[217] According to the data collected between 2013-2021 and published by Chamber of Press Publishers, Ringier Axel Springer Polska sp. z o.o has the largest circulation of journals among Polish publishers. See: Izba Wydawców Prasy, Rynek wydawców, https://www.iwp.pl/rynek-wydawcow/, accessed: 09.01.2023.
[218] All exist in online and offline version with the exception of Przegląd Sportowy, some publications of which are published on the website "onet.pl" also run by Ringier Axel Springer Polska S.A.
[219] See: https://www.onet.pl, accessed: 10.01.2023.
[220] In 2021 Polska Press has been acquired by PKN Orlen, Oil&Gas company in which the State has 49% of shares. See: Orlen, Organy i struktura spółki, https://www.orlen.pl/pl/o-firmie/o-spolce/organy-i-struktura-spolki/struktura-akcjonariatu, accessed: 09.01.2022. This acquisition raised doubts about the independence of the publisher and the potential influence of the state on the content issued, see: Rzecznik Praw Obywatelskich, Zakup Polska Press przez PKN Orlen. Rzecznik o zagrożeniach dla wolności słowa, 2020, https://bip.brpo.gov.pl/pl/content/rpo-o-zagrozeniach-wolnosci-prasy-po-kupnie-polska-press, accessed: 09.01.2022.
[221] According to the data collected between 2013-2021 and published by Chamber of Press Publishers, Polska Press has the second largest circulation of journals among Polish publishers. See: Izba Wydawców Prasy, Rynek wydawców, https://www.iwp.pl/rynek-wydawcow/, accessed: 09.01.2023.
[222] According to the data collected between 2013-2021 and published by Chamber of Press Publishers, Agora SA has the fourth largest circulation of journals among Polish publishers. See: Izba Wydawców Prasy, Rynek wydawców, https://www.iwp.pl/rynek-wydawcow/, accessed: 09.01.2023.
[223] According to the data collected between 2013-2021 and published by Chamber of Press Publishers, Bauer sp. z o. o. sp.k. has the first largest circulation of periodicals among Polish publishers. See: Izba Wydawców Prasy, Rynek wydawców, https://www.iwp.pl/rynek-wydawcow/, accessed: 09.01.2023.
[224] AVT, https://avt.pl, accessed: 01.04.2023. To compare, the print run of Fakt amounted to 138 160 in 2022. See: M. Kurdupski, Sprzedaż „Faktu" spadła do 138 tys. egz. w 2022 roku. „Perspektywa rezygnacji z papieru nieunikniona", https://www.wirtualnemedia.pl/artykul/wyniki-sprzedazy-dzienniki-2022-rok-koniec-pracy-gazeta-wyborcza-fakt-rzeczpospolita, accessed: 01.04.2023.

In France, the legal framework of press publishers' activity is provided in la Loi n° 86-897 du 1 août 1986 portant réforme du régime juridique de la presse[225]. According to art. 2 publishing company means any natural or legal person or grouping under the law, publishing, as owner or managing agent, a press publication or an online press service.[226] The term press publisher does not appear. Instead, the French legislator refers to a publishing company, being any natural, legal person or collectivity under the law.

The approach taken by French legislator in defining the term is different to the Polish one. In Poland, the legislator indicates, by enumeration, who could be the press publisher. In France, it enumerates what could be published, namely a press publication and online press service but what the publishing activity consists of has not been further defined. According to E. Derieux, press company should be understood as the structure gathering the various financial, material, intellectual and human means necessary for the realisation and the publication of a printed periodical, but also, of an on-line press service. [227]It means that publishing company provides a structure and necessary resources for the press publications and online press services to be created. It is not involved directly in the creative process which is based on the engagement of journalists and editor-in-chief but makes it possible. The conclusion can be drawn that the understanding of press publisher is similar in Poland and in France despite some differences in wording of relevant provisions.

Press publication, according to art. 1 of French press law is understood as any service using a written mode of dissemination of thought made available to the public in general or to categories of the public and appearing at regular intervals.[228] The term relates only to the written mode of dissemination of thoughts and in this context, the definition is narrower compared to the Polish definition of press which refers to any means of dissemination. Press publication can be addressed to the public in general or can be published on the specific topic, being in consequence directed towards a specific category of public. It should appear at regular intervals. French legislator does not provide any

[225] Law n° 86-897 of 1 August 1986 reforming the legal regime of the press, https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000687451, accessed: 09.01.2023, hereinafter: French press law.

[226] English version by the author. French version: Art. 2 of French press law : Au sens de la présente loi, l'expression "entreprise éditrice" désigne toute personne physique ou morale ou groupement de droit éditant, en tant que propriétaire ou locataire-gérant, une publication de presse ou un service de presse en ligne. https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000687451, accessed : 09.01.2023.

[227] E. Derieux, Droit des médias. Droit français, européen et international, LGDJ, 8 edition, 2018, p.77.

[228] English translation made by the author. French version: Art. 1 of French press law: publication de presse désigne tout service utilisant un mode écrit de diffusion de la pensée mis à la disposition du public en général ou de catégories de publics et paraissant à intervalles réguliers.

further distinction of press publication with regards to the regularity of publication as the Polish legislator did by distinguishing between journals and periodicals. Publishing company can apply for the recognition of the status of press publications published by them by Joint committee on publications and press agencies (*Commission paritaire des publications et agencies de presse*). It results in tax benefits and opportunities for direct aid from the state but is not mandatory neither necessary to carry out the publishing activity.[229] Press publication under the French press law is considered to be published only in print version. It should be justified by the fact that in the same provision the legislator introduced the term 'online press service' having exclusively online reach[230]. The term 'online press service' has not been identified and defined in the Polish press law.

Online press service, according to art. 1 of the French press law, means any online public communication service published on a professional basis by a natural or legal person who has editorial control over its content, consisting of the production and provision to the public of the original content of general interest, renewed regularly, composed of information linked to current events and news and having been processed in a journalistic manner, which does not constitute a promotional tool or an accessory to an industrial or commercial activity. (…) For online press services providing political and general information, this recognition implies the regular employment of at least one professional journalist within the meaning of Article L. 7111-3 of the Labour Code.[231]

Online press service can constitute a supplement to the printed press, or be an independent service with no print equivalent.[232] It should be edited on a professional basis by a natural or legal person and published by publishing company. Therefore, blogs,

[229] See : CPPAP, http://www.cppap.fr/publications/, accessed :12.01.2023.
[230] See: E. Derieux, Droit des médias. …, p.78.See also : E. Dreyer, Droit de la communication, LexisNexis,2ème édition,2022, p.118.
[231] English translation made by the author. French version: Art. 1 of French press law: On entend par service de presse en ligne tout service de communication au public en ligne édité à titre professionnel par une personne physique ou morale qui a la maîtrise éditoriale de son contenu, consistant en la production et la mise à disposition du public d'un contenu original, d'intérêt général, renouvelé régulièrement, composé d'informations présentant un lien avec l'actualité et ayant fait l'objet d'un traitement à caractère journalistique, qui ne constitue pas un outil de promotion ou un accessoire d'une activité industrielle ou commerciale. Un décret précise les conditions dans lesquelles un service de presse en ligne peut être reconnu, en vue notamment de bénéficier des avantages qui s'y attachent. Pour les services de presse en ligne présentant un caractère d'information politique
et générale, cette reconnaissance implique l'emploi, à titre régulier, d'au moins un journaliste professionnel au sens de l'article L. 7111-3 du code du travail.
[232] See: E. Derieux, Droit des médias…, p.78.

published outside of professional activities, e.g. culinary blogs, travel blogs which are published for pleasure without pursuing any economic objectives[233] are excluded from the scope of understanding.

The editorial control over the content of online press service consists of production and provision to the public of the original content of general interest. The obligation to have editorial control over the online press service means that services that rely on users' involvement, where the editorial control does not occur (e.g. platforms like Facebook, Twitter) are excluded from the scope of the definition.

The content should be original. It means that publishing of content originating from other online press services, of link to another website or content published by other publishing company should not constitute the core of the activity of the online press service. In consequence, the activity of news aggregators does not meet the criteria set in the definition discussed.

Online press service has to be updated regularly. However, the legislator does not specify how this regularity should be understood. For E. Dreyer regularity does not mean the one-off and partial updates and every new publication published within online press service should be dated.[234] The service discussed should be composed of information linked to current events and news. In other words, if a service provides the information on a specific topic, e.g. architecture, interior design and do not provide information linked to the current events and news cannot be considered as online press service. The service should provide the content of general interest having been processed in a journalistic manner. The latter is perceived as the guarantee of quality of the press content.[235] What does the general interest mean, in my opinion, seems to be blurred. According to art. D18 of Code des postes et des communications électroniques which refers to the modalities of the distribution of the print press by post, the general interests should relate to instruction, education, information and public recreation.[236] It could be perceived as a guidance on how to understand this concept. On the other hand, it should not be forgotten that it relates

[233] See differently: C. Castets – Renard, Éditeur de contenus ou éditeur de services, Victoires éditions, LEGICOM, vol.46, no.1, 2011, pp.48-49, pp.45-51.
[234] E. Dreyer, Droit de la communication, …, p.386.
[235] E. Dreyer, Droit de la communication, …, p.386.
[236] See: art. D18 du Code des postes et des communications électroniques (Postal and Electronic Communications Code),https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006070987/LEGISCTA000006150573/#LEGISCTA000006150573, accessed :12.01.2023.

to the print press, here, the operating principles of online press service are analysed.

The content of online press service can include not only written forms of expression but also pictures or videos. Online press services can apply for the recognition of their status of online press services by *Commission paritaire des publications et agencies de presse*. It results in tax benefits and opportunities for direct aid from the state but is not mandatory neither necessary to operate such a service.[237]

To give some examples from the French press market, Le Monde, the most read national newspaper in France between 2021-2022 with a coverage around 458 611[238] is published by Le Monde group. There is a paper version of the journal which corresponds to the definition of a press publication and its online format meeting the criteria set out in the definition of online press service. Le Figaro, the second most read national newspaper in France between 2021-2022[239] is published by the Société du Figaro, owned by the Figaro group, itself owned by the Dassault group and available online and in printed version. Mediapart is the online press service which has no paper equivalent. It is published by la Société éditrice de Mediapart (SAS).[240] Ouest France[241] has been the leading French daily newspaper in terms of circulation since 1975, with 624,455[242] copies distributed. It is an example of regional newspaper published by le groupe Sipa - Ouest-France in online and print version. These are known and large players in the French press market. However, the latter also consists of small, less well-known publishers, sometimes publishing on topics other than general information and politics, and having a much smaller readership. For example, So Press publishes the titles such as So Foot diffused

[237] See : CPPAP, Critères d'admission, http://www.cppap.fr/criteres-dadmission/, http://www.cppap.fr/linscription-sur-les-registres-de-la-cppap-est-elle-une-obligation-pour-faire-paraitre-une-publication-de-presse/ , accessed :12.01.2023.
[238] According to data provided by l'Alliance pour les chiffres de la presse et des médias, https://www.acpm.fr/Les-chiffres/Diffusion-Presse/Presse-Payante/Presse-Quotidienne-Nationale, accessed : 10.01.2023.
[239] According to data provided by l'Alliance pour les chiffres de la presse et des médias, https://www.acpm.fr/Les-chiffres/Diffusion-Presse/Presse-Payante/Presse-Quotidienne-Nationale, accessed : 10.01.2023.
[240] See: Mediapart, https://www.mediapart.fr, accessed: 10.01.2023.
[241] Ouest France is the regional journal the coverage of which exceeds the coverage of national journals. Press publishers' strategy is based on the principle of proximity and enjoys great success among French readers. See: K. Gajlewicz- Korab, Wpływ preferencji czytelników na rozwój francuskiego rynku współczesnej prasy codziennej, Studia Medioznawcze, vol. *3*, no.66, p.70.
[242] See: l'Alliance pour les chiffres de la presse et des médias, https://www.acpm.fr/Les-chiffres/Diffusion-Presse/Presse-Payante/Presse-Quotidienne-Regionale, accessed : 11.01.2023.

monthly and distributed in around 40 000 copies and being available also through subscription in digital version.[243]

Within the analysis conducted in this dissertation the terms 'large press publishers' and 'small press publishers' are used. For the purpose of this analysis I understand by the term 'large press publishers' a publisher who publishes on general – interest's topics, both on regional and national scale, in both forms, electronic and paper, or in only one, and the newspapers circulation or number of subscriptions exceeds 100 000. Small press publisher is understood as publishing on general interests or specific topic, both on regional and national scale, in both forms, electronic and paper, or in only one, and the newspapers circulation or number of subscriptions is smaller than 100 000.[244]

To conclude:

- In Polish law, there is no definition of press publishers but the legislator provides its numerous examples. A distinction between journal, periodical and press material is made. Press in general is understood broadly and there is a noticeable tendency in the doctrine and case law towards the expansion of its understanding.

- In French press law there is a distinction between press publication having a print form and online press services producing and providing to the public of the original content of general interest, renewed regularly, composed of information linked to current events and news and having been processed in a journalistic manner. French legislator therefore explicitly introduces a distinction between online and offline publications.

4.2.Business models

The press publishing industry is in a "transition phase"[245]. Circulation of print newspapers is marked by a constant decline[246]. The ongoing digital transformation has

[243] L'Alliance pour les chiffres de la presse et des médias, https://www.acpm.fr/Support/so-foot, accessed: 12.01.2023.
[244] This distinction has been made for the purpose of the analysis conducted in this dissertation. It is based on the current data on print circulation and subscription figures, and represents some averaging that takes into account differences in the Polish and French publishing markets.
[245] K. Panagiotidis, A. Veglis, Transitions in Journalism—Toward a Semantic-Oriented Technological Framework, Journal.Media,2020, vol.1, no.1, https://www.mdpi.com/2673-5172/1/1/1, accessed: 06.09.2023. See also: A. Leurdijk, M. Slot, O. Nieuwenhuis, Statistical, Ecosystems and Competitiveness Analysis of the Media and Content Industries: The Newspaper Publishing Industry, JRC Technical Reports, Joint Research Center, Institute for Prospective Technological Studies, 2012, p. 10.
[246] According to data provided in Impact Assessment accompanying the document Proposal for a Directive on copyright in the Digital Single Market, print circulation of daily newspapers has been constantly declining for years by 17 % in the period 2010-2014 in 8 EU MS a trend that is expected to continue. See: European Commission, Impact Assessment on the modernisation of EU copyright rules Accompanying the document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market Print, SWD (2016) 301 final, 2016, p.156. The recent studies showed that the number of Europeans who read print newspaper dropped from 37% in 2012 to 21% in 2022. See: Statista, Share of

offered new tools for the dissemination of news and allowed publishers to reach wider audience. It is also perceived as the origin of financial losses for publishers[247] and a source of increased competition in the market. New actors such as social media and news aggregators have emerged, and play an important role in the distribution of information. All these factors challenge the existing business models and forces publishers to renew the way they operate.

The main purpose of this point is to identify how press publishers respond to these changes and shape the digital press environment. To this end, the light will be shed on the publishers' business, on the investments they make, on the form in which they provide the content to the audience and on the extent to which this corresponds to the readers' preferences.

Technological changes add to the established divisions of press publishers into small and large or local and national, another differentiation, into those who operate exclusively in the online sphere, those existing online and offline, and those who have not decided yet to move into the digital environment. In case of publishers publishing online, either they immediately start their online activities without ever publishing a printed equivalent, as in the case of the French online press service Mediapart, or, due to the declining print revenues and raising costs of production, they decided to conduct their business exclusively online, as in the case of the Polish weekly Wprost, which stopped publishing printed copies in 2020.[248] Especially small and local publishers are reluctant to offer their services online and even if they decide to do so, they face greater difficulties than the big players.[249] This is due to the lack of sufficient resources, technological background or know how, due to an inability to adapt to market needs or to fear and reluctance. It should be noted that the recipients of some of the newspapers are older people who, accustomed to reading printed dailies and not likely to use electronic devices will be reluctant to buy subscriptions. For this reason, for such a publisher, provided it does not find a new

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respondents who read the written press every day or almost every day in the European Union from 2011 to 2022,https://www.statista.com/statistics/452430/europe-daily-newspaper-consumption/, accessed:18.01.2023, see also: Standard Eurobarometer 96, Public Opinion in the European Union, p. T196, https://europa.eu/eurobarometer/api/deliverable/download/file?deliverableId=81059, accessed:18.01.2023.

[247] See: European Commission, Impact Assessment, p.156.

[248] Wprost już tylko online, Polityka, 2020, https://www.polityka.pl/opolityce/1950926,1,wprost-juz-tylko-online.read, accessed:18.01.2023.

[249] R.K. Nielsen, A. Cornia, A. Karogelopulos, Challenges and opportunities for news media and journalism in increasingly digital, mobile, and social media environment, Council of Europe report, DGI 2016, 18, Reuters Institute for the Study of Journalism, 2016, p.28; N. Rashidian, et al., Friend & Foe: The Platform Press at the Heart of Journalism, Tow Center for Digital Journalism A Tow/Knight Report, 2018, p. 7.

audience, it may not be profitable to invest in a digital version of the newspaper he publishes. However, when considering that 88% of Europeans get at least some news online via their smartphone or laptop[250], for those who are not considering going digital, the outlook will be difficult.[251]

In the digital environment, press publishers use new forms of communication and rely on different media formats to retain readers and attract the new ones.[252] Next to the photos and videos including live reports, the podcasts, digital audio as well as email newsletters[253] are more and more popular. According to the survey conducted by N. Newman, they are considered to be very effective channels to meet audience expectations and attract new readers.[254]

As to the print press, even though the form of communication remains rather traditional, publishers propose the supplemental magazines, free newspapers, special or weekend editions to boost the revenues and press circulation[255]. The objective of publishers of print and digital press is to offer the content which "adds value as compared to free information"[256]. Moreover, press publishers are developing new content-based projects in order to attract new audience and advertisers. For example, Le Monde launched the project Pixels which is "is a content section focusing on new technologies, digital culture, and online gaming, addressing an audience that is younger and 'more geeky' than Le Monde's traditional readership."[257]

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[250] Flash Eurobarometer, News& Media survey 2022, https://europa.eu/eurobarometer/surveys/detail/2832, accessed:18.01.2023.

[251] N. Newman *et al.*, Journalism, Media and Technology Trends and Predictions 2022, Digital News Project, Reuters Institute for the Study of Journalism, University of Oxford, p.8, https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2022-01/Newman%20-%20Trends%20and%20Predictions%202022%20FINAL.pdf, accessed:18.01.2023.

[252] P.J. Boczkowski, E. Mitchelstein, The News Gap : When the Information Preferences of the Media and the Public Diverge, Cambridge, Massachusetts : The MIT Press, 2013, pp.23-48.

[253] See the homepage of Le Figaro where just under the title of the newspaper the user can find the category of podcasts, videos and newsletters, https://www.lefigaro.fr, accessed:19.01.2023.

[254] N. Newman, Journalism…, p.86 https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2022-01/Newman%20-%20Trends%20and%20Predictions%202022%20FINAL.pdf, accessed:18.01.2023.

[255] Deloitte, The impact of web traffic on revenues of traditional newspaper publishers. A study for France, Germany, Spain, and the UK, 2016, p.9, https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/technology-media-telecommunications/deloitte-uk-impact-of-web-traffic-on-newspaper-revenues-2016.pdf,accessed:18.01.2023.

[256] M. Senftleben, M. Kerk, M. Buiten, K. Heine, New Rights or New Business Models? An Inquiry into the Future of Publishing in the Digital Era, International Review of Intellectual Property and Competition Law, vol. 48, no.10, 2017, p.539.

[257] A. Cornia, A. Sehl, R.K. Nielsen, Digital News Project. Private Sector Media and Digital News, Reuter Institute for Study of Journalism, 2016, p.27.

The development of the press sector is linked to the increasing use of artificial intelligence in process of preparation, distribution and consumption of content[258]. It is widely used to filter the information published on social media, to tag it, to alert the journalists[259] or to collect and process the data[260]. For 40% of respondents of survey conducted by N. Newman, the AI is used to automatically write or finish the stories[261]. The robo-journalism or automated journalism relies on clear algorithmic rules, human input and well-organised data sources[262]. All these factors contribute to its use primarily in areas such as sport, weather forecasting, press summaries[263] or finance analysis[264].

Currently, most importance is attached to the use of AI to recommend and personalise the news content.[265] News personalisation is an "interface to news, (…) which selects, highlights and filters individual news items, and compiles and aggregates them into news packages in a different manner for each individual newsreader."[266] It enables publishers to provide users with content that meets their needs and interests and to compete with online platforms that rely on it heavily in their operating model[267]. It should be noted that

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[258] N. Diakopoulos, Automating the News: How Algorithms Are Rewriting the Media,Harvard University Press, 2019, pp.96-144, 177-203.

[259] See: R. Fletcher, S. Schifferes, N. Thurman, Building the 'Truthmeter': Training algorithms to help journalists assess the credibility of social media sources, Convergence, vol.26, no.1, 2020, pp.19-34, https://journals.sagepub.com/doi/epub/10.1177/1354856517714955, accessed: 20.01.2023.

[260] N. Thurman *et al.*, Giving computers a nose for news: exploring the limits of story detection and verification, 2016, published in Digital Journalism, vol. 4, no.7, pp. 838-848, https://eprints.qut.edu.au/221748/1/cardiff-2015-v26%2Bfor%2Bopen%2Baccess%2Bcity.pdf, accessed: 19.01.2023.

[261] N. Newman, Journalism, …, p.35 https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2022-01/Newman%20-%20Trends%20and%20Predictions%202022%20FINAL.pdf, accessed:18.01.2023.

[262] J. Diaz- Noci, Authors' Rights and the Media , in: M. Pérez-Montoro (ed.), Interaction in Digital News Media. From principles to practice, Palgrave Macmillan, 2018, p.162.

[263] D. Wilding, P. Fray, S. Molitorisz and E. McKewon, Centre for media transition. The impact of digital platforms on News and Journalistic Content, University of Technology Sydney, 2018, p.66.

[264] See: M. Kowala, Algorytmiczne dziennikarstwo w świetle prawa autorskiego, Zeszyt Studencki Kół Naukowych Wydziału Prawa i Administracji UAM, no.10, 2020, https://cejsh.icm.edu.pl/cejsh/element/bwmeta1.element.desklight-a8d12919-6af5-47e6-8d43-2c618c5567f7/c/10_KOWALA.pdf; See also: P. Farhi, A news site used AI to write articles. It was a journalistic disaster, The Washington Post, 2023, https://www.washingtonpost.com/media/2023/01/17/cnet-ai-articles-journalism-corrections/, accessed:19.01.2023.

[265] According to the survey conducted by N. Newman: "More than eight-in-ten of our sample say these technologies will be important for better content recommendations (85%) and newsroom automation (81%). More than two-thirds (69%) see AI as critical on the business side in helping to attract and retain customers. See: N. Newman, Journalism, … p.35 https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2022-01/Newman%20-%20Trends%20and%20Predictions%202022%20FINAL.pdf, accessed:18.01.2023.

[266] B. Bodó, Selling News to Audiences – A Qualitative Inquiry into the Emerging Logics of Algorithmic News Personalization in European Quality News Media, Digital Journalism, vol. 7, no.8, 2019, p.1054.

[267] The NZZ Companion App is an example of application, used by press publishers which is a digital companion that personalises through-the-day news delivery, creating tailored news based on each user's profile, location and situation. See: Google News Initiative, Companion App, https://newsinitiative.withgoogle.com/dnifund/dni-projects/nzz-companion-app/, accessed: 23.01.2023.

personalisation is often seen in negative context as leading to the creation of filter bubbles and echo chambers[268]. However, according to B. Bodó[269], contrary to the online platforms which rely on important quantities of user data to maximise the users' engagement and to sell their attention to advisers without any significant editorial oversight over the content recommendations that are made[270], press publishers use personalisation mostly to "cultivate interest in quality information, including hard news, and to promote journalistic authority and reliability".[271] Their primary objective is therefore not to maximise profit by selling users' data to advertisers but to build a quality editorial offer.

Technological development and the investment in AI in press sector should be considered as essential for continuation of the conducted business. The example of Globe & Mail, Canadian news organisation perfectly reflects this trend. The organisation developed a software program called Sophi which decides whether article should be free to be accessed or put behind the paywall based on article content and user information. The results are impressive, the use of the software accelerated the growth of digital subscribers to 170 00[272] what proves also that the type of investment made in the press sector has changed.

The traditional press industry is characterised by high sunk costs for investments in printing presses, ink, paper.[273] The total costs including distribution account for up to 50% of all newspaper publishing costs[274] and are expensive to maintain even for big publishing companies.[275] However, given the decline in print press circulation the shift

[268] Marijn Sax, Algorithmic News Diversity and Democratic Theory: Adding Agonism to the Mix, Digital Journalism,2022; M. Bastian *et al.*, Explanations of news personalisation across countries and media types, Internet Policy Review Journal on Internet Regulation vol.9, no.4,2020; C. Monzer *et al*., User Perspectives on the News Personalisation Process: Agency, Trust and Utility as Building Blocks, Digital Journalism, vol.8, no.9, pp.1142-1162.
[269] B. Bodó, Selling News to Audiences …., p.1071.
[270] B. Bodó, Selling News to Audiences …, p.1054.
[271] N. Thurman, S.C. Lewis, J. Kunert, Algorithms, Automation, and News, Digital Journalism, vol. 7, no.8, 2019, p.983.
[272] How AI and data boost sustainability for publishers, What's new in publishing, https://whatsnewinpublishing.com/how-ai-and-data-boosts-sustainability-for-publishers/, accessed:20.01.2023.
[273] A. Leurdijk, M. Slot, O. Nieuwenhuis, Statistical, …, p.25.
[274] B. Martens *et al*., The digital transformation of news media and the rise of disinformation and fake news, JRC Digital Economy Working Paper 2018-02, JRC Technical Reports, 2018, pp.15-17; see also: Deloitte, The impact …, p.10, https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/technology-media-telecommunications/deloitte-uk-impact-of-web-traffic-on-newspaper-revenues-2016.pdf,accessed:18.01.2023.
[275]Deloitte, The impact …,, p.10, https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/technology-media-telecommunications/deloitte-uk-impact-of-web-traffic-on-newspaper-revenues-2016.pdf,accessed:18.01.2023. See also: R. Xalabarder, Google News and copyright, in: A. Lopez -

of the investment which is now more focused on the digital perspective should be noted. Catherine Joly, general secretary of the Le Monde Group, interviewed by A. Cornia argues that "organisations such as her own need to continually rationalise legacy operations and cut printing, distribution, and production costs to remain sustainable and be able to invest in digital opportunities".[276] This shows the trend of gradually moving away from the investments in paper in favor of investing in digital.

The important feature of the digital transformation is "the shift from a linear business model in offline news publishing to a multi-sided market or platform business model in online news publishing"[277] with focus on the demand side factors. Therefore, the important investment nowadays is made in the creation of a digital platform and its subsequent modernisation[278]. Especially, the initial investment in the creation of the platform and in the technical model for handling subscriptions can be significant. Then, the investment in new technologies used within the functioning of the platform is important to determine the content which is attractive for readers, to identify the specific functionalities of platforms that enhance its attractiveness and to target new audience. Moreover, press publishers need to acknowledge the changing habits of their readers as regards the news consumption and should adapt their business model to the growing popularity of mobile apps what also requires the investments to be made. According to Nabil Wakim, director of editorial innovation at Le Monde, the traffic on their mobile apps "is growing between 5% and 10% per year and, on their mobile website, at a rate that can vary from 50% to 100% per year".[279] The digital environment is distinguished by the fact that the large technological investments in platform and its operationality made at the beginning of its functioning mean that the publisher will incur lower investment costs in the coming years.[280]

Amongst planned tech investments evoked by press publishers are the investments in data analytics and AI (90%), videos, audio, podcasts (83%), customer management (80%) or automation (72%).[281] It is difficult to estimate the exact size of these investments

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Taruella, Empirical Approaches to Legal Aspects of Knowledge-Economy Business Models, Springer, 2012, p.116.

[276] A. Cornia, A. Sehl, R.K.Nielsen, Digital News …, p. 15.

[277] B. Martens *et al*., The digital transformation …, p.15.

[278] M. Senftleben, M. Kerk, M. Buiten, K. Heine, New Rights or New Business Models? …, p.543.

[279] A. Cornia, A. Sehl, R.K.Nielsen, Digital News …, p. 43.

[280] M. Senftleben, M. Kerk, M. Buiten, K. Heine, New Rights or New Business Models? …, p.543, pp. 538-561.

[281] World Association of News Publishers, World Press Trends preview: Publishers brace for a period marked by uncertainty, 2022, https://wan-ifra.org/2022/09/world-press-trends-preview-publishers-brace-for-a-period-marked-by-uncertainty/, accessed:20.01.2023.

since they depend on a variety of factors and vary from publisher to publisher. However, the digital transformation in press sector should be seen as firstly, leading to a change in the type of investments made by publishers, and secondly, to a reduction in their amount.[282] Adapting to the pace of change and its technical complexity can be particularly challenging for small and local publishers.

Traditionally, the main revenues of press publishers came from print sales, subscriptions, and advertising[283]. Digital transformation and a drop in demand for the printed press made it necessary to seek for new sources of funding and to adjust business models.[284] Publishers' current revenues come primary from the subscriptions (and in particular digital subscriptions), advertising, state aid, and, to a lesser extent, from philatropy, press development funds paid by platforms such as Facebook or Google or from other publishers' activities like the exploitation of brand name or the diversification strategies.[285]

4.2.1. Subscriptions revenue

For important number of publishers (76%) interviewed for the Digital News Project report, driving digital subscriptions constitute important or very important source of revenues.[286] In 2022, 79% of them declared that this will be one of their most important revenue priorities, ahead of both display and native advertising.[287] Revenue from subscription is seen as an important element to reduce the reliance on advertising revenue, which is increasingly being captured by large platforms.[288]According to the publication by the Reuters Institute, in European news, 66% of newspapers and 71% of magazines

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[282] See: B. Martens *et al.*, The digital transformation …, p.17; M. Senftleben, M. Kerk, M. Buiten, K. Heine, New Rights or New Business Models? …, p.543: R.G. Picard, Mapping digital media. Digitalisation and media business models, no.5, 2011,p.9, https://www.opensocietyfoundations.org/uploads/226aec3a-9d1f-4cc0-b9a1-1ad9ccedda55/digitization-media-business-models-20110721.pdf,accessed:20.01.2023

[283] See: B. Martens *et al*., The digital transformation …, p.15; A. Cornia, A. Sehl, R.K.Nielsen, Digital News …,p.11, https://www.opensocietyfoundations.org/uploads/226aec3a-9d1f-4cc0-b9a1-1ad9ccedda55/digitization-media-business-models-20110721.pdf,accessed:20.01.2023.

[284] D. Bossio, Journalism and social media. Practitioners, organisations and institutions, Palgrave Macmillan, 2017, p.72.

[285] See: R.K. Nielsen, A. Cornia, A. Karogelopulos, Challenges and opportunities …, pp.26-27.

[286] N. Newman, Journalism, …, p.10, https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2022-01/Newman%20-%20Trends%20and%20Predictions%202022%20FINAL.pdf, accessed:18.01.2023.

[287] N. Newman, Journalism, …, p.6, https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2022-01/Newman%20-%20Trends%20and%20Predictions%202022%20FINAL.pdf, accessed:18.01.2023.

[288] N. Newman et al., Reuters Institute Digital News Report 2022, Reuters Institute, University of Oxford, 2022, p. 18; Deloitte, The impact …, p.12, https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/technology-media-telecommunications/deloitte-uk-impact-of-web-traffic-on-newspaper-revenues-2016.pdf, accessed:18.01.2023.

include some type of subscription and these percentages are the highest in France (95%), Poland (90%) and Finland (87%).[289]

The subscription models are based on the paywall system which prevents web users without a paid subscription from accessing certain content. A paywall is a method of monetising content which however can lead to a decrease in page views and advertising revenue due to limited number of readers having access to it.[290] **Hard paywalls** does not allow any access to publishers' content without subscription.[291] **Soft paywalls** or metered models allow free access to a limited number of articles for a selected period. After its expiration a user has to purchase a subscription to continue reading.[292] **Freemium** allows users to access the content with some exceptions of articles reserved exclusively for subscribers[293]. Gazeta Wyborcza has a metered paywall with elements of hard paywall. Le Figaro opted for freemium system.[294] For readers who do not have it, only the short introductory passages of the articles are visible. Some articles remain however accessible in its entirety and are to be found on the main page of Le Figaro.

The long availability of news on publishers' websites for free, and the possibility of consulting them also on websites of the news aggregators or social media has led to the situation where the readers not fully accept the necessity to pay for content published by press publishers online.[295] Publishers have somehow got their readers used to having

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[289] A. Cornia *et al.*, Pay Models in European News, Reuters Institute for study of journalism, 2017, pp.1-2, https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2017-07/Pay%20Models%20in%20European%20News%20Factsheet.pdf, accessed: 20.01.2023.

[290] Deloitte, The impact …, p.12, https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/technology-media-telecommunications/deloitte-uk-impact-of-web-traffic-on-newspaper-revenues-2016.pdf, accessed:18.01.2023.

[291] Deloitte, The impact …, p.12, https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/technology-media-telecommunications/deloitte-uk-impact-of-web-traffic-on-newspaper-revenues-2016.pdf, accessed:18.01.2023.

[292] Deloitte, The impact …, p.12, https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/technology-media-telecommunications/deloitte-uk-impact-of-web-traffic-on-newspaper-revenues-2016.pdf,accessed:18.01.2023.

[293] R.K. Nielsen, A. Cornia, A. Karogelopulos, Challenges and opportunities …, p.24. See also: A. Szynol, Czy paywall to być albo nie być wydawców prasy codziennej? Zeszyty prasoznawcze, vol.64, no.4, 2019; D. Bossio, Journalism and social media. …, p.72.

[294] See : Le Kiosque, https://kiosque.lefigaro.fr/catalog/le-figaro-magazine, accessed :12.01.2023.

[295] See: R.K. Nielsen, A. Cornia, A. Karogelopulos, Challenges and opportunities …, pp.26-27; A. Leurdijk, M. Slot, O. Nieuwenhuis, Statistical, …, p. 90. See also: T. Kormelink, Why people don't pay for news: A qualitative study, 2022, Journalism,vol.0,no.0, pp.1-19 https://journals.sagepub.com/doi/epub/10.1177/14648849221099325, accessed: 21.01.2023.

access to free content. Thus, the subsequent introduction of a fee for reading articles makes some readers willing to look for free alternatives. Moreover, it is important to note the change in reading habits resulting from digital transformations. Today, it has become popular to read selected articles from different newspapers.[296] In consequence, the requirement to subscribe to the entire edition of one newspaper which is sometimes the only possibility offered by the press publishers in order to access their content, even though the reader is only interested in one article may not be attractive and may discourage the audience. According to the survey conducted by Ipsos European Public Affairs, among those who access news online,70% use only free news content or news services online[297]. 11% of the population pay for news online in France, 14% in Poland.[298]

However, there is a noticeable upward trend in the number of subscribers to digital press. For example, the number of active paid digital subscriptions to Polish Gazeta Wyborcza at the end of December 2021 was over 286 100.[299] By comparison, in 2017 the average total sales of Gazeta Wyborcza's (digital) editions amounted to 124 0000 copies. As to the France, le Figaro, between 2021 and 2022, had 250 000 online subscribers[300]. By comparison, in 2017 their number was 80 000.[301] In four years, the number of subscription readers has more than tripled. In 2017, the distribution of journal consisted in 70,8% of printed copies and in 29,2% digital version.[302] Between 2021 and 2022, the trend has reversed significantly, since the printed copies accounted for 32,9% of the total distribution, and digital copies for 67,1%.[303]

In relation to the discussed problem the term subscription fatigue is also used. See: N. Newman, Journalism…, p.20, https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2022-01/Newman%20-%20Trends%20and%20Predictions%202022%20FINAL.pdf, accessed:18.01.2023.

[296] J. Rutt, Aggregators and the News Industry: Charging for Access to Content, NET Institute, Working Paper 11-19, 2011, p. 2.

[297] Flash Eurobarometer, News& Media survey 2022, p.3. https://europa.eu/eurobarometer/surveys/detail/2832, accessed:18.01.2023.

[298] N. Newman et al., Report 2022, …, p. 79, 95.

[299] Grupa Kapitałowa Agora S.A., Sprawozdanie niezależnego biegłego rewidenta z badania roku obrotowego kończącego się 31 grudnia 2022r., p.37.

[300] MindMedia, Abonnements numériques (1/2) : la croissance des médias d'information en ligne payants se stabilise en 2021, 2022, https://www.mindmedia.fr/medias-audiovisuel/abonnements-en-ligne/abonnements-numeriques-1-2-la-croissance-des-medias-dinformations-en-ligne-payants-se-stabilise-en-2021/, accessed : 12.02.2023.

[301] E. Renault, Le groupe Figaro a terminé l'année 2017 sur de bons résultats, Le Figaro, 2018, https://www.lefigaro.fr/medias/2018/02/15/20004-20180215ARTFIG00017-le-groupe-figaro-a-termine-l-annee-2017-sur-de-bons-resultats.php, 12.01.2023.

[302]Le Figaro, Synthèse du procès verbal 2017, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjJ0e3Li8L8AhW6XaQEHdZhA58QFnoECBUQAQ&url=https%3A%2F%2Fwww.acpm.fr%2Fdownload%2Fdocument%2F107811&usg=AOvVaw1bXhuXVkGUB5VMgVdozW6K accessed :12.01.2023.

[303] Le Figaro, Synthèse …, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUK

"The paper-only readership is losing ground to the digital readership. Between the first quarter of 2014 and the third quarter of 2018, the paper-only readership of the newspaper l'Equipe fell from 48% to 21% of the total readership. (…). Similarly, the Centre France Group has noted, over the last five years, a decrease in its paper readership of 4% per year and an increase in its digital subscriptions *"*of around 10% to 30%"[304].

Mediapart is an actor who has undeniably succeeded in terms of adopted business model. Unlike other publishers who decided to introduce paid subscriptions after several years of providing news for free, what led to their loss of readers, it has consistently been a paid service from its inception[305]. The readers got used to this operating mode and their number gradually grew.

It should be also noted that some titles managed to attract a significant number of readers willing to pay for the content and continue to see the important growth.[306] These are primarily the large press publishers. Gazeta Wyborcza[307] and Le Figaro[308] are the good examples. In my opinion, getting into the habit of paying for content is a matter of developing public awareness and reinforcing the values of professional media. Given the presented trends, it could be expected that the number of subscribers will continue to increase as well as the revenue of press publishers resulting from this field.

However, I identified two major problems related to the discussed change of business model of press publishers. Firstly, local and small press publishers have more difficulty in adapting to technological change, in investing in new technologies and in finding a model of subscription which works and is well-received by readers. Moreover, especially their readers are not willing to pay for the news online what in consequence means that the local and small publishers see they print revenues declining and do not have a better,

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EwitlJXji8L8AhVRSKQEHarrB6wQFnoECBwQAQ&url=https%3A%2F%2Fwww.acpm.fr%2Fsite%2Fdownload%2Fdocument%2F224917&usg=AOvVaw1PPCBdXVN-wNDGtBi8T7sH, accessed :12.01.2023.

[304] Decision 20-MC-01 of 9 April 2020 of French Autorité de la concurrence on requests for interim measures by the Syndicat des éditeurs de la presse magazine, the Alliance de la presse d'information générale and others and Agence France-Presse, p.51. English version : https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2020-06/20-mc-01_en.pdf, accessed : 05.07.2023.

[305] M. Rubio, Mediapart : les clés du succès d'un média d'enquête indépendant,Global Investigate Journalism Network,2022, https://gijn.org/2022/03/16/francais-mediapart-independance/, accessed : 20.01.2023.

[306] R.K. Nielsen, A. Cornia, A. Karogelopulos, Challenges and opportunities …, p.26.

[307]WirtualneMedia, „Gazeta Wyborcza" ma ponad 300 tys. cyfrowych prenumeratorów, https://www.wirtualnemedia.pl/artykul/gazeta-wyborcza-subskrypcja-cyfrowa-agora-segment-prasa, accesssed: 20.01.2023.

[308]Le Figaro, Le Figaro franchit le cap des 200.000 abonnés numériques, 2020, https://www.lefigaro.fr/medias/le-figaro-franchit-le-cap-des-200-000-abonnes-numeriques-20201103, accessed: 20.01.2023.

ready-to-implement perspective on the horizon[309]. Due to their size, they are also not a strong player in negotiating with platforms regarding the use of their content.[310] On the other hand, the initiative of Facebook aimed at helping local publisher to take their digital subscription business to a new level as the example of the support of small and local publishers from big platforms should be mentioned.[311] Secondly, the important number of digital subscriptions going to few big press publishers results in their domination and consolidation of power in media landscape[312]. This reinforce the "winner takes most dynamics"[313] and is the reason of decreasing diversity of news production.[314]

4.2.2. Advertising revenue

Next to the revenue coming from sales of newspapers in print or digital form, publishers generate revenues by selling the readers' attention to advertisers.[315] According to the data from 2010, global newspaper revenue depends for 57% on advertising and for 43% on direct income from subscription or single copies bought by readers.[316] With the development of online space, this business model has been affected. Since online platforms such as search engines, news aggregators and social media platforms have much more users than single newspaper website, and therefore can reach wider audience, they become the obvious choice for advertisers to put their services there to the detriment of press publishers.[317] Decline in print revenue combined with sometimes unsuccessful

[309] What's new in publishing, Why local news outlets struggle with digital subscriptions, 2020, https://medium.com/whats-new-in-publishing/why-local-news-outlets-struggle-with-digital-subscriptions-3ca7ec9b83b7 , accessed: 21.01.2023; M. Shapiro, The False Promise of Paywalls for Local News, E&P, https://www.editorandpublisher.com/stories/shoptalk-the-false-promise-of-paywalls-for-local-news,1303, accessed:21.01.2023.
[310] N. Rashidian, *et al.*, Friend & Foe…, pp.45-46
[311] Meta, Facebook Helps Local News Publishers Build Digital Subscriptions, 2018, https://www.facebook.com/formedia/blog/facebook-local-news-digital-subscriptions, 21.01.2023.
[312] R.K. Nielsen, A. Cornia, A. Karogelopulos, Challenges and opportunities …, p.9.
[313] N. Newman *et al.*, Reuters Report 2022, …, pp.11-13.
[314] R.K. Nielsen, A. Cornia, A. Karogelopulos, Challenges and …, p.9.
[315] A. Leurdijk, M. Slot, O. Nieuwenhuis, Statistical …, p. 26.
[316] Organisation for Economic Co-operation and Development (OECD), The evolution of news and the Internet, Working Party on the Information Economy, 2010, p.8, https://www.oecd.org/sti/ieconomy/45559596.pdf, accessed: 23.01.2023.
[317] B. Martens *et al.*, The digital transformation …, 2018, p.26.

attempts to launch subscriptions[318] and decline in online advertising revenue can threaten the existence of some press publishers.[319]

The trend in advertising revenue is downward. To illustrate, newspaper ad revenues in Europe have fallen from € 22 billion in 2009 to around €12 billion in 2018.[320] The advertising revenue of Polish Gazeta Wyborcza amounted to 68,5 million PLN in 2017[321] dropped to 64.7 million PLN in 2021[322].

However, today, advertisement is still an important source of revenues for press publishers.[323] According to the survey conducted in 2022 and regarding the publishers' expectations for 2023, 41 % of surveyed publishers said that most of their revenue would come from advertising and some publishers declared that advertising still accounts for up to 80% of revenues. By comparison, readers' revenue is expected to account for 33% of revenue.[324] It should be noted that some press publishers, especially those publishing the newspapers with very large online audience still offer digital news for free and base their business model primarily on advertising.[325] This is the case of for example Polish journal Fakt. Nevertheless, the number of press publishers operating in this way is decreasing.

As to the online news, the amount of advertising revenue depends on factors such as number of visitors or the time they spent on the website.[326] When taking into account

[318] The publisher of Polish Gazeta Radomszczańska describes the process of the implementation of the subscription model as difficult and fraught with failures. Ultimately, however, it is proving increasingly popular. See: Wirtualnemedia.pl, Subskrypcje „Gazety Radomszczańskiej": 90 proc. czytelników odnawia abonament , 2022, https://www.wirtualnemedia.pl/artykul/subskrypcje-gazety-radomszczanskiej-przekroczyly-polowe-papierowego-nakladu-90-procent-czytelnikow-odnawia-abonament, accessed:24.01.2023.

[319] European Parliament, Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive, Policy Department for Citizens' Rights and Constitutional Affairs Directorate General for Internal Policies of the Union, Study for the JURI Committee 2017, p.15.

[320] Statista, Newspaper advertising expenditure in the European Union (EU 28) from 2009 to 2018, https://www.statista.com/statistics/434708/newspaper-advertising-expenditure-in-the-eu/, accessed: 23.01.2023.

[321] Grupa Kapitałowa Agora S.A., Sprawozdanie niezależnego biegłego rewidenta z badania roku obrotowego kończącego się 31 grudnia 2017r., p.40.

[322] Grupa Kapitałowa Agora S.A., Sprawozdanie niezależnego biegłego rewidenta z badania roku obrotowego kończącego się 31 grudnia 2021r., p.6.

[323]Deloitte, The impact …, p.14, https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/technology-media-telecommunications/deloitte-uk-impact-of-web-traffic-on-newspaper-revenues-2016.pdf,accessed:18.01.2023.

[324] WNIP, "News publishers expect revenues to more than double this year": World Press Trends 2022-23 Preview, 2022, https://whatsnewinpublishing.com/news-publishers-expect-revenues-to-more-than-double-this-year-world-press-trends-2022-23-preview/, accessed: 23.01.2023.

[325] See: R.K. Nielsen, A. Cornia, A. Karogelopulos, Challenges and opportunities …, p. 25.

[326] Deloitte, The impact …, https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/technology-media-telecommunications/deloitte-uk-impact-of-web-traffic-on-newspaper-revenues-2016.pdf,accessed:18.01.20

the already mentioned popularity of online platforms which are able to attract a wider audience and sell more targeted advertising,[327] it leads to the conclusion that the larger publishers have a greater chance of generating more advertising revenue and to compete or cooperate in the advertising market with the online platforms.[328] This sheds light on two problems. Firstly, press publishers have to look for other sources of revenue due to the dominance of large platforms in the online advertising market, due to decline in print circulation and subscription systems that are just gaining popularity.

Secondly, the biggest victims of this phenomenon are the local and small publishers who are not attractive to advertisers, and cannot compete with online platforms and large publishers in terms of audience reach. Adding to this their difficulties in implementing the subscription models, their situation can be described as difficult.[329]

4.2.3. State aid revenue

In some countries the direct or indirect subsidies to some or all newspapers are provided.[330] In France the financial support from the state plays an important role.[331] It is seen as a commitment to guarantee freedom of press and to strengthen its pluralism[332]. To illustrate, in France, "In order to mitigate the consequences of the crisis, on 27 August 2020 the government announced a support plan for the press industry comprising, on the one hand, of emergency measures to guarantee the continuity of press distribution, amounting to €106 million, and, on the other hand, an envelope of €377 million to finance recovery measures over the period 2020-202212".[333]

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[327] A. Cornia *et al*., Pay Models …, https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2017-07/Pay%20Models%20in%20European%20News%20Factsheet.pdf, accessed: 20.01.2023,p.17.
[328] N. Rashidian, *et al.*, Friend & Foe…, p.10.
[329] See: Press Gazette, Next challenge for publishers is restoring revenue back to print levels, 2022, https://pressgazette.co.uk/publishing-services-content/next-challenge-for-publishers-is-restoring-revenue-back-to-print-levels/, accessed: 23.01.2023.
[330]R.K. Nielsen, A. Cornia, A. Karogelopulos, Challenges and opportunities …, p. 31.
[331] France has a long tradition of subsidising press, dating back to the period after the French Revolution. The model of aid to press has been developed after the end of the second World War. Initially, it was intended to restore the press' honour and credibility, which had been damaged during the occupation and more precisely, during the collaboration of the popular press with the occupying forces. See: K. Gajlewicz-Korab, Wpływ preferencji …, p.71,. See also : R. Badouard, Pluralisme, **…,** pp.265-266.
[332]République francaise, Aides à la presse, https://data.culture.gouv.fr/api/datasets/1.0/aides-a-la-presse-classement-des-titres-de-presse-aides/attachments/1_page_de_presentation_generale_des_aides_a_la_presse_2020_et_2021_docx/, accessed :12.01.2023 ; Ministère de la culture, Aides à la presse, See also : https://www.culture.gouv.fr/Thematiques/Presse/Aides-a-la-Presse, accessed: 12.01.2023.
[333] Decision of 12 July 2021 of French Autorité de la concurrence on compliance with the injunctions issued against Google in Decision of 9 April 2020, p.16. English version:

In France, there are two types of aid[334]: a) indirect, manifested, for example, in preferential tariffs for the transport of newspapers by the postal service or tax aid[335] and b) direct, intended to support certain categories of titles, in particular, the press related to political and general topics[336]. They have several purposes: to support the distribution of titles, to assist the most financially fragile general and political information publications in order to preserve pluralism and finally, to encourage the modernisation and development of press companies. In 2021, 431 titles received the direct and indirect aid. [337] For example, the direct aid received by all the titles of the Le Monde group in 2021 was 2.6 million euros, constituting 0.8% of its turnover.[338]

However, the system of aids and the way in which they are allocated is subject to criticism. According to the French Court of auditors, it remains fragmented and consists of a multitude of mechanisms, most of which do not fit the new, digital reality of publishing and its specificities. Moreover, it has been pointed out that the aid allocation process is not very transparent, rather discretional and its results are difficult to predict.[339] The analysis of the Court's report as well as of the views expressed by some experts leads to the conclusion that the system of the state aid to press in France is not sufficiently effective and does not translate into a real improvement of the situation of press

https://www.autoritedelaconcurrence.fr/sites/default/files/attachments/2022-02/21-d-17_en.pdf, accessed:06.07.2023.

[334] See: B. Beignier, B. de Lamy, E. Deyer, Traité de droit de la presse et des médias, Lexis Nexis Lites,2009, pp.328-364.

[335] Regulated inter alia in Code des postes et communication électroniques (Post and Electronic Communications Code).

[336] Regulated inter alia in the following acts: décret n. 2012-484 du 13 avril 2012 concernant le principe de conditionnalité des aides (the principle of conditionality of aid), décret n.2002-29 du 25.02.2002 concernant l'aide à la distribution de la presse quotidienne nationale d'information politique et générale (Aid for the distribution of the national daily press on political and general topics); décret n.2004-1312 du 26.11.2004 (modifié) concenrnant l'aide au pluralisme de la presse périodique, régionale et locale (Aid for pluralism of the periodical, regional and local press),le décret n.2021-1067 du 10.08.2021 concernant l'aide au pluralisme des titres ultramarins (Aid for the pluralism of overseas titles); le décret n.86-616 du 12.03.1986 (modifié), le décret n.2015-1440 du 06.11.2015, le décret n.2017-1700 du 15.12.2017 concernant l'aide aux publications nationales d'information politique et générale à faibles ressources publicitaires (aid for national political and general information publications with low advertising resources),le décret n° 98-1009 du 6.11.1998 (modifié) concernant l'aide au portage de la presse (aid for post distribution of press).

[337] See : République francaise, Aides à la presse, Tableaux des titres de presse aidés en 2021 Notice de présentation, https://data.culture.gouv.fr/api/datasets/1.0/aides-a-la-presse-classement-des-titres-de-presse-aides/attachments/2_notice_de_presentation_des_tableaux_des_titres_de_presse_aides_en_2021_doc/, accessed :12.02.2023.

[338] Le Monde, Les revenus du « Monde », des sources diversifiées, 2022, https://www.lemonde.fr/le-monde-et-vous/article/2021/01/26/les-revenus-du-monde-des-sources-diversifiees_6067680_6065879.html, accessed : 21.01.2023.

[339] Cour des comptes, Les aides à la presse écrite : des choix nécessaires, Rapport public annuel 2018, https://www.ccomptes.fr/sites/default/files/2018-01/12-aides-presse-ecrite-Tome-2.pdf, accessed : 12.02.2023.

publishers.[340] It has been also criticised by some commentators because of the fact that the biggest beneficiaries of the aid are the large press publishers.[341]

In Poland, the system of state aid for press publishers is less developed than in France. It is provided directly in form of subsidies in very specific cases. The Ministry of Culture and National Heritage grants subsidies to some journals on cultural or historical topics whose content can contribute to the preservation of national heritage and the increase of public awareness. Nearly 3.6 million PLN in funding has been allocated to 45 projects in 2022.[342] It should be however noted that the choice of subsidised journals and the way in which the funds were allocated have been criticised in press for being discretionary.[343] Some forms of indirect support for example within tax law are also foreseen. [344] The current initiative of publishers of local press who called on Polish Prime Minister and the Minister of Culture and National Heritage to introduce the direct financial support for them deserves attention.[345] Unfortunately, no solution has been implemented to answer this postulate for the moment.

4.2.4. Others sources of revenue

[340] Cour des comptes, Les aides à la presse écrite : des choix nécessaires, Rapport public annuel 2018, https://www.ccomptes.fr/sites/default/files/2018-01/12-aides-presse-ecrite-Tome-2.pdf, accessed : 12.02.2023 ; G. Bastin, Les aides à la presse peuvent-ellescontribuer à promouvoir le journalisme d'intérêt public ?, The Conversation, 2019, https://theconversation.com/les-aides-a-la-presse-peuvent-elles-contribuer-a-promouvoir-le-journalisme-dinteret-public-115510, accessed :12.01.2023.

[341] La lettre A, Le Parisien, Le Monde, Le Figaro : le palmarès des plus gros bénéficiaires des aides à la presse en 2021, 2022, https://www.lalettrea.fr/medias_presse-ecrite/2022/09/06/le-parisien-le-monde-le-figaro--le-palmares-des-plus-gros-beneficiaires-des-aides-a-la-presse-en-2021,109810115-eve, accessed : 21.01.2023 ; Le Figaro, Aides à la presse : 76 millions d'euros versés à plus de 400 titres en 2019, 2021, https://www.lefigaro.fr/medias/aides-a-la-presse-76-millions-d-euros-verses-a-plus-de-400-titres-en-2019-20210602. accessed : 21.01.2023 ; Le monde diplomatique, Aides à la presse, un scandale qui dure, 2014, https://www.monde-diplomatique.fr/2014/11/FONTENELLE/50945, accessed : 21.01.2023.

[342] See: Ministerstwo Kultury i Dziedzictwa Narodowego,Czasopisma, https://www.gov.pl/web/kultura/czasopisma4, accessed:21.01.2023.

[343]WirtualneMedia.pl, 64 projekty wspierające czasopisma kulturalne otrzymają dotację MKiDN,2021 https://www.wirtualnemedia.pl/artykul/64-projekty-wspierajace-czasopisma-kulturalne-otrzymaja-dotacje-mkidn, accessed:21.01.2023; oko.press, Minister Gliński i czasopisma. Dotacje tylko dla swoich. Dostała nawet kościelna gazetka dla dzieci, 2020,https://oko.press/minister-glinski-i-czasopisma-dotacje-tylko-dla-swoich , accessed:21.01.2023.

[344]Indirect support through tax benefits is provided for specialised print periodicals or regional press. See: Ustawa z dnia 11 marca 2004 o podatku od towarów i usług Dz. U. 2004 Nr 54 poz. 535, t.j. Dz. U. z 2022 r. poz. 931, 974, 1137, 1301, 1488, 1561, 2180, (Act of 11 March 2004 on tax on goods and services) art. 41 ust.2a.

[345] See: Rząd milczy w sprawie dotacji dla prasy lokalnej, Press, 2022, https://www.press.pl/tresc/71406,rzad-milczy-w-sprawie-dotacji-dla-prasy-lokalnej, accessed:11.01.2023.

As to other source of press revenue, philanthropy in Europe is of marginal importance.[346] The technological transition of press, is, in some cases, financially supported by platforms[347]. According to the report published in 2020 by Google, €150 million Google's Digital News Innovation Fund has supported 662 digital news projects in Europe. 27% of the funds were directed to regional and national publishers, 14,5 % to news startups and 11% to local publishers.[348] 12% of the funds were intended to boost digital revenue and 52% to explore new technologies.[349] Meta proposed Meta News Accelerator programs which helped European publishers to generate more than $18 million in value for their companies.[350]

Some press publishers decided to adopt the diversification strategies to provide services in the sectors outside of their core market by moving into e–commerce[351], offline activities such as events and merchandising[352] and by exploiting their brand name.[353] Crowdfunding is another alternative of funding journalism.[354]It consists in gathering funding from online crowds on digital platforms by individual journalists or news organisations. The audience is asked to make the small donations to finance the

[346] See: E. Karstens, The media philantropy space in 2017, Alliance for philanthropy and social investement worldwide, 2017, https://www.alliancemagazine.org/feature/media-philanthropy-space-2017/, accessed:23.01.2023; see also: Philantropy Europe Assosiation, Journalism Funding in Europe. Reflections and key lessons from the Journalism Funders Forum, 2019, https://philea.eu/journalism-funding-in-europe/, accessed:23.01.2023.

[347] 29% of publishers surveyed by N. Newman for the purpose of the Digital News Report, declared to expect to get significant revenue from tech platforms for content licensing or innovation. See: N. Newman *et al*., Journalism, …, https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2022-01/Newman%20-%20Trends%20and%20Predictions%202022%20FINAL.pdf, accessed:18.01.2023.

[348] See: Google, Digital News Innovation Fund Impact Report, https://newsinitiative.withgoogle.com/dnifund/report/, accessed: 23.01.2023.

[349] See: Google, Digital …, https://newsinitiative.withgoogle.com/dnifund/report/, accessed: 23.01.2023.

[350] See: Meta, European news publishers build big business through Meta Accelerators, 2022, https://www.facebook.com/formedia/blog/european-publishers-accelerator-program, accessed: 23.01.2023.

[351] According to F. Kalim from What's new in publishing, "eCommerce is another promising revenue source for publishers with spending predicted to double over the next four years to $7T, according to GroupM. Brands like BuzzFeed, The New York Times, and New York Magazine/Vox Media have already made significant inroads in this area" See: F. Kalim, 76% of publishers have "accelerated their plans for digital transition": Here's how (A Reuters Institute report), What's new in publishing, 2021, https://whatsnewinpublishing.com/76-of-publishers-have-accelerated-their-plans-for-digital-transition-heres-how-a-reuters-institute-report/, accessed: 23.01.2023.

[352] R.K. Nielsen, A. Cornia, A. Karogelopulos, Challenges and opportunities …, p.26-27.

[353] A. Leurdijk, M. Slot, O. Nieuwenhuis, Statistical…, p.9.

[354] See: M. Pérez-Montoro, Interaction …, p.123.

journalists' work and the story process.[355] At present, crowdfunding is not expected to become the main funding source but rather as "an add-on or something extra"[356].

To conclude:

- Digital transition turned out to be highly challenging for press publishers. Decline in circulation of print press required the adoption of new business models and the search for new sources of revenue. According to the current data, the overall situation of press publishers in Europe is promising. 59% surveyed press publishers say that their overall revenues including both subscription and advertising have increased.[357] Moreover, it has been noted that the investment in new revenue are starting to pay off with the important grow of digital reader revenue.[358]

- It results from the analysis conducted in this section that the adaptation to the digital reality is more successful for large press publishers. On the contrary, small and local publishers, dominated by large platforms and large press publishers as to the advertising revenue, struggle to find out the successful business model and to convince their readers of it, what in consequence, calls into question their existence. In many cases, they are not able to make the important investments, essential in particular at the beginning of the digital activity.

- The systems of state aid are different in Poland and in France. Both offers an important support for press publishers but more resources should be provided to support local and small publishers and it should be done in more transparent way.

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[355] T. Aitamurto, Crowdfunding for Journalism, In: T. Vos, F. Hanusch (general eds.), The International Encyclopedia of Journalism Studies, Wiley-Blackwell, 2019, pp.1-5, https://www.researchgate.net/profile/Tanja-Aitamurto/publication/332751519_Crowdfunding_for_Journalism/links/5e9a14dba6fdcca7892086dd/Crowdfunding-for-Journalism.pdf?origin=publicationDetail&_sg%5B0%5D=REhIz2UlP68FUdM-eOwOAKDK6JdtdKTWbzX9wR9ZRo-ePDnJetiHVdC8Vei8IPg8Hw83ClLVgr_hv-V0dRBXVw.u4wjokIRBIKywnVVT-XaYpGPG7tkzo8gA9w0PEBgIa_iutZOI19lALWsu47KybH5aeW5zkqEC-MnLkPxUjVV1w&_sg%5B1%5D=Lk94xzNqk1mIhyo5vALj5VSlCrIsdlVjO50oJz5IQAfR4wpQ1pBbljFYK-JTV7yym70jdvz8EPPvd78o0joUHRgTWT0ZvDAAlp2-vuLAaXD8.u4wjokIRBIKywnVVT-XaYpGPG7tkzo8gA9w0PEBgIa_iutZOI19lALWsu47KybH5aeW5zkqEC-MnLkPxUjVV1w&_iepl=&_rtd=eyJjb250ZW50SW50ZW50IjoibWFpbkl0ZW0ifQ%3D%3D, accessed: 23.01.2023. See: J. Cagé, Sauver les médias. Capitalisme, financement participatif et démocratie, Editions Seuil, 2015.

[356] A. Majid, Alternative ways of funding journalism: Crowdfunding has raised $20m+ and seeded some major titles, Press Gazette. Future of Media, 2021, **https://pressgazette.co.uk/media-audience-and-business-data/alternative-funding-journalism-crowdfunding/**, accessed:23.01.2023

[357] N. Newman et al., Journalism, …, p.8, https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2022-01/Newman%20-%20Trends%20and%20Predictions%202022%20FINAL.pdf, accessed:18.01.2023.

[358]World Press Trends preview: Publishers brace for a period marked by uncertainty, World Association of News Publishers, 2022, https://wan-ifra.org/2022/09/world-press-trends-preview-publishers-brace-for-a-period-marked-by-uncertainty/, accessed: 23.01.2023.

4.3.Press publishers, access to information and media pluralism

Press plays the essential role in a democratic society.[359] Being an indispensable tool for the transmission and reception of ideas and thoughts, it contributes to the exercise of freedom of expression. The crucial task to enable the citizens' access to information is entrusted to journalists[360] but also to press publishers who participate fully in the exercise of freedom of expression by providing support to authors[361] and by disseminating the news content to the readers. Freedom of press, according to the ECtHR, affords the public one of the best means of discovering and forming an opinion and participating in the public debate.[362]

According to the definition of media pluralism set out in the introduction to this chapter in the context of press sector, the plurality and diversity of ownership and control should be ensured. Even though this element of pluralism of media in the context of press industry does not constitute the core of the analysis conducted in this dissertation, some observations need to be made. It should be noted that more and more of large press publishers become part of multinational media companies producing different media. The business activity of Axel Springer constitutes an example. Moreover, a single press publisher usually publishes multiple titles. For example, the publisher of Le Monde, Le Monde group, publishes also: L'OBS, Télérama, Courrier International or Le Monde Diplomatique.[363] Therefore, the control over the publication of several journals and magazines is concentrated in one hand.

The authors of the report "The Newspaper Publishing Industry" prepared for the European Commission point that "Compared to other media markets, the level of concentration in the newspaper market is relatively low, with a few large publishers which are part of multimedia companies and many medium-sized and small publishers, especially at regional and local levels. Nevertheless, the concentration of newspaper publishers is ongoing, especially as newspaper publishers are increasingly having trouble in sustaining their business as stand-alone, individual businesses."[364] The phenomenon of

[359] ECtHR, Thoma v. Luxembourg, 38432/97, 29 March 2001, para.45.
[360] CDSM Directive 2019/790, recital 54.
[361] ECtHR, Editions Plon v. France, 58148/00, 18 May 2004, para.22.
[362]ECtHR, Guide on Article 10 of the European Convention on Human Rights, 2022, p.116, https://www.echr.coe.int/documents/guide_art_10_eng.pdf, accessed:24.01.2023.
[363] See: Le Monde, Présenation du groupe, https://sdllemonde.fr/groupe-le-monde/presentation-du-groupe/, accessed : 25.01.2023.
[364] A. Leurdijk, M. Slot, O. Nieuwenhuis, Statistical, …, p.5. See also: J. Skrzypczak, Media ownership regulation in Europe – a threat or opportunity for freedom of speech? Przegląd Polityczny, 2017, pp.109-

progressing concentration in press sector and its impact on media pluralism becomes an important issue from the legal perspective.

Such dynamics can be seen in France. One of the recent examples is the expected acquisition of publishing company Lagardère by another one, Vivendi.[365] It constitutes an issue from competition law perspective but when taking in consideration that Paris Match is published by Lagardère and Gala and Voici by Vivendi, and they are the most widely read people magazines in France, the merger of these publishers could lead to a concentration having negative impact on media pluralism. The European Commission has opened an in-depth investigation to assess, under the EU Merger Regulation[366], the proposed acquisition and expressed also its concerns as to its negative consequences on quality, diversity and prices for readers of this type of magazines.[367] Moreover, an argument often repeated in French public opinion is that 8 billionaires and 2 millionaires own 81% of the circulation of national daily newspapers and 95% of the circulation of national generalist weeklies[368] which may be considered as the denial of the rule of the plurality and diversity of ownership and control within the media pluralism concept.[369]

118; B. Klimkiewicz, Krajobraz medialny w Polsce: Struktura własności i pluralizm mediów, in. B. Klimkiewicz (ed.),Własność medialna i jej wpływ na pluralizm oraz niezależność mediów, Wydawnictwo Uniwersytetu Jagiellońskiego,2005; B. Klimkiewicz, Własność medialna i jej wpływ na pluralizm i niezależność mediów, Wydawnictwo Uniwersytetu Jagiellońskiego, 2005; Z. Jurczyk, Procesy koncentracji i monopolizacji na rynku prasy regionalnej w Polsce, "Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu", no. 405, 2015, pp. 139–140; P. Kaminam, Media concentration in France, in: Media ownership – Market realities and regulatory
responses, European Audiovisual Observatory, Strasbourg, 2017.

[365] O. Ubertalli, Hachette-Éditis : stupeur et tremblements dans l'édition française, Le Point Economie, 2021, https://www.lepoint.fr/economie/hachette-editis-big-bang-pour-l-edition-casse-tete-pour-vincent-bollore-21-09-2021-2443994_28.php, accessed : 25.01.2023.

[366] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32004R0139, accessed: 17.12.2023.

[367] European Commission, Mergers: Commission opens in-depth investigation into the proposed acquisition of Lagardère by Vivendi, 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7243, accessed: 25.01.2023.

[368] L'Assemblée nationale Proposition de loi visant à mettre fin à la concentration dans les médias et l'industrie culturelle, Enregistré à la Présidence de l'Assemblée nationale le 11 octobre 2022, https://www.assemblee-nationale.fr/dyn/16/textes/l16b0327_proposition-loi, accessed : 25.01.2023 ; M. Roche, M. Thimonnier, Est-il vrai que «90% des grands médias appartiennent à neuf milliardaires» ?, Libération, 2022, https://www.liberation.fr/checknews/est-il-vrai-que-90-des-grands-medias-appartiennent-a-neuf-milliardaires-20220227_7J3H2INMD5GOPBN7YJ77C33KRY/, accessed : 25.01.2023.

[369] In France, there are regulations prohibiting the acquisition of journals titles on general and political topics of a specific subject matter, which would lead to excessive concentration, see article 11 of Loi n° 86-897 du 1 août 1986 portant réforme du régime juridique de la presse (Law n° 86-897 of 1 August 1986 reforming the legal regime of the press). Moreover, at the end of 2022 The proposal for a law to "put an end to concentration in the media and the cultural industry" was presented by La France insoumise. The proposal was rejected by the Commission within the Assemblée National. See: Proposition de loi visant à mettre fin à la concentration dans les médias et l'industrie culturelle, Enregistré à la Présidence de l'Assemblée nationale le 11 octobre 2022, https://www.assemblee-

As to the others factors constituting media pluralism, press should reflect **divers and plural viewpoints and cultural expressions**. Moreover, the press sector should be differentiated in terms of **both type and genre of content and the actors creating and distributing it**. Finally, it should correspond to both **national and local interests**. It means that press industry to comply with the presented definition of media pluralism should be characterised by the activities of various types of press publishers, both small and large, publishing on a local and national scale, on general and specific topics.

According to the concept of media pluralism, the plurality and diversity of media offer should be guaranteed at the stage of supply, use and distribution of media. In other words, the mere existence of multiple and diverse press publishers producing multiple and diverse content is not enough to speak of media pluralism. This content must be distributed and reach an audience. In terms of the latter, the increasing importance of visibility factor should be pointed out. Press distribution takes place more and more at the global level[370] in the digital reality. Internet has enormously expanded the area in which publishers can publish their content. On the other hand, however, it has been narrowed considerably since readers are not able to see and access all the content. Although they potentially have access to content published by many press publishers, only a small part will be visible to them. R. Baduard by giving the example of LeMonde.fr points out that although the Internet allows for a multiplication of voices to be heard, it does not allow them to be heard in the same way, and the historical actors remain the most listened to.[371] The problem of attention allocation should be identified. Press publishers, and it regards in particular the local and small ones, must therefore ensure their visibility either in the form of promotional campaigns, partnerships or cooperation with social media platforms and news aggregators[372] since this visibility is essential for their existence.

The problem discussed is linked to another threat to media pluralism that I noticed, namely to the increasing domination of press market by limited number of very large press publishers. It can result in important concentration of power in production and

nationale.fr/dyn/16/textes/l16b0327_proposition-loi, accessed : 25.01.2023 ; L. Dermarkarian, Concentration dans les médias : la proposition de LFI ne passe le cap de la Commission, 2022, https://lcp.fr/actualites/concentration-dans-les-medias-la-proposition-de-lfi-ne-passe-le-cap-de-la-commission, accessed : 25.01.2023.

[370] Understood as the opposite to local level.

[371] R. Badouard, Pluralisme…, p.8.

[372] See point 5.3.

distribution the content among few players[373]. The winners take all/ most pattern[374] contradicts the assumption of media pluralism, according to which there should be many publishers of different size, type, who publish various content. P.L. Parcu considers this increasing concentration of media / platforms as the factor of deterioration of the democratic debate constituting the high risk of the manipulation for example as regards the electoral processes.[375] On the other hand, the fragmentation of the market and the drive towards an artificial proliferation of press publishers is not advisable, as it will not essentially be synonymous with a high quality of the content produced. Neither fragmentation nor dominance in terms of the number of press publishers in the market are desirable phenomena from the perspective of media pluralism and freedom of expression. What is desirable is the optimisation[376] of their number.

To conclude:

- The phenomenon of progressing concentration in press sector and its impact on media pluralism becomes an important issue from the legal perspective.
- Press industry to comply with the definition of media pluralism should be characterised by the activities of various types of press publishers, both small and large, publishing on a local and national scale, on general and specific topics. The mere existence of multiple and diverse press publishers producing multiple and diverse content is not enough to speak of media pluralism. This content must be distributed and reach the audience. In terms of the latter, the visibility factor is of increasing importance.
- The problem of attention allocation in press industry is gaining in importance. Press publishers, and it regards in particular the local and small ones, must ensure their visibility either in the form of promotional campaigns, partnerships or cooperation with social media platforms and news aggregators since this visibility is essential for their existence. The increasing domination of press market by limited number of very large press publishers corresponds with the principle 'winners take it all' which is of negative impact on media pluralism.

5. News aggregators and flow of information

[373] R.K. Nielsen, A. Cornia, A. Karogelopulos, Challenges …, p.28.
[374]M. Hindman, The Myth of Digital Democracy, Princeton, NJ: Princeton University Press, 2008, p.93; K. Karppinen, Rethinking …, p.12.
[375] P. L. Parcu, New digital threats to media pluralism in the information age, Robert Schuman Centre for Advanced Studies Centre for Media Pluralism and Media Freedom, no.19, 2019, p.106.
[376] A. Lebois during the discussion at Institut de recherche en droit privé, Nantes University, 25.01.2023.

5.1. Introductory remarks

Over 50% of respondents interviewed by N. Newman for the purpose of the Reuters Institute Digital News Report 2019 prefer to access news through search engines, social media, or news aggregators.[377]Since the latter are listed among the most consulted sources of information, it is worth examining how they are defined, what is their way of functioning, how do they affect the activity of press publishers and finally, what are their impact on media pluralism. The main objective of this section is to provide answers to these questions.

News aggregators emerged as a reaction to the overload of information in the digital environment.[378] They are defined as the websites which take information from multiple sources, organise it in specific manner and display it in a single place. [379] They consolidate the content which leads to the lowering of the transactions costs of obtaining information[380] and means that users are provided with selected and categorised news from different sources. The news aggregators are seen "as prototypes for digital newspaper kiosks"[381] which rely on the content published by press publishers on the websites of their newspapers.

They are mostly based on the RSS format.[382]This is a software protocol that "allows applications and their users to access automatic website or content updates. RSS feeds rely on simple text files, extracting important information from XML (extensible markup language). Simplified, streamlined content is then input into an RSS reader, which converts text files into digital updates. Through this process, an RSS feed makes it possible to turn simple information, like a site name or a content's title description, into

[377] N. Newman et *al.*, Reuters Institute Digital News Report 2019, Reuters Institute for the Study of Journalism, University of Oxford, 2019, p. 13.
[378] See: A. Mohamed et *al.*, News Aggregator and Efficient Summarization System, International Journal of Advanced Computer Science and Applications, vol. 11, no. 6, 2020,pp.636-641; A. Kobyliński, News aggregators - a remedy for the information overload?, Ekonomiczne Problemy Usług, vol.126, 2017,pp.83-92.
[379] K.A. Isbell, The Rise of the News Aggregator: Legal Implications and Best Practices, Berkman Center Research Publication, No. 10,2010, p. 2, pp.1-30; W.A. Hanff, News aggregator, Britannica, https://www.britannica.com/topic/news-aggregator, accessed: 31.01.2023.
[380] L. Chiou and C. Tucker, Content Aggregation by Platforms: The Case of the News Media, 2015, no.21404, p. 2.
[381] G. Priora, News Aggregation and the Reform of EU Copyright Law, CEU Democracy Institute, Center for Media, Data and Society, 2018, https://cmds.ceu.edu/article/2018-07-03/news-aggregation-and-reform-eu-copyright-law, accessed: 31.01.2023.
[382] RSS stands for "really simple syndication" or "rich site summary" see: A. Mohamed et *al.*, News Aggregator …,pp.636-641.

a steady stream of news articles and new content pieces. This helps readers stay up to date with the latest online developments."[383]

They may take various form. Feed aggregator constitutes a traditional model of news aggregator. It contains content from different websites which is "organised into various 'feeds', typically arranged by source, topic, or story."[384] The examples of such feed aggregator are Google News, Yahoo, Apple News, Flipboard or Reddit. Specialty aggregator[385] is another type of news aggregator. Like feed aggregator, it collects a variety of information from a number of sources. The difference is that it covers the specific topics or gathers information from only some selected sources, like for example Techmeme which focuses on the news related to the technology. Blog aggregators use the third - party content to provide the stories on a given topic, by synthetising information from different sources into a single piece of content[386]. The example of such a blog aggregator is HuffPost. Another subcategory that I would like to identify is the news aggregation service offered by social media, for example Facebook. It provides a news section "Facebook News" based on the feed aggregator mode which aims at finding major and local news published by a wide range of publishers. It is available since 2020 in US, UK, Germany, Australia and since 2022 in France[387]. News aggregators can operate for free as it is in case of Google News or provide some specific content against payment as it is in case of Meltwater.

The analysis conducted in this dissertation focuses significantly but not exclusively on the feed aggregator, Google News. This is a computer - generated news service, launched in 2006 that collects articles from more than 20 000 publishers worldwide.[388]

[383]Riverside, What is an RSS Feed: Beginners Guide on How RSS Feeds Work,2023, https://riverside.fm/blog/what-is-an-rss-feed, accessed: 31.01.2023. See: A. Mohamed et *al.*, News Aggregator …,pp.636-641; W.A. Hanff, News aggregator, Britannica, https://www.britannica.com/topic/news-aggregator, accessed: 31.01.2023.

[384] K.A. Isbell, The Rise …, p. 2, pp.1-30.

[385] K.A. Isbell, The Rise …, p. 3, pp.1-30.

[386] K.A. Isbell, The Rise …, p. 5, pp.1-30.

[387]Wiadomości Facebooka – informacje, https://www.facebook.com/business/help/417376132287321?id=204021664031159, accessed:31.01.2023; J. Doub, Lancement en France de Facebook News, un espace dédié à l'actualité sur Facebook, Meta, 2022, https://about.fb.com/fr/news/2022/02/lancement-en-france-de-facebook-news-un-espace-dedie-a-lactualite-sur-facebook/, accessed :31.01.2023.

[388] J. Cohen, Same protocol, more options for news publishers, 2009, https://news.googleblog.com/2009/12/same-protocol-more-options-for-news.html,accessed:31.01.2023.

Described as the world's largest news aggregator[389] it had 468.1 millions of visits in December 2022.[390] It is available in over 125 countries and 40 languages.[391]

5.2.Business model

The functionning of Google News is based on the use of the third - party content[392]. The news aggregator does not produce any original content but curates the one which is produced by the press publishers. The user can see headlines which are the same or a shortened version of the original headlines displayed on the press publishers' websites (the websites of different newspapers published by press publishers). By clicking on the news, the user accesses directly the reference page.[393] Consumers see also the pictures, the name of the news source, the time of publication and whether the news item is local or not. The current design[394] of the Google News website is a list of news items grouped according to different themes such as country, world, local information, business, science, technology, entertainment or sport. News items do not consist of news texts any more, except the headline.[395] The design of the website differs slightly when the user logs in. It has also an impact on the content displayed due to the content personalisation. However, users are able to partially[396] deactivate the option of personalisation[397]. They can also subscribe to an alert service to receive notifications at regular basis on their favorite topics as well as the updates.

From technical point of view, the press publishers, in order to appear on Google News home page have to produce the articles compliant with the format of Accelerated Mobile

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[389] Q. Wang, Normalization and differentiation in Google News: a multi-method analysis of the world's largest news aggregator, Rutgers University, 2020, https://rucore.libraries.rutgers.edu/rutgers-lib/62647/, accessed: 31.01.2023.

[390]A. Majid, Top 50 biggest news websites in the world: December a slow month for top ten brands, PressGazette Future of Media, https://pressgazette.co.uk/media-audience-and-business-data/media_metrics/most-popular-websites-news-world-monthly-2/, accessed: 31.01.2023.

[391] B. Bender, O. Ma, Read all about it: A new look for Google News, 2022, https://blog.google/products/news/google-news-anniversary-local-reporting-funding/, accessed:31.01.2023.

[392] J. M.T. Roos, C. F. Mela, R. Shachar, The Effect of Links and Excerpts on Internet News Consumption, Journal of Marketing Research, vol. 57, no. 3, 2020, p.398.

[393]The link is not displayed on the Google News' page separately but in the form of headline.

[394] Previous design of Google News included snippets defined as a small and often interesting piece of news, information, or conversation (see: Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/snippet, accessed: 09.11.2022.)

[395] I. Engelmann, Effects …, p.794.

[396] Previously activity and purchases within other Google services are the factors taken into account in provision of the content and this cannot be switched off by the user.

[397]See also: Google Offical Blog, Personalized Search for everyone, 2009, https://googleblog.blogspot.com/2009/12/personalized-search-for-everyone.html, accessed: 07.02.2023.

Pages ("AMP") which is optimised for mobile web browsing.[398] It responds to changes in readers' habits since as it results from the research conducted for Ofcom, the online news is accessed primarily through smartphones[399]. The main purpose of AMP format is to help webpages load quicker[400]

D. Geradin notes that "because unlike traditional mobile pages AMP pages are loaded on and served from Google servers, Google can maintain readers in its environment, as well as collect all the data generated on such pages."[401] It constitutes a manifestation of platform dependency. It means that Google gains some kind of control over the content created by press publishers which can be displayed on Google News website and in consequence, the scale of the recognition of their brand as well as their monetisation and the advertising opportunities may be limited.[402] Press publisher, but also everyone who runs a website dedicated to news, meeting the specified technical conditions, can share its content on Google News. Persons interested can submit their content through Google publishing centre which is an interface that helps publishers publish, manage, and monetize their content in Google News.[403] The question arises what press publishers

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[398] In response to the adoption of the related right of press publishers in France Google implemented new display policy. "Google has implemented new "tags", which are code fragments, that publishers and news agencies can insert into the source code of their web pages to allow Google to take excerpts from their editorial content in the form of text, images and video. (…) These tags, which take the form of a piece of computer code exploitable by Google's robots, are as follows:
- The "max-snippet" tag: this tag allows the publisher to indicate to Google whether it authorises the reuse and display of excerpts of articles by the various Google services, as well as the length of the excerpts that can be displayed by Google. The "-1" parameter in the "max- snippet" tag allows Google to reuse news content without a limit on the size of the text excerpts. Conversely, by setting the parameter to "0", the publisher indicates that no text excerpts will be displayed by Google on its services.
- The "max-image-preview" tag: this tag allows the publisher to indicate to Google whether it authorises the reuse and display by Google of photographs in the form of thumbnail images in the results pages, as well as the display size of these thumbnail images in Google's services. Enabling the "wide" setting gives Google the ability to display these photographs at maximum quality." (Decision 20-MC-01 of 9 April 2020 of French Autorité de la concurrence, p.27, https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2020-06/20-mc-01_en.pdf, accessed : 05.07.2023.).

[399] Scrolling news: The changing face of online news consumption, A report for Ofcom, 2018, p.20, https://www.ofcom.org.uk/__data/assets/pdf_file/0022/115915/Scrolling-News.pdf, accessed: 06.02.2023.

[400] Google Ads Help, About Accelerated Mobile Pages (AMP), https://support.google.com/google-ads/answer/7496737?hl=en, accessed:01.02.2023.See also: Nemesis studio, Qu'est-ce que le format AMP?, 2018, https://www.nemesis-studio.com/quest-ce-que-le-format-amp/, accessed:01.02.2023.

[401] D. Geradin, Complements or substitutes, The competitive dynamics between news publishers and digital platforms and what it means for competition policy, Focus on Antitrus, Antitrust& Public Policies, no.0, 2019, pp.10-11.

[402] D. Geradin, Complements or substitutes, T…, pp.10-11. See also: R.K. Nielsen, S.A. Ganter, Dealing with digital intermediaries: A case study of the relations between publishers and platforms, New media and society, vol.20, no.4, 2018, p.1601.

[403] Google, Publisher Center Help, Show up in Google News, https://support.google.com/news/publisher-center/answer/9607025?hl=en, accessed: 04.02.2023. This interface is rather dedicated to small and unknow to wider public publishers.

could do if they did not want their content to be displayed on the Google News[404]. In theory, it would be enough to change the format of the displayed content or to include a notice that a press publisher does not consent to the use of press materials by news aggregators. In practice, however, this scenario seems highly unlikely. Given the beneficial impact of the publishers' presence on the news aggregators on their increased visibility, publishers are rather reluctant to resign from being displayed on news aggregators. [405]

As to the copyright framework of the use of third - party content by the news aggregators, until the adoption of the CDSM Directive in 2019 there was no regulation at the EU level to address this practice. As to the regulation at the national level[406], in France, in 2019 la loi 2019-1063 of 18 October 2019 amended la loi no.47-585 of 2 April 1947 on the status of groupage and distribution companies for newspapers and periodicals[407] and introduced a provision related to the transparency of data processing by news aggregators. The latter should provide users with fair, clear and transparent information on the use of their personal data within the framework of the classification or referencing of this content. Each year, they shall draw up statistics, which they shall make public, relating to the titles, publishers and number of consultations of such content.[408] It may be

[404] According to Google: "Until the end of last year (2019), publishers had to fill out a form to be displayed in Google News. Now, editors can opt out of Google News by giving an instruction to the robots", see: Decision 20-MC-01 of 9 April 2020 of French Autorité de la concurrence, p.18. English version : https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2020-06/20-mc-01_en.pdf, accessed : 05.07.2023.

[405] Discussion with F. Reda in Amsterdam during Critical Perspectives on Data Access for Research, 15 March 2023.

[406] The implementation of the CDSM Directive is not taken into account and will be discussed in details in chapters III and IV.

[407] Loi n° 47-585 du 2 avril 1947 relative au statut des entreprises de groupage et de distribution des journaux et publications périodiques.

[408] Art. 15§2 of la Loi n° 47-585 du 2 avril 1947 relative au statut des entreprises de groupage et de distribution des journaux et publications périodiques : The operators of online platforms mentioned in I of Article L. 111-7 of the Consumer Code who offer the classification or referencing of content extracted from press publications or online political and general information press services and who exceed a threshold of connections on French territory set by decree shall provide users, in addition to the information mentioned in II of the same Article L. 111-7, with fair, clear and transparent information on the use of their personal data within the framework of the classification or referencing of this content. Each year, they shall draw up statistics, which they shall make public, relating to the titles, publishers and number of consultations of such content
English version by the author, French version of art. 15§2 of la Loi n° 47-585 du 2 avril 1947 relative au statut des entreprises de groupage et de distribution des journaux et publications périodiques :
Les opérateurs de plateformes en ligne mentionnés au I de l'article L. 111-7 du code de la consommation qui proposent le classement ou le référencement de contenus extraits de publications de presse ou de services de presse en ligne d'information politique et générale et qui dépassent un seuil de connexions sur le territoire français fixé par décret fournissent à l'utilisateur, outre les informations mentionnées au II du même article L. 111-7, une information loyale, claire et transparente sur l'utilisation de ses données personnelles dans le cadre du classement ou du référencement de ces contenus. Ils établissent chaque année

seen as an important step towards increasing transparency of practice of news aggregators which will certainly result in greater awareness of users as regards the use of their data[409]. In Poland, no specific provision as to the functioning of news aggregators has been adopted.

It could be presumed that the use of the content of press publishers by news aggregators should be license based. However, this is a rather rare practice[410]. In the vast majority of cases news aggregators use the excerpts from press publications without acquiring any legal title to these elements and without paying the publishers for it. Platforms justify their practice by referring to the copyright exceptions[411]. Nevertheless, this argumentation is not reflected in the court decisions[412] issued as a result of disputes between publishers and aggregators.[413]

Google News, as it has been already noted, does not produce the original content but selects, organises, prioritises and distributes information published by third parties. [414] According to the Brussels Court of Appeal the role of Google News is not limited to

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des éléments statistiques, qu'ils rendent publics, relatifs aux titres, aux éditeurs et au nombre de consultations de ces contenus.

[409] See: E. Dreyer, Droit de la communication, LexisNexis, 2 édition, 2022, pp.387-388.

[410] Google News licenses the use of the entire articles of some press publishers within the Google News Showcase section. Launched in 2020 it allows readers to access for free the selected articles originating from the websites of newspapers thanks to the licensing program established between Google and some press publishers.

[411] See chapter II, section 6.2.

[412] See for example: The Court Appel of Brussels in case of Google Inc vs. Copiepresse, 2011, http://www.copiepresse.be/pdf/Copiepresse%20-%20ruling%20appeal%20Google_5May2011.pdf, accessed: 02.02.2023.

[413] List of legal disputes between Google News and newspaper publishers before the adoption of the CDSM Directive is long. To mention some conflicts, News Agency Agence France - Presse sued Google claiming the search engine breached its copyright by reproducing its pictures and articles. To close litigation, the licensing agreements between these two actors have been signed. (E. Auchard, AFP, Google News settle lawsuit over Google News, Reuters, 2007, https://www.reuters.com/article/us-google-afp-idUSN0728115420070407, accessed: 01.02.2023.) In 2012, the agreement has been reached between Google and Belgian newspaper publishers group, Copiepresse that accused Google of copyright infringement (S. Musil, Google settles copyright dispute with Belgium newspapers, CNET,2012, https://www.cnet.com/tech/services-and-software/google-settles-copyright-dispute-with-belgium-newspapers/, accessed: 01.02.2023). In 2013, a fund of 60 million euros has been created by Google to put an end to disputes that arose with French press publishers (Z. Miners, Google creates €60M media fund to settle copyright dispute with French publishers, ComputerWorld, 2013, https://www.computerworld.com/article/2495147/google-creates--60m-media-fund-to-settle-copyright-dispute-with-french-publishers.html, accessed: 01.02.2023.). In 2014, the Google News Spain closed down due to the conflicts that arose around the reformed Spanish intellectual property law obliging Google to pay press publishers for the use of their content (The Guardian, Google News Spain to be shut down: what does it mean?, 2014, https://www.theguardian.com/media-network/2014/dec/12/google-news-spain-tax-withdraws, accessed: 01.02.2023) and reopened in 2022 (F.Y.Chee, Google News re-opens in Spain after eight-year shutdown, Reuters, 2022, https://www.reuters.com/technology/google-news-re-opens-spain-after-eight-year-shutdown-2022-06-22/, accessed:01.02.2023.)

[414]N. Smyrnaios, F. Rebillard, L'actualité selon Google. L'emprise du principal moteur de recherche sur l'information en ligne, Communication & Langages, no.160, p.96.

'passive mediator'[415] since it selects the information, classifies it in a sequence and according to its own method, chooses one article in disfavour of another, print some pieces of text in bold or duplicates the sections.[416] The news pieces published on Google News are selected[417] and ranked automatically as the result of the use of the algorithms[418]. In some cases, there is also a human judgement[419] but it should not be understood as a traditional publishing process that implies a certain editorial responsibility.[420]

The news are selected according to criteria[421] such as frequency of appearance across different websites,[422] recency of the articles[423], relevancy of the topic, credibility of the source[424], originality, freshness, localness[425] or the position of the articles on the other websites[426]. Two tendencies should be identified in this context. Firstly, Google News promotes the content which is covered by an important number of sources. It reflects the phenomenon of circular flow of information, already known in field of traditional media[427]. Secondly, content of local publishers is increasingly promoted, Google News offers new services in this area and provides special funds for this purpose[428].

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[415] The Court Appel of Brussels in case of Google Inc vs. Copiepresse, 2011, paragraph 55, http://www.copiepresse.be/pdf/Copiepresse%20-%20ruling%20appeal%20Google_5May2011.pdf

[416] The Court Appel of Brussels in case of Google Inc vs. Copiepresse, 2011, paragraph 55, http://www.copiepresse.be/pdf/Copiepresse%20-%20ruling%20appeal%20Google_5May2011.pdf. See also: A. Lebois, La légitimité du nouveau droit voisin de l'éditeur et de l'agence de presse. Légipresse, Victoires Éditions, 2019, p.3.

[417] However, in case of Google News Shawcase that Google launched in 2020, the partnership with selected publishers has been established and according to Google News, they "have direct control of their presentation and branding, which provides a way to form deeper relationships with their audiences". (Google, What's Google News Showcase,https://support.google.com/news/publisher-center/answer/10018888?hl=en, accessed:31.01.2023.) Their content is used on the license basis, Google News pays the media outlets to provide readers with access to a limited amount of their paid content.

[418] S.H. Kessler, I. Engelmann, Why do we click? Investigating reasons for user selection on a news aggregator website, Communications, 2018, p.5, pp.1-23. See: F. Pasquale, The Black Box Society : The Secret Algorithms That Control Money and Information, Harvard University Press, 2015, pp.59-100.

[419] Google News Help, How Google News stories are selected, https://support.google.com/googlenews/answer/9005749?hl=en, accessed: 02.02.2023.

[420] The role of human in the distrubtion of news on Goolge News consist mostly in rating the content, see: The Cairncross Review. A sustainable future for journalism, 2019, p.28. See also: A. Strowel, J.N.Jeanneney, Quand Google défie le droit, De Boeck& Larcier, 2011, p.62; S.H. Kessler, I. Engelmann, Why do we click? …, p.6, pp.1-23.

[421] See: N. Smyrnaios, F. Rebillard, L'actualité …, p.96. ; The Cairncross Review. A sustainable future for journalism, 2019, pp.28-29.

[422] I. Engelmann, S. M. Luebke, S. H. Kessler, Effects …, p.786.

[423] S.H. Kessler, I. Engelmann, Why do we click? …, p.6.

[424] I. Engelmann, S. M. Luebke, S. H. Kessler, Effects …, p.786.

[425] S. Machlis, Inside the Google News algorithm, Computer World, 2009, https://www.computerworld.com/article/2467854/inside-the-google-news-algorithm.html, accessed: 02.02.2023.

[426] I. Engelmann, S. M. Luebke, S. H. Kessler, Effects …, p.786.

[427] N. Smyrnaios, F. Rebillard, L'actualité …, p.105.

[428] D. Goodwin, Google gives more visibility to local news publishers, https://searchengineland.com/google-news-local-visibility-showcase-panels-380139, accessed: 02.02.2023.

In the academic literature the lack of transparency as to the algorithmic rank of content on the news aggregators is sometimes pointed out[429]. It should be noted that Google News informs the readers (in general terms) how press publications available therein are ranked.[430]

As to the users' perception of the content, there is a relationship between the amount of information displayed by the news aggregators and the probability that readers will click on the link to read the article in its entirety. It should be acknowledged that the content displayed on news aggregators allows users to assess whether the article corresponds to their interests. For some of them, it constitutes already an important and, in many cases, sufficient source of information, what implies the decrease in clik-through rates. It has been proved that the longer the snippet is, the lower is the click-through rate[431]. However, when users have a choice between several publications, it is more likely that they click on a headline or snippet which is longer[432].

Google News, like platforms such as Facebook or Twitter are called "attention brokers" since their business model is based on attracting users by providing them with content for free and then on reselling their attention and their personal data to advertisers.[433] The users do not see the advertisements on the Google News's website but there are visible on other Google' services pages.[434]According to the T. L.Cobos, the profits of the aggregators are based "on the information they collect about the audience's behaviors and digital consumption".[435] They monetises the readers' attention and data

[429] D. Geradin, Complements …, pp.12,19; R. Evans, D. Jackson, J. Murphy, Google News and Machine Gatekeepers: Algorithmic Personalisation and News Diversity in Online News Search, Digital Journalism,2022, p. 5, pp.1-19; J.Ørmen, Googling the News, Digital Journalism, vol. 4, no. 1, 2016, p.111.
[430]On the home page of Google News the following text is displayed: "These news articles are ranked based on their quality, originality of content, freshness of content, your previous activity and purchases within Google News, and activity in other Google products. Google may have a license agreement with some of these publishers, but it has no impact on the ranking of results." See: Google News, https://news.google.com/home?hl=en-IE&gl=IE&ceid=IE:en, accessed: 02.02.2023.
[431] M. Calin *et al.*, Attention Allocation in Information. Rich Environments: The Case of News Aggregators, Boston University School of Management Research Paper Series, no 4, 2013, p.4.
[432] B. Martens *et al.*, The digital transformation …, p.19. See also: M. Calin *et al.*, Attention Allocation …, p.4.
[433] D. Geradin, Complements …, p.7.
[434] According to the Google News: Articles included on Google News sometimes serve advertisements, which are labeled as such. The publishers themselves manage these advertisements. Google could receive a portion of the payment from the advertiser. See: Google News Help, https://support.google.com/googlenews/answer/7688387?visit_id=638110151176350942-1588431607&p=consumer_info&rd=1, accessed: 03.02.2023.
[435] T. L. Cobos, New Scenarios in News Distribution: The Impact of News Aggregators Like Google News in The Media Outlets on the Web, in: S. Tosoni *et al.* (ed.), Present Scenarios of Media Production and Engagement, edition Lumière Bremen, 2017, p.98. See also: G. Doyle, 'Why ownership pluralism still matters in a multi-platform world' in: P. Valcke, M. Sükösd, R.G. Picard (ed.), Media pluralism and

through displaying the targeted advertising within its services.[436] This practice contributes to the reinforcement of the "winner takes all" or "winner takes most"[437] dynamics since one branch of the Google's business drives the other and this contributes to the increasingly strong position of this player in the market and the consequent weaker position and dependence of other media outlets including the one of press publishers·. This is even more relevant given that there is no charge for the use of news aggregator and one of the most important criteria for readers when choosing a service for accessing the news online is whether the service is free.[438]

To conclude:

- Google News is an important actor in news media ecosystem, especially from the perspective of digital transformation which determines the new modes of distribution and receiving information. It has increasingly strong position in the market which implies the consequent weaker position and dependence of press publishers. The important imbalances between these two actors should be highlighted.

- The news aggregator allows readers to have access to a wide variety of content. It saves their time and reduces cost since selected materials appear in a single place and constitute a basic source of information which can be always deepen by the visit on the press publishers' website[439]. Moreover, it is adapted to the changing readers' habits and offers the compilation of selected, matching with their interests' articles from different sources[440].

- There is a relationship between the amount of information displayed by the news aggregators and the probability that readers will click on the link to read the article in its entirety. When users have a choice between several publications, it is more likely that they click on a headline or snippet which is longer.

5.3.Relationship between Google and press publishers from market perspective

diversity. Concepts, risks and global trends, Palgrave Global Media Policy and Business Series, 2015, pp.297-309.

[436] European Publishers Council, Online Platforms and Digital Advertising Market Study Observations of the European Publishers Council (EPC) on the Statement of Scope, Sent to the Competition and Markets Authority on 30th July 2019, pp.3-5.

[437] P. L. Parcu, New digital threats …, p.94.

[438] Flash Eurobarometer 437 – TNS Political & Social, Internet users' preferences for accessing content online, Survey requested by the European Commission, Directorate-General for Communications Networks, Content and Technology and co-ordinated by the Directorate-General for Communication, 2016, p.5.

[439] L. Chiou and C. Tucker, Content …, p.1.

[440] J. Rutt, Aggregators …, p. 2.

Considering what has already been said, it is worth to focus now on the impact of Google News on the interests and functioning of press publishers. Based on the empirical studies and analysis conducted already in this field, I identified four characteristics of the relationship between these two actors which are: **competition, substitution, dependence, and complementarity.**

As regards the **competition**, the major online platforms, including Google, have "the unique data economies of scale and scope"[441] meaning that they have a significant number of users which equates to a rich set of data valuable for advertisers and a large audience to receive advertisements. The digital advertising market is highly concentrated and dominated by the large players. In 2021, Google generated 147 billion U.S. dollars in advertising revenue and is responsible for roughly 42 percent of the global ad revenue[442]. Moreover, the advertisers tend to favor user-oriented rather than context-oriented display of adverts[443]. Press publishers are not able to collect as much and as accurate information about users as online platforms. Moreover, they have also smaller audiences and all this together means that they are less attractive to advertisers. Therefore, these two actors compete for eyeballs and advertising revenues but, given what has been already said, press publishers are in a worse position.

Since the press sector becomes less and less reliant on advertising-based models, they are forced to look for other sources of revenues.[444] The dominance of Google News is even more difficult to accept for press publishers when taking into consideration its business model, based on the use of the press publishers' content. They accuse the aggregator of free riding and claim that it achieves its advertising revenues by exploiting their content without sharing the profits.[445]

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[441] European Publishers Council, Online Platforms and Digital Advertising Market Study Observations of the European Publishers Council (EPC) on the Statement of Scope, Sent to the Competition and Markets Authority on 30th July 2019, p.3.

[442]Statista, Advertising revenue generated by Google from 2017 to 2026, 2022, https://www.statista.com/statistics/539447/google-global-net-advertising-revenues/, accessed: 03.02.2023.

[443] D. Geradin, Complements …, p.14.

[444] See section 4.2. See: D. Geradin, Complements …, pp.1-26; D.S. Jeon, News Aggregators and Competition among Newspapers on the Internet, American Economic Journal: Microeconomics, vol.8, no.4, 2016, p.107; E. Bell *et al.*, The platform press. How Silicon Valley reengineered journalism, Tow Center for Digital Journalism, Columbia Journalism School,2017, p.43; T. L. Cobos, New Scenarios …, pp.101-102.

[445] The European Publishers Council points out that the content used by news aggregators is professionally produced under the editorial responsibility and legal liability of press publishers and is of vital importance for the attractivity and the mere existence of such a platform. (European Publishers Council, Online Platforms and Digital Advertising Market Study Observations of the European Publishers Council (EPC) on the Statement of Scope, Sent to the Competition and Markets Authority on 30th July 2019, p.6; see also: D. Geradin, Complements …, p.7.

47 % of consumers browse and read news extracts on the websites of social media, news aggregators and search engines without clicking on links to access the whole article in the newspaper page according to the survey requested by the European Commission in 2016.[446] The read of headlines displayed on the website on news aggregators for many users is enough to get the information and to know what the article is about. This is called 'scanning effect' which occurs when the news aggregators substitute press publisher's content.[447] In consequence, the reader does not click through to the publisher's website, neither reads his other publications, nor contributes to the advertising revenue. The decrease of the traffic to the newspaper home pages is described as "business stealing effect"[448] and results in financial losses for the press publishers.

According to the data provided by E. Bell "only 56 percent of online news consumers who had clicked on a link could recall the news source".[449] In addition to financial losses for press publishers, the loss of brand recognition should be pointed out.

News aggregators **substitutes** newspapers' websites. The reader is less aware of the source of the press material, the press publisher's brand is less perpetuated in the recipients' memory and therefore, less recognisable what may mean for example that less users will be willing to subscribe to the newspaper. This is primarily due to the fact that the news aggregators bypass the press publishers' home page and replace it with their own index page.[450] Moreover, press publishers point out that the activity of Google News may decrease the incentive to make the investments and to improve the quality of their publications and to strengthen the brand in the market.[451]

The relationship between these two actors is complex and contradictory. In some case, they are not only the substitutes or competitors but also, **they vertically complement each other**[452]. News aggregators, while using the content produced by press publishers,

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H. Coster, Google, Facebook pledged millions for local news. Was it enough?, Reuters, 2021, https://www.reuters.com/business/media-telecom/google-facebook-pledged-millions-local-news-was-it-enough-2021-06-10/, accessed: 03.02.2023.

[446] Flash Eurobarometer 437 Report, Internet users' preferences for accessing content online,2016, p.437. The reference to this data has been also made in the Impact Assessment on the modernisation of EU copyright rules Accompanying the document Proposal for a CDSM Directive.

[447] L. Chiou and C. Tucker, Content Aggregation …, p. 4.

[448] D.-S. Jeon, N. Nasr, News Aggregators …, p.93.

[449] E. Bell *et al.*, The platform press. …, p.35.

[450] Google News is considered as a complement to overall news reading and articles but a substitute for landing pages since it directly links to publishers' articles and not to their home pages. See: S. Athey, M. Mobius, J.Pal, The Impact of News Aggregators on Internet News Consumption: The Case of Localization, NBER Working Paper No. 28746, 2021, pp.14,18,https://www.nber.org/system/files/working_papers/w28746/w28746.pdf, accessed: 03.02.2023.

[451] See: D. Geradin, Complements …., p.11.

[452] See: D. Geradin, Complements …, p.2.

improve their visibility online and therefore, generate the traffic to their websites.[453] Consumers become informed about a number of outlets, can discover the new ones and find those which best match with their interests. This is particularly relevant in the context of small, niche and local publishers that readers do not know about but can discover through the news aggregators. Consumers learn that next to the well - known 'big name' news outlets are others, smaller, but also worth to be visited. Thanks to the news aggregators, newspapers are able to reach audience that they may not otherwise would have been able to reach[454]. On a side note, it should be pointed out that this may contribute to the increase of the competition between press publishers and reflects the opposite trend to "the winners take it all" principle press as regards the domination of large press publishers and big newspapers.

More visibility of press publishers means more traffic to their websites. According to data provided by audience analytics company Parse.ly, in 2015 Google and Facebook accounted of about 40% of all referral traffic to publishers.[455] Google claims that "each month, people click through from Google Search and Google News results to publishers' websites more than 24 billion times — that's over 9,000 clicks per second. By sending free traffic to news sites, we generate significant monetary value for publishers."[456] According to data provided by some French press publishers, search engines such as Google search account for, "depending on the publisher, between 26% and 90% of redirected traffic, and two thirds of this traffic on average. For more than three-quarters of SEPM respondents (and 80% of APIG respondents), this percentage is greater than 50%."[457] Multiplying the number of clicks by the value per click will produce a significant monetary value for press publishers.

An important source of data as regards the relationship between these two actors are the researches assessing the effects of conflicts between them. When Google News stopped to host the Associated Press content in France in 2009, firstly, 28% fewer users visited news websites where Associated Press articles were featured[458], and secondly,

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[453] L. Chiou and C. Tucker, Content Aggregation …, p. 1.
[454] D. Geradin, Complements …., p.11.
[455] A. VanNest, Facebook Dominates Referral Traffic: A Coverage Overview, Parse.ly, 2015, https://blog.parse.ly/facebook-dominates-referral-traffic-a-coverage-overview/, accessed: 04.02.2023.
[456] Google, How Google supports journalism and the news industry, https://blog.google/supportingnews/#overview, accessed: 04.02.2023.
[457] Decision 20-MC-01 of 9 April 2020 of French Autorité de la concurrence, p.51, https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2020-06/20-mc-01_en.pdf, accessed : 05.07.2023.).
[458] L. Chiou and C. Tucker, Content aggregation …, p.783.

users were less likely to visit other news websites[459]. After the shutdown of Google News in Spain in 2014, the Spanish news outlets noted the overall decrease of daily visits between 8% and 14%, with larger reduction in visits in relation to smaller and less known outlets[460]. NERA Economic Consulting reported 30% traffic decreases to some websites.[461] This shows how strongly connected these two actors are, and how dependent they are on each other.

News aggregators are particularly influential in increasing traffic to small and local press publishers[462]. According to S. Athey, M. Mobius, J. Pal, who examined the consequences of adoption of "local news" feature in France in 2009 by Google, the local outlets gain as much as 26,3% from the presence on Google News and article views increase by 44.6%. [463] They noted a 5% of increase in direct navigation to local outlets and 13 % of increase in clicks on local outlets from the Google news home page.[464] The previously discussed conflicts, in a significant manner, especially in the initial phase, affected the small publishers and resulted in the reduced traffic to their website and in consequence, in the financial losses.[465]

The relationship is marked by a peculiar dependency of the two actors. Google News is dependent on the content produced by press publishers. For the latter, but especially for small and local press publishers, visibility on news aggregators and the generated traffic is a matter of life and death. The fear of missing out and of encountering difficulties[466] in managing the websites traffic without any intermediaries makes some publishers unwilling to risk bad relations with Google. The asymmetries and noticeable imbalances of barging power between platforms and publishers of small and local newspapers should be pointed out. For many small and local publishers the risk of no

[459] L. Chiou and C. Tucker, Content aggregation …, p.785.
[460] J. Calzada, R. Gil, What Do News Aggregators Do? Evidence from Google News in Spain and Germany, Marketing Science, vol. 39, no.1, 2020, p.135.
[461] Impacto del Nuevo Artículo 32.2 de la Ley de Propiedad Intelectual Informe para la Asociación Española de Editoriales de Publicaciones Periódicas (AEEPP), p.6, https://clabe.org/pdf/InformeNera.pdf , accessed : 04.02.2023.
[462] See: F. Kalim, Popular news aggregators are now focusing on regional content, driving substantial traffic for publishers, What's new in publishing, 2020, https://whatsnewinpublishing.com/popular-news-aggregators-are-now-focusing-on-regional-content-driving-substantial-traffic-for-news-publishers/, accessed: 04.02.2023.
[463] S. Athey, M. Mobius, J. Pal, The Impact …, p.5, https://www.nber.org/system/files/working_papers/w28746/w28746.pdf, accessed: 03.02.2023.
[464] S. Athey, M. Mobius, J. Pal, The Impact …, p.5, https://www.nber.org/system/files/working_papers/w28746/w28746.pdf, accessed: 03.02.2023.
[465]See: J. Calzada, R. Gil, What Do …, p.135, pp.134-167; S. Athey, M. Mobius, J.Pal, The Impact …, pp.35-36, https://www.nber.org/system/files/working_papers/w28746/w28746.pdf, accessed: 03.02.2023.
[466] R.K. Nielsen, S.A. Ganter, Dealing …, p.1602.

longer being displayed means the end of their business[467]. T**hey are vulnerable to conditions dictated by news aggregators**. Moreover, it should be noted that given what has been already discussed, it is not in the interest of every press publisher, especially small and local, to have disputes with Google which can result in limiting their visibility on the aggregator's website or putting an end to displaying their content[468].

To conclude:

- It is not possible to conclude an absolutely positive or absolutely negative impact of news aggregators on press publishers. Their relationship is nuanced.

- In the area of advertising revenue, brand recognition or in terms of contributing to the scanning effect, news aggregators have a negative impact on the interests of press publishers. However, as to the raise of visibility of press publishers and the increase of traffic to their websites, this impact is positive and this is all the more important as regards the small and local publishers for whom the existence on news aggregators is of vital importance.[469]

5.4.News aggregators, access to information and media pluralism

To define the role of news aggregators in the context of media pluralism, the definition of the latter, discussed in the introduction to this chapter should be recalled. According to it, media pluralism is understood as **plurality and diversity of media supply, use and distribution**, in relation to 1) ownership and control, 2) media types and genres, 3) political viewpoints, 4) cultural expressions and 5) local and regional interests. The practice of news aggregators should be analysed in particular from the perspective of plurality and diversity of media distribution. Their activity consists in enabling access to information. The fact that a variety of content from multiple sources is presented determines that users have access to an important diversity (regardless of quality) of press publications. It is a well-established view in the academic literature that news aggregators are conducive to the increase of diversity of information in online environment.[470]They

[467] See: D. Geradin, Complements …, p.22.
[468] See: SudOuest, Bataille entre Google et la presse française : qu'est-ce que "le droit voisin" et quels sont les enjeux ?, https://www.sudouest.fr/international/europe/bataille-entre-google-et-la-presse-francaise-qu-est-ce-que-le-droit-voisin-et-quels-sont-les-enjeux-1716961.php, accessed : 07.02.2023.
[469]See: S. Athey, M. Mobius, J. Pal, The Impact …, pp. 1-36, https://www.nber.org/system/files/working_papers/w28746/w28746.pdf, accessed: 03.02.2023.
[470]N. Newman, R. Fletcher, Platform reliance, information intermediaries, and News Diversity. A look at the evidence, in: M. Moore, D. Tambini, The power of Google, Amazon, Facebook and people, Oxford University Press, 2018, p.133; see also: E. Nechushtai, S. C. Lewis, What kind of news gatekeepers do we

are gatekeepers, making the process of selecting, organising, scheduling, prioritising and distributing news.[471] They constitute a kind of "access industry" by organising and providing access for the general public to the output of the media outlets[472]. They play the role of intermediaries[473], connecting publishers with an important number of consumers. Press publishers are responsible for the provision of content to their readers, which is then disseminated on a much larger scale by news aggregators what contributes to the significant expansion of the original audience.

The access to information provided by news aggregators is broad. Firstly, it allows users to confront different political, social, economic views. This is in contrast to newspapers which are generally considered to present a particular line of views, providing content from either more liberal or more conservative perspective[474]. For this reason, news aggregators can be classified as neutral actor[475]. Secondly, users not only have access to the content currently on display, but can also search for information of their interest that was published earlier, months or years ago. The accessibility and availability of information is therefore long and depending on users' interests.[476] Thirdly, the information distributed through news aggregators are available for free which enhances users to use such a platform and increases their exposure to news. Lastly, the news aggregators, by ensuring the visibility of different press materials, including that produced by the unknown, small, local or niche press publishers, allow a wider audience to access content they would not have come across if they had not visited the aggregator's

want machines to be? Filter bubbles, fragmentation, and the normative dimensions of algorithmic recommendations, Computers in Human Behavior, vol.90, 2019, pp. 298-307.

[471] See: E. Nechushtai, S. C. Lewis, What kind …, p.299. See also: N. Smyrnaios, F.Rebillard, L'actualité …, p.96.

[472] N. Smyrnaios, F. Rebillard, L'actualité …, p.96.

[473] See: A. Del Águila, A. Padilla, C. Serarols, Value creation and news intermediaries on Internet: an exploratory analysis of the online news industry and the web content aggregators, International Journal of Information Management, vol. 27, no.3, 2007, pp.187-199.

[474] Results of the study conducted by R. Fletcher, R.K. Nielsen show that those who find news via search engines (i) on average use more sources of online news, (ii) are more likely to use both left-leaning and right-leaning online news sources, and (iii) have more balanced news repertoires in terms of using similar numbers of left-leaning and right-leaning sources". See: R. Fletcher, R. K. Nielsen, Automated Serendipity. The effect of using search engines on news repertoire balance and diversity, Digital Journalism, vol. 6, no. 8, 2018, p.986.

[475] However, it should be pointed out that the neutrality of news aggregators being the important actors in distribution of information is called into question by the fact that the decision to distribute information is in this case entrusted to large private companies that pursue specific interests and may display the kind of information that corresponds to those interests. See: R. K. Nielsen, S.A. Ganter, Dealing …, p.1605; F. Pasquale, The Black …, pp.59-100.

[476] The same search facility is offered by some newspapers, see for example the home page of Le Figaro: https://www.lefigaro.fr, accessed:06.02.2023.

website[477]. Moreover, it has been noted that news aggregators contribute to the increase of the competition between press publishers, which in turn results in improving the quality of the content displayed[478].

In the academic literature, two different kinds of access have been identified. The access can be either direct which means that the user goes straight to the homepage of the news outlets or distributed which means that the user arrives at the home page of the media outlet through platform such as Google News.[479]

"Google is able to make a profit from any Internet user accessing news content on the Internet, whether this access takes place through a news-related search on (Google) Search and results in the display of protected content, or via any other means. In the case of an Internet user that uses the general search engine Search, Google is in fact able to collect revenues, whether or not the Internet user clicks on a link displaying protected content and redirecting it to a press publisher's website. In the case of an Internet user that accesses a press publisher's website by a means other than Search, Google can still take advantage of its role as an intermediary in online advertising. Thus, unlike publishers, which are still dependent for their advertising revenue solely on the traffic directed to them, Google derives a benefit from any Internet user search for news, even though it does not produce news content."[480]

The lastly conducted research show that distributed access constitutes the main way of accessing news online for an important number of readers.[481] It is governed to some extent by self-selection but mostly, by algorithmic selection resulting in content recommendation[482]. The latter is perceived as a threat to media pluralism. According to the Committee of Ministers to Member States, the control over the flow, availability, findability and accessibility of information and other content online acquired by online intermediaries "may affect the variety of media sources that individuals are exposed to

[477] See: R. Evans, D. Jackson, J. Murphy, Google News …, p.14.
[478] D.-S. Jeon, N. Nasr, News Aggregators …, pp.93,107.
[479] R. Fletcher, A. Kalogeropoulos, R. K. Nielsen, More diverse, more politically varied: How social media, search engines and aggregators shape news repertoires in the United Kingdom, New media & society, vol.0, no.0, 2021, pp.2-3.
[480] Decision 20-MC-01 of 9 April 2020 of French Autorité de la concurrence, p.50, https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2020-06/20-mc-01_en.pdf, accessed : 05.07.2023.).
[481] According to the Reuters Institute Digital News Report around 65% surveyed people prefer to get to news though side door. See: N. Newman *et al.*, Reuters Institute Digital News Report 2018, p.13.
[482]See: F. J. Zuiderveen Borgesius *et al.*, Should we worry about filter bubbles?, Internet Policy Review, vol. 5, no.1, 2016, pp.1–16. See also: D. Wilding, P. Fray, S. Molitorisz and E. McKewon, Centre …, pp.60-61.

and result in their selecting or being exposed to information that confirms their existing views and opinions, which is further reinforced by exchange with other like-minded individuals (this phenomenon is sometimes referred to as a "filter bubble" or "echo chamber"). Selective exposure to media content and the resulting limitations on its use can generate fragmentation and result in a more polarised society."[483]

Phenomenon of filter bubbles and echo chambers is considered of having negative impact on media diversity and in wider perspective, on media pluralism[484]. It is therefore necessary to examine whether news aggregators contribute to their creation. According to the recent studies, there is no proof that news aggregators prioritise the distribution of like-minded content and content that conforms to already existing preferences what could lead to the fragmentation of the society.[485] It has not been proven that the information displayed on Google News differs significantly depending on user profiles.[486] In addition, there are the studies which show that aggregation increases the diversity of sources consulted.[487] J. Calzada and R. Gil point that "aggregators offer content of a higher quality and variety than traditional news outlets, which induce consumers to read more news stories".[488]

Personalisation has the potential to provide users with a diverse and rich range of information. In addition, more technologically advanced algorithms take into account the objectives such as ensuring the diversity of the content while selecting the information to be displayed.[489] It is worth to point out that Google News, as part of its redesign in 2018

[483] Committee of Ministers, Recommendation CM/Rec (2018)1 of the Committee of Ministers to member States on media pluralism and transparency of media ownership, Adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers' Deputies, https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680790e13 , accessed: 06.02.2023.
[484] Pluralisme des médias et enjeux de la concurrence, Observatoire européen de l'audiovisuel, 2020, pp.6-7.
[485] J. Moeller, N. Helberger, Beyond the filter bubble: Concepts, myths, evidence and issues for future debates, 2018, pp.1-29, https://www.ivir.nl/publicaties/download/Beyond_the_filter_bubble__concepts_myths_evidence_and_issues_for_future_debates.pdf, accessed: 06.02.2023.
[486] See the results of the study conducted by M. Haim, A, Graefe, H. -B., Brosius, Burst of the Filter Bubble? Effects of personalization on the diversity of Google News. Digital Journalism, vol. 6, no.3, 2018, pp. 334-335; See also: R. Evans, D. Jackson, J. Murphy, Google News …, pp.14-15.
R. Fletcher, A. Kalogeropoulos, R. K. Nielsen, More diverse, …, pp.2-3.
[487] L.M. George, Ch. Hogendorn, Local News online: aggregators, geo-targeting and the market for local news, The journal of industrial economics, vol. LXVIII, no.4,2020, p.816.
[488] J. Calzada, R. Gil, What Do …, p.139.
[489] J. Moeller, N. Helberger, Beyond …, pp.24-25, https://www.ivir.nl/publicaties/download/Beyond_the_filter_bubble__concepts_myths_evidence_and_issues_for_future_debates.pdf, accessed: 06.02.2023.

has offered the users the possibility to opt out of the content personalisation[490]. Therefore, it should be repeated after M. Haim, A, Graefe, H.-B.Brosius that the filter-bubble phenomenon in the case of algorithmic personalisation within Google News may be overestimated.[491] N. Helberger and J. Moeller point interestingly that concerns about filter bubbles may lead to discouraging media companies in Europe from investing in new technologies to explore better ways of distributing content, offering better services and competing with other platforms.[492]

In this context, I identified another problem that has not been discussed in the academic literature in details yet and has not been the subject of much research so far. I see a risk of favoring content from certain publishers by Google News leading to over-representation of some media outlets and under- representation of others. Google News decides what information from which publishers it distributes and therefore, in this aspect the press publishers are dependent on the aggregator. It may happen that many articles from one press publisher will be displayed on the news aggregator's website and nothing from another press publisher for a certain period of time. There can be two justifications for such practices. The first one relates to the technical aspects of functioning of Google News and the fact that the algorithms may favor highly up to date information or the one including the popular keywords. The second one regards the relationship between the news aggregator and the press publishers. Since some of them engaged in legal disputes with Google News, it can be assumed that the platform by wanting to punish them in a certain way, will partially exclude their content.[493] It should be specified that this topic still needs to be examined through the empirical studies. In addition, it is worth to be highlighted that the news aggregators have the freedom to provide services and, unless anything contrary has been agreed, are not obliged to display a certain amount of content from certain publishers. Nevertheless, the users should be aware that such practices may take place especially in case when, news aggregators constitute for them the only source of information.

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[490] See: E. Nechushtai, S. C. Lewis, What kind …, p.301, pp. 298-307; see also: Android News, The new Google News: AI meets human intelligence, https://ndrdnws.blogspot.com/2018/05/the-new-google-news-ai-meets-human.html, accessed: 07.02.2023.

[491] M. Haim, A, Graefe, H. -B., Brosius, Burst …, p.339.

[492] J. Moeller, N. Helberger, Beyond …, pp.24-25, https://www.ivir.nl/publicaties/download/Beyond_the_filter_bubble__concepts_myths_evidence_and_issues_for_future_debates.pdf, accessed: 06.02.2023.

[493] See: M. Haim, A, Graefe, H. -B., Brosius, Burst …, p.339.

To conclude:

- News aggregators are conducive to the increase of diversity of information in the online environment. Their role in enabling access to information constists in selecting, organising, scheduling, prioritising and distributing news, organising and providing access for the general public to the output of the media outlets and connecting publishers with an important number of consumers.

- The filter-bubble phenomenon in the case of algorithmic personalisation within Google News does not constitute a threat for the safeguard for media pluralism.

- I see a risk of favoring content from certain publishers by Google News leading to over-representation of some media outlets and under- representation of others which can have the negative consequences on media pluralism.

6. Conclusion

The legislative interference into area of rights and freedoms protected by Charter has to be justified. The role of legislator is to assess whether the law it proposes does not interfere with the fundamental rights and, if it does, whether it meets the criteria justifying that interference. It should examine in particular, whether the proposed law pursues a legitimate aim and is necessary what means that the adopted measures should be suitable for achieving the pursued objective. Moreover, it should assess whether the interference should be adequately comprehesible and foreseeable what means that the law should be formulated with sufficient precision to enable individuals to understand how they should behave and what would be the consequences which a given behavior may entail. Finally, it is important to examine whether there is no measure that could be less intrusive in achieving of a legitimate goal and that could cause less prejudice to the right the interference with takes place and whether the proposed legal solution is proportional. This is a framework that constitutes a basis when adopting the new regulation. It should be taken into account by the EU legislator while adopting the related rights of press publishers.

This assessment is very often complex. Not always all factors can be considered due to technological development or unpredictable human behavior. Only a thorough evaluation of the proposed legal solution, conducted according to the indicated criteria can lead to a minimization of its possible negative impact on other fundamental rights.

Media pluralism and access to information have been discussed in a number of contexts in this chapter. The provided analysis discussed also the ongoing transformation

and technological development of press sector. This is related to the need to adapt business models, to seek new sources of revenue and make a different type of investment compared to the bygone age of printed press. Adapting to the pace of change and its technical complexity can be particularly challenging for small and local publishers. They are the victims of the winner-take-all dynamic, both when it comes to competing with larger press publishers and with online platforms. They are also the ones most likely to enter into partnerships with the latter, giving them the online visibility, they need to survive. The difficult situation of small and local press publishers, many going out of business, can be considered as a threat to media pluralism.

Given the emerging asymmetries within the press sector and the discussed difficult economic situation of, in particular, small and local publishers, I consider that the States should act as the guarantors of media pluralism. Therefore, firstly, the state aid for publishers should be strengthened with a particular focus on small and local publishers and especially, as regards the support for their technological transition. Secondly, and this will be a recommendation that merely reiterates what has already been said, in the legislative process for the enactment of law directly or indirectly concerning the situation of press publishers, the legislator should take due account of all factors that may be potentially conflicting and interfering with the public' interests, impacting the right to receive information and the safeguard for media pluralism. In this context, the complex landscape of the press sector, and the differences between the situation of large and small publishers, should be taken into account.

An important role, as regards enabling access to information and contributing to protection of media pluralism is played by news aggregators. It is not possible to conclude an absolutely positive or absolutely negative impact of news aggregators on press publishers' interests. Their relationship is nuanced. In the area of advertising revenue, brand recognition or in terms of contributing to the scanning effect, news aggregators have a negative impact on the interests of press publishers. However, as to the rise of visibility of press publishers and the increase of traffic to their websites, this impact is positive and this is all the more important as regards the small and local publishers for whom the existence on news aggregators is of vital importance. The latter should be taken into account by legislator while regulating the relationship between press publishers and news aggregators.

Chapter II: Copyright protection of press publication in light of international, EU and national laws

1. Introduction

Since the adoption of the related rights of press publishers brings changes to the legal framework for access to information, in order to determine the scope of these changes, the framework for access to information in copyright law before the adoption of art. 15 of the CDSM Directive is provided in this chapter. The focus is on the protection in press publishing sector. My objective is firstly, to specify the limits of the copyright protection in the area of access to information. Secondly, I will demonstrate how and to what extent press publication and its elements are protected in the framework of copyright law. Thirdly, I will indicate who is the holder of exclusive rights to press publication and its elements and outline the scope of protection, focusing especially on the legal situation of press publishers.

The definitions of terms: 'information' and 'access to information' provided in the first chapter are relevant for the following study. Here, however, these terms will be used in the context of the analysis of copyright law. Information may take the form of idea, principle, news of the day, miscellaneous fact or official reports and therefore, be excluded from copyright protection. It may also be transformed and expressed in a creative way being therefore a part of a work protected by copyright. Enjoying of work, its listening, reading or viewing constitute a determinant of intellectual access to work which is not restricted by copyright. What is under control, as the result of copyright protection, is the diffusion and the exploitation of works which enables users to obtain a physical access to work. The latter leads to the intellectual access to work and these two accesses are inextricably linked.

This chapter starts with the analysis of the concept of public domain. It will serve the discussion on the role of public domain in enabling and increasing access to information. In section 3, the analysis relates to the copyright protection of press publication and its elements. I understand a press publication as the result of press publishing activity. It can be for example an article in print or digital form containing the elements such as headline, excerpt of the article, picture or video published in a newspaper or on the website of

newspaper or other website managed by media organisation. Press publication aims at communicating either news or information not related to current events.

Section 4 focuses on holder of exclusive rights. I discuss especially the legal situation of publisher of collective work and employer in the framework of employment contract. In section 5 the analysis of exclusive rights: right of reproduction, distribution and communication to the public, rental and lending rights is provided and aims at enabling a better understanding of how the rightholder's interests are protected within the copyright framework and what is the scope of this protection. The objective is to determine what is the power of entities protected by copyright in enabling, determining, controlling and influencing the access to work and information included therein.

Exceptions and limitations are the key instrument to delimitate the exact contours of the exclusive rights. Their main purpose is to balance the public interest with the interests of rightholders in matter of access to works and their dissemination. In section 6 a comprehensive study of their scope, character and types is provided with a special attention to exceptions and limitations important in the context of the use of press publication. Lastly, section 7 focuses on technological protection of access to a work.

The analysis conducted in this chapter enables an understanding of the scope of copyright protection from the perspective of international, EU, French and Polish law. It should be however specified that study of international law is subsidiary to the central study of the EU law and serves as a tool to better understand the context, rationale, purpose and meaning of the solutions adopted later at the EU level. The analysis encompasses the national solutions adopted in Poland and France. It is of particular importance to determine how the press publications was protected and what was the framework of access to it by the public prior to the implementation of the press publishers' rights in these Member States. Moreover, due to the lack of specific measures as regards for example holder of rights to press publication before the adoption of the said right in the EU law, the research covering the national grounds is necessary.

The analysis intends to determine the copyright framework for access to information and press publishing activity. These two threads intermingle and their in-depth study offers a complete background for the further study of the press publishers related rights and the consequences of their introduction on the access to information and media pluralism.

2. Public domain

The aim of this section is to provide a brief analysis of the structure and scope of public domain in order to discuss its role in **enabling and increasing the access to information.**

The term 'public domain' rarely appears in the legislations[494]. It is also in vain to look for its legal definition which in consequence may mean that the actual scope of the public domain is difficult to determine.[495] Public domain exists *de facto* and its understanding is rather reconstructed by scholars through the negative[496] approach encompassing anything that is not covered by copyright protection. Some academics claim that copyright could be seen as an exception to public domain, to the natural principle of free circulation of works and knowledge.[497] Public domain guarantees an absolute and unrestricted enjoyment of the components it contains. The name speaks for itself, the elements in the domain, are public, belonging to everyone.

Ideas, facts, principles and methods form[498] a basis of public domain. They can be used by anyone[499] to be creatively expressed and this creative expression can deserve copyright protection.[500] Public domain is a building block of intellectual process which enables innovation and creation. Access to ideas, fact, principles and methods is unrestricted and uncontrolled and should be perceived as the main factor of societal

[494] V-L. Benabou, S. Dusollier, Draw me a public domain, in. P. Torremans (ed.), Copyright Law. A Handbook of Contemporary Research, Edward Elgar Publishing, 2007, p.164.
[495] E. Czarny- Drożdżejko, Utwór i przedmioty praw pokrewnych w systemie polskim i francuskim, vol. 2, Uniwersytet Papieski Jana Pawła II w Krakowie, 2019, pp.53-62, http://bc.upjp2.edu.pl/Content/4896/Utwór_przedmioty_praw_pokrewnych_rep.pdf, accessed: 14.04.2023.
[496] See: M. Birnhack, More or Better? Shaping the public domain in: P.B. Hugenholtz, L. Guibault (eds.), The public domain of information, Kluwer Law International, 2005, pp.59-86.
[497] K. Gliściński, Komentarz do art. 17 Ustawy o prawie autorskim i prawach pokrewnych in: A. Michalak (ed.) Ustawa oprawie autorskim i prawach pokrewnych, Komentarz, C.H. Beck, 2019, Legalis, points 1-2. See also: M.D. de Rosnay, H. Le Crosnier, Le domaine public, in : M.D. de Rosnay, H. Le Crosnier (ed.), Propriété intellectuelle, Géopolitique et mondialisation, Les essentiels d'Hermès, 2013, pp.37-54, https://books.openedition.org/editionscnrs/19461, accessed : 14.04.2023.
[498]Art. 8 (2) of the Berne Convention states that the copyright protection does not apply to "news of the day or to miscellaneous facts having the character of mere items of press information". According to the art. 9 (2) of TRIPS „Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such"; according to art. 2 of WIPO Copyright Treaty adopted in Geneva in 1996 (hereinafter: WCT) "Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such".
[499] Ch. Geiger, Droit d'auteur et droit du public a l'information Approche du droit comparé, Le droit des affaires Propriété intellectuelle, Institut de Recherche en Propriété Intellectuelle Henri Desbois, Paris 2004, p.8 ; K. J. Koelman, The Public Domain Commodified: Technological Measures and Productive Information Usage in: L. Guibault, P.B. Hugenholtz (eds.),The Future of the Public Domain, Kluwer 2006,p.106.
[500] K. J. Koelman, The Public Domain Commodified: Technological Measures and Productive Information Usage in: L. Guibault, P.B. Hugenholtz (eds.), The Future of the Public Domain, Kluwer 2006,p.106.

development.[501]

Public domain contains the elements that do not meet the requirements of copyright protection. Some degree of originality, but also, in certain legislations, individuality or fixations of the expression of intellectual creation are indispensable to qualify a subject matter as a work. If a result of the said expression does not have these features, it falls into the scope of public domain.

Another element of public domain are works in respect of which the copyright protection has expired.[502]It contains also the elements excluded from copyright protection on the public policy basis[503] such as news of the day and miscellaneous facts or official acts. Finally, it can also include works that are relinquished into the public domain through the voluntary act of the author of the work.[504]

Public domain aims at fostering the creative development or increasing economic advantages related to the re-use of unprotected works or never protected elements. The informative and cultural heritage rationales laying behind public domain are particularly important from the perspective of this dissertation. Public domain serves and increases access to information[505]. To illustrate, the same fact, being part of public domain, can constitute a basis for many different press articles.

The wider the scope of public domain is, the wider is also the access to information. However, such an extension is beneficial for recipients of information[506] but not necessarily for authors whose works are protected by copyright. The public domain can be restricted by the introduction of a new subject matter of protection including the elements not previously protected, or due to the extension of the term of protection of the subject matters already protected.

To conclude:

[501] See section 3.1. for the in-depth analysis of idea/expression dichotomy. See: J. Barta, R. Markiewicz, Prawo autorskie, Wolters Kluwer, 4 wydanie, 2016, p.60.
[502] The term of protection for copyright has be harmonised at 70 years after the death of the author or 70 years after the work is lawfully made available to the public within the EU law in the Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights.
[503] See: S. Dusollier, Scoping study on copyright and related rights and the public domain, WIPO, 2010, p.20
[504] See: Creative CommonsPolska, Poznaj licencje Creative Commons, https://creativecommons.pl/poznaj-licencje-creative-commons/, accessed: 14.04.2023.
[505] A. Niewęgłowski, Komentarz do art.4 in: A. Niewęgłowski (ed.), Prawo autorskie, Komentarz, Wolters Kluwer 2021, LEX, point.2.
[506] Understood also as future creators who would make use of what is in the public domain.

- Public domain encompasses the following categories of elements: - never protected subject matters, - works to which protection has expired, - elements excluded from protection on the public policy basis such as news of the day and miscellaneous facts or official acts, - works which were relinquished into the public domain through the voluntary act of their authors. These elements can be accessed by anyone, and this does not involve meeting any criteria.

- Any restriction of public domain, for example by extending the copyright protection to a subject matter which has not been previously protected, can constitute also a restriction of access to the information contained in that subject matter.

3. Work as a subject matter of copyright protection

The objective of this section is firstly, to provide a general analysis of the concept of work under the international, EU, French and Polish copyright law. Secondly, the research will focus on the protection of press publication and its components. Its aim will be to establish which results of press publishing activity are protected by copyright law and which ones fall outside the scope of protection.

3.1.Introductory remarks

A. International law

The Berne Convention, considered as the most relevant Convention in the field[507], does not provide any definition of the subject matter of copyright protection explicitly. The concept of work can be reconstructed from art. 2 (1) which extends the copyright protection to every production in the literary, scientific and artistic domain, whatever may be the mode and form of its expression and provides the non - exhaustive list of examples of expressions of literary and artistic works.

The term 'expression' has been considered by a WIPO Committee of Experts as the synonymous with "intellectual creation"[508] which is distinguished by originality[509]. Even though the requisite of "intellectual creation" is not mentioned in the provision form art.2(1) of the Berne Convention, it appears in art. 2 (5) in relation to collections of literary

[507]T. Margoni, The harmonisation of EU copyright law: The originality standard, in: M. Perry, (ed.), Global Governance of Intellectual Property in the 21st Century, 2016, Springer International Publishing: Switzerland, p. p.87.
[508] D. Gervais, La notion d'œuvre dans la Convention de Berne et en droit comparé, Libraire Droz, 1998, pp.45-49.
[509] T. Margoni, The harmonisation …, p.87.

or artistic works. The latter constitutes an intellectual creation by reason of the selection and arrangement of their content and therefore, is protected by copyright. It has been said that the introduction of the notion of "intellectual creations" was indispensable in case of the provision from art. 2 (5) but its application to any other scientific or literary works is evident and does not need to be mentioned explicitly.[510] The exact level of originality needed for protection to be granted has not been specified and remains a matter for national legislators[511].

The protection resulting from the Convention is granted on the basis of the principle of national treatment and the principle of minimum rights. According to the first one, works originating in one of the Member States must be protected in each of the Member States in the same way that such States protect the works of their own nationals[512]. According to the second pillar of a satisfactory international protection[513], the principle of minimum rights, a certain level of protection laid down in the treaty, irrespective of the national law in which the protection is sought should be granted[514].

The protection does not apply to the news of the day or to miscellaneous facts having the character of mere items of press information as stated in art. 2 (8) of the Convention. According to C. Masouyé, this provision confirms "the general principle that for a work to be protected, it must contain a sufficient element of intellectual creation".[515]

The distinction between literary and artistic works protected by copyright and other subject matters like facts or ideas excluded from protection does not stem directly from the Berne Convention. According to S. von Lewinski, it could be however deduced, since what is protected, are the productions in whatever mode or 'expressions' understood as manifestation of thoughts and feelings. Therefore, simple ideas, concepts, facts,

[510] S. Ricketson, Threshold …, p.57. D. J. Gervais, Feist Goes Global: A comparative analysis of the notion of originality in copyright law, Journal of the Copyright Society of the USA, vol.49, 2002, pp.970-972, pp. 949-981; E.F. Judge, D. Gervais, Of Silos and Constellations: Comparing Notions of Originality in Copyright Law, Cardozo Arts & Entertainment Law Journal, vol. 27, no.2, 2009, pp.399-402.
[511] L. R. Helfer, Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy, Harvard International Law Journal, vol. 39, no.2, 1998, p. 369.
[512] See: M. Barczewski, Traktatowa ochrona praw autorskich i praw pokrewnych, Wolters Kluwer Polska, 2007, pp.42-45; J. Błeszyński, Konwencja berneńska a polskie prawo autorskie, Wydawnictwo Naukowe PWN, 1979, p.22.
[513] S. von Lewinski, International Copyright Law and Policy, Oxford University Press, 2013, p.100.
[514] S. von Lewinski, International Copyright…, p.100. See also: K. Grzybczyk, Komentarz do art.7, in. P. Ślęzak, (ed.), Ustawa o prawie autorskim i prawach pokrewnych. Komentarz, C.H. Beck,2017, Legalis, points 1-4.
[515] C. Masouyé, WIPO Guide to the Berne Convention for the Protection of Literary and artistic works, (Paris Act, 1971) WIPO 1978, p.23. See also: P. Goldstein, B. P. Hugenholtz, International Copyright: Principles, Law, Practice, Oxford University Press, 2013, p.220.

missing this expression part, are excluded from protection.[516] The idea/ expression dichotomy was expressly incorporated by the TRIPS in art.9 (2) and by the WCT in art 2.[517] The copyright protection does not extend to ideas, methods and processes.[518]

B. EU law

The Berne Convention and the subsequent international treaties constitute the basis for the harmonisation of copyright in the EU law. The European Union is not a signatory of the Berne Convention. However, according to the WCT of which the EU is a contracting party, the EU is obliged to comply with articles 1 to 21 of the Berne Convention[519]. The TRIPS Agreement and the WCT are binding for the EU being the signatory of them. The provisions of international agreements concluded by the UE are the integral part of the UE legal order.[520] They are, according to art.216 (2) of the TFEU binding upon the institutions of the Union and on its Member States which means that the compatibility of directives harmonising copyright and related rights has to be assessed with these international agreements.

The competence of the European Union to act in the copyright field is based on the provisions from articles 26 and 114 of TFEU rooting copyright in the functioning of internal market.[521] This has been seen as one of the origins of 'piecemeal legislation'[522] in the matter of copyright, reasoned by the limited power that the EU had in regulating this area. Indeed, EU copyright law harmonisation is fragmented and concerns specific

[516] S. von Lewinski, International Copyright …, p.123.
[517] TRIPS Agreement and the WCT, apart from this important addition in relation to Berne Convention, require the compliance with most of the provisions of the latter and extend the copyright protection to computer programs and databases.
[518] TRIPS art. 9 (2) „Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such"; WCT, art. 2 " Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such".
[519] CJEU, Football Association Premier League Ltd and Others v QC Leisure and Others and Karen Murphy v Media Protection Services Ltd, Cases C-403/08 and C-429/08, 4 October 2011, para.189, hereinafter: Murphy.
[520] See: The European Journal of International Law, Direct Effect of International Agreements of the European Union, , vol.25, no.1, 2014, pp.132-136, https://arpi.unipi.it/retrieve/e0d6c92a-f764-fcf8-e053-d805fe0aa794/direct%20effect%20Martines%20EJIL%20.pdf, accessed: 16.04.2023.
[521] See: A. Ramalho, Conceptualising the European Union's Competence in Copyright – What Can the EU Do?, IIC- International Review of Intellectual Property and Competition Law, vol.45, 2014, pp.178-200.
[522] E. Rosati, Judge - made EU copyright harmonisation. The case of originality, European University Institute, 2012, p.51; T. Margoni, The harmonization…, p.85; M. van Eechoud, Along the Road to Uniformity – diverse readings of the Court of Justice Judgements on Copyright Work, Journal of Intellectual Property, Information Technology and Electronic Commerce Law, vol.3, no.1, 2012, p. 73.

subject matters, i.e. computer programs, photographs and databases, considered of having particular importance for the smooth functioning of the EU internal market.[523]

According to art. 1 (3) of Directive 2009/24/EC of 23 April 2009 on the legal protection of computer programs[524], a computer program shall be protected if it is original in the sense that it is the author's own intellectual creation. No other criteria shall be applied to determine its eligibility for protection. The main purpose of this provision is to harmonise the threshold that software has to meet to be protected under copyright law. It is formulated on the basis of the criterion of "originality" and the "author's own intellectual creation" which have been already discussed in the framework of the analysis of art. 2 of the Berne Convention. According to L. Bently "the criterion of 'author's own intellectual creation requires that the work has not been copied and displays some minimal level of individuality".[525] The introduction of this criterion is linked to the adoption of a "standardised level of originality"[526] which became a reference model to determine the standards of originality when it comes to photographs[527] and databases.[528]

The directives which relate to the rights of author without reference to the specific subject matter of the copyright protection are: the Directive 2006/115/EC of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property[529] and the Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society[530]. Even though the notion of work appears in these acts, it is not further defined. Therefore, the general scheme provided in art. 2(5) and 2 (8) of the Berne Convention according to which protection of certain subject matters results from the fact that they are the intellectual creations applies[531].

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[523] T. Margoni, The harmonisation …, p.85.
[524] Hereinafter: Computer Programs Directive.
[525] L. Bently in: T. Dreier, B. Hugenholtz (eds.), Concise European Copyright Law, Kluwer Law International, 2006, p.217.
[526] T. Margoni, The harmonisation …, p.91, pp. 85-105.
[527] See: Directive 2006/116/EC of 12 December 2006 on the term of protection of copyright and certain related rights, hereinafter: Term Directive.
[528] See: Art. 3 (1) of Directive 96/9 of March 1996 on the legal protection of databases, hereinafter: Databases Directive. The first EU Directive on the legal protection of computer programs was Council Directive 91/250/EEC of 14 May 1991 which was formally replaced by Directive 2009/24/EC on 25 May 2009.
[529] Hereinafter: Rental and lending rights directive.
[530] Hereinafter: Infosoc Directive.
[531] The rationale for this is that the EU legislator chose to introduce definitions of works in relation to specific subject matters only in the cases when the general and basic definition from the Berne Convention required some further specification.

The CJEU has proven a proactive attitude[532] by interpreting the EU law and in consequence, by expanding it horizontally.[533] The key CJUE judgements in the area will be discussed briefly in order to establish a line of cases resulting in autonomous EU concept of work.

Infopaq[534] offers a baseline for the concept of originality in the EU.[535] The case concerned the activity of Infopaq, media monitoring organisation, which scanned articles from newspapers in order to perform electronic searches and to print short text extracts of 11 words without asking for the authorisation of the rightholder. The question whether 11 words could be considered as a work to which the reproduction right extends has been discussed. Firstly, the CJEU extended the criterion of originality which from then applies **to all categories of works**. It pointed out that copyright within the meaning of art. 2(a) of InfoSoc Directive may be applied to "any subject matter which is original in the sense that it is its author's own intellectual creation".[536] This important change introduced by the CJEU means that regardless of the type of the subject matter or its specific characteristics, its copyright protection should be assessed on the basis of the originality criterion.

Secondly, the CJEU made a step towards a more comprehensive harmonisation of the threshold for copyright protection by arguing that the parts of work, regardless of their size, can enjoy the copyright protection. The only condition is that "they contain elements which are the expression of the intellectual creation of the author of the work"[537] reflected through "the choice, sequence and combination of these elements"[538] enabling the author to "express his creativity in an original manner and achieve a result which is an intellectual creation"[539]. Therefore, rather than examining the number of elements that make up the subject matter, the question about the originality of these elements based on their choice, sequence or combination by author should be asked. [540] The CJEU gave

[532] I. A. Stamatoudi, Originality under EU copyright law in: P. Torremans, (ed.), Research Handbook on Copyright Law, Edward Elgar Publishing, 2017, p. 62.
[533]T. Margoni, The harmonisation …, p.86. See: J Griffiths, The role of the Court of Justice in the development of European Union copyright law, in: I. Stamatoudi, P. Torremans, (eds.), EU copyright law – A commentary, Edward Elgar, 2014, §§20.06-20.16.
[534]CJEU, Infopaq International A/S v Danske Dagblades Forening, case C-5/08, 16 July 2009.
[535] I. A. Stamatoudi, …, pp. 64-65.
[536] CJEU, Infopaq, para. 37.
[537] CJEU, Infopaq, para. 39.
[538] CJEU, Infopaq, para. 45.
[539] CJEU, Infopaq, para. 45.
[540] See: C. Moran, How Much Is Too Much? Copyright Protection of Short Portions of Text in the United States and European Union after Infopaq International A/S v. Danske Dagblades, Washington Journal of Law, Technology & Arts, vol. 6, no.3, 2011, p.10; B.Michaux, La notion d'originalité en droit d'auteur: une

priority to the qualitative and not quantitative understanding of the threshold of the copyright protection. The role of the author who decides on the shape of the work by selecting and arranging its elements what makes the work original since it reflects the author's intellectual choices has been underlined.

In Painer case, which concerned the use by certain newspapers of portrait photographs of Natascha K. taken by a freelance portrait photographer, Ms. Painer, the CJEU underlined that an intellectual creation is an author's own creation if it reflects the author's personality. It should be expressed by his/her "creative abilities in the production of the work through free and creative choices".[541] The CJEU added that while making the various choices, the author stamps the work created with his/her "personal touch"[542]. M. Vivant and J.-M. Bruguière point out that the author's possibility to choose is the most important reflection of the creative freedom.[543] In this vain, D. Gervais and E. F. Judge observe that this is what makes a distinction between creative and technical works, since the latter do not reflect the author's personality due to the lack of creative choices.[544] This reasoning appears in Football Dataco case where the CJEU ruled that the copyright protection does not extend to databases when their setting up is dictated by "technical considerations, rules or constraints not leaving room for creative freedom".[545] In Murphy case, which concerned restriction of the sale of European foreign satellite decoder cards in the context of freedom to provide services, the CJEU stated that where there is no room for creative freedom of author there is no intellectual creation and no work within the copyright understanding.[546] Similary, in Funke Medien, the case related to the publication of confidential military reports[547] in a newspaper, the CJEU considered that "the mere intellectual effort and skill of creating those reports are not relevant"[548] as regards the originality which arises "from the choice, sequence and combination of the words by which the author expressed his or her creativity in an original manner and achieved a

harmonisation communautaire en marche accélérée, Revue de Droit Commercial Belge,2012, https://www.rdc-tbh.be/nl/article/?docEtiq=rdc_tbh2012_6p599, accessed: 03.08.2022.

[541] CJEU, Eva-Maria Painer v Standard VerlagsGmbH, Axel Springer AG, Süddeutsche Zeitung GmbH, Spiegel-Verlag Rudolf Augstein GmbH & Co KG, Verlag M. DuMont Schauberg Expedition der Kölnischen Zeitung GmbH & Co KG, Case C-145/10, 1 December 2011, para.88-89.

[542] CJEU, Eva-Maria Painer, para.92.

[543]M. Vivant, J.-M. Bruguière, Le Droit d'auteur et Droits Voisins, Dalloz, 2016, p. 249.

[544] E.F. Judge, D. Gervais, Of Silos …, p.388, pp.375-408.

[545] CJEU, Football Dataco Ltd and Others v Yahoo! UK Ltd and Others, Case C-604/10, 1 March 2012, para. 39.

[546] CJEU, Football Association Premier League Ltd, paras.98-99.

[547] CJEU, Funke Medien NRW GmbH v Bundesrepublik Deutschland, 29 July 2019, C-469/17, para. 38, hereinafter: Funken Medien.

[548] CJEU, Funken Medien, para.23.

result which is an intellectual creation"[549]. Therefore, the military reports which according to the interpretation provided by the Court are not original, cannot be considered as works under copyright law.

In Levola case, which concerned the possible copyright protection of the taste of cheese, the CJEU added that the subject matter protected by copyright must be expressed in a manner which "makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form".[550] It has been justified by the fact that "the authorities responsible for ensuring that the exclusive rights inherent in copyright are protected must be able to identify, clearly and precisely, the subject matter so protected. The same is true for individuals, in particular economic operators, who must be able to identify, clearly and precisely, what is the subject matter of protection which third parties, especially competitors, enjoy."[551] Moreover, the CJEU highlighted that since the subjectivity in identifying the subject matter of protection is detrimental to legal certainty, the subject matter, in order to be protected must be capable of being expressed in **a precise and objective manner**.

C. French and Polish law

The Berne Convention and the subsequent international treaties constituted a model[552] for the solution adopted at the national level. Poland accessed the Berne Convention in 1920, France was its signatory since the adoption of the first act in 1886. Both countries are contracting parties of the WCT and the TRIPS Agreement. As Members of the European Union, they are obliged to comply with the EU law, including international treaties and agreements signed by the EU. Primary law and secondary law (regulations) become directly part of the legal order of the Member States, as regards the directives, they require the implementation.

According to art. L-111-1 of the Intellectual Property Code[553] a work should be "une oeuvre de l'esprit" (a work of mind) and its protection depends on the very fact of

[549] CJEU, Funken Medien, para24.
[550] CJEU, Levola Hengelo BV v Smilde Foods BV, Case C-310/17, 13 November 2018, para. 40.
[551] CJEU, Levola Hengelo, para. 41.
[552] M. Barczewski, Traktatowa ochrona …, pp.177-180.
[553] Code de la propriété intellectuelle, https://www.legifrance.gouv.fr/codes/texte_lc/LEGITEXT000006069414/, accessed : 21.05.2023, hereinafter : Intellectual Property Code.

its creation.[554] Ch. Caron proposes to define the latter as a legal fact resulting from a conscious human activity leading to a modification of reality.[555] The creation has to be made by human. It has to be identifiable and expressed in a specific form which allows the work to be communicated to the recipient. However, there are no specific requirements as to this form.[556] The copyright protection extends only to the works of mind which are original. [557] The term is defined in the doctrine as containing an objective element - the novelty of the work in relation to works already existing and a subjective element - a reflection of the creator's personality.[558]

According to art. 1 (1) of the Act of 4 February 1994 on Copyright and Related Rights (Dz. U. 1994 Nr 24 poz. 83 t.j. Dz. U. z 2022 r. poz. 2509)[559], the subject matter of copyright shall be any manifestation of creative activity of individual nature, established in any form, irrespective of its value, purpose or form of expression. According to art. 1 (2) [1] protection can apply to the form of **expression** being a result of human's effort. No protection shall be granted to discoveries, ideas, procedures, methods and principles of operation as well as mathematical concepts. According to art. 1(3) the work shall be protected as of its establishment, even though its form is incomplete.[560]

W. Machała considers a work as a link in the process of communication between author and audience.[561] It constitutes a manifestation of intellectual creation. To be protected under copyright law, the work has to be individual and original. As regards the premise of individuality, it allows to assess whether the work is unique and whether it

[554] English translation by the author. According to art. L-111-1 of French Intellectual Property Code: L'auteur d'une oeuvre de l'esprit jouit sur cette oeuvre, du seul fait de sa création, d'un droit de propriété incorporelle exclusif et opposable à tous. English version : The author of a work of the mind enjoys, by the mere fact of its creation, an exclusive intangible property right enforceable against all, https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006069414/LEGISCTA000006161633/, accessed:29.08.2023.

[555] See : Ch. Caron, Droit d'auteur et droits voisins, Lexis Nexis,2017, p.56.

[556] A. Lucas, A. Lucas- Schloetter, C. Bernault, Traité de la propriété littéraire et artistique, Lexis Nexis,2017, pp.109-110.

[557] See: F. Pollaud-Dulian, Propriété intellectuelle. Le droit d'auteur, Economica, 2014, pp.202-205.

[558] Ch. Caron, Droit d'auteur …, p.88. See also : A. Lucas, A. Lucas- Schloetter, C. Bernault, Traité …, pp.128-130.

[559] Hereinafter: Polish Copyright Act.

[560] English version by the author. Polish version: Art. 1. 1. Przedmiotem prawa autorskiego jest każdy przejaw działalności twórczej o indywidualnym charakterze, ustalony w jakiejkolwiek postaci, niezależnie od wartości, przeznaczenia i sposobu wyrażenia (utwór). Art. 2^{1}. Ochroną objęty może być wyłącznie sposób wyrażenia; nie są objęte ochroną odkrycia, idee, procedury, metody i zasady działania oraz koncepcje matematyczne. Art. 3. Utwór jest przedmiotem prawa autorskiego od chwili ustalenia, chociażby miał postać nieukończoną. https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19940240083/U/D19940083Lj.pdf, accessed: 17.04.2023,

[561] W. Machała, Utwór. Przedmiot prawa autorskiego, C.H. Beck, 2013, p.13.

reflects the personality of its author. According to M. Poźniak- Niedzielska and A. Niewęgłowski, the premise of individuality should be understood as a bridge connecting a certain intangible entity with a certain person in a way which justifies the knot of authorship.[562] J. Barta and R. Markiewicz emphasise that a work does not necessarily have to reflect the characteristics of the author's individuality. However, it must by itself stand out from other identical creative expressions in a way that it testifies to its peculiarity, originality and all those properties which make it, to a greater or lesser extent, unique.[563] It should be noted, that this premise is increasingly being criticised in the context of popular mass production where, in case of the vast majority of works, the reflection of the creator's personality is difficult to be discerned[564]. As to the premise of originality, original is everything that is the result of an independent creative effort which differs from other works[565].

To conclude:

- Copyright protection in the international law extends to literary and artistic expressions, whatever may be the mode and form of this expression, without specific requirements concerning the level of originality of work and its fixation. News of the day or miscellaneous facts having the character of mere items of press information are excluded from protection, the same applies to ideas, procedures, methods of operation and mathematical concepts according to idea/expression dichotomy.

- In the EU law, there is a partial harmonisation in relation to photographs, software and databases. In all three cases it is established that a work should be its 'author's own intellectual creation'. According to the interpretation provided by the CJEU the criterion of originality applies to all categories of works. [566] The subject matter in order to be protected as a work has to constitute a literary or artistic expression, an author's own intellectual creation being original due to the creative freedom of author while selecting and arranging the elements of the work. Regardless of the

[562] M. Poźniak-Niedzielska, A. Niewęgłowski, Przedmiot prawa autorskiego, in: J. Barta (ed.), Prawo autorskie. System prawa prywatnego, vol. 13, 2017, p.9.
[563] J. Barta *et al*., in: J. Barta (ed.), Prawo autorskie i prawa pokrewne, Komentarz do artykułu pierwszego, Warszawa 2017, p.3, Legalis.
[564] See: D. Flisak, Pojęcie utworu w prawie autorskim – potrzeba głębokich zmian, Przegląd Prawa Handlowego 2006, no.12, p.35.
[565] See: E. Traple, Dzieło zależne jako przedmiot prawa autorskiego, Wydawnictwo Prawnicze, 1979, p.34; P. F. Piesiewicz, Utwór muzyczny i jego twórca, Wolters Kluwer, 2009, p.25.
[566] See: E. Rosati, Copyright at the CJEU: Back to the start (of copyright protection), Forthcoming in: H. Bosher, E. Rosati (eds.), Developments and Directions in Intellectual Property Law. 20 Years of The IPKat (Oxford University Press: 2023), https://www.diva-portal.org/smash/get/diva2:1655124/FULLTEXT01.pdf, accessed: 04.08.2022, pp.9-11.

type of the subject matter or its specific features, the copyright protection should be assessed on the basis of the originality criterion.

- Even the small part of the work may be granted copyright protection if it is original and the personal touch of its author is possible to be recognised. The subject matter should be distinguishable and identifiable in a precise and objective manner.[567] The technical character of the subject matter excludes its copyright protection.

- French and Polish laws correspond to the provisions adopted in the international and EU law and to the interpretation provided by the CJEU as regards the subject matter of protection. The protection, according to these national laws, is granted regardless of the form, length, shape or purpose of the work. In both legislations it is specified that work should be a result of creative process what leads to the conclusion that a work can be protected only if is created by human. In Polish law it is specified that a work has to be of individual nature. It should allow the assessment whether the work is unique and reflects the personality of its author. Although it is not mentioned explicitly by French legislator, the criterion of individuality has been developed in French doctrine and serves the same purpose. In doctrines of both countries the criterion of originality has been developed enabling the assessment whether the work constitutes a result of creative process.

3.2.Press publication as a protected subject matter

3.2.1. Limits of copyright protection

3.2.1.1.Ideas

A. International law

Ideas are excluded from copyright protection. It stems directly from art. 9 (2) of TRIPS and art. 2 of the WCT according to which copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such[568]. According to P. Goldstein and P.B. Hugenholtz the requirements of authorship and originality implicitly support this exclusion.[569] It has a particular importance from the

[567]E. Treppoz, La notion d'œuvre en droit d'auteur européen, Droit européen de la propriété intellectuelle, chroniques, Revue Trimestrielle de droit européen, 2019, pp.930-932.
[568] See also the analysis in point 3.1. of this chapter and section 2.
[569] P. Goldstein, B. P. Hugenholtz, International Copyright: Principles, Law, Practice, Oxford University Press, 2019, p.204.

perspective of access to knowledge being a basis of innovation and research. It enables the creative processes based on existing facts, ideas and knowledge aiming at producing the value-added products.[570] It establishes also a line between public domain and copyright protection.

B. EU law

In art. 1 (2) of the Computer Programs Directive it is explicitly specified that the protection applies to the expression in any form of computer program but not to ideas and principles which underline any element of computer program, including those which underline its interfaces. In consequence, one idea may be a basis for several expressions taking form of computer programs and only to these expressions the copyright protection will apply.

C. French and Polish law

The idea/expression dichotomy is included in already discussed provision from art.1(2)(1)[571] of Polish Copyright Act and it follows, albeit indirectly, from the French Intellectual Property Law. This unwritten rule in the French law[572] is justified, according to H. Desbois, by essence and by objective of free flow of information and ideas[573]. In the Polish doctrine the concept of idea is defined as an objective theme (premise) that represents a general type of representational situation that has yet to be individually

[570] See: H.G Ruse-Khan, Access to knowledge under the international copyright regime, the WIPO development agenda and the European Communities' new external trade and IP policy in: E. Derclaye (ed.), Research handbook on the future of EU copyright, Edward Elgar Publishing, 2009, pp.581-582. See: D. Flisak, Komentarz do art. 1 ustawy o prawie autorskim i prawach pokrewnych, in. D. Flisak (ed.), Komentarz do wybranych przepisów ustawy o prawie autorskim i prawach pokrewnych, 2018, point 23.

[571] English tversion by the author: Protection may apply to the form of expression only and no protection shall be granted to discoveries, ideas, procedures, methods and principles of operation as well as mathematical concepts. Polish version: art. 2^1 Ochroną objęty może być wyłącznie sposób wyrażenia; nie są objęte ochroną odkrycia, idee, procedury, metody i zasady działania oraz koncepcje matematyczne, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19940240083/U/D19940083Lj.pdf, accessed: 17.04.2023,

[572] Ch. Caron, Droit d'auteur …, p.88.

[573] According to H. Desbois : "les idées sont par essence et par destination de libre parcours". See : H. Desbois, Le droit d'auteur en France, Dalloz, 1978, p.22.

shaped.[574] Idea is 'dressed up' by the author in a specific form, and despite this form, it should be identifiable[575].

The question arises what the idea/expression dichotomy means in the context of press publishing activity. The idea itself being a basis for creation of press publication is not protected by copyright and can be used by anyone. According to J. Barta and R. Markiewicz, abstract ideas themselves must be free in the public interest. Ideas should be treated as part of the common good. [576] The fact, that they are not protected in the framework of copyright underpins the activity of press sector and allows for cultural, scientific and economic development.[577] For example, several journalists can write articles based on the same idea, reaching a wide and varied audience and contributing to broadening access to information. What will differentiate these articles is the mode of expression, conditioning also the copyright protection.

3.2.1.2.News of the day or miscellaneous facts

A. International law

News of the day or miscellaneous facts having the character of mere items of press information as stated in art. 2 (8) of the Berne Convention are excluded from copyright protection. This provision has evolved with the subsequent revisions of the act. According to art. 7 of the first act of the Berne Convention of 1886 "articles from newspapers or periodicals published in any of the countries of the Union might be reproduced in the original or in translation in the other countries of the Union unless the authors or publishers had expressly forbidden it (…) This prohibition did not in any case apply to articles of political discussion or to the reproduction of news of the day or miscellaneous information."[578] The objective of this point is not to trace and to examine all changes that this provision underwent. However, taking into consideration the perspective of publishing activity which determines the framework of the proposed analysis, it is worth

[574] S. Stanisławska-Kloc, Ochrona baz danych, Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Wynalazczości i Ochrony Własności Intelektualnej, no.82, 2002, p. 78.
[575] W. Machała, Kłopotliwa dychotomia. Głos w sprawie wyznaczenia granicy między przedmiotem prawa autorskiego a twórczością niechronioną, Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Wynalazczości i Ochrony Własności Intelektualnej, no.3, 2022, pp.5-17.
[576] J. Barta, R. Markiewicz, Prawo autorskie, Wolters Kluwer, 2016, p.60.
[577] R.M. Sarbiński, Prawo autorskie komentarz do art.1, in. R. M. Sarbiński, M. Siciarek, (eds.), Prawo autorskie. Komentarz do wybranych przepisów, LexisNexis, 2014, LEX, point 80.
[578] Berne Convention for the Protection of Literary and Artistic Works, 1886, https://www.wipo.int/wipolex/en/treaties/textdetails/12807, accessed: 04.02.2024.

to take a closer look at the wording of the initial version of the Berne Convention. This provision may be perceived as a significant interference with the copyright boundaries and a threat to the authors and publishers' interests since articles from newspapers or periodicals could be disseminated freely in the absence of express reservation by the author or publisher or in any case when it comes to the articles of political discussion. On the other hand, it could be seen as the implementation of the principle of access to knowledge and an instrument to promote more open environment for the access to news. The scope of this provision was gradually reduced and its final wording, since the Stockholm Act of 1967 became the already cited art. 2 (8).

What remains unchanged in the analysed provision since the beginning, is the exclusion from the copyright protection of news of the day or miscellaneous information. It should be explained by the need to protect the freedom of information and clarification of the principle that only intellectual creations in the form of concrete expressions such as commentaries or articles dealing with news, rather than mere news, facts, or information as such are protected by copyright.[579]

B. French and Polish law

The exclusion is not explicitly mentioned in the French Intellectual Property law but can be reconstructed from the provision from art. L112-1 of the French Intellectual Property Law according to which all works of the mind, whatever their genre, form of expression, merit or purpose should be protected.[580] Since an information is an emanation of facts, it does not constitute a result of creative expression of human mind and does not meet the criteria of a work. The French Court of Cassation in 1861 observed that telegraphic dispatches bringing political, scientific or literary news to the attention of the public cannot be considered as works. According to the Court, from the moment that a

[579] See: C. Masouyé, Guide to the Berne Convention for the Protection of Literary and Artistic Works, World Intellectual Property Organisation, 1978, p.23, https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf, accessed: 18.01.2024.

[580] English version by the author. French version of art. L112-1of French Intellectual Propoerty Law : Les dispositions du présent code protègent les droits des auteurs sur toutes les oeuvres de l'esprit, quels qu'en soient le genre, la forme d'expression, le mérite ou la destination, https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006069414/LEGISCTA000006161634/#LEGISCTA000006161634, accessed : 17.04.2023.

piece of news has been published by the press, everyone has the right to profit from it, to repeat it and to communicate it and this right belongs to the journalist as to all others[581].

According to art. 4 (4) of the Polish Copyright Act, copyright protection does not apply to simple press information[582]. A. Niewęgłowski specifies that information is simple if is of reporting nature. It does not contain judgements or assessments about reality and is rather short.[583] Simple press information should relate to the current events[584], the example of such could be "Paris Saint Germain won its 5th match this year".

The limits discussed enhance the flow of information and free use of it to create an artistic or literary expression. This is supported by the public interest rationale. The rapid and unfettered circulation of information and access to it constitutes an important value.[585] What is protected is not the substance of the news, not the ideas, but the form of their transmission. Therefore, the same news item may be presented in many different ways and each of these ways can be protected by copyright. What matters, is the originality of the expression understood as a creative freedom of author to select and arrange the different elements of the creation. For example, many journalists would cover the death of the Pope, a traffic accident or a tax increase but for the protection to arise the expression based on such facts have to be creative. The protection of a mere press information that an event has taken place or that something has happened, devoid of critical comment or opinion, would deprive others of the opportunity to express on a said subject and would be a fundamental obstacle to the public access to information.

3.2.2. Press publication and its elements

3.2.2.1.Headlines and excerpts from articles

[581] The Court of Cassation, Req. 8 août 1861, Havas, Bullier et comp. v. Gounouilhou : DP 1862. 1. 13, https://www.copyrighthistory.org/cam/pdf/f_1861_1.pdf, accessed : 18.01.2024.
[582] English version by the author. Polish version of art. 4 of Polish Copyright Act: Nie stanowią przedmiotu prawa autorskiego: 4) proste informacje prasowe, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19940240083/U/D19940083Lj.pdf, accessed: 17.04.2023.
[583] A. Niewęgłowski, Komentarz do art.4 Ustawy o prawie autorskim i prawach pokrewnych in: A. Niewęgłowski (ed.), Prawo Autorskie. Komentarz, Wolter Kluwers Polska, 2021, LEX.
[584] W. Machała, Komentarz do art. 4 Ustawy o prawie autorskim i prawach pokrewnych in: R. Sarbiński (ed.), Prawo autorskie i prawa pokrewne. Komentarz, Wolter Kluwers Polska, 2019, LEX.
[585] E. Ferenc-Szydełko, Komentarz do art. 4 Ustawy o prawie autorskim i prawach pokrewnych in: E. Ferenc- Szydełko (ed.), Ustawa o prawie autorskim i prawach pokrewnych. Komentarz, 2021, C.H. Beck, Legalis, points 14-16; see: N. Mallet - Poujol, Droit à l'information et propriété intellectuelle, https://core.ac.uk/download/pdf/12439079.pdf, accessed : 17.04.2023.

A. International law

Headlines and excerpts from articles despite their shortness can be protected under copyright law. Neither the Berne Convention nor the TRIPS Agreement and the WCT set a threshold for the quantum of creativity required for a work to be an 'intellectual creation."[586]

B. EU law

The CJEU in Infopaq case argued that "words as such do not constitute elements covered by the protection"[587] but "certain isolated sentences or even certain parts of sentences may be suitable for conveying to the reader the originality of a publication such as a newspaper article, by communicating to that reader an element which is, in itself, the expression of the intellectual creation of the author of that article."[588] Therefore, the headline consisting of few words being the reflection of creative choices of its author and having the character of the author's own intellectual creation will be protected by copyright. The qualitative understanding of work should be privileged.

The same applies to the copyright protection of parts of press publications. If its extract "contains an element of the work which, as such, expresses the author's own intellectual creation"[589] it can be protected by copyright. The CJEU addressed the problem of the use of parts of press articles in Infopaq case. It held that even such short excerpts from articles in media monitoring summaries could be considered as eligible for copyright protection. [590]

C. French and Polish law

Neither French nor Polish legal order provides any requirement as to the length of the work in order to be protected under copyright law. The form of expression is not important for the eligibility for protection[591]. According to art. L.112-4 of the French

[586] S. Ricketson, Threshold requirement for copyright protection under the International Convention, World Intellectual Property Organisation Journal, Thomson Reuters, 2009, vol.1, p.58.
[587] CJEU, Infopaq, para. 46.
[588] CJEU, Infopaq, para. 47.
[589] CJEU, Infopaq, para. 47.
[590] CJEU, Infopaq, para. 47.
[591] See : article 1(1) of Polish Copyright Law: Przedmiotem prawa autorskiego jest każdy przejaw działalności twórczej o indywidualnym charakterze, ustalony w jakiejkolwiek postaci, niezależnie od wartości, przeznaczenia i sposobu wyrażenia (utwór), https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19940240083/U/D19940083Lj.pdf, accessed: 17.04.2023, English version: The object of copyright shall be any manifestation of creative activity of

Intellectual Property Law, the title of a work of mind, as long as it has an original character, is protected like the work itself.[592] The French legislator therefore directly extends the protection to the titles, and more broadly to the short sentences, provided they are original.[593] In Polish doctrine, both positive and negative opinions towards the copyright protection of titles are expressed. S. Rittermann considers that the principle of *de minimis non curat praetor* does not justifies such a protection. In his view, it is more appropriate to base the title's protection on legislation against unfair competition than on copyright law.[594] According to R. Markiewicz, in addition to its function of identifying the work, the title forms an introduction to the work and can be its overall interpretation. In consequence, the title is an integral part of the work.[595] Following this reasoning, although the protection of the title may not be frequent, it cannot be excluded in case when the criteria of protection are met. G. Tylec proposes to base the scrutiny of whether the copyright protection applies on a distinction between titles protected on the basis of their creative content understood from the internal perspective e.g. because of their original meaning or composition, and titles protected on the basis of their creative content seen from the external perspective e.g. graphic design.[596]

From a practical point of view and in the context of press publishing sector, headlines have the function of providing information about the content of the article and of encouraging the reader to read it. The headlines like "The most powerful rocket in history will take off from Texas today. Elon Musk and NASA are keeping their fingers crossed."[597] from Gazeta Wyborcza or "Fire in the Pyrénées-Orientales: why the

individual nature, established in any form, irrespective of its value, purpose or form of expression (work) (translated by the author);
article L.112-1 of French Intellectual Property Law: Les dispositions du présent code protègent les droits des auteurs sur toutes les oeuvres de l'esprit, quels qu'en soient le genre, la forme d'expression, le mérite ou la destination. https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006069414/LEGISCTA000006161634/#LEGISCTA000006161634, accessed : 17.04.2023, English version: The provisions of this Code shall protect the rights of authors in all works of the mind, whatever their genre, form of expression, merit or purpose. (translated by the author).

[592] According to art. 112-4 of French Intellectual Property Law: Le titre d'une oeuvre de l'esprit, dès lors qu'il présente un caractère original, est protégé comme l'oeuvre elle-même (English translation made by the author).

[593] Ch. Caron, Droit d'auteur …, p.118.

[594] S. Rittermann, Komentarz do ustawy o prawie autorskim, Kraków 1937, p. 325, https://www.wbc.poznan.pl/dlibra/publication/504736/edition/430356/content, accessed: 18.01.2024.

[595] R. Markiewicz, Dzieło literackie i jego twórca w polskim prawie autorskim, Uniwersytet Jagielloński, 1984, pp. 52–58.

[596] G. Tylec, Ochrona tytułu utworu w prawie polskim, LexisNexis, 2006, LEX.

[597] Gazeta Wyborcza, Z Teksasu wystartuje dziś najpotężniejsza rakieta w dziejach. Elon Musk i NASA trzymają kciuki., 17.04.2023, https://wyborcza.pl/0,0.html, accessed: 17.04.2023.

department was particularly at risk"[598] from le Figaro report the facts. It is difficult to find therein the reflection of creative choices of the author. The assessment whether the headline itself could be eligible for copyright protection may be marked by a degree of subjectivity. However, it cannot be said that headlines can never be original. The decision whether it is the case or not, in the event of a dispute is left to the national courts. The same applies to the excerpts of press articles which can be original and therefore protected by copyright since the qualitative understanding of the work should be privileged.

3.2.2.2.Pictures

A. International law

According to art. 2 of the Berne Convention, among the examples of literary and artistic works are photographic works to which are assimilated works expressed by a process analogous to photography. C. Masouyé notes that the protection applies to all photographs regardless of their topic[599]. It will not be granted in case when the criteria of copyright protection will not be met, for example in case when a photograph will not be taken by human but by photomaton.[600]

B. EU law

According to art. 6 of the Term Directive the same protection as to the other literary and artistic works applies to photographs which are original in the sense that they are the author's own intellectual creation. No other criteria shall be applied to determine their eligibility for protection. Member States may provide for the protection of other photographs. CJEU in Painer case decided whether art. 6 of the Term Directive must be interpreted in such a way that a portrait photograph can, under that provision, be protected by copyright. According to the Court, an intellectual creation is an author's own creation if it reflects the author's personality[601]. As regards a portrait photograph, "the photographer can make free and creative choices in several ways and at various points in

[598] Le Figaro, Incendie dans les Pyrénées-Orientales : pourquoi le département était particulièrement à risque, 17.04.2023, https://www.lefigaro.fr/sciences/incendie-dans-les-pyrenees-orientales-pourquoi-le-departement-etait-particulierement-a-risque-20230417, accessed : 17.04.2023.
[599] C. Masouyé, Guide …, p.16, https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf, accessed: 18.01.2024.
[600] See: C. Masouyé, Guide …, p.16, https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf, accessed: 18.01.2024.
[601] CJEU, Painer, para. 88.

its production"[602] by choosing 'the background, the subject's pose and the lighting'. When taking a portrait photograph, he can choose the framing, the angle of view and the atmosphere created. Finally, when selecting the snapshot, the photographer may choose from a variety of developing techniques the one he wishes to adopt or, where appropriate, use computer software."[603] By making those various choices, according to the Court, the author of a portrait photograph can stamp the work created with his 'personal touch'[604]. The portrait photograph in question is a work. Its protection is not inferior to that enjoyed by any other work, including other photographic works[605]. In consequence, portrait photographs and other photographic works are considered as eligible for copyright protection in case when they constitute an intellectual creation being an author's own creation reflecting his personality.

C. French and Polish law

The protection of photographs is enshrined also in French and Polish legal orders. According to art. 1(2)(3) of the Polish Copyright Act, the copyright protection applies to photographic works[606]. According to art. L112-2 (9) of the French Intellectual Property Law protected by copyright are photographic works and works made using techniques similar to photography[607]. From practical point of view, it means that portrait, reportage or other photography used in press publication is protected under copyright law if it meets the criteria of work.

3.2.2.3.Videos

A. International law

Videos, although cannot be part of print press, are increasingly used by press publishers for the purpose of online newspapers. According to art. 2(1) of the Berne

[602] CJEU, Painer, para. 90.
[603] CJEU, Painer, para. 91.
[604] CJEU, Painer, para. 92.
[605] CJEU, Painer, para. 99.
[606] English translation by the author. Polish version of article 1(2) (3) of Polish Copyright Act: W szczególności przedmiotem prawa autorskiego są utwory: fotograficzne.
[607] English translation by the author. French version of art. L.112-2 (9) of French Intellectual Property Law: Les oeuvres photographiques et celles réalisées à l'aide de techniques analogues à la photographie.

Convention cinematographic works which cover all possible forms of filmed content, regardless of the technique used[608] are subject matter of copyright protection.

B. EU law

In the EU law, the broad definition of film is proposed. According to art. 2(1) (c) of the Rental and lending rights Directive, 'film' means a cinematographic or audiovisual work or moving images, whether or not accompanied by sound. According to I. Stamatoudi and P. Torremans the definition "aims at avoiding the exclusion from protection of any audiovisual objects, which could have been the case if reference had been made to cinematographs (which could exclude television productions) or to works (which excludes non-original subject matter like reports)."[609]

C. French and Polish law

According to art. L112-2 (6) of the French Intellectual Property Law, cinematographic and other works consisting of moving sequences of images, with or without sound, collectively referred to as audiovisual works[610] should be protected by copyright. According to art. 1 (2) (9) of the Polish Copyright Act, the copyright protection applies to audiovisual works (including films).[611] A. Niewęgłowski points out that audiovisual material meeting these criteria can be the subject matter of copyright protection if it has an individual and creative character[612]. In consequence, videos displayed on the websites of newspapers online are considered as works within copyright law[613] if they comply with the criteria of copyright protection.

[608] See: P. Goldstein, P.B. Hugenholtz, International Copyright: …, 2019, pp.190-191.
[609] S. Nérisson, The rental and lending rights directive, in: I. Stamatoudi, P. Torremans (eds.), EU Copyright Law. A Commentary, Edward Elgar Publishing, 2014, point 6.36, p.164.
[610]English version by the author. French version of Article L.112-2 (6) of the French Intellectual Property Law: Les oeuvres cinématographiques et autres oeuvres consistant dans des séquences animées d'images, sonorisées ou non, dénommées ensemble oeuvres audiovisuelles.
[611] English version by the author. Polish version of article 1(2) (3) of Polish Copyright Act: 2. W szczególności przedmiotem prawa autorskiego są utwory: audiowizualne (w tym filmowe). According to P. Ślęzak, audiovisual work means all visual recordings, whether or not accompanied by sound, which meet the criteria for copyright protection. See: P. Ślęzak, Prawo autorskie. Podręcznik dla studentów szkół filmowych i artystycznych, Wydawnictwo Uniwersytetu Śląskiego, 2008, p.187; A. Wojciechowska, Autorskie prawa osobiste twórców dział audiowizualnego, Zeszyty Naukowe Uniwersytetu Jagiellońskiego, no.72, 1999, p.61.
[612] A. Niewęgłowski, Komentarz do art. 1 Ustawy o prawie autorskim i prawach pokrewnych, in. A. Niewęgłowski (ed.), Prawo autorskie. Komentarz, 2021, Wolter Kluwers Polska, 2021, LEX.
[613] See: Ch. Caron, Droit d'auteur …, pp.140-143.

3.2.2.4.Articles in their entirety

A. International, EU, French and Polish law

A press article will be protected under copyright law according to international, EU[614], Polish and French law in every case when it will constitute the author's own intellectual creation expressed through the choice, sequence and combination of its elements. [615] If a press article is published onlie, the layout of the website can also constitute a work under copyright law. According to the Polish Appellate Court in Warsaw: The creation of the layout and graphic form of the website, as well as its improvement and changes, fall within the definition of a work.[616] The author's own intellectual creation can be expressed in this case through the choice, sequence and combination of the elements of the website, the choice of colours, fonts, seize and should be protected under copyright law.

To conclude:

- The work as a subject matter of copyright protection is understood broadly. In the context of press publishing activity, it is for example a press article, its parts, a headline, a picture or a video in case when they constitute the expression of the author's own intellectual creation according to international, EU, Polish and French law.

- Neither in the international law nor in the European, Polish and French law a threshold for the quantum of creativity required for a work to be an 'intellectual creation" is set. This quantitative threshold is not necessary in scrutiny whether a subject matter could be protected under copyright law. Its formulation would be complicated due to the variety of kinds of protected works, and its introduction could lead to conflicting results of not granting protection to the original subject matters simply because they did not meet this quantitative threshold. On the other hand, lack of such threshold means that there is a broad category of what is protected by copyright. The said protection extends far since even the short excerpts from press articles or their headlines can be protected.

[614] The CJEU considered that the author's own intellectual creation, press article, may be seen in the manner in which the subject is presented and the linguistic expression, see: CJEU, Infopaq, para. 44.
[615] See the analysis conducted in point 3.1 of this chapter.
[616] The Appellate Court in Warsaw, Judgement of 11 May 2007, I ACa 1145/06, LEX no. 558375.

- Exclusion of ideas and news of the day or miscellaneous facts having the character of mere items of press information from copyright protection in the international as well as national laws underpins the activity of press sector and allows for cultural, scientific and economic development.

4. Holders of exclusive rights to press publication under copyright law

This section aims at examining who and upon fulfilment of which criteria can be recognised as rightholder of exclusive rights under copyright law. Firstly, international and EU copyright law perspective will be provided. The brevity of the analysis should be justified by the fact that the issue of authorship has been harmonised in the EU law only to a small extent and only in relation to few selected subject matters. A brief overview of provisions related to the authorship in France and in Poland will be offered to complete the analysis conducted from the international and EU law perspective. Then, a special attention will be given to the roles of employer from the perspective of employment relationship and of publisher of the collective work. The term rightholder is understood broadly as encompassing the authors and other right holders who acquired the exclusive rights in an original or transferred manner. The provided analysis is rooted excusively in copyright law and does not extend to the related rights' regime.

The main objective of this section is to establish the circle of beneficiaries of copyright protection. This is necessary to explore whose legal situation may determine the access and enjoyment of copyright works and to establish who, in the context of press publishing activity, has the exclusive rights to press publications.[617]

4.1. Author and coauthor

A. International law

The Berne Convention does not contain any explicit provision regarding the authorship of works. According to art. 2 (6) of the Berne Convention, the protection shall operate for the benefit of the author and his/her successors in title. In art. 15 (1) the general presumption of authorship is established in case when the name or the pseudonym of the author appears on the work in the usual manner. The determination of the conditions of co-authorship is left to national law. According to S. Ricketson, even though the term

[617] The analysis does not encompass the exclusive rights of press publishers under art. 15 of the CDSM Directive. They will be discussed in chapter III.

"author" is not defined, the historical context of the Convention determines it to be interpreted as a natural person who created the work.[618]

B. EU law

The only provisions in the EU law as regards the authorship relate to the authorship[619] of specific subject matters: computer programs, audiovisual works and databases and will not be further elaborated in the framework of the analysis conducted.

C. French and Polish law

According to art. L.111-1 of the French Intellectual Property Law, the author of a work of the mind shall enjoy, by the mere fact of its creation, an exclusive incorporeal property right which shall be enforceable against all persons.[620] Author can be only natural person.[621] His rights arise from the very fact of the creation of the work.[622] The protection of the work is justified by the fact that it expresses the personality of author. Therefore, the possibility to grant the authorship to legal persons is excluded.[623] The status of author cannot be entrusted to another person[624] and according to art. L113-1[625] it belongs, in the absence of proof to the contrary, to the person or persons under whose name(s) the work is disclosed. French law provides that in case when the work is a result of the collaboration of several natural persons, they are the coauthors and collaborative work is their joint

[618] S. Ricketson, The 1992 Horace S. Manges Lecture - People or Machines: The Bern Convention and the Changing Concept of Authorship, Columbia-VLA Journal of Law & the Arts, vol. 16, no.1, pp. 1-38, p.11.
[619] Art. 2 (3) of the Computer Programs Directive provides a special rule regarding the exercise of economic rights in framework of the employment relationship and according to art. 2 of the Computer Program Directive, where collective works are recognised by the legislation of a Member State, the person considered by the legislation of the Member State to have created the work shall be deemed to be its author.
[620]English tversion by the author. French version of art. L.111-1 of the French Intellectual Property Code: L'auteur d'une œuvre de l'esprit jouit sur cette œuvre, du seul fait de sa création, d'un droit de propriété incorporelle exclusif et opposable à tous Code de la propriété intellectuelle, https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006069414/LEGISCTA000006161633/#LEGISCTA000006161633, accessed : 14.09.2022.
[621] See: A. Lebois, Oeuvre de presse - Quelle protection juridique pour les créations des robots journalistes ?, Communication Commerce électronique, no 1, Janvier 2015, pp.14-20.
[622] See: Ch. Caron, Droit d'auteur …, p. 179; F. Pollaud- Dulian, Propriété intellectuelle. …, p.281 ; A. Lucas, A. Lucas-Schloetter, C. Bernault, Traité …, p.169.
[623] See: Ch. Caron, Droit d'auteur …, p. 179.
[624] See : art. L111-3 La propriété incorporelle définie par l'article L. 111-1 est indépendante de la propriété de l'objet matériel. English version by the author: The intangible property defined by Article L. 111-1 is independent of the ownership of the material object.
[625] English version by the author. French version of art. L113-1 of the French Intellectual Property Code : La qualité d'auteur appartient, sauf preuve contraire, à celui ou à ceux sous le nom de qui l'œuvre est divulguée.

property. They should exercise their rights by mutual agreement[626]. The coauthors will have simultaneous power over the whole work. Each of them should be involved in the creation of the work in creative way which will result in original outcome.[627]

According to art. 8 (1) of the Polish Copyright Act, the holder of copyright shall be the author unless it is stated otherwise.[628] In Polish like in French copyright law there is a presumption of authorship according to which the author is the person whose name appears on the copies of the work or whose authorship is otherwise made known to the public in connection with the distribution of the work.[629] The author can be only natural person.[630]

According to art. 9(1) of the Polish Copyright Act, the co-authors shall enjoy copyright protection jointly. It shall be presumed that the amounts of shares are equal but each of the co-authors may claim the amounts of shares to be determined by the court on the basis of his/her contribution. In consequence, a person who, in the creation of a work, performs only technical tasks strictly according to the instructions of the author cannot be considered as a co-author. [631] An agreement expressing the intention to create a work by joint effort and to materialise it subsequently constitutes a necessary precondition for coauthorship.[632] Academics have identified some prerequisites to be met for the coauthorship to be determined. Firstly, the contributions to the work of the co-authors must be identifiable. Secondly, the contributions of the co-authors should form a single work. Thirdly, the cooperation of the authors is necessary.[633]

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[626]English version by the author. French version of art. L113-2 of French Intellectual Property Code : Est dite de collaboration l'oeuvre à la création de laquelle ont concouru plusieurs personnes physiques ; and of art. L. L113-3 of French Intellectual Propoerty Code : L'oeuvre de collaboration est la propriété commune des coauteurs. Les coauteurs doivent exercer leurs droits d'un commun accord; https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006069414/LEGISCTA000006161635/#LEGISCTA000006161635, accessed : 21.04.2023.

[627] See: Ch. Caron, Droit d'auteur …, pp.200-201.

[628] English version by the author. Polish version of art. 8(1) of Polish Copyright Act: Prawo autorskie przysługuje twórcy, o ile ustawa nie stanowi inaczej, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19940240083/U/D19940083Lj.pdf, accessed: 21.04.2023.

[629] English version by the author. Polish version of art.8 of Polish Copyright Law: 1. Prawo autorskie przysługuje twórcy, o ile ustawa nie stanowi inaczej. 2. Domniemywa się, że twórcą jest osoba, której nazwisko w tym charakterze uwidoczniono na egzemplarzach utworu lub której autorstwo podano do publicznej wiadomości w jakikolwiek inny sposób w związku z rozpowszechnianiem utworu, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19940240083/U/D19940083Lj.pdf, accessed: 14.09.20222.

[630] J. Szwaja, Twórcy i ich prawa osobiste in: System prawa własności intelektualnej, t. III, Prawo wynalazcze, Ossolineum 1990, p.76; M. Jankowska, Autor i prawo do autorstwa, Wolters Kluwer, 2011, p.92. See: J. Barta, R. Markiewicz, Prawo autorskie, Wolters Kluwer, 2016, pp.105-106.

[631] See: The Polish Supereme Court, Judgement of 05 July 2002, III CKN 1096/00, LEX nr 81369.

[632] See: The Polish Supreme Court, Judgement of 19 Feburary 2014,

[633] J. Barta, R. Markiewicz, Prawo autorskie, Wolters Kluwer, 2016, pp.106-108.

To illustrate, the journalist who wrote a press article, who is the natural person and whose name appears on the publication will be considered as the author according to Polish and French legal order. The person who took a photograph which appears in the press will be its author. As to the video, one of the authors will be its principal director[634]. In case when the article is written by many journalists they will be considered as co-authors. The rights arise from the very fact of the creation of the work which is original and expresses the personality of the author.

4.2.Authorship and Artificial Intelligence

The author can be only natural person. This argument is important in the context of the current discussion on who should be granted the exclusive rights to the results of the activity of Artificial Intelligence. AI is increasingly used in press sector. Bloomberg uses a program called Cyborg, which transforms the financial reports into news stories.[635] Agence France-Presse in 2014 decided to experiment with automatic writing for sports event announcements[636]. In 2023 Polish Gazeta Wyborcza published an article written by

[634] See: art. 1 (5) of Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31993L0083, accessed: 21.04.2023). Member States shall be free to designate other co-authors according to art. 2 (1) of the Term Directive. In this context, the Luksan case which concerned the question whether the original and exclusive allocation of the rights to the exploitation of cinematographic works to the film producer provided in the national law was inconsistent with the EU law and whether a statutory presumption of transfer of rights is allowed should be discussed. The CJEU held that the rights concerning the exploitation of a cinematographic work vest by law, directly and originally, in the principal director. Moreover, as to the relationship between national regulations introduced in Member States and the provisions from the Berne Convention, according to the Court, "in providing that the principal director of a cinematographic work is to be considered its author or one of its authors, the European Union legislature exercised the competence of the European Union in the field of intellectual property. In those circumstances, the Member States are no longer competent to adopt provisions compromising that European Union legislation. Accordingly, they can no longer rely on the power granted by Article 14bis of the Berne Convention" (CJEU, Martin Luksan v Petrus van der Let, 9 February 2012, Case C-277/10, https://curia.europa.eu/juris/document/document.jsf?text=&docid=119322&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=571582, accessed: 20.04.2023, para. 64.) Therefore, EU Member States cannot, according to this judgement, introduce a provision whereby those rights vest in such a manner in the film producer, even by invoking the Berne Convention, which provides for such a possibility. However, this does not preclude national regulation introducing a presumption of transfer of the exploitation rights to the film work to the producer.

[635] Washington Post, The Washington Post to debut AI-powered audio updates for 2020 election results, 2020, https://www.washingtonpost.com/pr/2020/10/13/washington-post-debut-ai-powered-audio-updates-2020-election-results/, accessed: 22.05.2023. See: N. Martin, Did A Robot Write This? How AI Is Impacting Journalism, Forbes, 2019, https://www.forbes.com/sites/nicolemartin1/2019/02/08/did-a-robot-write-this-how-ai-is-impacting-journalism/?sh=f6ff72a77957, accessed: 22.05.2023.

[636] A. Lebois, Oeuvre de presse …, pp.14-20.

ChatGPT.[637] AI is mostly used to report on sport, weather of finance's topics[638] but it is also increasingly used to write the whole articles although their quality is still rather contested.[639] AI is used in the press industry to help journalists to increase the pace of work, broaden the coverage and improve data verification.

Generative technologies defined as "capable of creating media content largely autonomously and with very little human intervention"[640] are considered as the most problematic from the perspective of copyright protection of the products created by AI.[641] As results from the analysis conducted, AI cannot be granted the authorship to the outputs of its activity. Therefore, the question whether such products should be protected and if so, who should be granted exclusive rights arises.[642]

As observed by J.P. Quintais and P. B. Hugenholtz, the process of creation done by AI always takes place with greater or lesser human intervention.[643] Its result should meet the criteria such as: be a production in literary, scientific or artistic domain, be original,

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[637] Wirtualne Media, Sztuczna inteligencja napisała artykuł w "Gazecie Wyborczej". „Nikt się nie zorientował, tekst był słaby", 2023, https://www.wirtualnemedia.pl/artykul/sztuczna-inteligencja-tekst-gazeta-wyborcza-boleslaw-breczko, accessed: 22.05.2023. See: B. Breczko, Czy dziennikarze są jeszcze potrzebni? Mój ostatni artykuł napisał ChatGPT, Gazeta Wyborcza, https://wyborcza.biz/biznes/7,177150,29639137,czy-dziennikarze-sa-jeszcze-potrzebni-moj-ostatni-artykul-napisal.html, accessed: 22.05.2023.

[638] See: How the Bundesliga is using AI to increase brand reach, SP, 2020, https://www.sportspromedia.com/opinions/bundesliga-ai-dfl-deltatre/?zephr_sso_ott=exInKO, accessed: 22.05.2023; A. Gani *and* L. Haddou, Could robots be the journalists of the future?, The Guardian, 2014, https://www.theguardian.com/media/shortcuts/2014/mar/16/could-robots-be-journalist-of-future, accessed: 22.05.2023.

[639] P. Farhi, A news site …, 2023, https://www.washingtonpost.com/media/2023/01/17/cnet-ai-articles-journalism-corrections/, accessed: 22.05.2023.

[640] P.B. Hugenholtz *et al*., Trends and Developments in Artificial Intelligence. Challenges to the Intellectual Property Rights Framework, Final Report, p.57, https://www.ivir.nl/publicaties/download/Trends_and_Developments_in_Artificial_Intelligence-1.pdf, accessed: 22.05.2023.

[641] A. Trapova, P. Mezei, *Robojournalism* – A Copyright Study on the Use of Artificial Intelligence in the European News Industry, GRUR International, vol.71, no.7, 2022, pp.589-602.

[642] See: D. Gervais, Humans as a matter of law. How Courts can define humanness in the age of AI., Essay, 2022, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4213543, accessed:14.09.2022. D. Flisak, Sztuczna inteligencja - prawdziwe wyzwanie dla prawa autorskiego, Rzeczpospolita, https://www.rp.pl/Prawo-autorskie/305139958-Sztuczna-inteligencja--prawdziwe-wyzwanie-dla-prawa-autorskiego.html?preview=&remainingPreview=&grantedBy=preview&, accessed 08.08.2022; D. Flisak, I. Matusiak, Ab homine Auctore Ad Robotum Auctorum [in:] Opus auctorem laudat. Księga jubileuszowa dedykowana Profesor Monice Czajkowskiej-Dąbrowskiej, ed. K. Szczepanowska-Kozłowska, I. Matusiak, Ł. Żelechowski, Warszawa 2019, p. 77; J.V. Grubow, O.K. Computer: The Devolution of Human Creativity and Granting Musical Copyrights to Artificially Intelligent Joint Authors, Cardozo Law Review, vol. 40, no.1,2018, pp. 404–405; S. Yanisky-Ravid, L.A. Velez-Hernandez, Copyrightability of Artworks Produced by Creative Robots and Originality: The Formality-Objective Model, The Minnesota Journal of Law, Science & Technology, vol.19, no.1, 2018, p.9, https://scholarship.law.umn.edu/ mjlst/vol19/iss1/1, accessed: 8.08.2022.

[643] P. B. Hugenholtz, J. P. Quintais, Copyright and Artificial Creation: Does EU Copyright Law Protect AI-Assisted Output?, IIC- International Review of Intellectual Property and Competition Law, vol. 52, 2021, p.1201.

consist of creative choices and constitute an expression[644] in order to be qualified as a work. Moreover, A. Trapova and P. Mezei highlight that news publishers, as regards the use of AI in press sector, are "strongly in control of the output they communicate"[645] which means that AI still should be considered as a tool to create news items and not as a creator itself. As to the question who should be granted copyright protection to such works, potential claims from the developer or programmer of the AI system and the users of this system are discussed[646]. This question is highly important from the perspective of functioning of press industry sector since the answer to it will determine the answer to the question as to from whom press publishers will acquire press materials created by AI, who should be asked for the authorisation of their use for the press publishing purposes.

I see also a challenge posed by Generative AI to copyright in the context of transparency as regards who and to what extent is actually responsible for the creation of literary or artistic products. Although the creativity is a human matter, in an increasing number of cases we will not be dealing with purely human works but with their mixed AI-human versions.[647] This is a new reality of creation which is not reflected in copyright law what may cause the ethical issues or lead to incorrect attribution of financial benefits, excluding or diminishing the role of AI creators[648]. There is no obligation to disclose the information that a work has been created with the use of Generative AI neither at the EU nor at the national (Polish and French level)[649].

However, there are the public expectations as regards the standards of the use of AI. The very way AI works is complex and difficult to understand. If, in addition to that, recipient of work cannot be sure whether the latter has been entirely created by human or

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[644] P. B. Hugenholtz, J. P. Quintais, Copyright …1, p.1200.
[645] A. Trapova, P. Mezei, Robojournalism …, pp.589-602.
[646] E. Bonadio, L. McDonagh, Artificial intelligence as producer and consumer of copyright works: evaluating the consequences of algorithmic creativity, Intellectual Property Quarterly, vol.2, 2020, pp.112-137; T. Pihlajarinne *et al*., European copyright system as a suitable incentive for AI based journalism?, Legal Studies Research Paper Series, no.67, 2021, pp. 1-20;
P. B. Hugenholtz, J. P. Quintais, Copyright …, p.1208.
[647] D. Flisak, Milenijny problem tworzenie przez Sztuczną Inteligencję, Rzeczpospolita, https://www.rp.pl/opinie-prawne/art37920861-damian-flisak-milenijny-problem-tworzenie-przez-sztuczna-inteligencje, accessed: 02.12.2023.
[648] See : A. Bensamoun, J. Farchy, Mission du CSPLA sur les enjeux juridiques et économiques de l'intelligence artificielle dans les secteurs de la création culturelle. (CLSPA – Conseil Supérieur de la Propriété Littéraire et Artistique), 2020,p.31, https://www.culture.gouv.fr/Nous-connaitre/Organisation-du-ministere/Conseil-superieur-de-la-propriete-litteraire-et-artistique-CSPLA/Travaux-et-publications-du-CSPLA/Missions-du-CSPLA/Mission-du-CSPLA-sur-les-enjeux-juridiques-et-economiques-de-l-intelligence-artificielle-dans-les-secteurs-de-la-creation-culturelle , accessed : 02.12.2023 ; P.B. Hugenholtz, Copyright and Artificial Creation: Does EU Copyright Law Protect AI-Assisted Output?, IIC-International Review of Intellectual Property and Competition Law, 2021, pp.1190-1216, https://link.springer.com/article/10.1007/s40319-021-01115-0#Fn120, accessed : 02.12.2023.
[649] At the time of writing: 18.01.2024.

with significant involvement of AI, the credibility and trust can be undermined. An informormation that the work was created with the use of Generative AI would allow the public to choose whether they want to enjoy such works or not.

The efforts to clarify the demonstrated transparency issues have been taken in France. According to art.3 of the proposal aimed at providing a copyright framework for artificial intelligence submitted on 12 September 2023: In cases where a work has been generated by an artificial intelligence system, it is imperative to include the following information: "work generated by AI" and to include the names of the authors of the works that led to the creation of such a work".[650] In relation to this provision some linguistic doubts and inconsistencies may arise since the subject matter, to be protected as a work under copyright regime, has to be created by human. It does not stem directly from the French proposal that these AI-generated works were actually also created by a human, which can create interpretative confusion when it comes to the understanding of term 'work'. However, the French proposal is an important step towards increasing the transparency of use of Generative AI aiming at adopting the safeguards in this area. The latter would enable public to make informed choices about the content accessed, and could serve also as an indicator of its quality.

The inspiration from the French proposal could be drawn, as a first step, this quest for transparency at national or EU level could be based on soft law and the issuing of guidelines or recommendations. The second possibility would be to adopt an obligation to disclose that a work[651] has been created with the use of AI in copyright law. This will not change the author's paradigm, neither affect the consequences resulting from the authorship of work such as acquisition of moral and economic rights to it, enabling at the same time for greater transparency. The last option would be to provide such an obligation within the adoption of sectoral laws. To give an example, at the EU level, it could be introduced in the DSA, in relation to the online intermediaries and platforms, in case of its revision; in the EMFA, in relation to media services. Thus, gradually, it would apply to more and more areas where AI is used to create, enabling the increase of the

[650] English translation by the author. French version: « Dans le cas où une œuvre a été générée par un système d'intelligence artificielle, il est impératif d'apposer la mention : « œuvre générée par IA » ainsi que d'insérer le nom des auteurs des œuvres ayant permis d'aboutir à une telle œuvre », Proposition de la loi visant à encadrer l'intelligence artificielle par le droit d'auteur, 12.09.2023, https://www.assemblee-nationale.fr/dyn/16/textes/l16b1630_proposition-loi, accessed : 02.12.2023.

[651] For the purpose of the analysis conducted in this point, I will limit the scrutiny only to such cases when the human involvement into creation with the use of AI falls within the creative boundaries, which allows its original results to be qualified as works within copyright law.

transparency in this regard. Nonetheless, the process can be time-consuming and respond only in a piecemeal way to the outlined needs.

I agree with A. Trapova who points out that "the heavy reliance on AI stretches the causation bond between the human author and the final creative output to breaking point"[652]. Since the AI is more and more autonomous, the scope of human engagement will be limited to minimum and this minimum will not necessarily be the creative one. This means that such AI's outputs are not protected under current copyright law, they enter the public domain and can be used freerly. The arising question is whether the content created by AI without creative human involvement should be protected for example to foster innovation and if so, on which basis.

4.3.Employer in the employment relationship

A. French and Polish law

French law provides for a special legal regime regarding the relationship between employed journalists and their employers in the context of transfer of the exclusive rights. According to art. L.132-36 of the French Intellectual Property Code the employement contract between a professional journalist and his employer entails the exclusive transfer to the press company of the exploitation rights to the contribution made by the journalist. This is a legal cession which takes place automatically[653]. It should be however underlined that it includes only the transfer of economic rights. Moral rights are inextricably linked to the author.[654]

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[652]A. Trapova, Copyright for AI-generated works: a task for the internal market?, Kluwer Copyright Blog, 2023, https://copyrightblog.kluweriplaw.com/2023/02/08/copyright-for-ai-generated-works-a-task-for-the-internal-market/ , accessed:02.12.2023.

[653] See : English version of art. L.132-36 of French Intellectual Property Law : By way of derogation from Article L. 131-1 and subject to the provisions of Article L. 121-8, the agreement between a professional journalist or a journalist treated as such within the meaning of Articles L. 7111-3 et seq. of the Labour Code, who contributes, on a permanent or occasional basis, to the production of a press title, and the employer shall entail, in the absence of any stipulation to the contrary, the transfer to the employer on an exclusive basis of the rights of exploitation of the journalist's works produced within the framework of that title, whether or not they are published.
French version of art. L.132-36 of French Intellectual Property Code : Par dérogation à l'article L. 131-1 et sous réserve des dispositions de l'article L. 121-8, la convention liant un journaliste professionnel ou assimilé au sens des articles L. 7111-3 et suivants du code du travail, qui contribue, de manière permanente ou occasionnelle, à l'élaboration d'un titre de presse, et l'employeur emporte, sauf stipulation contraire, cession à titre exclusif à l'employeur des droits d'exploitation des œuvres du journaliste réalisées dans le cadre de ce titre, qu'elles soient ou non publiées (English version by the author), https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006069414/LEGISCTA000020739011/?anchor=LEGIARTI000024039974#LEGIARTI000024039974,accessed: 21.04.2023.

[654] Ch. Caron, Droit d'auteur …, p.193.

The transfer of rights is the result of the contribution made on a permanent or occasional basis by professional journalist[655].The transfer is made in favor of employer which is a press company employing the journalist. The employer acquires the economic rights to the journalist's contribution. In return, the journalist receives a salary for a period set by a company agreement or collective agreement.[656]

In the Polish law there is no specific regime regarding the relationship between journalists and their employers. However, there is a general rule that can be applied. According to art. 12 (1) of the Polish Copyright Act, unless otherwise stipulated by law or the employment contract, an employer, whose employee has created a work in the framework of the performance of the duties resulting from the employment relationship, acquires, upon acceptance of the work, the author's economic rights within the limits which arise from the purpose of the employment contract and the parties' mutual intention.[657]

The employer is natural or legal person having an employment relationship with an employee in accordance to the labor law. To qualify the work as created in the framework of the employment relationship, it has to be made at the employer's expense, and on the basis of the organisational structure, technical and personnel facilities. The work needs to be created in the framework of the employees' duties.[658] Once the work is created, the employer should accept it what entails the acquisition of the economic rights to the work. The rights, originally acquired by the employee as a result of his creative work are transferred on a *cessio legis* basis to the employer.[659] It takes place within the

[655] Professional journalist, according to art. L.7112-1 of Labour Code is assumed to have an employment contract.

[656] English version by the author. Art. L.132-37 of the French Intellectual Property Code: L'exploitation de l'œuvre du journaliste sur différents supports, dans le cadre du titre de presse défini à l'article L. 132-35 du présent code, a pour seule contrepartie le salaire, pendant une période fixée par un accord d'entreprise ou, à défaut, par tout autre accord collectif, au sens des articles L. 2222-1 et suivants du code du travail. Cette période est déterminée en prenant notamment en considération la périodicité du titre de presse et la nature de son contenu, https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006069414/LEGISCTA000006161640/#LEGISCTA000006161640, accessed: 21.04.2023.

[657] English version by the author. Polish version of Art. 12 (1) of the Polish Copyright Act: Jeżeli ustawa lub umowa o pracę nie stanowią inaczej, pracodawca, którego pracownik stworzył utwór w wyniku wykonywania obowiązków ze stosunku pracy, nabywa z chwilą przyjęcia utworu autorskie prawa majątkowe w granicach wynikających z celu umowy o pracę i zgodnego zamiaru stron, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19940240083/U/D19940083Lj.pdf, accessed: 21.04.2023.

[658] J. Ożegalska-Trybalska, Komentarz do art. 12 Ustawy o prawie autorskim i prawach pokrewnych in: R. Markiewicz (ed.) Komentarz do ustawy o prawie autorskim i prawach pokrewnych in: Ustawy autorskie. Komentarze. Tom 1, 2021, Wolters Kluwer Polska, LEX.

[659] R.M. Sarbiński, Komentarz do art. 12 Ustawy o prawie autorskim i prawach pokrewnych in. W. Machała, R.M. Sarbiński (eds.), Prawo autorskie i prawa pokrewne. Komentarz, 2019, Wolters Kluwer

normatively defined boundaries set by the purpose of the employment contract and the consensual intention of the parties.[660] The employee is not entitled to a separate remuneration due to the creation of the work, the acquisition of the economic rights by the employer does not affect the existence of the employee's moral rights to the work and the freedom to exercise them.

To illustrate, if the journalist wrote an article in the framework of his duties enshrined in the employment contract, as soon as the article is accepted by the employer, the economic rights to the article, being a work within copyright law, are transferred to the employer. The acquisition of the economic rights takes place on the basis of the transfer, the journalist remains the holder of moral rights to the work. The provision discussed applies exclusively to the journalists employed under an employment contract for example by press publishers. It does not apply to the journalist who are freelancers.[661] In such a case, an agreement should be concluded on the terms of use of works created by the journalist which will be subsequently published by press publisher. The employement relationship will exist not only between press publishers and journalists but also between press publishers and for example editor-in-chief, graphic designers or documentalists.

4.4.Holder of economic rights to collective work

A. French and Polish law

According to art.L113-2 of the French Intellectual Property Code : Collective work shall mean a work created at the initiative of natural or legal person who edits it, publishes it and discloses it under his direction and name and in which the personal contributions of the various authors who participated in its production are merged in the overall work for which they were conceived, without it being possible to attribute to each author a separate right in the work as created. According to art. L113-5: A collective work

Polska, LEX. See also: A. Nowicka, Podmiot prawa autorskiego in: J. Barta, R. Markiewicz (eds.), System Prawa Prywatnego vol. 13, 2017, §13, Legalis.

[660] A. Niewęgłowski, Komentarz do art. 12 Ustawy o prawie autorskim i prawach pokrewnych, in A. Niewęgłowski (ed.), Prawo autorskie. Komentarz, Wolters Kluwer Polska 2021, LEX.

[661] See: M.C. Amerine, The fragility of freelancing : The impact of copyright law on modern journalism in: E. Bonadio, C. Sappa, (eds.) The subjects of literary and artistic copyright, Edward Elgar Publishing, 2022, pp.37-57.

shall be the property, unless proved otherwise, of the natural or legal person under whose name it has been disclosed. The author's rights shall vest in such person. [662]

According to the art. 11 of the Polish Copyright Act: The producer or publisher shall have the author's economic rights to a collective work and in particular the rights to encyclopedias or periodical publications. The authors shall have economic rights to their specific parts which may exist independently. It shall be presumed that the producer or publisher have the right to the title.[663]

Collective work has a complex nature. It is a fruit of the assembly of many individual parts. There is however no need for the agreement as to the final form of the collective work between the authors of these parts which means that they are not considered as co-authors of the collective work.[664]

In the Polish law the encyclopedias and periodical publications are the examples of such works but the list provided in the provision is not exhaustive. The concept applies both to the printed and digitalised publications. It may apply also to radio emissions, to the websites generally and to the news websites in particular.[665] Scholars discussing the concept of collective work often give the example of newspaper[666]. It consists of numerous contributions from different authors who have no influence on the final version of the newspaper.

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[662] English version by the Author. French version of art. L. 113-2 of the French Intellectual Property Code : Est dite de collaboration l'œuvre à la création de laquelle ont concouru plusieurs personnes physiques. Est dite composite l'œuvre nouvelle à laquelle est incorporée une œuvre préexistante sans la collaboration de l'auteur de cette dernière. Est dite collective l'œuvre créée sur l'initiative d'une personne physique ou morale qui l'édite, la publie et la divulgue sous sa direction et son nom et dans laquelle la contribution personnelle des divers auteurs participant à son élaboration se fond dans l'ensemble en vue duquel elle est conçue, sans qu'il soit possible d'attribuer à chacun d'eux un droit distinct sur l'ensemble réalisé.
French version of art. L. 113-5 of the French Intellectual Propoerty Code : L'œuvre collective est, sauf preuve contraire, la propriété de la personne physique ou morale sous le nom de laquelle elle est divulguée. Cette personne est investie des droits de l'auteur, https://www.dalloz.fr/documentation/Document?id=CODE_CPPI_ARTI_L113-2&scrll=CPPI048654&FromId=DZ_OASIS_001057, accessed : 04.08.2022.

[663] English version by the Author. Polish version of art. 11 of the Polish Copyright Act: Autorskie prawa majątkowe do utworu zbiorowego, w szczególności do encyklopedii lub publikacji periodycznej, przysługują producentowi lub wydawcy, a do poszczególnych części mających samodzielne znaczenie - ich twórcom. Domniemywa się, że producentowi lub wydawcy przysługuje prawo do tytułu, Open LEX, https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/prawo-autorskie-i-prawa-pokrewne-16795787/art-11, accessed: 04.08.2022.

[664] T. Grzeszak, Autorskie prawa majątkowe wydawcy dzieła zbiorowego a prawa jego twórców, Zeszyty Naukowe Uniwersytetu Jagiellońskiego, 1996, no.67, p.38; See: D. Sokołowska, Utwory zbiorowe w prawie autorskim ze szczególnym uwzględnieniem encyklopedii i słowników, Uniwersytet Jagielloński, 2001.

[665] See: Appellate Court in Warsaw: Judgement of 11 May 2007, I Aca 1145/06, LEX no.558375.

[666] See for example: A. Nowicka, Podmiot prawa autorskiego, Utwory zbiorowe in: J. Barta (ed.), System Prawa Prywatnego Prawo autorskie, vol.13, 2017, §12; A. Niewęgłowski, Komentarz do art.11, in. A. Niewęgłowski (ed.) Prawo autorskie. Komentarz, Wolters Kluwer Polska, 2021, points 14-15, LEX.

Every independent part of the collective work has to comply with the concept proposed by the person who publishes it. As the result of the activity of the latter, these independent parts become a whole. Polish scholars present different opinions as to whether each of the contributions to the collective work should constitute a work within the copyright meaning. For a great number of them, it is not necessary for all of the discussed collective work's components to be the copyright protectable works. According to the Polish doctrine, the collective work should contain at least two works[667]. It is reflected for example in the linguistic analysis of the provision leading to the conclusion that since there are authors (in plural) having the economic rights to the specific parts of collective work which may exist independently, there should be at least two works, if the legislator has not assumed that the plurality of authors refers to co-authors of a single work.

It may be technically impossible for a collective work to consist solely of works. It may also contain unprotected elements which are necessary for the creation of a collective work to connect, label, categorise its individual elements.

A collective work in the French law is understood as a combination of multiple contributions from different authors, described as a plural work in which these individual contributions merge into the whole[668]. The combination is made on the initiative of a natural or legal person who publishes, edits and discloses it under his name. Contrary to the Polish law, the examples of such a work are not provided.

Under the Polish law, the protection resulting from the creation of collective work extends to publishers or producers[669]. The *ratio legis* of this provision is to reward the publisher's multi-faceted involvement and to address the potential problems in identifying the author of the work. Art. 11 introduces an exception to the principle expressed in art.8 of the Polish Copyright Act according to which copyright belongs to the author. The Polish legislator does not provide any definition of the term 'publisher'. In case law it is often determined by the reference to the publisher's role consisting in initiating, organising and providing technical and financial background[670] and bearing the risks and

[667] B. Błońska, Prawo autorskie i prawa pokrewne. Komentarz do art.11 in: R. Sarbiński, W. Machała (eds.), Prawo autorskie i prawa pokrewne. Komentarz, Wolters Kluwer Polska, 2019, LEX ; A. Nowicka, Podmiot prawa autorskiego, Utwory zbiorowe in :J. Barta (ed.), System Prawa Prywatnego Prawo autorskie, vol.13, 2017, §12.

[668] A. R. Bertrand, Auteur et titulaires des droits d'auteur, in. André R. Bertrand (ed.) Droit d'auteur, Paris Dalloz action, 2010, p.204.

[669] Taking into account the perspective of this study, in further considerations, the term 'publisher' will be exclusively used.

[670] Appellate Court in Warsaw: Judgement of 26 January1995, I ACr 1037/94, LEX no. 535044.

responsibilities of the final form of the work.[671] Taking into consideration that the protection applies to the multi-component work of complex nature, based on the individual contributions of many authors, the producer's involvement in collecting, organising and subsequently publishing is crucial to the creation of the collective work. According to J. Barta and R. Markiewicz, this is the publisher's responsibility to indicate the conceptual framework, to organise, to coordinate and to support financially the intellectual work of the team[672]. The lack of statutory definition of who the publisher is and of his role in the context of collective work in Polish law may lead to the interpretative doubts as to how to classify a given activity and whether a given publisher' s involvement is sufficient to grant him the exclusive rights to the collective work.

In the French law, the collective work can be created by the 'natural or legal person'. French scholars use interchangeable terms like initiator, producer, or publisher [673] to describe the person involved in the creation of the collective work.[674]

The contribution of publisher from French law perspective should be assessed firstly in the context of initiating the work[675]. He should also supervise the whole process of creation, and ensure the compliance of the results achieved with the intended effect. Moreover, his contribution consists in supporting the project from the financial and organisational perspective.[676]

The entire work, according to the French Intellectual Property Law is edited, published and disclosed under the publisher's name. The authors of individual elements have creative freedom but within the limits set by the publisher[677] who controls the process of creating the work[678] and this is the reason why collective work is described by many French scholars as "pyramidal" or "hierarchical"[679].

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[671] Polish Supreme Court: Judgement of 15 November 2002, II CKN 1289/00, OSNC Journal 2004, no. 3, pos. 44.
[672]J. Barta and R. Markiewicz, Prawo autorskie i prawa pokrewne. Komentarz do art.11, in: J. Barta, R. Markiewicz (eds.) Ustawa o prawie autorskim i prawach pokrewnych. Komentarz, Wolters Kluwer, 2011, LEX, p.140.
[673] A. R. Bertrand, Auteur …, p. 206.
[674] For the purpose of the following analysis reference to term 'publisher' will be made.
[675] According to article L113-2 the natural or legal person initiates the creation of the collective work.
[676] A. R. Bertrand, Auteur …, p.206.
[677] A.R. Bertrand, Auteur …, p.208.
[678] Although the obligation to exercise control over the process of creating a work is not directly expressed in the legal text, such a requirement has been formulated by the doctrine and jurisprudence. J. Cedras, La qualification des œuvres collectives dans la jurisprudence actuelle, Revue juridique de l'Ouest 1995-2, 1995, p.140.
[679] N. Cazeau, Le titulaire des droits d'exploitation sur une œuvre collective peut –il librement la faire évoluer ?, 2007, https://www.village-justice.com/articles/titulaire-droits-exploitation-oeuvre-collective,3008.html, accessed : 24.03.2022; J. Cedras, La qualification des œuvres collectives dans la jurisprudence actuelle, Revue juridique de l'Ouest 1995-2, 1995, p.140.

The creative character of the publisher's involvement is subject to continuous discussion amongst the academics.[680] To support the thesis about his creative involvement, it should be indicated that publisher is present at every stage of production and dissemination of the collective work. In addition to purely technical involvement, his engagement consists also in providing the idea for the creation of work, initiating the creation or/and selecting of its elements. According to art. 1 of the Polish Copyright Law a subject matter in order to be protected under copyright law shall be a manifestation of creative activity of individual nature. The same can be noted from the provision from art. L-111-1 of the French Intellectual Property Code according to which a work should be "une oeuvre de l'esprit" (a work of mind). In consequence, a collective work should be a result of creative activity in order to be protected under copyright law.

On the other hand, one may say that firstly, publisher can be also a legal person which excludes the possibility of its creative involvement. However, D. Sokołowska points that the creative idea, although it may be born with the participation of various people, belongs to the publisher and is realised by the publisher throughout the process of creation of the work.[681] Therefore, publisher of collective work may act through other persons bearing however the responsibility for the final result.

Secondly, it could be said that the scope of the involvement of publisher may consist, depending on case, rather of technical activities than the creative ones. A. Nowicka[682] and D. Sokołowska[683] expressed the view that the role publisher of collective work consists in selection and arrangement of its elements. D. Flisak points out that in case of collective works, the condition for the primary acquisition of economic rights is the creative quality of the results which may manifest itself not only in the manner of selection or ordering of the individual parts of the collective work, but also in the elements of this work originating from the editorial tasks of publisher.[684]

To illustrate, if a press publisher is responsible for the selection of the elements of a newspaper, for their arrangement, showing the editorial involvement, and other criteria of protection of collective work are met, the exclusive rights to the collective work will

[680] See: D. Flisak, Prawo autorskie i prawa pokrewne. Komentarz do art. 11 in: D Flisak (ed.), Prawo autorskie i prawa pokrewne. Komentarz, Wolters Kluwer 2015, LEX; K. Klafkowska- Waśniowska during the discussion at the Faculty of Law and Administration of Adam Mickiewicz University in Poznań, October 2022.
[681] D. Sokołowska, Utwory zbiorowe w prawie autorskim ze szczególnym uwzględnieniem encyklopedii i słowników, Uniwersytet Jagielloński, 2001, p.81.
[682] A. Nowicka, Utwory zbiorowe, …, §12, LEGALIS.
[683] D. Sokołowska, Utwory …, pp.141-142.
[684] D. Flisak, Prawo autorskie i prawa pokrewne. Komentarz do art. …, point 6, LEX

extend to him. In case when the described tasks will be carried out by the editor in chief of the newspaper and its publisher will be responsible for the financial part, the latter will not be enough for the copyright protection to apply to such a publisher.

The necessity for creative nature of the involvement of the publisher of collective work for the protection to arise impinges on the legal situation of press publishers and leads to the indetification of a gap in their protection. The creative efforts will be protected under copyright law if the criteria of collective work are met but if such efforts cannot be identified and rather financial and technical involvement takes place, the latter will not be rewarded on the basis of the provision discussed.

The moral and economic rights to parts included in collective work, according to the Polish law, remain with their authors. It is by concluding contracts between authors and publisher that the latter obtains the economic rights to the individual contributions[685]. In this way, the publisher acquires the title to every individual component of the collective work. Moreover, he is the holder of the rights to the collective work as a whole.[686] A. Nowicka points out that publisher is originally entitled to the rights to collective work, acquiring the rights *ex lege*[687]. It means, according to art.17 of Polish Copyright Act, that he has the exclusive right to use the collective work in all fields of exploitation[688] and to receive the remuneration for its use.

According to article L113-5 of the French Intellectual Property Law, the collective work becomes a property of natural or legal person under whose name it has been disclosed. However, the adequacy of the wording of the French provision is widely discussed. The question whether both natural and legal persons may obtain moral and economic rights to the work arises. According to the French concept of copyright, only natural person can be granted the authorship.[689] Therefore, the extension of moral rights to the legal person as it is provided in the French provision is considered to be a legal

[685] Appellate Court in Warsaw: Judgement of 18 November 1999, I ACa 792/99, LEX no. 535049.
[686] B. Błońska, Prawo autorskie i prawa pokrewne. Komentarz do art.11 in: R Sarbiński, W Machała (eds.), Prawo autorskie i prawa pokrewne. Komentarz, Wolters Kluwer Polska, 2019, LEX.
[687] A. Nowicka, Podmiot prawa autorskiego, Utwory zbiorowe in J. Barta (ed.), System Prawa Prywatnego Prawo autorskie, vol.13, 2017, §12.
[688] In the art.50 of Polish Copyright Act, the legislator includes the exemplary list of fields of exploitation. It encompasses the act of recording and reproducing the work, or producing the copies of the work. It includes moreover, in terms of trading the original work or its copies, the introduction to trade, the dissemination of works on the basis of the public performance, exhibition etc. The list is not exhaustive - it should be pointed out that any activity that is not explicitly excluded may be included in the fields of exploitation of the work. The author's economic rights have an *erga omnes* character.
[689] The Court of Cassation, Civil Chamber 1, Judgement of 15 January 2015, Ref. No. 13-23.566, Published in Bulletin. See point 4.2.1.

fiction.[690] The Polish provision related to the collective work is more precise and dispels any potential doubts as only economic rights are granted to the publisher. In France, the copyright protection extends to the publisher of collective work and, in the case of conclusion of the relevant agreements, the economic rights to individual parts are transferred to him. The authors of individual parts retain moral rights to the works created by them.[691]

There are many similarities as regards the understanding of the concept of collective work, the role of publisher and scope of his rights in both disscussed legislations. To illustrate, a print press article written by a journalist, can be one of many contributions to the newspaper. The latter consisting of several press articles written by different journalists can be qualified as a collective work in case when it meets the criteria discussed above.

From practical point of view the legal construction of the concept of collective work may be perceived as complicated. Publishers point to the complexity of the procedure of concluding the agreements with the authors of each individual element that will be later included in the collective work[692]. It enables the publisher to have the legal title to every individual component, indispensable in the event of copyright infringement. However, in case of hundreds of individual parts, proving the rights to them can be difficult and time - consuming.[693] According to art. 15 of the Polish Copyright law: The producer or publisher shall be presumed to be the person whose name is indicated as such on the objects on which the work is recorded or who is communicated to the public in any way in connection with the distribution of the work[694]. In case of collective work, press publishers has the exclusive rights to a "surplus" created following the selection and arrangement of its components, his name appears for example on the cover of the encyclopaedia. However, he is not an original holder of rights to the components of collective work. Therefore, in order to get injunctive relief or institute infringement proceeding before the court, he may be asked to prove the fact of owning all the allegedly

[690] J. Cedras, La qualification …., p.136.
[691] The Court of Cassation, Civil Chamber 1, Judgement of 15 April 1986, Ref. No. 84-12.008, Published in Bulletin.
[692] M.van Eechoud, A publisher's intellectual property right. …, p.27.
[693] M.van Eechoud, A publisher's intellectual property right. …, p.27.
[694] English version by the author. Polish version of art. 15 of the Polish Copyright Law: Domniemywa się, że producentem lub wydawcą jest osoba, której nazwisko lub nazwę uwidoczniono w tym charakterze na przedmiotach, na których utwór utrwalono, albo podano do publicznej wiadomości w jakikolwiek sposób w związku z rozpowszechnianiem utworu.

infringed rights as licensee or transferee what may render the procedure complicated. Moreover, the concept of collective work is not recognised in every EU Member State. Provisions regarding the collective work in addition to Poland and France have been also adopted for example in German or Italian legal system.

To conclude:

- Author can be only natural person. The exclusive rights to work arise from the very fact of its creation. Work's protection is justified by the fact that it expresses the personality of its author. Human involvement in creation of literary or artistic expression should go beyond conducting technical activities, mapping the rules, proceeding according to guidelines with no margin for discretion. The result of activity deprived of creative freedom cannot be considered as a work within copyright law.

- I identified several challenges posed to copyright by the use of AI, focusing especially on press publishing sector. The autonomous creation of AI (without creative human involvement) are not protected under current copyright law, they enter public domain and can be used freerly for example by journalists as the elements of press publication prepared by them. The arising question in this context is whether such an AI's output should be protected for example with the view of supporting innovation and if so, on which basis it should be done since the actual copyright framework does not allow for it.

  The role of press in enabling access to reliable information involves the necessity to maintain an appropriate level of transparency as regards the use of AI to create. The need for transparency in this field implies the action to encourage (in the form of soft law, guidelines and recommendations) or oblige (in the form of hard law) the disclosure of information on the use of artificial intelligence to create and on the extent of this use.

- The transfer of economic rights to employer in context of the employment contract or publisher of collective work is not linked to their direct involvement in the creation of intellectual expression but rather to their role in collecting the elements of the work, organising the creation process, providing guidance or subsequently publishing the created work. French law provides for a special legal regime regarding the relationship between employed journalists and their employers in the context of transfer of exclusive rights. A legal cession takes place automatically including only the transfer of economic rights from a professional journalist to his employer.

- Collective work consists of numerous contributions from different authors who have no influence on its final version. The economic rights to the separate parts expected to be included in the collective work are transferred to the publisher on the basis of the contracts concluded between authors and publisher. The collective work should include at least two works. Publisher is originally entitled to the rights to collective work, being a surplus, the effect of combining all its parts.

- The combination of the elements included in a collective work is made on the initiative of natural or legal person who publishes, edits and discloses it under his name. Due to the fact that the engagement of publisher has to be creative for the protection to arise, the needs to complement the publishers' protection should be expressed. Their efforts will not be rewarded in case when a press publication could be protected as a collective work but will not, due to the lack of the publishers' creative engagement. Moreover, only creative effects of publisher's involvement will be protected under copyright law which means that the contributions of publishers in producing press publications will not be recognised if their effect will not meet the criteria of work. The concept of collective work does not exist in legislation of every Member States which means that the scope of protection granted to press publishers differs across the EU.

5. Exclusive rights

Exclusivity, from the copyright perspective, means having right to exclude others from using works in any of the forms covered by copyright law[695].

The aim of this section is to discuss the exclusive rights granted with regards to the exploitation of works. The international context will only be mentioned to ensure a comprehensive basis for the further analysis of these rights at the EU level. The economic rights were partially harmonised in the EU law in relation to specific subject matters like computer programs or databases already before the adoption of the InfoSco Directive. However, since it has been the InfoSoc Directive that fully and in horizontal way harmonised the economic rights, only the provisions of this act will be discussed. Rental

[695]However, it should be mentioned that in some cases the right granted is not the exclusive right entitling the rightholder to authorise or prohibit the use of the work but the right which entitles the right holder to hold a claim to remuneration for the use which is not an exclusive right. See: art. 8 (2) of the Rental and lending rights directive as example. Moreover, the right may be exclusive but given the application of an exception it is transformed into a non-exclusive right to compensation see: J. P. Quintais, Copyright in the Age of online access: Alternative Compensation Systems in EU Law, 2017, Kluwer Law International, pp.128-129. See chapter chapter 4, point 3.2.1. See: Ch. Geiger, The future of copyright in Europe: Striking a fair balance between protection and access to information. Report for the Committee on Culture, Science and Education – Parliamentary Assembly, Council of Europe, 2009, pp.3-4.

and lending rights will be examined through the analysis of provisions from the Rental and lending rights directive. Then, the Polish and French perspective will be discussed.

5.1.Right of reproduction

A. International law

The history of right of reproduction dates back to Statue of Anne.[696] Especially before the massive digitalisation of works, it constituted an instrument to control the number of copies of works to measure the number of their recipients. It is considered as the core of copyright[697], its backbone[698] and the most fundamental of all exclusive rights since it embodies a key principle of copyright which is the right to make copies.[699]

According to art. 9 of the Berne Convention: authors of literary and artistic works protected by this Convention shall have the exclusive right of authorising the reproduction of these works, in any manner or form. Reproduction should be understood according to T. Dreier as each single additional copy of a work[700]. The reproduction is possible in any manner or form what makes the scope of the right very broad. However, it has been widely discussed whether the reproductions of merely temporary nature were covered by the Berne formula. At first glance the wording "in any manner of form" is wide and encompasses all methods of reproduction e.g. scanning or digitising printed text, photocopying a book, scanning an image and saving it on the computer, and all forms of it e.g. digital, 3-dimensional etc. However, as it is rightly pointed out by T. Rendas, art. 9 (1) of the Berne Convention does not provide any details regarding the duration of the reproduction[701] which leads to doubts whether the temporary reproduction also requires

[696] According to the Statue the 'copy' was the 'sole liberty of printing and reprinting' a book and which could be infringed by any person who printed, reprinted or imported the book without consent" See: The Statute of Anne; April 10, 1710, 8 Anne, c. 19, 1710, https://avalon.law.yale.edu/18th_century/anne_1710.asp, accessed: 10.08.2022.
[697] European Commission Green Paper of 27 July 1995 on Copyright and Related Rights in the Information Society COM (95) 382 final, p.49,https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:1995:0382:FIN:EN:PDF, accessed: 10.08.2022.
[698] S. Dusollier, Realigning Economic Rights with Exploitation of works: The control of authors over the circulation of works in the public sphere in. Copyright reconstructed: Rethinking Copyright's Economic rights in a time of highly dynamic technological and economic change, Kluwer Law International, Information Law Series, 2018, p. 163, pp.163-201.
[699]J. Ginsburg, From Having Copies to Experiencing Works: The Development of an Access Right in US Copyright Law, Columbia Law School, Public Law & Legal Theory Working Paper Group, Paper, vol. 50, no.8, 2003, http://papers.ssrn.com/sol3/papers. cfm?abstract_id=222493, accessed: 10.08.2022.
[700] T. Dreier, in: T. Dreier, B. Hugenholtz (eds.), Concise European Copyright Law, Kluwer Law International, 2006, p.41.
[701] T. Rendas, Exceptions in EU copyright Law. In search of a balance between flexibility and legal certainty, Wolters Kluwer Law International, Information Law Series, 2021, p.41.

an authorisation.[702] It may be assumed that the legislator at the time did not perceive the temporary reproductions as a danger for the author's interests or it seemed to be not necessary to provide details on its temporary character. In consequence, it makes difficult to assess the exact scope of the right of reproduction introduced in the Berne Convention as the matter of the permissibility of temporary reproduction is questionable. Obviously, by assuming that the provision relates also to the temporary reproductions, the scope of the discussed exclusive right becomes even broader.

In the WCT the reproduction right is included on the basis of the compliance clause from art. 1(4) of the WCT which refers to the reproduction right from art. 9 of the Berne Convention[703]. In TRIPS, similarly, the reproduction right is provided on the basis of the compliance clause from art. 9 (1), according to which Member States should comply with art. 9 of the Berne Convention.

B. EU law

The harmonisation of the right of reproduction is an example of full harmonisation. According to art. 2(a) of the InfoSoc directive Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part: (a) for authors, of their works.[704]

The scope of the right encompasses the direct or indirect reproduction. The latter serves to strengthen the control of rightholders over the reproduction made not from the original copy of the work. The reproduction can also be permanent or temporary which broadens the scope of the right provided for at the international level and dispels the uncertainties discussed above. However, it has been agreed that the extension of the right of reproduction to the temporary reproduction is a too far- reaching step when taking into consideration that the latter is of great importance within the use of every digital device

[702] See: S. Ricketson, J.C. Ginsburg, International Copyright …., 2006, p. 645.
[703] See: S. von Lewinski, International Copyright …, p.450.
[704] According to art. 2(a) of the InfoSoc Directive the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part should be provided also (b) for performers, of fixations of their performances; (c) for phonogram producers, of their phonograms; (d) for the producers of the first fixations of films, in respect of the original and copies of their films; (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite. The protection extends to authors in relation to their works but also to the four categories of holders of related rights recognised at the EU level, and since the adoption of art. 15 of the CDSM Directive to press publishers what will be discussed in details in chapter IV of this dissertation.

and during the daily use of Internet. Therefore, the EU legislator decided to exclude from the protection via the exception in art. 5 (1) the acts of reproduction which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:(a) a transmission in a network between third parties by an intermediary, or (b) a lawful use and in consequence[705], to limit the very broad scope of the exclusive right. The employed legislative technique was highly criticised as the legislator decided to extend the right but then immediately to limit it via an exception, in order to mitigate the harmful effects of such an extension.[706]

The right applies to any methods and formats of reproduction covering both analogue and digital reproductions[707] and being made on any material carrier or immaterial format[708] as it may be done by "any means and in any forms". Reproduction can be made "in whole or in part" so the right applies not only to the reproduction of the entire work but also to the partial one[709].

5.2.Right of distribution

A. International law

The right of distribution covers the distribution of original work or its copies by sale or otherwise. Considered for long as being part of reproduction right has not received much attention from international legislator. The Berne Convention includes the right to authorise distribution of adapted or reproduced cinematographic works[710] but no general provision addressed to every subject matter is provided. The general distribution right was introduced in art. 6 of the WCT.[711] It is limited by the "exhaustion" or "first sale"

[705] See chapter IV, point 2.1.
[706] S. Dusollier, Internet et droit d'auteur, Droit et Nouvelles Technologies, 2001, p.13, http://www.crid.be/pdf/public/4132.pdf, accessed : 06.09.2022, original French version : De manière plus générale, on peut critiquer l'approche du législateur européen qui étend un droit pour aussitôt le limiter par une exception afin de corriger immédiatement les effets néfastes d'une telle extension. Cette technique législative est pour le moins saugrenue. (Translation by the Author).
[707] Ch. Geiger, F. Chönherr, The Information Society Directive, in: I. Stamatoudi, P. Torremans (eds.), EU Copyright Law. A Commentary, Edward Elgar Publishing, 2014, p.11.06.
[708] Ch. Geiger, F. Chönherr, The Information …, p.11.06.
[709] In depth analysis of the scope of the right of reproduction which will include the thorough study of the CJEU case law will be provided in chapter IV in the context of the press publishers' related rights adopted in art. 15 of the CDSM Directive.
[710] Art. 14 (1)(i) of the Berne Convention.
[711] Authors of literary and artistic works shall enjoy the exclusive right of authorising the making available to the public of the original and copies of their works through sale or other transfer of ownership. (2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.

doctrine, which "allows the resale of copies of works (or related subject matter) without authorisation from the right holders once the copies have been put on the market with their consent".[712]

B. EU law

According to art. 4 of the InfoSoc Directive: Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise. The distribution right shall not be exhausted in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the right holder or with his consent.

This is an exclusive right to control the distribution of the work incorporated in tangible article[713], defined by A. Ohly as "the right to control the marketing and circulation of tangible embodiments of the work."[714] The discussed right, under the EU law applies in all situations involving the distribution of media 'by sale or otherwise'.

Contrary to other exclusive rights, it has an ephemeral[715] character as with the first sale of copies or other transfer of ownership it becomes exhausted. However, it should be pointed out that the exhaustion applies only to the copy and not to the work itself.[716] A. Lucas - Schloetter explains this rationale by stating that "the owner of a medium incorporating a work does not own any copyright and is therefore not authorised to reproduce it (nor in theory to display it) without the author's consent." [717] The question whether digital distribution through Internet is covered by the distribution right was clarified by the CJEU[718] in Tom Kabinet[719] case where the Court confirmed that the right

[712] P. Goldstein, P.B. Hugenholtz, International Copyright: …, 2010, p.305.
[713] See: Recital 28 of the InfoSoc Directive.
[714] A. Ohly, Economic rights in. E. Derclaye (ed.), Research Handbook on the Future of EU Copyright, Edward Elgar Publishing, 2009, p.219.
[715] Ch. Caron, La nouvelle directive du 9 avril 2001 sur le droit d'auteur et les droits voisins dans la société de l'information ou les ambitions limitées du législateur européen, Communication Commerce électronique n° 5, 2001, Lexis 360 Intelligence.
[716] M. Walter in: M. Walter and S. von Lewinski (eds.), European Copyright Law, Oxford University Press, 2010, p.997.
[717] A. Lucas – Schloetter, The Acquis Communautaire in the Area of Copyright, in: T.-E. Synodinou (ed.) Codification of European Copyright Law. Challenges and Perspectives, Wolters Kluwers Law & Business, Information Law Series, 2012, p.122-123.
[718] See for the detailed analysis of the evolution of the understanding of exhaustion doctrine in relation to the online distribution in: O.A. Rognstad, The distribution right and its exhaustion, in. E. Rosati (ed.) The Routledge Handbook of EU Copyright Law, Routledge, 2021, pp.151-171.
[719] CJEU, Nederlands Uitgeversverbond, Groep Algemene Uitgevers v Tom Kabinet Internet BV et al., C-263/18, 19 December 2019, hereinafter: Tom Kabinet.

of distribution from art. 4 of the InfoSoc Directive applies only to the distribution of works incorporated in tangible articles and the exhaustion is limited to the copies in material medium.

5.3.Right of communication to the public

A. International law

Authors were granted in art. 11 of the Berne Convention the exclusive right to publicly perform and communicate to the public the dramatic, dramatico-musical and musical works. In art. 11 bis the minimum standards of protection for the right of broadcasting were established and in 11 ter authors were granted the right to authorise the public performance of cinematographic adaptations of their works[720].

The act of communication to the public includes the public performance, concerning the communication of a work to the public in situ[721], broadcasting and making available of a work to the public in a way so the members of the public can access the work at an individually chosen time and place. A distinction should be drawn between a direct communication, which is made to public present at the same time and in the same place (unity of time and place) taking place during the public performances and indirect communication, characterised by the lack of unity of place, in case of broadcasting, or by lack of unity of place and time, in case of right of making available.[722] Following this systemisation, the right of public performance which constitutes a direct communication will fall outside the scope of this study.

According to art. 8 of the WCT, authors shall enjoy the exclusive right of authorising any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at time individually chosen by them. This broad formula constituted an expansion of provisions included in Berne Convention[723]. Communication to the public is seen as occurring simultaneously whereas the making available concern on-demand uses usually occurring on individual basis.[724]

[720] See: P. Goldstein, B. P. Hugenholtz, International Copyright…, 2013, p.328.
[721] M. van Eechoud *et al.*, Harmonizing …, p.71.
[722] A. Lucas – Schloetter, The Acquis …, p.119.
[723] See: P. Goldstein, B. P. Hugenholtz, International Copyright: …, p.328.
[724] S. von Lewinski, International Copyright …, pp.456-457.

Making available relates to the works in intangible form (contrary to the distribution right which refers to works in tangible form). The term public is left to be defined at the national level. In the TRIPS, apart from the compliance clause from art. 9 (1), according to which Member States should comply with art. 11 of the Berne Convention, there is no explicit reference to the communication to the public right.

B. EU law

According to art. 3 (1) of the InfoSoc Directive, Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.[725]

Right of communication to the public should be understood in a broad sense as covering all communication to the public not present at the place from where the communication originates.[726] The transmission to the public placed in a different place that the one from where the communication originates from is perceived as "the decisive factor"[727] of the right of communication.[728] The right covers any such transmission or retransmission of a work to the public by wire or wireless means, including broadcasting.

The concept of communication to the public encompasses a wide scope of activities in offline sphere like for example the transmissions of broadcasts in public spaces such as restaurants, hotels, health and beauty centers. It applies also to the online environment for example in case of streaming over Internet of signals from commercial television broadcasters or an online peer-to peer file sharing.[729]

[725] According to art. 3 (2) of the Infosc directive performers, phonogram producers, producers of the first fixations of films, broadcasting organisations the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them. The scope of the exclusive rights granted to holders of related rights will be discussed in details in chapter 3 of this dissertation.
[726] Recital 23 of the InfoSoc Directive.
[727] C. Angelopoulos, On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market, 2017, p.18, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800, accessed: 16.08.2022.
[728] See: CJEU, Circul Globus Bucureşti (Circ & Variete Globus Bucureşti) v Uniunea Compozitorilor şi Muzicologilor din România – Asociaţia pentru Drepturi de Autor (UCMR – ADA), case C-283/10, 24 November 2011.
[729]See: J. P. Quintais, Untangling the hyperlinking web: In search of the online right of communication to the public, The Journal of World Intellectual Property, vol. 21, 2018, p.388, pp.385-420.

The right of communication to the public is fully harmonised.[730] To avoid the legislative differences in copyright protection and the legal uncertainty, Member States are not allowed to include in national legislations wider range of activities than those referred to in art. 3(1).[731] Terms 'communication' and 'public' have not been further specified by the EU legislator which led to a series of open questions. These two elements[732] constitute the main and cumulative[733] requirements to qualify a given use as a communication to the public[734]. The CJEU's interpretation brought some clarity to important and not defined by the legislator aspects of the provision[735] and especially, to the understanding of these elements.

- 'communication'

Communication means imparting or exchanging of information by speaking, writing, or using some other medium.[736] From intellectual rights perspective, communication is understood as giving to public the access to works or other subject matters. It can be subject to authorisation of the holder of protection to such a work or other subject matter[737]. To assess whether the act of communication to the public from art. 3 of the InfoSoc Directive occurs, several sub - conditions formulated by the CJEU need to be analysed. As regards the mere act of communication, it should be firstly examined whether the user of the work[738] provides public with access to it in **deliberate and intentional** manner and what is the understanding of such an engagement in providing the access. Secondly, the focus will be on **the criterion of knowledge**. The question will

[730] CJEU, Funke Medien, para. 38.
[731] CJEU, Nils Svensson and others v Retriever Sverige AB, case C-466/12, 13 February 2014, hereinafter: Svensson, paras. 34-41.
[732] The analysis of the criterion of communication and public, focused on the selected issues, important from the perspective of this dissertation will take precedence over the chronological analysis of consecutive judgements of the CJEU.
[733] CJEU, GS Media B V Sanoma Media Netherlands BV, Playboy Enterprises International Inc.,Britt Geertruida Dekker, case C-160/15, 8 September 2016, para.32, hereinafter: GS Media.
[734] J. Koo, The EU right of Communication to the public – still looking for a good link, in: E. Rosati (ed.),The Routledge Handbook of EU Copyright Law, Routledge, 2021, p.181.
[735] J. Koo, The EU right …, p.181.
[736] Oxford languages, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiJr_na0d7_AhXxsosKHTegADAQvecEegQIGBAD&url=https%3A%2F%2Flanguages.oup.com%2Fgoogle-dictionary-en&usg=AOvVaw3kNBXVjbAIAFeyFQVCJmJF&opi=89978449, accessed: 25.06.2023.
[737] In case when the requirements corresponding to a specific exception are not fulfilled.
[738] The following analysis will focus on the example of the use of a work but the considerations applies also in case of the use of subject matters protected within related rights regime.

be answered whether in case of provision of access to a work published online without the authorisation of the right holder when the person providing such an access knew or ought to have known about it, the said act should be understood as an infringement of the right of communication to the public. Thirdly, the relevance of **profit- making purpose** of providing access to work from the perspective of the right of communication to the public will be discussed. Lastly, the scope of the engagement of person providing access to work to the public will be analysed with a special attention to the question whether **the mere provision of physical facilities enabling the act of communication to the public is enough for the act of communication** from art. 3 of the InfoSoc Directive to occur.

The act of communication relates to **the "intentional" and "deliberate" intervention of the user** who using a mean of communication makes a deliberate act to provide to a number of potential recipients the access to a work. In Rafael Hoteles SA[739], case which concerned the question whether placing of television sets in the rooms of a hotel constituted an act of communication to the public by the hotel, the CJEU noted that the user, in full knowledge of the consequences of his/her action, gives access to the protected work to his/her customers. In the absence of that intervention, "the customers, although physically within that area, would not, in principle, be able to enjoy the broadcast work".[740] The user's intervention has been thus considered as indispensable for the act of communication to occur. In other words, without the user's intentional and deliberate intervention to provide the recipients the access to a work, the act of communication does not occur.

In the later judgements, the approach of the CJEU towards this requirement has changed. It may be explained by the fact that the more recent rulings moved from the offline to online reality what needed some adaptations. In Filmspeler[741] case which concerned the question whether selling a product (mediaplayer) in which are installed the add-ons providing hyperlinks to websites on which works protected by copyright are made directly accessible without the authorisation of the right holders, the Court argued that "in the absence of that intervention, those customers would not be able to enjoy the broadcast work, *or would be able to do so only with difficulty."*[742] The notion of what amounts to an 'indispensable intervention' for the the right of communication to the

[739] CJEU, SGAE v Hoteles SA, case 306/05, 7 December 2006, hereinafter: Rafael Hoteles SA.
[740] CJEU, Rafael Hoteles SA, para.42.
[741] CJEU, Filmspeler.
[742] CJEU, Filmspeler, para.41.

public to apply was relaxed by the Court. Instead of indispensable intervention, *mere facilitation* should be enough. The CJEU, in contrast to the interpretation given in the Rafael Hoteles SA case, allowed for the possibility that communication to the public also occurs in such a situation where the user providing the said access does not intervene in deliberate and intentional manner. The enjoyment of the work in such a case although being more complicated is still possible and therefore, the communication to the public takes place.

The engagement of the person providing access to work can be limited, according to the Court to mere facilitation of access. It means that the scope of understanding of the act of communication has been broadened. Wider group of users may be regarded as liable for unauthorised acts of communication to the public since the mere facilitation of access is enough to satisfy the requirement from art. 3 of the InfoSoc Directive according to the Court.[743] In my opinion, this tendency, emerging from the cases discussed leads to the important extension of the exclusive rights in detriment to the users' interests[744].

As to the character of the intervention of user giving access to the work, in GS Media case which concerned the question whether website link to a work placed online without the consent of the rights holder constitutes an act of communication to the public, a new sub - criterion of **knowledge** was introduced. According to the test of knowledge, if a link provides access to a work published online without the authorisation of the rightholder and the person providing the access knew or ought to have known about it, the act of hyperlinking constitutes an infringement of the right of communication to the public. According to the CJEU "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 is 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. In such circumstances, and in so far as that rebuttable presumption is not rebutted, the act of posting a hyperlink to a work

[743] See: E. Rosati, Filmspeler, the right of communication to the public, and unlawful streams: a landmark decision, 2017, https://ipkitten.blogspot.com/2017/04/filmspeler-right-of-communication-to.html, accessed: 18.08.2022. See: J.C. Ginsburg, The Court of Justice of the European Union Creates an EU Law of Liability for Facilitation of Copyright Infringement: Observations on Brein v. Filmspeler [C-527/15] (2017) and Brein v. Ziggo [C-610/15], 2017, https://core.ac.uk/download/pdf/230177032.pdf, accessed:24.01.2024.

[744] See: Chapter V, point 3.3.

which was illegally placed on the Internet constitutes a 'communication to the public' within the meaning of Article 3(1) of the Directive 2001/29."[745]

The said case related to a very specific problem of linking to the work illegally published but the knowledge test can be interpreted also in a broader perspective. According to it, the provision of access to a work in case when the provider knew or ought to have known that the work was published without the rightholder's authorisation has to be considered as infringement of right of communication to the public. It is reflected in Ziggo[746] case which concerned the question whether in circumstances where TPB, a peer-to-peer network based on a BitTorrent protocol, did not host any infringing content but instead provided a way for its users to access such content from the computers of other users (i.e. peer-to-peer), could be considered as the act of communication to the public. According to the CJEU "any act by which a user, with full knowledge of the relevant facts, provides its clients with access to protected works is liable to constitute an 'act of communication' for the purposes of Article 3(1) of Directive 2001/29."[747]

The criterion of knowledge has been nuanced in YouTube/Cyando [748] as regards the entities providing the access to work and their knowledge about the legality of the availability of the work on the Internet. The case concerned the question whether the operator of a video sharing platform or a file-hosting and sharing platform, on which users can illegally make protected content available to the public, itself makes a 'communication to the public' of that content. The CJEU held that the situation of "a person posting a hyperlink who acts on his or her own initiative and who, at the time of posting, knows the content to which that link is supposed to lead, is not comparable to that of the operator of a video-sharing platform or of a file-hosting and - sharing platform where that operator does not know specifically what protected content is uploaded to that platform by users and does not contribute, beyond merely making that platform available, to giving the public access to such content in breach of copyright."[749] For this reason,

[745] CJEU, GS Media, para. 51. See: E. Laskowska – Litak, Treść prawa autorskiego : kiedy publiczność staje się nowa? : wprowadzenie i wyrok TS z 8.09.2016 r. w sprawie C-160/15 GS Media BV przeciwko Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruidzie Dekker, Europejski Przegląd Sądowy, no.3 (138), 2017, pp.46-54.
[746] CJEU, Stichting Brein v Ziggo BV, XS4ALL Internet BV, case C-610/15, 14 June 2017, hereinafter: Ziggo.
[747] CJEU, Ziggo, para. 34. See also: B. Marušić, The Autonomous Legal Concept of Communication to the Public. Interpretation in EU Copyright Law, Edward Elgar Publishing 2023.
[748]CJEU, Frank Peterson v Google LLC, YouTube Inc., YouTube LLC, Google Germany GmbH (C-682/18), and Elsevier Inc. v Cyando AG (C-683/18), 22 June 2021, hereinafter: YouTube/Cyando.
[749] CJEU, YouTube/Cyando, para.89.

according to the Court, the operator of a video-sharing platform or a file-hosting and - sharing platform will make the act of communication in the case when "that operator has specific knowledge that protected content is available illegally on its platform and **refrains** from expeditiously deleting it or blocking access to it, or where that operator, despite the fact that it knows or ought to know, in a general sense, that users of its platform are making protected content available to the public illegally via its platform, **refrains from putting in place the appropriate technological** measures that can be expected from a reasonably diligent operator in its situation in order to counter credibly and effectively copyright infringements on that platform, or where that operator participates in selecting protected content illegally"[750].

The Court therefore drew a distinction between the individual user and video-sharing platform or a file-hosting and - sharing platform as regards the criterion of knowledge. According to it, in the case of the latter group of actors, due to the nature of their activity, in addition to knowledge that protected content is available illegally, for the act of communication to occur, the said entities should refrain from deleting the illegally available work or blocking access to it, or from putting in place the appropriate technological measures that can be expected from a reasonably diligent operator.

As to the **profit - making criterion**[751] of activity of the user providing access to the work, in Rafael Hoteles SA case, the CJEU mentions its importance but neither in this case, nor in the following ones this criterion is considered as necessary or essential to establish "the existence of a communication to the public".[752] In Murphy, the CJEU noted that the profit- making nature is not irrelevant to qualify an act as an act of communication to the public.[753] In TVCatchup[754] case which concerned the question whether the TV Catchup's online streaming service breaches the broadcasters' right of communication to the public, the CJEU held that a profit-making nature of a communication is "not necessarily an essential condition for the existence of a communication to the public."[755] In GS Media case, the said criterion is mentioned by the CJEU in relation to the

[750] CJEU, YouTube/Cyando, para.102.
[751] See: K. Klafkowska - Waśniowska, Public Communication Right: Towards Full Harmonisation?, European Intellectual Property Review,vol.35, no. 12, 2013,p.756,pp.751-758.
[752] CJEU, Rafael Hoteles SA para.44, CJEU, Murphy par.204, CJEU, Filmspeler par.34, CJEU Ziggo par.28. However, in relation to the subject matters protected by related rights the reasoning of the CJEU is different.
[753] CJEU, Murphy, para. 204
[754] CJEU, ITV Broadcasting Ltd and others v TVCatchup Ltd, Case C-607/11, 7 March 2013, hereinafter: TV Catchup.
[755] CJEU, TV Catchup, para. 42.

knowledge test. According to it, the person who decides to provide a link to protected content and its activity is of profit - oriented nature, he/she should undertake the necessary checks to make sure the work to which he/she linked was not illegally published.

As to the scope of the engagement of user providing access to work to the public, the CJEU considered that the **mere provision of physical facilities enabling the act of communication to the public is not enough** for the act of communication to the public from art. 3 of the InfoSoc Directive to occur. However, in Rafael Hoteles SA, although the Court decided that the mere provision of physical facilities, usually involving, besides the hotel, companies specialising in the sale or hire of television sets, does not constitute, as such, a communication to the public, "the installation of such facilities may nevertheless make public access to broadcast works technically possible and therefore, constitute a communication to the public".[756]

Similarly, in Filmspeler case, the provision of a multimedia player which offers its users direct access to protected works without the consent of the copyright holders must be regarded, according to the CJEU, as an act of communication within the meaning of Article 3(1) of Directive 2001/29[757]. The physical product which gave access to unlawful transmissions by third parties, according to the CJEU should not be considered as physical facilities for enabling or making communication but as a manifestation of communication to the public.

Since the physical facilities are understood by the Court very narrowly, any potential use of almost anything which makes possible the public access to the content protected by copyright can be considered as a communication to the public. On the basis of the discussed interpretation of the CJEU, the engagement of the user providing public with the access to the work has not to be of substantial nature in order to meet the criteria of the act of communication to the public. Already the provision of a product giving access to the work can be considered as an act of communication to the public.

To conclude, the act of communication to the public from art. 3 of the InfoSoc Directive, as regards the criterion of communication, occurs when:

- There is a deliberate and intentional intervention of user providing access to work. However, according to the interpretation provided by the CJEU in recent cases, the engagement of user providing access to the work will meet the requirements of communication to the public also in the situation when his/her activity consists of mere facilitation of the access to the work.

[756] CJEU, Rafael Hoteles SA, para.46.
[757] CJEU, Filmspeler, para.42.

- The provider of access to work knew or could have known that the work was published without the right holder's authorisation. However, the criterion of knowledge has been nuanced as regards the operator of a video sharing platform or a file-hosting and sharing platform, on which users can illegally make protected content available to the public. The Court held that for such a platform to make the act of communication, not only the knowledge about the illegality of the work matters but also the fact that the platform refrains from expeditiously deleting the said works or blocking access to them, or where that operator, despite the fact that it knows or ought to know, in a general sense, that users of its platform are making protected content available to the public illegally via its platform, refrains from putting in place the appropriate technological measures.

- The provider of access to content protected by copyright conducts the activity of profit- making nature. However, according to the interpretation provided by the CJEU it is important but not indispensable for concluding that the act of communication to the public occurs.

- The engagement of provider of the access to the work does not consist of providing exclusively the physical facilities enabling the act of communication to the public. However, since the act of provision of physical facilities is understood by the CJEU in a narrow way, also a provision of a product giving access to the work can be considered as an act of communication to the public.

- 'public'

The notion of public refers to an indeterminate number of potential recipients[758] likely to access the work"[759]. The CJEU in Rafael Hoteles SA specified that the public should be "**new** what means a public different from the public to which the original act of communication of the work was directed" [760] and not taken into account by the rightholder while making the act of authorisation of the transmission.[761] Therefore, if the recipients of the work are the same and already known to the rightholder at the moment of authorising the initial act of communication there is no issue of potential infringement.

[758]CJEU, Rafael Hoteles SA, para.37.
[759] A. Lucas – Schloetter, The Acquis …, p.129.
[760] CJEU, Rafael Hoteles, para. 40. See: CJEU, Murphy, paras.197-198.
[761] T. Rendas, Exceptions …, p.251.

In Svensson[762] case which concerned the question whether including hyperlink leading to the protected material available on a website and being freely accessible there could be considered as the act of communication to the public, the CJEU provided some important details on the understanding of the criterion of 'new public' in the specific situation of providing links to the content protected by copyright. Linking, according to the CJEU makes the works available to the users and allows direct access to them.[763] All potential website visitors being able to access the link published there are the targeted public taken into account by rightholder while authorising the original communication. Therefore, they do not constitute a new public and in consequence, the communication to the public does not occur.

What should be seen differently according to the CJEU's interpretation provided in Svensson case is when the access to the work is restricted and the act of linking intends to circumvent the restrictions in order to enable recipients to access the work. It would constitute an intervention directed towards a new public[764]. It would be also the case, according to the CJEU, if the work was simply no longer available to the public on the website on which it was initially communicated or if new restrictions were introduced to that website, after it had already been made accessible through linking at another location without these new restrictions being taken into account. The last observation leads to the conclusion that the legality of linking may depend on the acts of rightholders *a posteriori* what contributes to the user's uncertainty and precarious position.[765]

In the TV Catchup case the CJEU specified that in the situation when the communication is made by **different technical means** to the original communication, there is no need to establish whether there is new public or not.[766] Thus, even though the public is the same, the author should be asked for the permission to communicate the work to public if the communication would be made with the use of different technical means. The CJEU made a distinction between a transmission of works included in a terrestrial broadcast and the making available of those works over Internet as "each of those two transmissions must be authorised individually and separately by the authors

[762] CJEU, Nils Svensson and others v Retriever Sverige AB, 13 February 2014, C-466/12, hereinafter: Svensson.
[763] CJEU Svensson par. 18; See: J. Rosen, "How much communication to the public is 'communication to the public'?", in I.A. Stamatoudi (ed.), New Developments in EU and International Copyright Law, Information Law Series Kluwer Law International, 2016, pp. 341-347.
[764] CJEU, Svensson, para.31.
[765] See: C. Angelopoulos, On Online…,p.21, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800, accessed: 16.08.2022.
[766] CJEU, TV Catchup, paras. 26, 39.

concerned given that each is made under specific technical conditions, using a different means of transmission for the protected works, and each is intended for a public". [767]

To conclude, the act of communication to the public from art. 3 of the InfoSoc Directive, as regards the criterion of public occurs when:

- Is directed towards a new public. However, in specific case of linking, the CJEU held that the criterion of new public will be met if the link intends to circumvent the restrictions in order to enable recipients to access the work. Moreover, the link will be directed towards new public in case when new restrictions were introduced to that website, after it had already been made accessible through the link at another location without these new restrictions being taken into account.

- The communication is made by different technical means to the original communication such as by wireless means or terrestrial networks. In such a situation there is no need to establish whether there is new public or not.

The EU legislator, in 2019, identified a specific group of actors amongst the entities making the communication to the public. According to the provision from art. 17 of the CDSM Directive, the scope of the right of communication to the public is extended to the online content- sharing service providers who perform the act of communication to the public or the act of making available to the public when they give the public access to copyright- protected works or other protected subject matter uploaded by its users. The provision applies to the providers of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which they organise and promote for profit-making purposes[768] such as Facebook, Instagram or YouTube. However, direct copyright liability will be excluded in case when the providers have made best efforts[769] to obtain the authorisation form the right holders and "to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information"[770].

[767] CJEU, TV Catchup, para. 39.
[768] Art. 2 (6) of the CDSM Directive.
[769] See: J. Reda, J. Selinger, M. Servatius, Article 17 of the Directive on Copyright in the Digital Single Market:a Fundamental Rights Assessment, 2020, p.7, https://freiheitsrechte.org/uploads/publications/Demokratie/Article17_Fundamental_Rights-Gesellschaft_fuer_Freiheitsrechte_2020_Projekt_Control_C.pdf, accessed: 29.05.2023.See also: P.Goldstein, P.B. Hugenholtz, International Copyright. …, 2019, p.325.
[770] Art 17(4) of CDSM Directive. Following the adoption of Art. 17 CDSM Directive in, Poland brought an action for annulment before the CJEU. The aim of the action was to have (parts of) Art. 17 CDSM Directive declared null and void on the grounds of a violation of freedom of expression and information. However, the CJEU in the judgement of 26.04.2022, considered art. 17 in line with fundamental rights, see:

The right of making available to the public[771] is a species of a more general right of communication to the public. It is included[772] in and forms part of the wider[773] communication to the public right, and should be interpreted consistently[774] with it. According to art. 3 (1) of the InfoSoc Directive it is granted to the authors and according to art. 3(2) the protection is extended to the related rights holders. S. Bechtold explains that the right covers "the act of providing a work to the public"[775]. It is enough for the protection resulting from the right to be triggered if a possibility of access[776] being a result of the transmission exists.[777] Public accesses the work 'on demand' meaning, from a place and at a time individually chosen. This is a reference to the interactive services. The simultaneity[778]of the reception of work by the public is not necessary. The making available is linked to the services based on "user-initiated modes of communication, such as offers to download a work from a public website or online streaming services that allow the consumer to 'pull' content at his/her convenience."[779]

5.4.Rental and lending rights

A. International law

Art. 7 (1) of the WCT provides the authors of computer programs, cinematographic works and works embodied in phonograms with the exclusive right of authorising commercial rental to the public of the originals or copies of their works.

CJEU, Republic of Poland v. European Parliament, Council of the European Union, case C-401/19, 26 April 2022.

[771] In depth analysis of the scope of the right of making available which will include the thorough study of the CJEU case law will be provided in chapter IV in the context of the press publishers' related rights adopted in art. 15 of the CDSM Directive.

[772] P. B. Hugenholtz, Sam C. Van Velze, Communication to a new public? Three reasons why EU copyright law can do without a "new public", International Review of Intellectual Property and Competition Law, IIC, vol.47, no.7, 2016, p.801.

[773] CJEU, C More Entertainment AB v Linus Sandberg, Case c-279/13, 26 March 2015, paras.24,26.

[774] Ch. Geiger, F. Chönherr, The Information Society Directive, in: I. Stamatoudi, P. Torremans (eds.), EU Copyright Law. A Commentary, Edward Elgar Publishing, 2014, p.11.24.

[775] S. Bechtold, in: T. Dreier, B. Hugenholtz (eds.), Concise European Copyright Law, Kluwer Law International, 2006, p.361.

[776] See: J. Koo, The right of communication to the public in EU Copyright Law, Hart Publishing 2019, pp.73-77.

[777]T. Rendas, Exceptions …, p.52. See: CJEU, Land Nordrhein-Westfalen v Dirk Renckhoff, Case C-161/17,7 August 2018.

[778] What differs the right of making available from the right of broadcasting. In case of the latter, according to Ch. Geiger "even when the user selects the place and time to use the work, transmission and use are simultaneous." See: Ch. Geiger, F. Chönherr, The Information …, p.11.24.

[779] C. Angelopoulos, On Online Platforms …, p.18, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800, accessed: 16.08.2022.

According to art. 11 of the TRIPS, in respect of at least computer programs and cinematographic works, a Member State shall provide authors and their successors in title the right to authorise or to prohibit the commercial rental to the public of originals or copies of their copyright works. P. Goldstein and P. B. Hugenholtz explain that the exhaustion rule allowing copies of works to be redistributed following their initial first sale led to a booming secondary market for the rental copies of motion pictures, phonograms and computer software. This is the origin of the adoption of such provision. However, due to the rise of Internet, the rental of audiovisual content, music or software lost its relevance, and in consequence, the rental rights became of marginal importance from the economic point of view. Lending right has not been adopted in the international law.

B. EU law

According to art. 3 (1) (a) of the Rental and lending rights Directive the exclusive right to authorise or prohibit rental and lending shall belong to the author in respect of the original and copies of his work.[780] According to art. 2 of the Rental and lending rights Directive 'rental' means making available for use, for a limited period of time and for direct or indirect economic or commercial advantage. 'Lending', according to the same provision means making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public.

Rental right, as it was noted in the context of international law, due to the development of new technologies became of marginal importance from the economic point of view. Lending right has some importance in the digital sphere due to the lending of digital copies of books conducted by libraries.[781]

5.5.French and Polish law

[780] According to art. 3 (1) of Rental and lending rights directive, the exclusive right to authorise or prohibit rental and lending shall belong also to (b) the performer in respect of fixations of his performance; (c) the phonogram producer in respect of his phonograms; (d) the producer of the first fixation of a film in respect of the original and copies of his film. According to art. 4, the provision of the Directive should be without prejudice to art. 4 (c) of the Software Directive according to which the exclusive rights of the rightholder within the meaning of Article 2 shall include the right to do or to authorise (…) c) the rental, of the original computer program or of copies thereof.

[781] See: CJEU, Vereniging Openbare Bibliotheken v Stichting Leenrecht, Case C-174/15, 10 November 2016.

According to art. 122-1 of the French Intellectual Property Law[782], the author's right of exploitation includes the right of representation and the right of reproduction. French legislator makes reference to the general term of act of exploitation, the use of which is explained by the willingness to keep the law in line with technological development and not to exclude the future possible forms of exploitation.[783]The latter includes, according to the provision discussed, the right of reproduction and the right of representation. The reproduction right includes the reproduction right *sensu stricto*, the distribution right and the rental and lending rights[784] and concerns the exploitation of work in tangible form. The representation right, unknown for the EU and Polish legislation as well as for the legislation of other Member States[785], applies to all ways of exploitation of a work in intangible form. The term 'representation' is considered as a synonym of communication to the public in case when that term is understood in its general sense as including performance, broadcasting, making available, retransmission by cable or satellite and other uses of the work in intangible form[786].

According to art. 17 of the Polish Copyright Act unless this act provides otherwise, the author shall have an exclusive right to use the work and to manage its use throughout all fields of exploitation and to receive remuneration for the use of the work.[787] The provision applies to authors and his successors in title and persons other than the author who are granted the economic rights *ex lege.*[788]

According to art. 50 of the Polish Copyright Act the separate fields of exploitation include, but are not limited to: 1) as regards fixing and reproducing a work – producing copies of a work using a specific technique, including printing, reprographic, magnetic recording and digital techniques; 2) as regards the circulation of the original copy of the work or its duplicates on which the work has been fixed – putting into circulation, lending or renting the original copy of the work or its duplicates; 3) as regards the dissemination of works in a manner other than that referred to under subparagraph 2 above – public

[782] English version by the author. French version of art. 122-1 of French Intellectual Property Law: Le droit d'exploitation appartenant à l'auteur comprend le droit de représentation et le droit de reproduction.
[783] S. Dusollier, Le droit de destination: une espèce franco-belge vouée à la disparition, Propriétés Intellectuelles, 2006, pp. 281-289, https://pure.unamur.be/ws/portalfiles/portal/55155517/5535.pdf, accessed : 02.05.2023.
[784] A. Lucas, A. Lucas- Schloetter, C. Bernault, Traité …, p.274.
[785] A. Lucas, A. Lucas- Schloetter, C. Bernault, Traité …, p.298.
[786] A. Lucas, A. Lucas- Schloetter, C. Bernault, Traité …, p.298.
[787] English translation by the author. According to art. 17 of Polish Copyright Law: Jeżeli ustawa nie stanowi inaczej, twórcy przysługuje wyłączne prawo do korzystania z utworu i rozporządzania nim na wszystkich polach eksploatacji oraz do wynagrodzenia za korzystanie z utworu.
[788] For example, the publisher as regards his right to the collective work.

performance, exhibition, screening, presentation, broadcast and rebroadcast, communicating it to the public in a manner that allows anyone to access it from a place and at a time of their choosing[789]. The Polish legislator proposes to divide the fields of exploitation into three main categories concerning the fixation and reproduction of the work, its distribution and communication to the public but the list is illustrative and non-exhaustive.

In the contract parties must specify the scope of the rights transferred or licensed on a specification basis, which, as Piotr Ślęzak explains, has been adopted into the Polish legislation from the French law. According to the principle of specification, copyright contracts are subject to a restrictive interpretation and, as a consequence, the author retains all rights and modes of exploitation that are not literally expressed in the contract. This is to prevent the general formulation of contracts.[790] According to art. 41 (2) of the Polish Copyright Law, a contract for the transfer of copyright or for the licence covers the fields of exploitation expressly mentioned therein. The indication of fields of exploitation in a contract is part of its essentialia negotii. According to art. L.131-3 of the Intellectual Propoerty Code each right transferred must be distinctly mentioned along with the scope ("étendue").

To conclude:

- In the Polish law an author has the positive right to use the work but also the negative right to prohibit others from doing so. The use of work encompasses any factual act of exploitation of the work which are for example producing copies of the work, disseminating works etc.

- The French legislator, like the Polish one, refers to the general term of right of exploitation, the use of which is explained by the willingness to keep the law in line with technological development and not to exclude future possible forms of

[789] (English version from: Act of 4 February 1994 on Copyright and Related Rights (Consolidated text) Ministerstwo Kultury i Dziedzictwa Narodowego, http://www.copyright.gov.pl/modules/download_gallery/dlc.php?file=23&id=1578048906, accessed: 24.05.2023). Polish version of art. 50 of Polish Copyright Law: Art. 50. Odrębne pola eksploatacji stanowią w szczególności:1) w zakresie utrwalania i zwielokrotniania utworu – wytwarzanie określoną techniką egzemplarzy utworu, w tym techniką drukarską, reprograficzną, zapisu magnetycznego oraz techniką cyfrową; 2) w zakresie obrotu oryginałem albo egzemplarzami, na których utwór utrwalono – wprowadzanie do obrotu, użyczenie lub najem oryginału albo egzemplarzy; 3) w zakresie rozpowszechniania utworu w sposób inny niż określony w pkt 2 – publiczne wykonanie, wystawienie, wyświetlenie, odtworzenie oraz nadawanie i reemitowanie, a także publiczne udostępnianie utworu w taki sposób, aby każdy mógł mieć do niego dostęp w miejscu i w czasie przez siebie wybranym.

[790] P. Ślęzak, Umowy w zakresie współczesnych sztuk wizualnych, Wolters Kluwer Polska, 2012, p.218.

exploitation. The latter includes the right of reproduction and the right of representation. The representation right, unknown for the EU and Polish legislation, applies to all ways of exploitation of a work in intangible form. French approach towards the right of communication to the public classified as representation right differs from the Polish one but the result as regards the scope of the exclusive rights in both legislations is the same. This similarity can be explained firstly, by the scope of harmonisation of the exclusive rights at the EU level, secondly by the similiraties of the construction of these rights and finally by their purpose.

6. Exceptions and limitations

6.1.General remarks

Exceptions and limitations[791] are the key instrument to delimitate the exact contours of exclusive rights.[792] Their main purpose is to balance[793] the public interest with the interests of rightholders in matter of access to works and their dissemination. This term applies to "statutory limitations that curtail the rights of right holders in specific circumstances to cater for the interests of certain user groups or the public at large."[794]

The safeguard of fundamental rights, and in particular, the user's freedom of expression and information as well as the promotion of dissemination of knowledge and culture are, for many scholars "the most powerful justification of copyright limitation."[795] Limitations are perceived as "essential balancing tools calibrated to allow users of

[791] Having in mind the ongoing discussion on the terminological differences between 'exceptions' and limitations', in this section however, these two terms will be used interchangeably. See: T. Rendas, Exceptions …, pp.62-77; Ch. Geiger, De la nature juridique des limites au droit d'auteur. Une analyse comparatiste à la lumière des droits fondamentaux, Propriétés intelectuelles, no.13, 2004, p.882; Ch. Geiger, Promoting creativity through copyright limitations : Reflections on the Concept of exclusivity in copyright law, Vanderbilt Journal of Entertainment and Technology Law, vol.12, no.3, 2010, p. 525.

[792] See: T. Dreier, Limitations: The Centerpiece of Copyright in Distress. An introduction, Journal of Intellectual Property, Information Technology and E-Commerce Law, no.1, 2010, p.50; See: Ch. Geiger, F. Schönherr, Defining the Scope of Protection of Copyright in the EU: The need to reconsider the Acquis regarding Limitations and Exceptions, in: T.-E. Synodinou (ed.), Codification of European Copyright Law. Challenges and perspectives, Wolters Kluwer Law&Business, Information Law Series, 2012, p.133.

[793] See: S. Dusollier, Y. Poullet, M. Buydens, Droit d'auteur et accès à l'information dans l'environnement numérique, Bulletin du droit d'auteur, vol. XXXIV, no. 4,2000, p. 13.

[794]B. Hugehnholtz, R. l. Okediji, Conceiving an International Instrument on limitations and exception to copyright, Amsterdam Law School Legal Studies Research Paper no.43, 2012, p.19.

[795] M. Senftleben, Copyright Limitations and the Three-Step Test: An analysis of the Three-Step Test in Interntional and EC Copyright Law, Kluwer Law International,2004, p.24; M. van Eechoud *et al*., Harmonizing European Copyright Law: The Challenges of Better Lawmaking, Kluwer Law International, Information Law Series, 2009, p.95.

copyright works sufficient freedoms to interact with these works without unduly undermining copyright's multiple rationales."[796]

Copyright, despite its name referring in many countries to the person of author (in French: droit d'auteur, in Polish: prawo autorskie, in German: Urcheberrehcht) encompasses the more complex relationships between authors, recipients of works, and society at large[797] and requires a copyright system for benefit of all these actors. The purpose of exclusive rights and exceptions and limitations is the same, they constitute an instrument to promote the creativity. [798]

The main objective of the following points is to provide a comprehensive study of the scope, character and types of exceptions and limitations. To do so, firstly, the analysis of the international and EU law will be conducted. Secondly, French and Polish law will be examined next to the international and European law as regards the selected exceptions and limitations important from the perspective of the use of press publications.

A. International law

The exceptions and limitations were included in the Berne Convention since its first version in 1886. However, they were few there. The exception allowing the reproduction of newspapers or articles for the purpose of reporting current events[799] was the only mandatory exception[800]. In the framework of the revision of the Convention further exceptions have been added.[801]

A set of minimum standards in matter of exceptions and limitations from the Berne Convention of 1971 consists of quotation exception (art. 10 (1)), exception for the: uses for teaching purposes (art. 10(2)), uses by the press (art. 2bis(2), art. 10 bis (1) and (2)), ephemeral recordings made by broadcasting organisations (art.11 bis (3)), conditions on the broadcasting and related rights (art.11 bis (2)) and reservations conditions on

[796]P.B. Hugenholtz, Flexible Copyright. Can the EU Author's Rights Accommodate Fair Use?, in: R.L., Okediji (ed.), Copyright Law in an Age of Limitations and Exceptions, Cambridge University Press, 2017, p.278.
[797] See: Ch. Geiger, De la …, p.883.
[798] Ch. Geiger, Promoting …, p. 525.
[799]Art.7 of the Berne Convention, 1886, https://wipolex.wipo.int/en/text/278701, accessed: 23.08.2022.
[800] In art.8 of the Berne Convention of 1886 the voluntary exception for the educational purposes was introduced. See: art. 8 of the Berne Convention, 1886, https://wipolex.wipo.int/en/text/278701, accessed: 23.08.2022.
[801] See: M.Ch. Janssens, The issue of exceptions reshaping the keys to the gates in the territory of literary, musical and artistic creation, in. E. Derclaye (ed.), Research Handbook on the future of copyright, Edward Elgar Publishing, 2009, pp.319-321.

mechanical reproduction rights (art.13).[802] Only the exception permitting the quotation is mandatory.

In the framework of the revision of the Berne Convention in 1967, the three-step test in relation to the limitations on the reproduction right was established. According to this test, in special cases when the reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author, the unauthorised reproduction of protected works should be permitted.[803] The test is addressed to legislators and restricts their ability to introduce and maintain the exceptions to the exclusive rights of authors and other right holders.[804]The test has been extended within art. 13 of the TRIPS Agreement to all exclusive rights.[805]

The three-step test has been largely criticised. It has been viewed as a negation of the balance between exclusivity and access. P.B Hugenholtz and R.L. Okediji note that "the cumulative application of the three - step test heavily tilts the balance in favor of right holders"[806]. In other words, the three - step test is rather seen as an instrument beneficial to rightholders and not to the recipients of works, contributing to the broad understanding of the exclusive rights. On the other hand, the international three-step test is perceived as a synonymous of flexibility allowing national legislators to answer cultural and economic needs.[807]

The international landscape of exceptions and limitations, since the revision of the Berne Convention in 1967 has not undergone any significant change and has not been substantially expanded, contrary to subject matters protected by copyright and scope of economic rights. World Intellectual Property Organisation reports on the conducted in recent years works on the new copyright exceptions for libraries, archives, museums, educational and research institutions which should better correspond with the

[802] The Berne Convention, Paris Act 1971, https://wipolex.wipo.int/en/text/278718, accessed: 23.08.2022.
[803] Determination of the common understanding of significance of this test still constitutes a challenge. see: D. Gervais, Making Copyright Whole. A Principled Approach to Copyright Exceptions and Limitations, University of Ottawa Law & Technology Journal, Vol. 5, Nos. 1, 2, 2008, pp.25-31; M.Ch. Janssens, The issue …, pp.323.
[804] R. Sikorski, Ocena dozwolonego użytku w prawie autorskim w świetle kryteriów testu trójstopniowego, in. M. Kępiński (ed.), Granice Prawa Autorskiego. C.H. Beck, 2010, pp.25-53; J. Griffiths, The three-step test in European Copyright Law- Problems and solution, Queen Mary University of London, School of Law, Legal Studies Research Paper no. 31,2009, p.1.See: J. Barta, R. Markiewicz, Prawo …, p.209.
[805] Art.13 of TRIPS Agreement: https://www.wto.org/english/docs_e/legal_e/trips_e.htm#art1, accessed: 24.08.2022.
[806] B. Hugehnholtz, R. l. Okediji, Conceiving …, p.17.
[807] M. Senftleben, The international Three-Step test. A model provision for EC fair use legislation, Kluwer Law International, 2004, p.67.

development of new technologies and should apply in the digital environment, including when content crosses borders.[808]

B. EU law

As regards the analysis of the exceptions and limitations in the EU law, the ones included in the InfoSoc Directive and the CDSM Directive will be analysed. Although this matter is also regulated in other EU directives, namely, in the Computer Programs Directive, the Databases Directive, the Rental and lending rights Directive, the Orphan Works Directive[809] and the directive implementing the Marrakesh Treaty[810], the choice of the provisions from the said directives to be discussed is justified by the horizontal scope of harmonisation resulting from these two acts.

o The InfoSoc Directive

The limitations and exceptions from the InfoSoc Directive apply to all categories of works, except computer programs and databases. Apart from the exception permitting the temporary acts of reproduction which is mandatory, all other exceptions are optional.

Art. 5 (2) provides five exceptions to the right of reproduction:

-the reprography exception,
-the private copying exception,
-the exception for specific acts of reproduction by cultural heritage institutions,
-the exception for ephemeral recordings made by broadcasting organisations, and
-the exception for reproductions of broadcast made by social institutions.

Art. 5 (3) provides a list of fifteen other exceptions which relate to both reproduction and communication to the public. They cover:

-teaching or scientific research,
-use by people with disabilities,

[808]See: WIPO, Limitations and Exceptions, https://www.wipo.int/copyright/en/limitations/, accessed: 26.04.2023.
[809] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, hereinafter: the Orphan works directive.
[810] Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, hereinafter: the Marrakesh Directive.

-reproduction by press, quotation, use for the purposes of public security,
-use of political speeches, use during religious celebrations,
-use of works, such as works of architecture or sculpture, incidental inclusion of a work or other subject matter in other material,
-use for the purpose of advertising the public exhibition or sale of artistic works,
-use for the purpose of caricature, parody or pastiche,
-use in connection with the demonstration or repair of equipment,
-use of an artistic work in the form of a building or a drawing,
-use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals.

Finally, in relation to reproduction right, according to art. 5 (4) of the InfoSoc Directive, the reproduction exceptions may be extended.

This point of the dissertation aims at establishing the scope of the margin of discretion of Member States while implementing the exceptions and limitations. **Optional** character of the majority of the exceptions and limitations leaves Member States the ample discretion to decide which exceptions to implement. The EU legislator explained this optional nature through the prism of differences in legal traditions in Member States.[811] Scholars consider this optional list as "random collection of cases"[812] and highlight its negative impact on legal certainty[813] and very limited harmonizing effect[814]. It is worth pointing out that the Advocate General M. Szpunar in his opinion in Pelham case which concerned the problem whether sampling requires authorisation from the holder of rights to the phonogram from which a sample is extracted, observed that "some of those exceptions reflect the balance struck by the EU legislature between copyright and various fundamental rights, in particular the freedom of expression. Failing to provide for certain exceptions in domestic law could therefore be incompatible with the Charter"[815]. However, the Advocate General did not specify which of the exceptions

[811] See: recital 32 of the InfoSoc Directive.
[812] M.Ch. Janssens, The issue …, p.332.
[813] C. Sganga, A new era for EU copyright exceptions and limitations? Judicial flexibility and legislative discretion in the aftermath of the Directive on Copyright in the Digital Single Market and the trio of the Grand Chamber of the European Court of Justice, ERA, Springer, 2020, p.311.
[814] L. Guibault, Why Cherry-Picking Never Leads to Harmonisation. The Case of the Limitations on Copyright under Directive 2001/29/EC, Journal of Intellectual Property, Information Technology and E-Commerce Law, 2010, p.58; P.B. Hugenholtz, The dynamics of harmonization of copyright at the European level, in. Ch. Geiger (ed.), Constructing European Intellectual Property: Achievements and New Perspectives, Edward Elgar Publishing, 2013, p. 273 et seq.
[815] Opinion of Advocate General Szpunar, 12 December 2018, Case C-476/17, Pelham, para.77. See: CJEU Pelham GmbH and Others v Ralf Hütter, Florian Schneider-Esleben, case C-476/17, 29 July 2019, hereinafter Pelham.

had such a status. Secondly, some scholars underlined the lack of precision in wording of the provisions discussed, which makes it difficult for Members States to determine the exact scope and conditions of application of exceptions and limitations.[816]

The list of exceptions and limitations provided in art. 5 is **exhaustive**[817] which means that national legislators are not allowed to modify the list of exceptions and to add the new ones. However, Member States are allowed to provide for limitations for certain uses of minor importance if limitations already exist under national law and in case when they concern only analogue uses and do not affect the free circulation of goods and services within the EU[818]. It is considered as the remedy for some of "the rigidness inherent to an exhaustive list of limitations."[819] In Pelham case, the CJEU stated that allowing Member States "to derogate from the author's exclusive rights beyond the exceptions and limitations exhaustively set out in Article 5 of the InfoSoc Directive, would endanger the effectiveness of the harmonisation of copyright and related rights, the objective of legal certainty and the proper functioning of the internal market".[820] The Court confirmed therefore, that Members States are not allowed to introduce new limitations and exceptions since the list provided in the InfoSoc Directive is exhaustive. In ACI Adam case where the Court discussed whether the scope of the private copying limitation covers reproductions from unauthorised sources, it has been confirmed that Member States are not allowed to extend the scope of the exceptions and limitations beyond the scope provided for in the InfoSoc Directive. It means that Member States may restrict but are not allowed to extend the scope of exceptions[821]. According to M. Leistner, the CJEU in this way demonstrated the strict and economic oriented rather than flexible approach.[822]

The Court addressed the problem of restriction of the scope of exceptions and limitations done by Member States while transposing the European directives in Spiegel online[823] case. It concerned the dispute between a publisher, Spiegel online and Volker

[816] See: C. Sganga, A new era …, p.312.
[817] See: E.Treppoz, De l'apparente rigidité du droit d'auteur européen en matière d'exceptions, Droit européen de la propriété intellectuelle, chroniques, RTDEur., 2019, p.927.
[818] Art. 5.3 (o) of the InfoSoc Directive
[819] See: M.M. Walter (ed.), Europäisches Urheberrecht: Kommentar, Springer,2001, p.1065.
[820] CJEU, Pelham, para.63.
[821] CJEU, ACI Adam BV and Others v Stichting de Thuiskopie, Stichting Onderhandelingen Thuiskopie vergoeding, case C-435/12, 10 April 2014, para. 26, hereinafter: ACI Adam.
[822] M. Leistner, Europe's copyright law decade: Recent case law of the European Court of Justice and policy perspectives, Common Market Law Review, vol. 51, no.2, 2014, p.569.
[823] CJEU, Spiegel Online GmbH v Volker Beck, Case C-516/17, 29 July 2019, hereinafter: Spiegel online.

Beck on the publication of the Mr. Beck's manuscript considered by him as published in edited way which had distorted his ideas and took place without his authorisation. The case related to the activity of reporting current events. It constitutes an exception from art. 5(3) of the InfoSoc Directive according to which Member States may provide for exceptions or limitations to the exclusive rights of reproduction and of communication to the public in case of use of works or other subject matters in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible.

The CJEU answered whether the mentioned exception precludes the introduction of a national rule restricting the application of the exception or limitation by introduction of the obligation to make a prior request for authorisation of the author with a view to the use of protected work. The Court argued that the wording of the provision does not require the rightholder's consent prior to the reproduction or communication to the public of protected work. Moreover, in matter of current events it is necessary to diffuse them rapidly which would be difficult to be reconciled with a requirement for the author's prior consent. The Court noted that the purpose of this limitation is to "contribute to the exercise of the freedom of information and the freedom of the media"[824], so the activity of press in a democratic society "governed by the rule of law should be conducted without restrictions other than those that are strictly necessary"[825]. Therefore, the Court stressed the importance of examining the purpose of exceptions and limitations and putting them in the broader context of fundamental rights.[826]

Member States, apart from one mandatory exception, are free to implement chosen optional exceptions. The CJEU confirmed that Member States **have discretion** while implementing the exceptions and limitations but this discretion is circumscribed by several factors. The implementation should be exercised within the limits imposed by the EU law. Member States are not in every case free to determine, in an unharmonised manner, the parameters governing the exceptions or limitations and should comply with the EU law principles including amongst other the principle of proportionality. The implementation cannot be used so as to compromise the objectives related to the establishment of a high level of protection for authors and the guarantee of the proper

[824] CJEU, Spiegel online, para. 72.
[825] CJEU, Spiegel online, para. 72.
[826] CJEU, Spiegel online, paras 68-74.

functioning of the internal market.[827]Nevertheless, Member States, while implementing, should also **safeguard the effectiveness of the exceptions and limitations** in order to strike a fair balance of rights and interests between different categories of rightholders and users of protected subject matter.[828]

- The three - step test

According to art. 5(5) of the InfoSoc Directive: the exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interests of the rightholder. All copyright limitations must pass this test. Exceptions shall only be applied in concrete cases. Any limitation must neither deprive the rightholder of the general benefits of the right in question nor inappropriately unbalance the relationship between the interests of rightholders and of third parties.[829] S. Bechtold observes that in assessing whether a limitation unreasonably prejudices legitimate interests of rightholders, both the quantity and the quality of the potential prejudice must be taken into consideration. [830]

The three-step test in the international law restricts the ability of legislators to introduce the exceptions to the exclusive rights of authors and other right holders,[831] it relates to the admissibility of exceptions. In the EU law, it has a function of impacting the application of copyright exceptions what may lead to the conclusion that the three-step test is therefore addressed to judges deciding cases about unauthorised uses of copyright works potentially covered by the exception. This issue remains however subject to discussion.[832]

[827] CJEU, Funke Medien, para 50.
[828] CJEU, Funke Medien, para 53.
[829] Sometimes the CJEU analyses the second and the third step together as it was in case of Filmspeler (Stichting Brein V Jack Frederik Wullems, also trading under the name Filmspeler, case C-527/15, 26 April 2017) and ACI Adam.
[830]S. Bechtold, in: T. Dreier, B. Hugenholtz (eds.), …, p.470.
[831] J. Griffiths, The three-step test …, p.1.
[832] M. Walter and S. von Lewinski state that the test is directed at national legislators when implementing the exceptions see: M. Walter, S. von Lewinski, European Copyright Law: A Commentary, Oxford University Press, 2010, p.1060-1061(111), contrary to R. Arnold, E. Rosati who point to the terminological use of words "to provide" and "to apply" in art. 5 of the InfoSoc Directive. According to the authors, the first relates to the Member States that may provide exceptions and limitations and the second to the judges who should apply the test, See: R. Arnold, E. Rosati, Are national courts the addresses of the InfoSoc three-step test? Journal of Intellectual Property Law and Practice, vol.10, no.10, p.743. See also: J. H. Cohen, Restrictions on Copyright and their Abuse, European Intellectual Property Review, vol.27, no.10, 2005,

The three-step test, according to the CJEU should lead to strict[833] understanding of exceptions and limitations. In Infopaq case, the Court stated that the provisions which derogate from a general principle, in this case, the requirement of rightholder's authorisation for any reproduction of a protected work, must be interpreted strictly. Moreover, the Court highlighted the need to interpret exceptions and limitations in the light of ensuring legal certainty for authors with regard to the protection of their works.[834] This rigid and definitively rightholder's oriented approach has been relaxed in subsequent judgements. In Murphy case, the CJEU acknowledged the strict interpretation of exceptions but at the same time noted the importance of ensuring their effectiveness and the fulfillment of their purpose[835].

In Ulmer[836] case the CJEU clarified whether the national court may depart from a restrictive interpretation in favor of an interpretation which takes full account of the respect of freedom of expression and freedom of information, enshrined in art. 11 of the Charter. The case concerned the situation of allowing by the libraries the electronic consultations from dedicated terminals of the books the rights to which were held by the publishers so that readers could print them out or save them on a USB sticks. Firstly, it should be highlighted that the CJEU made a reference to the users' rights, by stating that exceptions or limitations do themselves confer rights on the users of works or of other subject matter. It has been further elaborated in Funke Medien case where the Court provided more details on how to strike the balance between the exclusive rights on the one hand, and, on the other, the rights of the users[837]. Interesting is the fact that the Court recognised the statutory exceptions not just as derogations from the copyright but as a

p.364; J. H. Cohen, Is there a hidden agenda behind the general non-implementation of the EU three-step test, vol.31, no.8, European Intellectual Property Review, 2009 p.408.
S. Bechtold argues that the addresses of the provision are both Members States that are required to take it into consideration while implementing art. 5 and to the national courts that apply the national implementation of the exceptions and limitations listed in art. 5. See: S. Bechtold in: T. Dreier, B. Hugenholtz (eds.), Concise …, p.382; See also the opinion of the Advocate General Jääskinen in Stichting de Thuiskopie case in which AG stated that : "though being primarily a norm addressed to the legislature, the three-step test must also be applied to the national courts in order to ensure that the practical application of the exception to art.2 od Directive 2001/29 provided by national legislation remains within limits allowed by art.5" in: Opinion of Advocate General Jääskinen in Stichting de Thuiskopie, Case C-462/09, 10 March 2011, para. 42; See also: C. Zolynski, Le test en trois étapes, renouvellement des pouvoirs du juge ?, Legicom, vol.39, no.3, 2007,pp.107-113, https://www.cairn.info/revue-legicom-2007-3-page-107.htm, accessed :08.09.2022.

[833] See: R. Sikorski, Ocena …, pp.42-45.

[834] CJEU, Infopaq, paras. 56-59.

[835] CJEU, Murphy, paras. 163-164.

[836] See: CJEU Technische Universität Darmstadt v Eugen Ulmer KG, Case c-117/13, 11 September 2014, para.43, hereinafter: Ulmer.

[837] CJEU, Funken Medien, para.51.

source of rights, users' rights, which can in principle be balanced against rights of copyright protection holders.[838] The concept of users' rights emerging from the CJEU's interpretation is however still rather blurry.

Secondly, in Ulmer case, the Court pointed out that the national courts should interpret the national law in a consistent manner and rely on the interpretation of exceptions and limitations not being in conflict with fundamental rights or general principles of EU law.[839]The national courts, while applying the three - step test, according to the CJEU, should safeguard the effectiveness and the purpose of exceptions and limitations.

The restrictive approach towards the interpretation of the three-step test is adopted by national courts, imposing another layer of restrictiveness on the framework of exceptions and limitations. It may result in rendering the exceptions and limitations ineffective and inadequate to be applied in relation to digital technologies.[840] To illustrate this tendency, it is worth discussing the decision of the Court of Appeal of Brussels in Google INC v Copiepresse SCRL case.[841] The copyright management society representing a number of press publishers sued Google for infringement of the exclusive rights of reproduction and communication to the public. The infringement was based on the activity of French language Google News service which automatically searched websites on current news, then extracted articles from those websites, reproduced them without permission and stored in "cache" memory so any articles that have been withdrawn from the publishers' websites could still be accessed via the Google website. Google, in its defense, made a reference to the limitation for quotation and news reporting. The Brussels Court assessed the mentioned exceptions in the context of the three - step test and argued that when the reproduction right is the exclusive one, exceptions can only be interpreted with reservation, therefore, exemplifying a strict approach to the formula.[842] In the same vein the French Court of Cassation decided in the

[838] See: M. Borghi, Exceptions as user's rights in: E. Rosati (ed.), Routledge Handbook of EU Copyright Law, 2021, Routledge, 2021, pp.263-281.
[839] CJEU, Ulmer, paras.33-34; CJEU, Funke Medien, para.68.
[840] R. Xalabarder, Google News and Copyright in: A. Lopez – Tarruella (ed.), Google and the Law. Empirical Approaches to Legal Aspects of Knowledge-Economy Business Models, Springer, Information Technology and Law Series, vol. 22, 2012, p.164.
[841]The Court of Appeal of Brussels in Google INC v Copiepresse SCRL,2011, http://www.copiepresse.be/pdf/Copiepresse%20-%20ruling%20appeal%20Google_5May2011.pdf, accessed: 25.08.2022.
[842] The Court of Appeal of Brussels in Google INC v Copiepresse SCRL. See also: Mulholland Drive, Cour de Cassation, Chambre civile 1, du 28 février 2006, 05-15.824, Publié au bulletin, https://www.legifrance.gouv.fr/juri/id/JURITEXT000007052414/, accessed : 03.09.2022.

Mulholland Drive[843] case related to the transfer of film from a DVD copy into VHS prevented by the TPM.[844]The Court stated that the private copying is not an absolute right recognised to users and it must be interpreted strictly in light of the three-step test. The risk of income loss by the rightholder was sufficient justification to disapply the private use exception in this case and no others factors related to the user's interest were considered.

According to J. Griffiths, under art. 5(5) of the InfoSoc Directive, a user of works cannot ever be sure that his or her activities will fall within the terms of an exception in national law because the scope of the exception will always be subject to the uncertain conditions of the three-step test.[845] A. Lucas points out that the three-step test could in practice rather result in "paralysing these exceptions, or at least, in reducing their reach. It creates a vagueness that is prejudicial to legal security."[846] On the other hand, R. Xalabarder makes reference to 'Pedragosa v. Google Spain, S.L.'[847] case to illustrate the tendency of Spanish Courts to use the three-step test as a flexible interpretative clause, and not only as a 'restrictive' instrument, in the application of the statutory exceptions.[848]

The conclusion is that despite the fact the exceptions and limitations are seen by the CJEU as a potential source of the users' rights, although it is difficult for now to forsee what legal consequences this qualification will have, their restrictive understanding through the three-step test, and the restrictive application of such a test are detrimental to users' access to works and lead to the legal uncertainty. The latter, demonstrated on the example of very different application of the test by national courts shows, that finally, user, cannot be sure whether a given exception applies or not.

○ The CDSM Directive

The framework of exceptions and limitations adopted in the CDSM directive had been seen as a remedy to the shortcomings of the InfoSoc Directive and an answer to new, digital uses. S. Dussolier points out that in the CDSM Directive it has been assumed that

[843] Mulholland Drive, Cour de Cassation, Chambre civile 1, du 28 février 2006, 05-15.824, Publié au bulletin, https://www.legifrance.gouv.fr/juri/id/JURITEXT000007052414/, accessed : 03.09.2022.
[844] See analysis of TPM (Technological protection measures) in section 7 of this chapter.
[845] J. Griffiths, The three-step test …, p.14.
[846] A. Lucas, For a Reasonable Interpretation of the Three-Step Test, European Intellectual Property Review, 2010, p.277.
[847] Pedragosa v. Google Spain, S.L.' decision of Provincial Audience of Barcelona (Sec. 15), 17.09.2008.
[848] See: R. Xalabarder, Google News …, p.147.

exceptions should become "enabling devices and not constraints imposed on valuable uses. (…) The exception is not just a derogation to the rule, it becomes a rule of its own to pursue certain objectives that prevail over the protection of authors and copyright owners."[849] The new exceptions to copyright, declared mandatory and not overridable by contract[850] to ensure the smooth functioning of the digital single market and legal certainty[851]were introduced and this reflects, according to R. Markiewicz, a new approach taken by the EU legislator in relation to permitted use.[852] These new measures are perceived to have the goal of achieving a fair balance between the rights and interests of authors, other rightholders and users. They are limited in their application by the three-step test.[853]

The first two exceptions adopted in the Directive from 2019 concern the "text and data mining", defined in Article 2(2) of the CDSM Directive as any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations. However, as observed by a number of scholars, the scope of both TDM exceptions[854] is narrow and limited what may exclude many important applications in the field.[855]

Some observations need to be made as regards the second TDM exception from art.4 of the CDSM Directive, which allows the acts of reproduction and extraction to be conducted for the purposes of text and data mining regardless of any underlying commercial motive.[856] The possibility to opt out of the exemption is provided which means that rightholder has a possibility not to authorise the use of the works or other

[849] S. Dussolier, The 2019 Directive on Copyright in the Digital Single Market: Some progress, a few bad choices, and an overall failed ambition. Common Market Law Review, Kluwer Law International, 2020, vol. 57, no. 4, p.982.
[850] Apart from the exception introduced in the art. 4 of the CDSM Directive.
[851] Recital 5 of the CDSM Directive.
[852] R. Markiewicz, Prawo autorskie na jednolitym rynku cyfrowym. Dyrektywa Parlamentu Europejskiego i Rady UE 2019/790, Wolters Kluwer, 2021, p.31.
[853] Recital 6 of the CDSM Directive.
[854] See: T. Margoni, M. Kretschmer, A Deeper Look into the EU Text and Data Mining Exceptions: Harmonisation, Data Ownership, and the Future of Technology, GRUR International (Journal of European and International IP law), vol.71, no.8, 2022, pp.685-701.
[855] See: J.P. Quintais, The New Copyright in the Digital Single Market Directive A Critical Look, European Intellectual Property Review, vol.42, no.1, 2020, p. 35; R. Ducato, A. Strowel, Limitations to Text and Data Mining and Consumer Empowerment. Making the Case for a Right to 'Machine Legibility, 2018, CRIDES Working Paper Series; Ch. Geiger, G. Frosio and O. Bulayenko, The Exception for Text and Data Mining (TDM) in the Proposed Directive on Copyright in the Digital Single Market - Legal Aspects, Centre for International Intellectual Property Studies (CEIPI) Research Paper No. 2018-02,2018; R. Markiewicz, Prawo autorskie na …, p.31.
[856] P. B. Hugenholtz, The New Copyright Directive: Text and Data Mining (Articles 3 and 4), Kluwer Copyright Blog, 2019, https://copyrightblog.kluweriplaw.com/2019/07/24/the-new-copyright-directive-text-and-data-mining-articles-3-and-4/, accessed: 27.07.2023.

subject matters for the said purpose. Another issue is whether this opt out option allows the effective blocking of the use of content for the purpose of machine learning[857].

The exception is of high importance as regards the training of AI notably in press sector. Some practical issues as regards the application of this exception should be indicated. The exception from art. 4 applies in case when reproductions and extractions for the purposes of TDM take place from lawfully accessible works and other subject matters. The question arises whether the exception applies in case when a press publication lawfully accessible was reproduced for the TDM purposes and then, it has been placed by press publisher behind a paywall. Does the fact that a press publication has been put behind paywall mean that it cannot be further used for training purposes? According to art. 4(2) of the CDSM Directive reproductions and extractions made pursuant to paragraph 1 may be retained for as long as is necessary for the purposes of text and data mining. Therefore, the lawfulness of the access to the content should be assessed at the moment of its use for the TDM purposes.

Another question is whether and in which form the information about works and other subject matters used for the TDM purposes should be disclosed. According to chapter Y, article (C) (1) [858] proposed in the final AI Act compromise reached in December 2023, "Providers of general – purpose AI models[859] shall: (…) (d) draw up and make publicly available a sufficiently detailed summary about the content used for training of the general-purpose AI model, according to a template provided by the AI Office." This obligation could reinforce the transparency as regards the use of works and mitigate their use without consent. It should be also asked how legally qualify the ChatGPT's answers, which responds by quoting the parts of the used for the TDM purposes content and the identification of such content is possible? It seems that the further making available of materials accessed for the TDM purposes goes beyond the scope of the exception discussed. Finally, the question arises whether the use of press materials for AI training

[857] See: Z. Okoń, Dziś zablokowanie AI dostępu do treści to fikcja, Dziennik Gazeta Prawna, no.21, 2024.

[858] At the time of writing (26.12.2023) the consolidated text of the AI Act with authoritative article numbers has not been published yet. The quoted provisions are taken from a compromise proposal published by Politico: http://www.openfuture.eu/wp-content/uploads/2023/12/231206GPAI_Compromise_proposalv4.pdf, accessed: 26.12.2023.

[859] Defined as "an AI model, including when trained with a large amount of data using self-supervision at scale, that displays significant generality and is capable to competently perform a wide range of distinct tasks regardless of the way the model is released on the market and that can be integrated into a variety of downstream systems or applications." See: AI Act - compromise proposal published by Politico, p.1, http://www.openfuture.eu/wp-content/uploads/2023/12/231206GPAI_Compromise_proposalv4.pdf, accessed: 26.12.2023.

purposes should imply the obligation to pay a compensation to press publishers in view of the importance of these materials to the development of AI and the substantial work required to create them[860].

On a side note, it is worth to point out that in December 2023, New York Times sued OpenAI for unlawful use of its articles to create artificial intelligence products, including for training purposes. It alleged the infringement of copyright law and claimed that OpenAI's chatbots bypassed the newspaper's paywalls to create summaries of articles which had negative commercial impact on the functioning of the newspaper.[861] In the EU, the adoption of the TDM exceptions constitutes perhaps imperfect, but a needed very first step towards a legal framework of use of protected content for the AI-training purpose.

Art. 5 of the CDSM Directive provides an exception for uses of works and other subject matters in digital and cross-border teaching activities. Since it covers only the use for the sole purpose of illustration for teaching by educational establishments to the extent justified by the non-commercial purpose to be achieved, its scope may be considered as limited and overlapping with already existing exceptions in this matter.[862] Member States are allowed to exclude the application of art.5 as regards specific uses or types of works/subject matter if there are suitable licences on the market, i.e. covering at least the same uses as those allowed under the exception what is criticised as neglecting public interests and fundamental rights underpinnings.[863] According to art. 6 of the DSA cultural heritage institutions are allowed to make copies of any works or other subject matter which are permanently in their collections for the purposes of preservation.

The CDSM Directive also provides a provision related to the optional exceptions from the InfoSoc Directive, namely, quotation, criticism, review, caricature, parody and pastiche. It requires Member States to make them mandatory in favor of users uploading and making content available on online-sharing service providers, in the context of the implementation by the latter of content-filtering technologies[864]. Taking into

[860] M. Senftleben, Generative AI and Author Remuneration, International Review of Intellectual Property and Competition Law (IIC) no. 54, 2023, https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID4588969_code1440600.pdf?abstractid=4478370&mirid=1, accessed: 01.02.2024.
[861] See: S. Malyarevsky, How a New York Times copyright lawsuit against OpenAI could potentially transform how AI and copyright work, The Conversation, 2024, https://theconversation.com/how-a-new-york-times-copyright-lawsuit-against-openai-could-potentially-transform-how-ai-and-copyright-work-221059, accessed: 19.01.2024.
[862] See: S. Dussolier, The 2019 Directive …, pp.987-989.
[863] J.P. Quintais, The New Copyright …, p. 35.
[864] Article 17 (7) and recital 70 of the CDSM Directive.

consideration the optional list of exceptions and limitations adopted in the InfoSoc Directive, this provision may cause some confusion.[865] The question as to why these exceptions should be mandatory only as regards the activity of users uploading and making content available on online-sharing service providers and not as regards also the uses of press publications given that the latter also take place in the digital environment should be asked. On the other hand, Members States which did not have these exceptions in their legal orders, thanks to the provision discussed are obliged to adopt such what took place for example in Austria in relation to the exception of caricature, parody and pastiche within the process of implementation of the CDSM Directive. However, the scope of application of this exception is limited and applies only to the uses within the context provided for by the provision from art.17 of the CDSM Directive.[866]

6.2.Exceptions and limitations in relation to the use of press publication

Some of the exceptions are of great significance from the perspective of creation and use of press publications. In the following sections press reviews, reporting of current events and quotation exceptions will be discussed from the international, EU, French and Polish law perspective.

6.2.1. Press review and reporting of current events

A. International law

The Berne Convention since its inception always included the provisions promoting the free flow of information.[867] According to art. 10 bis (1) of the Berne Convention Member States can permit the reproduction by the press, the broadcasting or the communication to the public by wire of articles published in newspapers or periodicals on current economic, political or religious topics, and of broadcast works of the same character, in cases in which the reproduction, broadcasting or such communication thereof is not expressly reserved. Nevertheless, the source must always

[865] See: C. Sganga, A new era …, p.329

[866] The Austrian case was discussed in details by P. Homar during: Copyright flexibilities: Mapping, explaining, empowering organised by ReCreating Europe and Communia at the IViR University of Amsterdam, 21.09.2022.
See also the website of Communia on the process of the implementation of the CDSM Directive: https://eurovision.communia-association.org/detail/austria/, accessed: 21.09.2022.

[867] See: S. Ricketson, J. Ginsburg, International Copyright and Neighbouring Rights: The Berne Convention and Beyond, Oxford University Press,2022, p.786.

be clearly indicated; the legal consequences of a breach of this obligation shall be determined by the legislation of the country where the protection is claimed.

Introduction of the exception is not mandatory. It permits the taking of the entire articles if the relevant conditions are met. In consequence, the reproduction and communication of fragments of articles, such as headlines and introductory sentences are also authorised.[868] The content reproduced or communicated must be limited to current economic, political or religious topics. The provision relates to the reproduction by press, broadcasting or communication to the public by wire of the relevant articles. Only two modes of communications are enumerated (broadcasting and communication to the public by wire). Since the Convention has been adopted in the pre-internet era is likely that on-demand access had not been envisaged by the authors of the Convention.

According to art. 10 bis (2) of the Berne Convention it shall also be a matter for legislation in the countries of the Union to determine the conditions under which, for the purpose of reporting current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary or artistic works seen or heard in the course of the event may, to the extent justified by the informatory purpose, be reproduced and made available to the public. The objective of this provision is to enable the reporting of current events. As explained in the WIPO Guide to the Berne Convention, "It often happens that, during the reporting of current events by film or broadcast, protected works are seen or heard. Their appearance is fortuitous and subsidiary to the report itself. For example, military music and other tunes are played on the occasion of a State visit or a sporting event; a microphone cannot avoid picking them up, even if only part of the ceremony or event is covered. It would be impossible to seek the composer's consent in advance." [869] It may happen therefore, that in the framework of reporting of current events by means of photography, cinematography, broadcasting or communication to the public by wire, literary and artistic works will be reproduced or made available. It should take place to the extent needed for the reporting[870], as explained by S. von Lewinski, and to the extent justified by the informatory purpose.

[868] See: S. Ricketson, J. C. Ginsburg, Intellectual Property in News? Why Not? Melbourne Legal Studies Researc Paper, Columbia Public Law Research Paper no.14 -511, 2016, p. 17.
[869] C. Masouyé, Guide …, p.62, https://www.wipo.int/edocs/pubdocs/en/copyright/615/wipo_pub_615.pdf, accessed: 18.01.2024.
[870] S. von Lewinski, International…, p.156.

B. EU law

According to art. 5 (3)(c) of the InfoSoc Directive Member States may provide for exceptions or limitations to the right of reproduction and right of communication to the public, including making available to the public in case of reproduction by press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated unless this turns out to be impossible.

The limitation covers articles that have already been published, broadcast works as well as other subject matters of the same character. There is a restriction as regards the topic, press articles have to refer to current economic, political or religious topics, other works or subject matter have to have the same character. According to A. Lazarova "the permitted use encompasses reproduction – by the press – and communication to the public or making available – by everyone."[871]This is an important observation as regards the potential qualification of the activity of news aggregators in the framework of the discussed exception. It needs however to be analysed at the national level, with the consideration to the implementation of the provision into national law. The term 'press' is not defined in the EU law and remains a matter of national legislation. Holders of rights to articles, other works or subject matter can expressly reserve their rights on the works or subject matters. The authors' name, if it is not impossible, has to be disclosed.

According to the second part of art. 5 (3) (c) of the InfoSoc Directive Member States may provide for exceptions or limitations to the right of reproduction and right of communication to the public, including making available to the public, in case of the use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible. Compared to the provision from the Berne Convention there is no specification of means through which the reporting takes place. What is included in both provisions is the specification that the

[871] A. Lazarova, Re-Use the News: Between the EU Press Publishers' Right's Addressees and the Informatory Exceptions' Beneficiaries, Journal of Intellectual Property Law & Practice, Vol. 16, no. 3, 2021, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4071438, accessed: 01.02.2024.

reproduction or communication to the public of works and other subject matter has to be done to the extent justified by the informatory purpose.

Contrary to the first part of the provision from art. 5 (3) (c) of the InfoSoc Directive, in case of this exception, rightholders cannot reserve the rights on their works or subject matters what can be explained by the specificity of the reporting of current events explained already in the Guide to the Berne Convention. In case of the use of the works in connection with the reporting of current events, the author's name, should be indicated, unless this turns out to be impossible.

In Spiegel online and Funke Medien cases, the CJEU underlined the role of this exception and the importance of its effectiveness in the exercise of the freedom of information and the freedom of the media enshrined in Article 11 of the Charter. The purpose of press, according to the Court, in a democratic society governed by the rule of law, justifies the exception to inform the public, without restrictions other than those that are strictly necessary.[872]

C. French and Polish law

According to art. L122-5 (3) (b) of the French Intellectual Property Law where the work has been disclosed, the author cannot prohibit press reviews provided that the author's name and source are clearly indicated[873]. The term “press review” has not been further defined. According to the case law of the French Court of Cassation it should be understood as the joint and comparative presentation of various comments by different journalists on the same theme or event.[874] The comparative presentation is needed, what means that mere compilations of newspaper or magazine’s articles known in practice as press panoramas cannot be qualified as press reviews.[875] The approach adopted by the Court of Cassation can be seen as being of limiting nature towards the understanding of the scope of the exception discussed.

French legislator did not specify the objective of the press review but it could be assumed that it is for the informative purposes. The press review has to relate to current events. The exception applies irrespective of means of communication and concerns also

[872] CJEU, Spiegel Online, para.72 ; CJEU, Funke Medien, paras.60-64.
[873] English version by the author, According to art. L122-5 (3) (b)of French Intellectual Propoerty Code : Lorsque l'oeuvre a été divulguée, l'auteur ne peut interdire les revues de presse sous réserve que soient indiqués clairement le nom de l'auteur et la source.
[874]The Court of cassation, criminal chamber, Judgement of 30 January 1978, 75-92.001, https://www.legifrance.gouv.fr/juri/id/JURITEXT000007060264/, accessed:03.05.2023.
[875] A. Lucas, A. Lucas- Schloetter, C. Bernault, Traité …, p.437.

the press revues disseminated online. The author's name and source should be clearly indicated. The scope of the provision compared to Polish one is narrower. It does not encompass the dissemination of mere reports and articles on current events and their short excerpts, current comments or photographs taken by reporters if it is not for the purposes of **comparative presentation of various press publications**. The dissemination of mere reports, articles and their short excerpts should be analysed in the framework of quotation exception.[876] The purpose of comparative presentation excludes the application of this exception to the activity of news aggregators since the comparative aspect in their activity is missing.

According to art. L122-5 (3) (c) of the French Intellectual Property Law where the work has been disclosed, the author may not prohibit, provided that the name of the author and the source are clearly indicated : dissemination, even in full, via the press or television, for the informatory purpose, of speeches intended for the public made in political, administrative, judicial or academic assemblies, as well as in public meetings of a political nature and official ceremonies.[877] The French legislator specified that the informatory purposes justify the dissemination of speches in part or in their entirety made in the enumerated specific contexts. The scope of the exception is therefore narrower compared to the provision from the InfoSoc Directive which relates to the use of works and subject matters in connection with the reporting of current events since it relates exclusively to the speeches.

According to art. 25(1) of the Polish Copyright Act it is permitted for information purposes to disseminate through press, radio and television the already disseminated: a) reports on current events and their short excerpts; b) articles on current political, economic or religious topics and their short excerpts where such further dissemination thereof is not expressly prohibited; c) current comments made and photographs taken by reporters. Moreover, it is permitted for information purposes to disseminate through press, radio and television the reviews of publications, works and short summaries of works already disseminated. According to art. 25 (2) the author shall have the right to

[876] See point 6.2.2.

[877] English version by the author. French version of art. L122-5 (3) (c) of the French Intellectual Property Code: Lorsque l'oeuvre a été divulguée, l'auteur ne peut interdire, sous réserve que soient indiqués clairement le nom de l'auteur et la source :diffusion, même intégrale, par la voie de presse ou de télédiffusion, à titre d'information d'actualité, des discours destinés au public prononcés dans les assemblées politiques, administratives, judiciaires ou académiques, ainsi que dans les réunions publiques d'ordre politique et les cérémonies officielles, https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006069414/LEGISCTA000006161637/?anchor=LEGIARTI000048603495#LEGIARTI000048603495, accessed : 13.02.2024.

remuneration for the use of the works which are the articles on current political, economic or religious topics where such further dissemination thereof is not expressly prohibited and current comments made and photographs taken by reporters[878].

The cited provision constitutes a basis for the use of reports, articles, comments, photographs and their short excerpts created by others for information purposes. Their dissemination takes place through press, radio and television. In case when the rightholder of copyright protection does not consent to the dissemination of his/ her works and its excerpts, it can be expressly prohibited.[879] The indicated in the provision subject matters can be used in parts or in their entirety.

According to art. 25 (4) of the Polish Copyright Act the said provisions shall apply accordingly to making works available to the public in a manner allowing anyone to access them in a place and at a time of their choice (…).[880] Opinions are divided as to whether it applies exclusively to press, radio and television making available the information through the Internet or to all entities, natural and legal persons. The latter, fos some academics constitutes a too extensive interpretation which would go beyond the

[878] According to art. 25 of Polish Copyright Act: 1. Wolno rozpowszechniać w celach informacyjnych w prasie, radiu i telewizji:
1) już rozpowszechnione:
a) sprawozdania o aktualnych wydarzeniach,
b) artykuły na aktualne tematy polityczne, gospodarcze lub religijne, chyba że zostało wyraźnie zastrzeżone, że ich dalsze rozpowszechnianie jest zabronione,
c) aktualne wypowiedzi i fotografie reporterskie;
2) krótkie wyciągi ze sprawozdań i artykułów, o których mowa w pkt 1 lit. a i b;
3) przeglądy publikacji i utworów rozpowszechnionych;
4) (uchylony)
5) krótkie streszczenia rozpowszechnionych utworów.
2. Za korzystanie z utworów, o których mowa w ust. 1 pkt 1 lit. b i c, twórcy przysługuje prawo do wynagrodzenia. (English version from: Act of 4 February 1994 on Copyright and Related Rights (Consolidated text) Ministerstwo Kultury i Dziedzictwa Narodowego, http://www.copyright.gov.pl/modules/download_gallery/dlc.php?file=23&id=1578048906, accessed: 24.05.2023).

[879] See: S. Stanisławska- Kloc, Komentarz do art. 25 Ustawy o prawie autorskim i prawach pokrewnych in: D. Flisak (ed.), Prawo autorskie i prawa pokrewne. Komentarz, 2015, Wolters Kluwer, point 17, Lex.

[880] According to art. 25 (4) of Polish Copyright Act: Przepisy ust. 1–3 stosuje się odpowiednio do publicznego udostępniania utworów w taki sposób, aby każdy mógł mieć do nich dostęp w miejscu i czasie przez siebie wybranym, z tym że jeżeli wypłata wynagrodzenia, o którym mowa w ust. 2, nie nastąpiła na podstawie umowy z uprawnionym, wynagrodzenie jest wypłacane za pośrednictwem właściwej organizacji zbiorowego zarządzania prawami autorskimi lub prawami pokrewnymi. (English version from: Act of 4 February 1994 on Copyright and Related Rights (Consolidated text) Ministerstwo Kultury i Dziedzictwa Narodowego, http://www.copyright.gov.pl/modules/download_gallery/dlc.php?file=23&id=1578048906, accessed: 24.05.2023). See: E. Traple, Raport na temat dostosowania polskiego systemu praw autorskich i praw pokrewnych do wymogów społeczeństwa informacyjnego,2012, http://www.prawoautorskie.gov.pl/media/warsztaty_/traple_(1).pdf, accessed: 28.04.2023.

scope of the exception from art. 5 (3) (c) of the InfoSoc Directive[881]. J. Barta and R. Markiewicz propose to understand this provision as concerning the making available of the said content by press, radio and television and other entities whose purpose is to disseminate information.[882] Following this interpretation it would be possible to include news aggregators in the category of entities to which the discussed provision applies[883] since they contribute to the dissemination of information. Key in assessing whether the exception applies to the activity of news aggregators, if we follow the broad interpretation of art. 25 (4) of the Polish Copyright Act, will be the three - step test and on this basis in my opinion, it will not be justified.

According to art. 26 of the Polish Copyright Act in the reports on current events the works made available at these events can be used, but within the limits justified by the informatory purpose. There is an obligation to indicate the author of the work used in the framework of reporting according to art. 34 of the Polish Copyright Act. Rightsholders cannot reserve the rights on their works. According to art. 26 [1] [884] political speeches and speeches delivered at public hearings, as well as excerpts from public speeches, lectures and sermons, may be used to the extent justified by the informatory purpose. The provision does not authorise the publication of collections of such works. According to E. Nowińska this is another provision which, in the name of satisfying the public interest in information, restricts the relevant rights to the works indicated in the provision.[885] Use of speeches from art. 26 [1] is not limited to the current events, there is no specification as to the entities using them.

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[881] See: E. Laskowska-Litak, J. Marcinkowska, J. Preussner-Zamorska, Dozwolony użytek chronionych utworów, in: J. Barta (ed.), System Prawa Prywatnego, 2017, C.H. Beck, pp.632-636, Legalis.

[882] J. Barta, R. Markiewicz, Prawo autorskie, Wolters Kluwer, 2016, p.478. See also: P. Ślęzak, Komentarz do art. 25 Ustawy o prawie autorskim i prawach pokrewnych, in: P. Ślęzak (ed.), Ustawa o prawie autorskim i prawach pokrewnych. Komentarz, C. H. Beck, 2017, point B, Legalis. Contrary opinion is expressed for example by S. Stanisławska- Kloc, in: S. Stanisławska- Kloc, Komentarz do art. 25 …, point 22, Lex.

[883] J. Barta, R. Markiewicz, Prawo autorskie…, p.478.

[884] English version by the author. Polish version of art. 26: Wolno wsprawozdaniach oaktualnych wydarzeniach przytaczać utwory udostępniane podczas tych wydarzeń, jednakże w granicach uzasadnionych celem informacji. And of art. 26 [1]: Wolno korzystać wgranicach uzasadnionych celem informacji z przemówień politycznych i mów wygłoszonych na publicznych rozprawach, a także fragmentów publicznych wystąpień, wykładów oraz kazań. Przepis nie upoważnia do publikacji zbiorów tego rodzaju utworów. https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19940240083/U/D19940083Lj.pdf, accessed: 02.02.2024.

[885] E. Nowińska, Komentarz do art. 26 (1), in: R. Markiewicz (ed.), Komentarz do ustawy o prawie autorskim i prawach pokrewnych. Ustawy Autorskie. Komentarze. Tom 1, Wolters Kluwer Polska, 2021, point 12, LEX.

6.2.2. Quotation

A. International law

According to art. 10 (1) and 10 (3) of the Berne Convention it shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that it is compatible with fair practice, and the extent of the quotation does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals in the form of press summaries. Where the quotation is based on works, the source and the name of the author should be mentioned.

The provision is not limited to the particular types of works and must satisfy three conditions: the work in question must have been lawfully made available to the public, the act of making the quotation must be compatible with fair practice and it cannot exceed the extent justified by the purpose of the exception. The requirement of compatibility with fair practice has not been specified in the quoted provision. S. Ricketson and J. Gainsburg suggest that it may relate to the nature of quotation or/ and its length[886]. T. Aplin and L. Bently add the factors like harm to the market for the source work and the impact on the integrity interests of the author of the source work.[887]

The length of permissible quotation is not determined. Although it should be seen as a part of a greater whole, quantitative restrictions considered as difficult to apply were omitted.[888] Quotation may be lengthy but it should be consistent with the purpose for which is made and compatible with fair practice.[889]

The mandatory nature of this exception should be highlighted. The wording of art. 10 (1) of the Berne Convention ('it shall be permissible to make quotations . . .'), differs significantly from the wording of others provisions related to exceptions and limitations (e.g. the wording of art. 10 (2) related to teaching exception: 'it shall be a matter for legislation…') and according to S. Ricketson and J. Ginsburg "comes closest to embodying a 'user right' to make quotations."[890]

Article 10(1) makes reference to a specific kind of quotation, namely 'quotations from newspaper articles and periodicals in the form of press summaries' but scholars

[886] S. Ricketson, J. Ginsburg, International Copyright …,2022, p.768.
[887]T. Aplin, L. Bently, Global Mandatory Fair Use. The Nature and Scope of the Right to Quote Copyright Works, Oxford University Press, 2020, pp. 140-189.
[888] See: S. Ricketson, J. Ginsburg, International Copyright …,2022, p.770.
[889] S. Ricketson, J. Ginsburg, International Copyright …,2022, p.771.
[890] S. Ricketson, J. Ginsburg, International Copyright …,2022, p.772.See also: T. Aplin, L. Bently, Global …, pp. 29-33.

point to some difficulties and linguistic differences in understanding of the term 'press summaries' which has not been clarified in the Convention.[891] In the literature it has been proposed to define this term as "a collection of quotations from a range of newspapers and periodicals, all concerning a single topic, with the purpose of illustrating how different publications report on, or express opinions about, the same issue.[892]" The role of Member States is to specify these interpretative doubts.

B. EU law

According to art. 5 (3) (d) of the InfoSoc Directive, Member States may provide for exceptions or limitations to the reproduction and making available rights in case of quotations for purposes such as criticism or review. It has to relate to a work or other subject matter which has already been lawfully made available to the public. Unless this turns out to be impossible, the source, including the author's name should be indicated, and the use should be in accordance with fair practice, and to the extent required by the specific purpose. The quotation exception draws significantly from the discussed provision of Berne Convention but, contrary to the latter is not mandatory.[893]

It is seen as an important instrument to strike a fair balance between freedom of expression and the exclusive rights to prevent the use of works[894]. It safeguards the interests in a free intellectual analysis, freedom of opinion and freedom of press.[895] Quotation should be defined, according to the CJEU, "by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and its purposes. Quotation constitutes a use, by a user other than the copyright holder, of a work or, more generally, of an extract from a work for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of the user".[896]

[891] See: S. Ricketson, J. Ginsburg, International Copyright .., p.769.
[892] S. Ricketson, Ginsburg, International Copyright …, p.770.
[893] However, Member States are required to make the quotation exception mandatory in favor of users uploading and making content available on online-sharing service providers, in the context of the implementation by the latter of content-filtering technologies but only for situations falling with the coverage of art.17. see Article 17(7) and Recital 70 of the CDSM Directive.
[894] CJEU, Painer, paras. 132-135.
[895] See: Advocate General Trstenjak, Painer Case, 12 April 2011, para. 186, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62010CC0145&from=EN, accessed: 06.09.2022.
[896] CJEU Pelham, paras. 70-71.

The CJEU in Pelham case observed that as a matter of conditions of the quotation it should be "unaltered and distinguishable."[897] Quotation cannot be "so extensive as to conflict with a normal exploitation of the work of another subject matter or prejudices unreasonably the legitimate interests of the rightholder"[898] and is required to be in accordance with fair practice and in light of a specific purpose. Exception applies not only to the quotation of small parts of work but also to the quotations of an entire work.[899] The quoted work does not have to be inextricably integrated in the work, a quotation can be made by including for example a hyperlink.[900]The list of purposes provided in the Directive is not exhaustive and includes *inter alia* the use 'for purposes such as criticism or review.'

The general rule resulting from the provision discussed is that the author's name should be indicated. However, the CJEU in Painer specified that in case where at the first lawful use of work the author's name was not indicated, during the subsequent use of work, in accordance with Article 5(3)(d) of the InfoSoc Directive, the indication of its source but not necessarily the name of its author is required.[901]

This exception has an optional character in the EU law. There is no consensus amongst scholars whether the optional nature of the discussed exceptions resulting from the EU law is contrary to art. 10 (1) of the Berne Convention or not.[902]

M.D. Papadopoulou notes that the Berne Convention does not apply to related rights and therefore there is no supporting rationale for the understanding of the exception discussed as mandatory.[903] On the other hand, according to J. Ginsburg, the mandatory character of article 10 of the Berne Convention should be understood in such a way that

[897] CJEU, Pelham, paras.72-73. J. Parkin criticizes the requirement of recognizability or identifiability of the quoted work by the audience See: J. Parkin, The Copyright Quotation Exception: Not Fair Use by Another Name, Oxford University Commonwealth Law Journal, vol.19, no.1, 2019, p.74.
[898] CJEU, Spiegel Online, para. 79.
[899] S. Ricketson, WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment, SCCR/9/7, p.13, https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=16805, accessed: 06.09.2022.
[900] CJEU, Spiegel Online, para. 80.
[901] CJEU, Painer, paras. 147-149.
[902] See: R. Xalabarder, The Remunerated ….
2014, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504596, accessed:14.11.2022, Contra: E. Rosati, Neighbouring Rights for Publishers: Are National and (Possible) EU Initiatives Lawful? International Review of Intellectual Property and Competition Law (IIC), vol.47, no.5, 2016, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2798628, accessed: 14.11.2022.
[903] M.-D. Papadopoulou, E.-M. Moustaka, Copyright and the Press Publishers Right on the Internet. Evolutions and Perspectives, in: T.-E. Synodinou, P. Jougleux, Ch. Markou, T. Prastitou (eds.), EU Internet Law in the Digital Era. Regulation and Enforcement, Springer, 2020, p.125.

the Convention introduces a maximum level of protection, whether located in copyright law or in sui generis protection.[904]

In recital 57 of the DSM Directive there is a particular mention of the exception of quotation for purposes such as criticism or review provided for in Article 5(3)(d) of the InfoSoc Directive. The question arises whether its emphasis in the mentioned recital could lead to the conclusion that the quotation exception should be obligatorily implemented. In my opinion, the mandatory character of an exception would be expressed directly if this was the will of the EU legislator. Therefore, the obligation to implement this exception cannot be reconstructed based on the wording of this recital. It finds its confirmation while taking into consideration that in art. 17 (7)(a) of the CDSM Directive in relation to the use of protected content by online content-sharing service providers, the exception of quotation, criticism and review has been made mandatory to enable users to upload and make available content generated by them on online content-sharing services.

In my opinion, it is pointless to make such a distinction and make this exception obligatory only as regards art. 17 of the CDSM Directive and the use of protected content on the online content-sharing service providers. I suggest to amend the wording of the latter to make the exception mandatory generally, especially when considering its importance from the perspective of access to information.

C. French and Polish law

According to art. L122-5 (3)a of the French Intellectual Property Code, once the work is disclosed, the author cannot prohibit the analysis and short quotations justified by the critical, polemical, educational, scientific or informative nature of the work into which they are incorporated[905]. The quotation should be short and not allowing the original work to be reconstructed in its entirety. It reflets the interpretation of the length of the quotations provided by the CJEU. Quotation should be duly marked, which means that the recipient should be able to distinguish between the work and the quotation incorporated into it. The restriction of the monopoly of rightholder of exclusive rights is justified by the freedom of information, criticism and distribution of knowledge.[906]

[904] J. C. Ginsburg, Floors and Ceilings …, pp.304-306.
[905] English version by the author. According to art. L122-5-3a of the Intellectual Property Law, Lorsque l'oeuvre a été divulguée, l'auteur ne peut interdire les analyses et courtes citations justifiées par le caractère critique, polémique, pédagogique, scientifique ou d'information de l'oeuvre à laquelle elles sont incorporées.
[906] A. Lucas, A. Lucas- Schloetter, C. Bernault, Traité…, p.434.

Therefore, the quotation has to serve the critical, polemical, educational, scientific or informative nature of the work to which it is incorporated. These conditions correspond to the requirements formulated by the CJEU.

According to art. 29 of the Polish Copyright Act works constituting an independent whole can include the quotations of fragments of distributed works and entire distributed graphic works, photographic works, and minor works, to the extent that it is justified by the purpose of the quotation, such as explanation, polemics, critical or scientific analysis or teaching, or by the rights of an artistic genre.[907]

The example of the quotation exception could be the dissemination of the excerpts of press articles. It results from the wording of the provision that the quotation should be incorporated into a work. In consequence, it is necessary that the quotation becomes a part of a larger whole, a work of critical, polemical, educational, scientific or informative nature. The Polish Supreme Court elaborated on the use of the work in its entirety for the quotation purposes in the case related to the use of a poster on the cover of a weekly newspaper[908]. According to the Court, in certain cases, it may even be justified to quote someone else's work in its entirety if this is done for the purpose of explanation, critical analysis or teaching. In any case, however, the quoted excerpt or even the entire minor work must be in such proportion to the contribution of the author's own work that there is no doubt that a work of one's own, self-contained creation has been created. In this case, when the poster was removed from the cover, only the title of the newspaper and the information about its publication remained which makes it impossible to conclude that the quotation became a part of a separate work and was placed there for the purpose of polemic or criticism. The Court noted that the relationship between the quotation and the work into which the quotation is incorporated is important.

The essence of a quotation, the same in French and in Polish law, is the incorporation of an unaltered fragment of someone else's work[909] into a work. J. Barta, R. Markiewicz, describe the quotation as having ancillary role in relation to the work as whole.[910] The extent of the quotation should not go beyond that justified by the purpose

[907] English version by the author. According to art. 29 of Polish Copyright Act: Wolno przytaczać w utworach stanowiących samoistną całość urywki rozpowszechnionych utworów oraz rozpowszechnione utwory plastyczne, utwory fotograficzne lub drobne utwory w całości, w zakresie uzasadnionym celami cytatu, takimi jak wyjaśnianie, polemika, analiza krytyczna lub naukowa, nauczanie lub prawami gatunku twórczości.
[908] The Polish Supreme Court, Judgement of 23.11.2004, I CK 232/04.
[909] J. Barta, R. Markiewicz, Prawo autorskie…, p.236.
[910] J. Barta, R. Markiewicz, Prawo autorskie…, p.236.

of explanation, polemics, critical or scientific analysis or teaching, or by the rights of an artistic genre. Quotation needs to be accompanied by the comments of critical, comparative or analytical nature.[911] The list of purposes provided by the Polish legislator is not exhaustive.

The quotation should be used to illustrate the analysis conducted, to review or criticise. It is not about simply incorporating someone else's content into another's content, but about incorporating it in a critical or illustrative manner[912]. The question whether the simple reproduction of the excerpts of press publication without any added critical comments meet the requirements from the discussed provision was addressed by the Polish Supreme Court in case concerning the use of press publications for the purpose of media monitoring services. According to the Court, the activity involving the reproduction of excerpts from press publications in order to create a compilation of excerpts from publications from various sources without any critical commentary, further analysis, or review does not meet the criteria of quotation exception.[913] A key factor in assessing whether a use of protected content can be qualified under quotation exception is whether it is included in a work and accompanied by critical comments, reflections, is used for comparison, discussion, illustration. Therefore, the activity of news aggregators

[911] In France the issue had been controversial due to the case Microfor v. Le Monde. Microfor included in its database and published in its France-actualités index the titles of French newspapers, in particular Le Monde and Le Monde diplomatique, accompanied by an indexation, as well as, under the name of "Résumés signalétiques", sentences extracted from the articles from these newspapers, which it claimed to report on. Microfor's work thus consisted of the collection and arrangement of various extracts from the French daily press, enriched with an index.
One of the questions that arose was whether the quotation exception applies to a collection of short quotes from a single daily newspaper without any commentary added. According to the Court of Cassation, due to the information context, such a collection devoid of critical remarks can be considered as meeting the requirement of the quotation exception.

It should be however noted that the judgement has been highly criticized as contradicting the basic premises of the citation exception and considered by some scholars as being contra legem to art.122-5 of French Intellectual Property Law. See: Judgement of the Court of Cassation, Civil chamber, 9 November 1983, 82-10.005**,** https://www.legifrance.gouv.fr/juri/id/JURITEXT000007012957/**,** accessed: 03.05.2023. See: L'affaire Microfor / Le Monde, Les infostratèges, 1998, https://www.les-infostrateges.com/article/880432/affaire-microfor-le-monde, accessed : 03.05.2023 ; A. Lucas, A. Lucas-Schloetter, C. Bernault, Traité …., pp.435-436 ; F. Pollaud- Dulian, Propriété intellectuelle. Le droit d'auteur, Economica, 2014, pp.859-860 ; Ch. Caron, Droit d'auteur et droits voisins, Lexis Nexis,2017, pp. 367-368.

[912] S. Stanisławska- Kloc, Komentarz do art. 29 Ustawy o prawie autorskim i prawach pokrewnych in: D. Flisak (ed.), Prawo autorskie i prawa pokrewne. Komentarz, 2015, Wolters Kluwer, points 19-22, Lex.

[913] Polish Supreme Court, 9 August 2019, II CSK 7/18. The same conclusion was reached by a Belgian court in a similar case a few years earlier, see: The Court of Appeal of Brussels in Google INC v Copiepresse SCRL,2011, http://www.copiepresse.be/pdf/Copiepresse%20-%20ruling%20appeal%20Google_5May2011.pdf, accessed: 25.08.2022.

which consists in reproducing the extracts from press publication without any added contribution cannot be considered in the framework of this exception.

An interesting issue is whether a publication of an excerpt of a work on a website meets the criteria of quotation. In my opinion, such an insertion of an extract from another work on a website could meet the conditions of the exception in question if there would be a functional connection between these two elements. Website could be considered as a work and therefore, if there would be an impact on its creative nature following the publication of such an extract, if there would be a reference to this excerpt on the website done by the incorporating person, the requirements of quotation exception would be met.[914]

Press articles can be a source of quotation, but can also contain the quotations if the requirements discussed above are met. The person invoking the exception of quotation should demonstrate that he used it in a manner justified by the content of his own statement, in which the quotation was used, in order to highlight the reviewed argument or illustrate the criticised view. The quotation should be duly marked, which means that the recipient should be able to distinguish between the work and the quotation incorporated into it. According to art. 34 of the Polish Copyright Act the name of the author as well as the source of quotation should be indicated.[915]

The quotation can be included in the work created as part of one's professional or business activity. Financial benefits from the use of a work in which the quotation has been included does not exclude the possibility of invoking the exception discussed[916]. To illustrate, information society service provider which provides a platform online on which for a monthly fee, the user has access to the critical reviews of recently published books which include some quotations from these books, can invoke the quotation exception if the requirements discussed above are met also in case when the provided services are for fee.

To conclude:

[914] See: A. Niewęgłowski, Komentarz do art.29 Ustawy o prawie autorskim i prawach pokrewnych in: A. Niewęgłowski (ed.), Prawo autorskie. Komentarz, Wolter Kluwers Polska, 2021, LEX.
[915] According to art. 34 of Polish Copyright Act: Można korzystać z utworów w granicach dozwolonego użytku pod warunkiem wymienienia imienia i nazwiska twórcy oraz źródła. Podanie twórcy i źródła powinno uwzględniać istniejące możliwości. Twórcy nie przysługuje prawo do wynagrodzenia, chyba że ustawa stanowi inaczej. (Translation by the author).
[916] See: S. Stanisławska – Kloc, Komentarz do art.29 Ustawy o prawie autorskim i prawach pokrewnych in. D. Flisak (ed.), Prawa autorskie i prawa pokrewne. Komentarz, 2015, LEX.

- Press review, reporting of current events and quotation exceptions are of crucial importance from the perspective of functioning of press industry. They allow for free flow of information enabling press to inform public by quoting or reproducing and communicating to the public already published articles. They provide also a legal framework for the reuse of the elements of press publications by public for the purposes such as analysis, review or criticism.

- The exception on press review in the French law applies to the comparative presentation of various press publications. It means that its scope is narrower compared to the Polish exception since the mere reproduction of press publication without any broader context of their comparative presentation will fall outside of the scope of the exception under French law.

- The exception of press review in the Polish law enables the use of reports, articles, comments, photographs and their short excerpts created by others, if they are up to date and relate to the information purposes.

- In the Polish law, the use of articles on current political, economic or religious topics and their short excerpts can be expressly prohibited. The latter can be understood as as a protection for the author in case he does not want his works to be disseminated for the purposes forseen in the exception. On the other hand, however, it can be seen as a solution that may limit the flow of information taking into account the aim of the exception which is news reporting, so the provision of current information. By comparison, in French law, where the work has been disclosed, the author cannot prohibit press reviews provided that the author's name and source are clearly indicated.

- In the Polish law, in case of the use of articles on current political, economic or religious topics and current comments made and photographs taken by reporters, the author has the right to remuneration what is not forseen in the French law. It may be explained by the narrower scope of the exception in the French law, which applies only in case of the use of press publications for the purpose of comparative presentation.

- The objective of the quotation’s exception, according to the legislations discussed, should be to illustrate the analysis conducted, to review or criticise. It is not about simply incorporating someone else's content into another's content, but about incorporating it in a critical or illustrative manner. Therefore, the activity involving the reproduction of excerpts from press publications in order to create a compilation of excerpts from publications from various sources without any critical commentary, further analysis, or review does not meet the criteria of quotation exception. The quotation can be made not only for personal purposes but also in the framework of professional activity conducted for remuneration. Financial benefits from the use of a work in which the quotation

has been included does not exclude the possibility of invoking the quotation exception.

- The fact that the length of the quotation has not been determined neither in French nor in Polish law provides flexibility, encourages artistic expressions and enhances dissemination of information. The analysis conducted leads to the conclusion that the key in assessing whether the quotation's exception applies is whether the quotation has been incorporated into a work and whether this has been done with a view of critical comments, reflections, comparison, discussion or illustration.

7. Technological protection of access to work

Technological Protection Measures[917] enable the rightholders to control, through the automated technological means, the use of digital content. The TPMs are used to prevent uses requiring authorisation in case when the latter has not been granted. They are employed to safeguard that the uses of the digital content protected by copyright take place in accordance with the terms and conditions of the services and to prevent online - privacy[918]. Examples of technological protection of access to work are passwords, limits on number of simultaneous readers of e-books, prevention of access to the services on multiple devices, prevention from saving music and videos to the users' devices or paywalls and subscriptions. In the context of the use of press publication it is worth examining what is the legal framework of protecting access to it and what are the tools to do so. The protection against the acts of circumvention is not another exclusive right. It constitutes a layer of protection aimed at securing the exercise of exclusive rights, so that only those who are authorised to do so have access to the work. It provides a "preemptive enforcement mechanisms"[919] that makes the infringements of copyright protection more difficult to perform.

A. International law

According to art. 11 of the WCT an adequate legal protection and effective legal remedies against the circumvention of effective technological measures which are neither authorised by the authors nor permitted by law should be provided. Terms 'adequate legal

[917] Hereinafter: TPM.
[918] B.J. Jütte, Reconstructing European Copyright Law for the Digital Single Market. Between Old Paradigms and Digital Challenges, Hart Publishing, Nomos, 2017, p.364.
[919] B.J. Jütte, Reconstructing …, p.364.

protection' and 'effective legal remedies' have not been defined. It constitutes a room to manoeuvre for States and an incentive to balance carefully the interests of all actors while having regard to the principle of proportionality and promoting fair and equitable procedures.[920] The legal protection against the circumvention of effective technological measures does not apply to subject matters excluded from copyright protection such news of the day or miscellaneous facts having the character of mere items of press information. It does not cover technological measures which restrict acts authorised by the author or permitted by law.

B. EU law

Art. 6 of the InfoSoc Directive implements art. 11 of the WCT. According to art. 6(1) of the InfoSoc Directive Member States shall provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective. According to art. 6(2) of the InfoSoc Directive adequate legal protection against the acts in preparation of circumvention should be provided. The term 'adequate legal protection' has not been further defined, and as it was done at the international level, in the EU law likewise, it is left to the discretion of Member States that may provide for any appropriate legal means, such as administrative, civil or criminal remedies.[921] In art. 6(3) of the InfoSoc Directive the EU legislator defines the 'technological measures' as "any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the sui generis right provided for in Chapter III of Directive 96/9/EC". The category of rightholders is broad and encompasses not only the authors or rightholders of related rights but also their agents or licensee acting with their consent[922].

The definition of technological measures relates to the prevention or restriction of acts which are not authorised by the rightholder. Therefore, firstly it is necessary for the rightholder to have the power to authorise the use. It will not be the case in relation to the

[920] M. Senftleben in: T. Dreier, B. Hugenholtz (eds.), Concise … ,p.113.
[921] See: Ch. Geiger, F. Schönherr, The information society directive in: I. Stamatoudi, P. Torremans (eds.), Eu Copyright Law, A Commentary, Edward Elgar Publishing, 2021, p.11.136.
[922] S. von Lewinski, Commentary to art. 6 of the InfoSoc Directive, in. M.M. Walter, S. von Lewinski (eds.),European Copyright Law. A Commentary, Oxford University Press, 2010, p.1067.

works whose term of protection has expired and they are part of public domain. However, in practice, most of accessed products constitute a mix of protectable and unprotectable elements so their absolute separation may not be possible.[923] Technological measures shall be deemed effective what could be considered as a synonym of achievement of protection objectives.

Technological measures entrust rightholders with an important empowerment to protect their interests with potential harm to the interests of users and society at large. Consumers may be prevented from using works even if they are allowed to do it based on the exceptions and limitations to copyright. S. Bechtold rightly points out that as copyright protection is limited in many respects, the protection by technological measures should also be restricted by equivalent instruments.[924]

In order to counterbalance the expansion of protection of digitally-protected works and to safeguard the effective exercise of uses enabled by the exceptions and limitations framework, art. 6 (4) of the InfoSoc Directive has been introduced. It obliges Member States to take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) of the InfoSoc Directive to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject matter concerned. The provision, however, gives a priority to **voluntary** measures taken by rightholders, including agreements between rightholders and other parties concerned. This is the first of many controversial elements of this solution. The question arises as to why the EU legislator decided to leave such an important issue of securing the exercise of exceptions and limitations firstly to voluntary measures. Doubts may arise as to whether being asked to facilitate the exercise of exceptions to their rights, they will be willing to do so. M.Ch. Janssens describes this solution as 'remarkable policy reversal'[925], other scholars signal a danger of increasing privatisation of copyright law.[926] In my view, leaving the

[923] K. Koelman, The Public Domain Commodified: Technological Measures and Productive Information Usage, 2004, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=895642, accessed:09.09.2022.
[924] S. Bechtold in: T. Dreier, B. Hugenholtz (eds.), Concise European Copyright Law, Kluwer Law International, 2006, pp.390-391.
[925] M.-Ch. Janssens, The issue of exceptions reshaping the keys to the gates in the territory of literary, musical and artistic creation, in. E. Derclaye (ed.), Research Handbook on the future of copyright, Edward Elgar Publishing, 2009, p. 334. See: B.P. Hugenholtz, Why the copyright directive is unimportant and possibly invalid, https://pure.uva.nl/ws/files/3086454/9021_opinion_EIPR.html, accessed: 09.09.2022.
[926] See: Ch. Geiger, F. Schönherr, The information society directive in: I. Stamatoudi, P. Torremans (eds.), Eu Copyright Law, A Commentary, Edward Elgar Publishing, 2021, p.11.106.

rigtholders with the discretion to regulate the matter of limitations in relation to the technological measures means leaving them free to decide about restricting their rights and, the extent of such restriction. It is difficult to imagine authors deciding, with great enthusiasm, to give up to some extent of securing access to works in the name of balancing their interests with the those of users.

If there is no voluntary measure taken by rightholders, Member States may provide for appropriate measures. The appropriateness means that the measures should be balanced with the objective to be achieved in favor of the beneficiary of exceptions or limitations.[927] If one were to end the analysis here, the question of the relationship between exceptions and limitations and protection of technological measures against circumvention would seem to be quite straightforward. Unfortunately, the EU legislator decided to provide a list of exceptions in relation to which Member States shall take the appropriate measures. These are exceptions in respect of: reprographic reproduction, reproductions by libraries and other establishments, uses for teaching and scientific research, uses for the benefit of people with a disability and uses for the purpose of public security and administrative and other proceedings. There is also one facultative measure in respect of private reproduction introduced in subparagraph 2 of art. 6 (4) of the InfoSoc Directive.

This systematisation has been widely criticised. Firstly, it is difficult to understand the justification for the choice and ranking of exceptions. It is unclear why such important exceptions as quotation, or use for the purpose of caricature, parody and pastiche were excluded[928]. Secondly, such a catalogue leads to differences in treatment between the various exceptions[929].

Lastly, the technical means to benefit from the exceptions included in art. 6 (4) should be given only to these users who have already **accessed** copyrighted works[930] which is another restriction on the users' side. S. Dusollier underlines that the provision

[927] S. von Lewinski, Commentary to art. 6 of the InfoSoc Directive, in: M.M.Walter, S. von Lewinski (eds.)European Copyright Law. A Commentary, Oxford University Press, 2010, p.1072.

[928] Some scholars point to public policy exceptions, but as it has been observed by G. Mazziotti it would be complicate to find a rationale other than "inability to reach political consensus on the composition of a set of imperative (i.e., non-overridable) copyright exceptions. See: G. Mazziotti, EU Digital Copyright Law and the End-User, Springer, 2008, p.98; See also: M. Favale, The Right of Access in Digital Copyright: Right of the Owner or Right of the User?,The Journal of World Intellectual Property (2012) vol. 15, no. 1, pp. 1–25.

[929] V.L. Bénabou, La directive droit d'auteur, droits voisins et société de l'information : valse à trois temps avec l'acquis communautaire, Communication Commerce électronique no. 10, 2001.

[930]According to art. 6(4) of the InfoSoc Directive "(…) where that beneficiary has legal access to the protected work or subject-matter concerned".

does not contain any obligation on the side of author to allow or to facilitate the access to work of user who would like to exercise one of the provided exceptions.[931]

In Nintendo case which concerned the question whether the employement of TPMs in the game consoles to avoid that unlawful copies of the software could be played on consoles manufactured by Nintendo, the CJEU held that TPMs cannot disable uses which are of nature not violating the rights of holders of copyright protection.[932] Moreover, "legal protection against acts not authorised by the rightholder of any copyright must respect the principle of proportionality."[933] In consequence, the TPMs should not disable the uses which not require the authorisation of the rightholder and/or are not protected by copyright either because they are permitted on the exceptions and limitations' basis or fall outside the scope of exclusive rights. However, the relationship between the application of TPMs and the use of content permitted under exceptions and limitations is quite problematic. The primacy of exceptions and limitations over the application of TPMs does not arise from the EU law. Moreover, as it is rightly pointed out by B.J. Jütte, TPMs raise the problems of rather technological than legal nature since according to the author, it is probably "unavoidable that the application of TPMs to digital content has 'side - effects' that go beyond what merits protection."[934] Therefore, what the legislator should react to is the effect disadvantaging users which prevents them from exercising their rights.[935] This unbalance could be mitigated for example by the adoption of solution charging rightsholders with the obligation to enable the exercise of some exceptions and limitation upon request of users.[936]

In the CDSM Directive the framework of protection of technological measures mirrors the one from the InfoSoc Directive and is supplemented by the reference to the exceptions made mandatory by this act and introduced in the CDSM Directive.[937] The EU legislator, despite the critics regarding the regulation of the protection of technological measures introduced in the InfoSoc Directive which privileges the voluntary measures, decided to maintain this opportunity for rightholders in the CDSM Directive. In the absence of voluntary measures, Member States should take appropriate

[931] S. Dusollier, Droit d'auteur et protection des œuvres dans l'univers numérique. Droit et exceptions à la lumière des dispositifs de verrouillage des œuvres, Collection Création Information Communication, Larcier, 2005, p.175.
[932] CJEU, Nintendo, paras.29-30.
[933] CJEU, Nintendo, para.30.
[934] B.J. Jütte, Reconstructing …, p.410
[935] B.J. Jütte, Reconstructing …, pp.410-411.
[936] See: B.J. Jütte, Reconstructing …, p.412.
[937] See section 6.1.

measures in accordance with the provision provided in the first subparagraph of art. 6(4) of the InfoSoc Directive. The appropriate measures taken by Member States, according to the recital 7 of the CDSM Directive may include also works and other subject matters which are made available to the public through on-demand services.

As regards the application of the TPMs to prevent the unauthorised access to press publication, press publishers are increasingly resorting to the use of paywalls and subscriptions[938] which are the measures of the technological protection of access to works or subject matters. The rationale behind it is to limit the unlimited use of works since the gains of press publishers if access to press articles were generally free and unrestricted would be limited. However, bearing in mind what has already been said, it should be pointed out that the TPMs should not prevent users from the legal uses of press publications in case when they are authorised to do so.

Another interesting point in the debate on the TPMs in press sector is whether press publishers use the TPMs to prevent the use of their press publications by ISSP. Press publishers are not keen on introducing the technological means to limit access of ISSP to their press publication. This is because of the fact that they are afraid of being penalised by the latter and being placed in worse display position in the ranking of the websites what in consequence means that the website is crawled less frequently.[939] T. Hoppner argues that "given that consumers presume that search engines rank websites on basis of their relevance and virtue only, no publisher can afford for its ranking to deteriorate"[940]. Moreover, the presence on the news aggregators guarantees press publishers the profits primarily in form of increased visibility and recognition, which translates into financial returns. Due to these economic interests which prevail, press publishers avoid the introduction of such technological measures.

C. French and Polish law

French legislator in art. L.331-5 of the Intellectual Property Law provides a definition of technical protection measures understood as any technology, device or component which, in the normal course of its operation, performs the function of

[938] See: chapter 1 section 4.2.
[939] T. Hoppner, EU Copyright Reform: The case for a publisher's right, 2018, pp.18-19. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3081733, accessed: 12.11.2022.
[940] T. Hoppner, EU Copyright …, pp.18-19. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3081733, accessed: 12.11.2022.

protecting access to work. Such technological measures shall be deemed effective where a use is controlled by the rightholders through the application of an access code, a protection process such as encryption, scrambling or any other transformation of the subject matter of the protection, or a copy control mechanism which achieves that protection objective[941]. According to this provision effective technological measures intended to prevent or limit the unauthorised use of a work other than software, a performance, a phonogram, a videogram, a program or a press publication by the owners of a copyright or a right related to copyright shall be protected[942].

According to art. 79 (6) of the Polish Copyright Act the technological protection measures against access, reproduction or dissemination of a work, provided that the objective of such actions is the unlawful use of such work should not be removed. [943] The effective technical protection measures are defined in art. 6(1) (11) of the Polish Copyright Act and are understood as measures that enable eligible entities to supervise the use of a protected work or artistic performance by way of applying an access code or a security mechanism, including in particular encoding, scrambling, or any other transformation of a work or artistic performance or a reproduction control mechanism that fulfils the purpose of protection.[944]

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[941] English version by the author. French version of art.L.331-5 of French Intellectual Property Law: toute technologie, dispositif, composant qui, dans le cadre normal de son fonctionnement, accomplit la fonction prévue par cet alinéa. Ces mesures techniques sont réputées efficaces lorsqu'une utilisation visée au même alinéa est contrôlée par les titulaires de droits grâce à l'application d'un code d'accès, d'un procédé de protection tel que le cryptage, le brouillage ou toute autre transformation de l'objet de la protection ou d'un mécanisme de contrôle de la copie qui atteint cet objectif de protection. https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006069414/LEGISCTA000006179045/, accessed : 25.05.2023.

[942] English version by the author. French version of art.L.331-5 of French Intellectual Property Law: Les mesures techniques efficaces destinées à empêcher ou à limiter les utilisations non autorisées par les titulaires d'un droit d'auteur ou d'un droit voisin du droit d'auteur d'une oeuvre, autre qu'un logiciel, d'une interprétation, d'un phonogramme, d'un vidéogramme, d'un programme ou d'une publication de presse sont protégées dans les conditions prévues au présent titre, https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000006069414/LEGISCTA000006179045/, accessed : 25.05.2023.

[943] Polish version of art.79 (6) of Polish Copyright Act: Przepis ust. 1 stosuje się odpowiednio w przypadku usuwania lub obchodzenia technicznych zabezpieczeń przed dostępem, zwielokrotnianiem lub rozpowszechnianiem utworu, jeżeli działania te mają na celu bezprawne korzystanie z utworu, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19940240083/U/D19940083Lj.pdf, accessed: 25.05.2023, (English version from: Act of 4 February 1994 on Copyright and Related Rights (Consolidated text) Ministerstwo Kultury i Dziedzictwa Narodowego, http://www.copyright.gov.pl/modules/download_gallery/dlc.php?file=23&id=1578048906, accessed: 25.05.2023).

[944] Polish version of art. 6(1) (11) of Polish Copyright Act: skutecznymi technicznymi zabezpieczeniami są techniczne zabezpieczenia umożliwiające podmiotom uprawnionym kontrolę nad korzystaniem z chronionego utworu lub artystycznego wykonania poprzez zastosowanie kodu dostępu lub mechanizmu zabezpieczenia, w szczególności szyfrowania, zakłócania lub każdej innej transformacji utworu lub artystycznego wykonania lub mechanizmu kontroli zwielokrotniania, które spełniają cel ochronny, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19940240083/U/D19940083Lj.pdf, accessed:

According to A. Matlak, the essence of this protection is to secure actual control over access to intellectual property.[945] It is permissible to remove the technological protection measures in case of the access to or reproduction of a work or other subject matter if such action is carried out within the scope of permitted use[946]. Although the Polish legislator does not refer to the effectiveness of the adopted measures to protect the access in art. 79 (6) of the Polish Copyright Act, it should be assumed, on the basis of the definition quoted, that the efficiency of measures is necessary.[947] Polish legislator decided to specify that the technological measures against access, reproduction or dissemination of a work should not be removed. However, this specification in relation to art. 6 of the InfoSoc Directive does not seem to be necessary.

To conclude:

- Technological Protection Measures enable rightholders to control, through the automated technological means, the use of digital content. The use of TPM intends to prevent the uses requiring authorisation in case when the latter has not been granted.

- The TPMs should not disable the uses which do not require the authorisation of the rightholder and/or are not protected by copyright either because they are permitted on the exceptions and limitations' basis or fall outside the scope of the exclusive rights. However, the relationship between the application of the TPMs and the use of content permitted under exceptions and limitations is problematic since the primacy of exceptions and limitations over the application of TPMs does not arise from the EU law and the issue is of technological nature.

- The legislator should take greater care of the principle of proportionality when safeguarding protection of holders of exclusive rights that may have the effect of limiting rights of users and put more emphasis on the achievement of the balance between conflicting interests.

8. Conclusion

25.05.2023, (English version from: Act of 4 February 1994 on Copyright and Related Rights (Consolidated text) Ministerstwo Kultury i Dziedzictwa Narodowego, http://www.copyright.gov.pl/modules/download_gallery/dlc.php?file=23&id=1578048906, accessed: 25.05.2023).

[945] A. Matlak, Charakter prawny regulacji dotyczących zabezpieczeń technicznych utworów, Wolters Kluwer Polska, 2007, p.170.

[946] See: J. Barta, R. Markiewicz, Prawo autorskie…, p.173.

[947] See: K. Klafkowska-Waśniowska, Ochrona zabezpieczeń technicznych a granice prawa autorskiego, in: M. Kępiński (ed.), Granice Prawa Autorskiego, C.H. Beck, 2010, p.73.

The purpose of this chapter was twofold: to establish the copyright framework for access to information and for press publishing activity.

The copyright framework for access to information is based first of all on public domain which enables the access to ideas, principles, facts or works not protected any more by copyright freely, without any control from the rightholder and without having to meet any additional requirements or specific criteria. Another important element are the limitations and exceptions which aim to achieve the objectives of copyright such as the dissemination of cultural heritage, the access of information or education and to balance the far-reaching powers of the author and other rightholders. The analysis conducted showed that the CJEU in the provided interpretation of exceptions and limitations puts more and more emphasis on the preservation of the interests of users. However, the restrictive understanding of the exceptions and limitations through the three-step test, and the restrictive application of such a test are detrimental to users' access to works and lead to the legal uncertainty unfavourable from the perspective of enhancing free flow of information. Here, I identify an area for further legislatives interventions.

I see also a danger to users' access to works coming from the broad scope and broad interpretation of the exclusive rights. The protection offered to rightholders is extensive and the noticeably trend is its expansion. This is undoubtedly a response to emerging technological innovations, to the transforming ways of using works which may render right holders' interests not sufficiently protected. However, it has been discussed that in the digital environment for example the right of reproduction "covers virtually any use of a work or other subject matter, even where similar acts of usage in the analogue realm (such as receiving a television signal or reading a book) would have fallen well outside the scope of what intellectual property aims to protect."[948] Maximalist protection approach[949] is seen also in relation to the communication to the public right. The broad scope of exclusive rights, for the sake of users' rights, should be balanced by an appropriate set of limitations and exceptions. Shifting the scales in the expansion of the exclusive rights can give rise to imbalances to the detriment of users.

The functioning of press is rooted in public domain. The use of facts or ideas to inform public constitutes a pillar of press industry. The lack of protection for news of the day or miscellaneous facts serves the public interest, enables access to information. The second

[948] B. Hugenholtz *et al*., The Recasting of Copyright & Related Rights for the Knowledge Economy, final report, Institute for Information Law, 2006, p.54.
[949] J. Koo, The EU right …, p.181.

pillar are the exceptions and limitations, in this context especially, the quotation, press review and reporting of current events exceptions.

As to the subject matter of protection, it should meet the criterion of originality interpreted on several occasions by the CJEU. The Court specified for example that not qualitative but quantitative perspective towards subject matters should be adopted what means that even small contributions may be protected if they constitute a creative expression and are original. In consequence, not only articles, but also their excerpts or headlines can be qualified as protectable by copyright.

In the context of the protection of press publishers before the adoption of the CDSM Directive, press publishers could be protected on the basis of the provisions on collective work understood as a combination of multiple contributions from different authors which merge into a whole provided that their involvement would be of creative nature. However, it should be acknowledged that not every EU Member State recognises the concept of collective work. In these Member States where the provisions on collective work are adopted, publishers have to face the complexity of process while willing to get injunctive relief or institute infringement proceeding before the court since not being the original holders of rights to the components of collective work, they have to prove the fact of owning all the allegedly infringed rights as licensee or transferee what may render the procedure complicated. Through the analysis conducted in this chapter, I identified several issues important from the perspective of the protection of press publishers. If we assume that for the collective work to arise the creative involvement of publisher is necessary, his efforts will not be rewarded in case when this engagement will be rather of technical, financial or organisational nature. Such an involvement is undoubtedly important but, in this scenario, will not be rewarded. Collective work is not recognised in every Member State which means that the scope of protection granted to press publishers differs across the EU. This leads to the conclusion that the legal situation of press publishers should be strengthened and unified.

Important, from the perspective of copyright protection of press industry is the protection of employer within the employment contract. Interestingly, France provides for a special regime regarding the relationship between employed journalists and their employers in the context of transfer of the exclusive rights. In Poland, to the relationship between journalists and their employers the general regime on works created within the employment contract applies.

The use of AI poses important challenges to the press sector. It can lead to ethical and transparency issues. The content created by AI without human creative input is not protected under current copyright law and may be used freely in press publications. Content created by human with the use of AI can be protected but the question is who should have exclusive rights to such works, and in consequence, from whom the rights to press materials created in such a way should be acquired by press publishers.

Press constitutes an important source of AI training materials. TDM exceptions adopted in the CDSM Directive are a significant step towards a legal framework for use of works for such purposes. However, many issues such as how to inform about the content used for training purposes or whether press publishers should receive a compensation for use of their materials still need to be clarified.

Chapter III: Related rights to press publication in light of the CDSM Directive and national laws

1. Introduction

This chapter starts with the analysis of the main features of the related rights' regime. Its objective is moreover to provide an overview of the entities already protected on the basis of the related rights and to determine the scope of the protection. Secondly, *ratio legis* of the publishers' rights is discussed to shed more light on the reasons behind its adoption. Thirdly, the focus is on the subject matter of protection. The purpose of the analysis conducted is to determine what is protected by the publishers's rights and what is excluded from the protection. Then, the characteristic of the press publisher, holder of protection is provided. Lastly, the legal relationship between press publishers and the authors of the works included in press publications is scrutinised.

As to the analysis of the publishers'rights, it covers the provisions from art. 15 and 2 (4) of the CDSM Directive. As to the national laws, the core of the study is based on the French implementation of the CDSM Directive and the Polish proposal for the implementation of the CDSM Directive. France adopted the related rights on 23 July 2019 in Code de la propriété intellectuelle[950] and has been the first Member State to do so. In Poland the legislation has not been adopted yet[951]. On 6 June 2022 the proposal of the act amending Ustawa o prawie autorskim i prawach pokrewnych has been published.[952] Just before the end of my research, new objectives of the implementation of the CDSM Directive were announced in Poland[953]. Since the new implementation draft was not published until the day of the completion of the research (07.02.2024), the research is based on the 2022 draft with consideration to the recently published objectives.

[950]LOI n° 2019-775 du 24 juillet 2019 tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000038821358, accessed : 23.11.2022. See in particular articles : L218-1-L.218-5, L.211-3-1, L.211-1,L.211-4 V, L.211-3.

[951] At the time of last check, 07.02.2024.

[952]Projekt ustawy o zmianie ustawy o prawie autorskim i prawach pokrewnych oraz niektórych innych ustaw, https://legislacja.rcl.gov.pl/projekt/12360954/katalog/12887995#12887995, accessed:15.08.2023. See articles: 99^{7}-101. Hereinafter : the draft of the act amending Polish Copyright Act.

[953] Projekt ustawy o zmianie ustawy o prawie autorskim i prawach pokrewnych oraz niektórych innych ustaw, Kancelaria Prezesa Rady Ministrów, https://www.gov.pl/web/premier/projekt-ustawy-o-zmianie-ustawy-o-prawie-autorskim-i-prawach-pokrewnych-oraz-niektorych-innych-ustaw3, accessed: 06.02.2024.

For the sake of comparison, to complete and enrich the analysis, certain solutions adopted in the framework of the implementation of article 15 of the CDSM Directive in Belgium, Spain, Germany and Italy will be discussed.

In Germany, the legislation was adopted on 20 May 2021 in Urheberrechtsgesetz,[954] and in Italy, on 8 November 2021 in Legge sul diritto d'autore.[955] In Spain it was adopted on 2 November 2021 in Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual[956]. In Belgium the related rights of press publishers were implemented on 19 June 2022 to the Code of Economic Law[957].

2. Related rights' regime – introductory remarks

Related rights constitute a heterogeneous subgroup of intellectual property rights[958] granted to persons involved in the process of dissemination of works. The objective of these rights is to prevent the particular kinds of acts of unfair appropriation of the efforts of the others.[959] What distinguishes them from copyright is *inter alia* the fact that the related rights protect the acts of exploitation or performance of the intellectual creations in literary, scientific or artistic domains and do not protect the intellectual creations themselves.

2.1.Rationale for the related rights' regime

2.1.1. Protection of the dissemination of the preexisting literary or artistic works

[954]Urheberrechtsgesetz https://dejure.org/gesetze/UrhG/87f.html, accessed : 15.08.2023. See articles: 87f-87k,127b.
[955]Legge sul diritto d'autore https://www.altalex.com/documents/codici-altalex/2014/06/26/legge-sul-diritto-d-autore#titolo1,aceessed: 15.08.2023. See article 43 bis.
[956]Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, hereinafter: Ley de Propiedad Intelectual. https://www.boe.es/buscar/act.php?id=BOE-A-1996-8930#:~:text=La%20propiedad%20intelectual%20est%C3%A1%20integrada,las%20establecidas%20en%20la%20Ley, accessed: 15.08.2023. See article 129 bis.
[957]Code de droit économique https://www.ejustice.just.fgov.be/eli/loi/2013/02/28/2013A11134/justel, accessed :15.08.2023. See articles: art. IX 216/1, IX 216/2, IX 216/3.
[958] A. Peukert, Related rights in. J. Basedow, Klaus J. Hopt, Reinhard Zimmermann, (eds.), Encyclopaedia of European Private Law, Oxford University Press, 2011, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1550103, accessed: 15.10.2022.
[959] S. Ricketson and J.C. Ginsburg, International Copyright …,2006, p.1213.

The activity of performers, broadcasts' organisations or producers is based on the use of the pre-existing literary or artistic works.[960] Its main and common objective is to disseminate the works to a wider public.[961] J.P. Quintais and J.Poort state that the creation of the category of related rights may be justified by the fact that some added value remaining in connection with the copyright works has been created.[962] The common recipient of the activity of both, authors and beneficiaries of related rights is the public, the audience. Thus, the aim of the related rights is also to reward the effort of dissemination of works, of making them known and available on the widest possible scale.[963]

Related rights are linked to the copyright protection. This link could be seen in the fact that the legal situation of holders of related rights is shaped to some extent similary to the situation of author. The question arises whether the grant of related rights may thwart the author's interests or, on the contrary, could contribute to the improvement of the authors' legal situation resulting in e.g. creation of new sources of profit. It is interesting to examine whether these two categories of rights are interdependent and, if so, how these interdependencies are shaped.

Numerous concerns were raised when it comes to the fact that the grant of new rights parallel to those already enjoyed by authors would diminish the authors' revenues.[964] The 'cake theory'[965], based on the assumption that since one cake would have to be divided into more parts, these parts would necessarily be smaller should be mentioned. If, adapting this example to the discussed relation between authors and beneficiaries of the related rights, the amount that the user is willing to pay for the use of art/culture is fixed at a constant level, the smaller shares would be to receive if the group of rightholders is

[960] With some exceptions related to the sounds of nature fixed on the phonogram or broadcast of live spectacles or events.
[961] See: K. Kurosz, Artystyczne wykonanie …, pp.55-56.
[962] J. P. Quintais and J. Poort, A Brief History of Value Gaps: Pre-Internet Copyright Protection and Exploitation Models, Copyright Reconstructed Rethinking Copyright's Economic Rights in: P. Bernt Hugenholtz (ed.), Time of Highly Dynamic Technological and Economic Change, Wolters Kluwer, 2018, p. 57.
[963] T. Azzi, Recherche sur la loi applicable aux droits voisins du droit d'auteur en droit international privé, L.G.D.J,2005, pp.38-39.
[964] S. Ricketson and J.C. Ginsburg, International Copyright …, 2006, p.1221.
[965] C. Masouyé, Guide …, p.17.

enlarged. [966] These concerns have been considered as unfounded[967], but the perspective of the related rights as a "burden" for the public was often discussed in the literature.[968]

According to art. 1 of the Rome Convention "Protection granted under this Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection." This provision has been adopted also in the successive acts at international[969] and EU level[970]. The question of whether this clause established a hierarchy between the two categories of rights has been widely discussed in the literature. T. Azzi notes that there is a real hierarchy between copyright and related rights to the detriment of the latter, which must neither infringe the former nor limit its exercise.[971] It may be explained by the relationship of interests, as the performers, phonogram producers or broadcasters build their contributions on the creative authorial creations[972] and in consequence, the effect of this derivative character is that the scope of protection under related rights is limited compared to the one under copyright.[973]

It is worth to mention that during the legislative works on the text of the Rome Convention there was a proposal to expressly give pre-eminence to the author in case of competing rights. However, the proposal was rejected and as it was observed by H. C. Jehoram "The Rome Convention and the copyright conventions are completely equal and no pre-eminence of copyright has been established, despite the symbolical opening article of the Rome Convention." [974] D. Gervais and S. Ricketson agree with this argument by stating that seeing the provision as creating a hierarchy is incorrect, as its objective is limited to safeguarding copyright.[975] S. Ricketson adds that the notion of hierarchy serves to explain the "chain of production that starts at one point and moves outwards"[976]. He clarifies that the respective contributions are linked to each other on the basis of interconnections and dependencies[977], but there is no question of copyright superiority.

[966] A. Kerever, Est-ce qu'il est nécessaire … , p.9.
[967] S. Ricketson and J.C. Ginsburg, International Copyright …pp.1221,1223.
[968] George H. C. Bodenhausen, Protection of Neighboring Rights, Law and Contemporary Problems, vol.19, 1954, p.160.
[969] See: the WPPT art.1
[970] See: art.12 of the Rental Directive, art. 1 of the InfoSoc Directive.
[971] T. Azzi, Recherche… , p.45.
[972] S. Ricketson, Rights …, p. 373;
[973] T. Azzi, Recherche… , p.2.
[974] H.C. Jehoram, The Nature…, p.84.
[975] D. Gervais, Related rights…, p.246; S. Ricketson and J.C. Ginsburg, International Copyright …p.1226; see: C. Masouyé, Guide…, p.17.
[976] S. Ricketson, Rights …, p. 373.
[977] S. Ricketson, Rights …, p. 373.

Some scholars consider this relationship rather in the context of subsidiarity of related rights with regard to copyright. Producers of phonograms, first fixations of film, broadcasting organisations and performers contribute to the large-scale distribution of works and make them accessible to a wide audience, which is only for the benefit of the authors.[978] Therefore, beneficiaries of the protection arising from the related rights and copyright are not antagonists, they have common interests.[979]

2.1.2. Protection of investment

One of the features of the related rights is that they are rooted in the investment and aim at rewarding it. However, the doubts arise as to the direct link to the investement of each group of holders of related rights.

The fact that the interests of performers have been regulated in the same category of related rights with these of producers of phonograms and broadcasting organisations has been criticised since the adoption of the Rome Convention. This criticsm may be explained by the 'artistic'[980] character of the performances and of the engagement of the performers, not well matched with the industrial, mechanical or technical nature of the work of broadcaster[981] or producer of phonogram[982]. They imply the question why performers are not granted protection under Berne Convention and following acts related to copyright since their skills and creativity do not seem to be qualitatively different from those of other authors of derivative works.[983]

It may be explained by the fact that until the twentieth century, the artistic performances were not at risk of unauthorised use in the form of recording, distribution or reproduction, since they were limited to one-off live performances. With the advent of phonograms, films and broadcasting this situation has changed. Performers have started

[978] T. Azzi, Recherche…, p.16.
[979] A. Kerever, Est-ce qu'il est nécessaire … , pp.15-16.
[980] Differently: S. Tomczyk, Artystyczne wykonanie. Przedmiot prawa, in: M. Kępiński (ed.) Prawa pokrewne, vol III, Zarys Prawa Własności Intelektualnej, 2011, p.13.
[981] The Rome Convention provides in art. 3(f) of the Rome Convention the definition of the term 'broadcasting', meaning "transmission by wireless means for the public reception of sounds or of images and sounds".
[982] Phonogram, understood according to art. 3 (b) of the Rome Convention as "any exclusively aural fixation of sounds of a performance or other sounds" is made by the producer defined as "the person who, or the legal entity which, first fixes the sound of performance or other sound" in art. 3(c) of the Rome Covention.
[983] S. Ricketson and J.C. Ginsburg, International Copyright…, pp..1208-1209.

to claim their protection. Unfortunately, it was too late[984], they were organised too weakly and in view of the authors' opposition to granting them copyright, they could not hope to succeed.[985] P. Goldstein and P. B. Hugenholtz argue that "it is a legal fiction that the subject matter of related rights necessarily lacks the authorial creativity" but at the same time they note that "the effort invested by a phonogram producer or a broadcaster in recording a musical performance or broadcasting an event in many cases involve entrepreneurial and organisational skills rather than authorial creativity."[986] Moreover, the claims for protection of broadcasts or sound recording have been mostly advanced by the corporate bodies and not by individuals.[987] A. Kopff proposed to make a distinction and to introduce two categories of rights, namely the related rights and the neighbouring rights. The first category would refer to the activities which are close to the act of creation within the meaning of copyright, while the second one would refer to the engagement of organisational, technical and economic nature[988]. Although this idea has not been adopted in legislation, it should be considered as innovative.

To bring order to this discussion it should be acknowledged that all holders of related rights are linked to each other by the fact that the adoption of their rights was dictated by the need to stop the unfair appropriation of their work.[989] Moreover, their common objective is to disseminate the works protected by copyright. I consider these two main reasons as sufficient to regulate the interests of performers as well as producers, or broadcasting organisations within the same category of rights. As for the importance of the investment and the industrial character of the engagement of these actors, it should be considered as a sub-criterion and one of the characteristics of the related rights which does not apply to performers. I suggest not to try at all costs to find a link between performers and other related rightsholders in context of investment, because there is no such a link. Therefore, the analysis conducted in this point will not apply to the performers.

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[984] P. B. Hugenholtz explains that : "The exclusion of performing artists from the copyright domain has a mainly historical reason. By the time sound recording technology was so advanced that performances could be recorded and recordings exploited commercially, the cards in Berne Convention were already stacked against the performers". See: P.B.Hugenholtz, Neighbouring rights are obsolete", IIC- International Review of Intellectual Property and Competition Law, vol.50, no.8, https://link.springer.com/article/10.1007/s40319-019-00864-3, accessed: 18.10.2022 ,p.1007.
[985] S. Ricketson and J.C. Ginsburg, International Copyright…, pp..1208-1209.
[986] P. Goldstein and B. Hugenholtz, International Copyright: …, p.216.
[987] See: S. Ricketson and J.C. Ginsburg, International Copyright, 2022, p.1209.
[988] A. Kopff, Prawa pokrewne i sąsiednie, Zeszyty Naukowe Uniwersytetu Jagiellońskiego, Prace z Wynalazczości i Ochrony Własności Intelektualnej) vol.61, 1993, pp.24-26.
[989] C. Masouyé, Guide …, p.12.

The threshold of the investment in recording or broadcasting technology which merits legal protection has not been established.[990] However, P.B. Hugenholtz indicates that related rights adopted in the Rome Convention were rooted in the principle that the technical costs of recording or broadcasting implied implicitly the investment threshold.[991]

Scholars analysing the related rights refer to the incentive paradigm meaning that "related rights allow (…) to recoup both the initial investment and the marginal production costs, and thereby create incentives to invest and produce."[992] It is worth pointing out that the international acts on the related rights do not recognise the objective of encouraging the further investments. In the preamble of the WPPT[993], the emphasis on the importance of such protection as an incentive for performers and phonograms producers is not found[994], contrary to the preamble of the WCT, where the outstanding significance of copyright protection as an incentive for literary and artistic creation is indicated.[995] At the European Union level, the example of the Infosoc Directive and wording of its recital 4 shows that the impact of the increased legal certainty and high level of protection of intellectual property on the substantial investment in creativity and innovation which leads to growth and increased competitiveness has been recognised.

Today, within digital transformation, the necessity of the investment in order to fix, distribute or reproduce works is questioned.[996] The way the phonogram industry operated several decades ago was based on fixing the sounds of performances or of other sounds in large recording studios, which necessitated the employment of sound mastering specialists and the use of an expensive equipment. Sounds were recorded on carriers such as CDs, or earlier on cassettes and gramophone records. Now, physical sound carriers are no longer in demand. The large and expensive recordings studios are not needed to record

[990] Some scholars argue that the investment required for the production of subject matters of related rights should be identifiable in order to trigger the protection. See: N. Ghazal, Prawo do fonogramu w świetle ustawy o prawie autorskim i prawach pokrewnych, Wolters Kluwer Polska, 2016, pp.121-127, K. Klafkowska- Waśniowska, Podstawowe założenia …, pp.123-125.

[991] P.B. Hugenholtz, Neighbouring rights …, https://link.springer.com/article/10.1007/s40319-019-00864-3, accessed: 18.10.2022, p.1009, pp. 1006-1011, A. Kopff considered that the act of making phonogram or videogram is costly and involves the use of new technologies and engagement of highly qualified team. See: A. Kopff, Prawa pokrewne i sąsiednie, …, pp.16-17.

[992] M.van Eechoud, P.B. Hugenholtz, S.van Gompel *et al.*, Harmonizing European Copyright Law. The Challenges of Better Lawmaking, P.B. Hugenholtz (eds.), Kluwer Law International, 2009, p. 198.

[993] WIPO Performances and Phonograms Treaty, hereinafter: the WPPT.

[994] F. Brison *et al.*, in: T. Dreiner, B. Hugenholtz (eds.) Concise European Copyright Law, Kluwer Law International, 2006, p.166.

[995] Preamble of the WCT, https://wipolex.wipo.int/en/text/295157, accessed: 18.10.2022.

[996] See: K. Grzybczyk, Komentarz do art. 94, in: P. Ślęzak (ed.), Ustawa o prawie autorskim i prawach pokrewnych. Komentarz, C.H. BECK, 2017, p. 641.

the performances[997]. The artists, or in general everyone, can do it on their own, using simple equipment. This is also the case with broadcasting. In the past, operating radio or television station entailed enormous costs. Today, anyone can be a broadcaster or a webcaster. All he or she needs is to have a smartphone and Internet access.

According to B.P. Hugenholtz, the value chain and business model of recording industry have changed[998] and the concept of the related rights based on the technological investment is outdated.[999] The activity of contemporary labels evolved from the production of phonograms towards managing and promoting artists[1000]. Social media platforms, applications such as podcasts have called into question the foundations of the broadcasting sector. Moreover, before, the main actors in the domain of sound and image distribution were commercial and industrial enterprises who invested the considerable amounts in the equipment and know-how. Now, any Internet user can do this without having to pay a significant cost.

I agree with the presented arguments that nowadays, the importance of the investment to disseminate works has decreased. However, it should be pointed out that firstly, the industry based on the low cost does not always guarantee the quality of the outcome. Secondly, the evolution of the digital technologies still implies the need to make some investments to make works known to broad audience[1001]. To illustrate, in the press publishing sector, the investments made in the tools based on the use of AI, in the online platform the subscription model[1002] are and will be necessary in the future. Moreover, in light of the challenges arising from new technologies such as dissemination of disinformation, the role of investment in the instruments appropriate to fight against this phenomenon should be highlighted. In addition, the easier and more accessible the dissemination of information becomes, the greater is also the competition, making the

[997] See: S. Tomczyk, Komentarz do art. 94, in: E. Ferenc – Szydełko (ed.), Ustawa o prawie autorskim i prawach pokrewnych. Komentarz, 2016, C.H. Beck, pp. 875–876.
[998] P. Bernt Hugenholtz, Neighbouring …, pp.1007-1008.
[999] P. Bernt Hugenholtz, Neighbouring …, pp.1007-1008.
[1000] P. B. Hugenholtz, Neighbouring …, pp.1007-1008; see: K. Bowrey, Copyright, creativity, big media and cultural value. Incorporating the author, Routledge,2021, pp.141-170.
[1001] For example, French Press Agency produces around 5,000 dispatches and 3,000 photographs every day, thanks to 2,400 employees in 151 countries around the world and is the only press agency to be represented in Afghanistan what requires significant financial investment. See: V. Duby – Muller, L. Garcia, Assemblée Nationale, Rapport d'information sur l'application du droit voisin au bénéfice des agences, des éditeurs et professionnels du secteur de la presse, 2022, p.23, https://www.assemblee-nationale.fr/dyn/15/rapports/dv/l15b4902_rapport-information.pdf, accessed : 18.07.2023.
[1002] See chapter I, section 4.2

need for innovation and investment even greater.[1003] Therefore, the conclusion would be that making investments, despite the digital evolution, remains an important factor specific for the category of the related rights.

2.1.3. Answer to the development of new technologies

Development of new technologies contribute to the emergence of the new forms of creation and dissemination of works which besides their obvious positive aspects may also have some negative consequences on the interests of authors and related rights holders. J. P. Quintais and J. Poort point out that the call for extension of existing rights or creation of the new ones has to be analysed in larger perspective[1004] of the search for balance between providing the means of communication, protecting the legal interests of authors and holders of related rights. New technologies often give rise to the need to extend, modify existing rights or to add new ones what should take place in respect of the balancing factor and the interests of the society as a whole.

With technological development not only the new possibilities for creating, disseminating culture and reaching a wider audience arose, but also new dangers, one of which is piracy[1005]. To illustrate, the example of producers of phonograms could be given. C. Masouyé mentions hundred millions of discs placed on the market "without the consent of those who made the original sound recordings which those discs contained and without the consent required by law of authors and composers of the works and the artists who performed them"[1006] what led to large losses of the phonogram's producers but also of the performers and authors.[1007] J. Ginsburg and S. Ricketson observe that the latter were protected by national laws and the international convention.[1008] As to the phonogram producers, the most affected group, the protection provided for in the Rome Convention

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[1003] See: N. Newman, Journalism, https://reutersinstitute.politics.ox.ac.uk/sites/default/files/2022-01/Newman%20-%20Trends%20and%20Predictions%202022%20FINAL.pdf accessed: 20.10.2022. For the further analysis of the current investment needs in press publishing sector. See also: M. Estivalèzes, Rapport sur l'objet et le champ d'application du droit voisin des éditeurs de publication de presse, Ministère de la Culture, Conseil Supérieur de la propriété littéraire et artistique, 2018 p.13.

[1004] P. Quintais and J. Poort, A Brief History …, p.55.

[1005] See: M. Barczewski, Traktatowa ochrona …, p.93; see also: D. Flisak, Komentarz do art. 94, in: D. Flisak, (ed.), Prawo autorskie i prawa pokrewne Komentarz, 2015, s. 1199.

[1006] C. Masouyé, Guide to the Rome Convention and to the Phonograms Convention, WIPO, no.617 (E), 1981, p.91.

[1007] C. Masouyé, Guide to the Rome Convention and to the Phonograms Convention, WIPO, no.617 (E), 1981, pp.91-92.

[1008] S. Ricketson and J.C. Ginsburg, International Copyright and Neighboring Rights: The Berne Convention and Beyond, Oxford University Press, vol. 2,2022, p.1233.

was not sufficient since it did not extend to the importation and unauthorised distribution of phonograms. Therefore, the reinforcement of the protection of this group in view of the described phenomenon was needed and led to the adoption of the Phonogram Convention where the phonograms' producers were given the legal means to oppose not only the reproduction itself, but also the importation and commercial distribution of duplicates made without their consent.

2.2.Related rights in the international and EU law[1009]

Performers according to the WPPT have full[1010] exclusive rights, namely the right of authorising the broadcasting and communication to the public of their unfixed performances and the fixation of their unfixed performances (art. 6), right of reproduction (art.7), right of distribution (art.8), making available right (art.10), rental right (art.9), remuneration right for broadcasting and communication to the public of commercial phonograms (art.15). They have also moral rights according to art. 5 of the WPPT. Under the EU law **performers** are granted the reproduction (art. 2 of the InfoSoc Directive) and making available (art. 3(2) of the InfoSoc Directive) rights. The shall have also the rental and lending rights (art. 3 of the rental and lending rights directive), distribution right (art. 9 of the rental and lending rights directive) and the fixation right (art. 7 (1) of the rental and lending rights directive). Performers shall be paid a single equitable remuneration according to the conditions laid down in art. 8 of the InfoSoc Directive[1011].

Phonogram producers, as it stems from the WPPT, are granted the reproduction right (art.11), the rental (art.13), distribution (art.12) and making available rights (art.14). According to art. 15 of the WPPT they shall obtain the remuneration for broadcasting and communication to the public of commercial phonograms, even for the indirect use. Under the EU law they are granted the reproduction (art. 2 of the InfoSoc Directive) and making available (art. 3(2) of the InfoSoc Directive) rights. The shall have also the Rental and lending rights (art. 3 of the rental and lending rights directive) and distribution right (art. 9 of the Rental and lending rights directive). The single equitable remuneration obtained

[1009] Since the objective of this point is to provide a general overview of holders of related rights to better understand who is already protected within this legal regime the analysis is limited and does not delve into the study of national legislations.
[1010]S. von Lewinski, International Copyright Law and Policy, Oxford University Press, 2013, p.566.
[1011] EU harmonisation of copyright concerns only the economic rights.

by performers according to the conditions laid down in art. 8 of the rental and lending rights Directive shall be shared with phonogram producers.

In the international law **broadcasting organisations**, according to art. 14 (3) of the TRIPS Agreement, shall have the right to prohibit the following acts when undertaken without their authorisation: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. In the EU law they are granted the reproduction (art. 2 of the InfoSoc Directive) and making available (art. 3(2) of the InfoSoc Directive) rights. The shall have also the distribution right (art. 9 of the Rental and lending rights directive) and the fixation right (art. 7 (1) of the Rental and lending rights directive) and public rebroadcast and communication rights (art.8(3) of the Rental and lending rights directive).

In the EU law producers of the first fixation of a film are granted the reproduction (art. 2 of the InfoSoc Directive) and making available (art. 3(2) of the InfoSoc Directive) rights. The shall have also the rental and lending rights (art. 3 of the rental and lending rights directive), distribution right (art. 9 of the rental and lending rights directive). According to art. 4 of the Term Directive, **any person who, after the expiry of the copyright protection, for the first time lawfully publishes or lawfully communicates to the public a previously unpublished work**, shall benefit from a protection equivalent to the economic rights of the author[1012]. The term of protection of such rights shall be 25 years from the time when the work was first lawfully published or lawfully communicated to the public. Moreover, according to art. 5 of the Term Directive Member States may protect[1013] the critical and scientific publications of works which have come into the public domain.

As to the relationship between international and EU protection of holders of related rights, it should be noted that international conventions have had a significant impact on the shape of harmonisation of the related rights in EU law. The European Union is not a contracting party to the Rome Convention and "it cannot be regarded as having taken the place of its Member States as regards its application, if only because not all of those States are parties to that convention."[1014] The same has been repeated by the CJEU as regards

[1012]See: J. Barta,Prawa pokrewne in: J.Barta (ed.), Prawo autorskie, System Prawa Prywatnego, tom.13,2017, pp.143-144.
[1013] The implementation of the provision is not mandatory.
[1014] CJEU, Società Consortile Fonografici (SCF) v Marco Del Corso, case C- 135/10, 15 March 2012, paras.41-42.

the Phonogram Convention[1015]. Although the provisions of these Conventions are not part of the EU legal order, it was considered desirable that all Member States introduce in national legislations the provisions to ensure the effective compliance therewith as regards the Rome Convention[1016], and to interpret the concepts existing in the EU law in accordance with the meaning that they have in the international conventions, for example in the Rome or Phonogram Convention[1017].

The TRIPS Agreement and the WPPT were concluded by the European Union and the Member States. According to art. 216(2) of TFEU agreements concluded by the Union are binding upon the institutions of the Union and on its Member States, form an integral part of the EU's legal order and have over other categories of secondary legislation. [1018] It means that the provisions of the directives harmonising copyright and related rights should be assessed as regards their compatibility with the international agreements in particular where these provisions "are intended specifically to give effect to an international agreement concluded by the Community".[1019]

The adoption of the InfoSoc Directive is considered as "the vehicle for implementation of the new obligations deriving from the WPPT and the WCT"[1020], which aimed to bring the legislation of the Member States into line with the standard of protection set by these treaties. It should be mentioned that another directive, the Rental and lending rights directive, was "intended to harmonise certain aspects of the law on copyright and related rights in the field of intellectual property in compliance with the relevant international agreements such as, inter alia, the Rome Convention, the TRIPS Agreement and the WPPT, and was supposed to establish a set of rules compatible with those contained in those agreements"[1021]. However, it should be pointed out that the first version of the Directive was adopted in 1992, 4 years before the adoption of the WPPT. Since the international acts adopted so far did not cover the rental right, in the field of rental and lending right, the Community (EU) legislator in the 1990s was not bound by standards set at international level.

[1015] CJEU, Pelham, para.53.
[1016] Council Resolution of 14 May 1992 on increased protection for copyright and neighbouring rights (92/C 138/01), 1992, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31992Y0528(01), accessed: 31.05.2023.
[1017] CJEU, Pelham, paras.51-52.
[1018] CJEU, Air Transport Association of America and Others, case C-366/10, 21 December 2011, para. 50
[1019]CJEU, Rafael Hoteles SA, para.35.
[1020] Opinion of Advocate General Tanchev, case C-265/19, Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd, Minister for Jobs, Enterprise and Innovation, Ireland, Attorney General, 2 July 2020, para. 70.
[1021] CJEU, Società Consortile, para.54.

To conclude:

- The purpose of the protection resulting from the related rights is to reward the effort of performance or dissemination of works, of making them known and available. The need to stop the unfair appropriation of the results of activity of holders of the related rights justifies the adoption of their protection. Moreover, their common objective is to disseminate the works protected by copyright. Adoption of the related rights constitutes an answer to the development of new technologies and aims at rewarding the investements made.

- There is no hierarchy between authors and holders of the related rights. The provisions adopted in the Rome Convention securing the author's interests, exclude the possible detrimental effect of the protection resulting from the related rights on the protection of authors. The activity of holders of related rights can be seen as generating profits for the authors since the dissemination of their works may translate afterwards into their increased financial benefits.

3. *Ratio legis* of the publishers'rights from the CDSM Directive

This section provides the analysis of the *ratio legis* of the publishers' rights. Its objective is to discuss the reasons of the adoption of the new rights. The study of the *ratio legis* will be divided in four points. The first point will focus on the argumentation in favour of the adoption of the related rights as regards the activity of press publishers. The second point will put a particular emphasis on argumentation related to the activity of the news aggregators and the media monitoring services. In the third point the inspiration drawn from the legislative steps taken in Germany and Spain to regulate the press publishers' issue will be discussed. Finally, the last one will shed more light on the relation between the new rights and media pluralism invoked by the EU legislator. All four of these threads intertwine with each other. Their separation has been made solely for the purposes of this analysis, in order to thoroughly examine each element of the justification for the introduction of the new rights. To this end the main documents related to the CDSM Directive: Communication "Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market"[1022], the Impact

[1022] European Commission, Communication from The Commission to the European Parliament, The Council, the European Economic and Social Committee and the Committee of the Regions Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market ,COM/2016/0592 final, 2016, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016DC0592, accessed: 27.10.2022.

Assessment[1023], the Explanatory Memorandum to the Proposal of the CDSM[1024] and the selected recitals from the CDSM Directive will be analysed.

3.1.Press publishers

The major reason for the adoption of the publishers' rights was the digital revolution in the press publishing sector and the shift from offline to online resulting in a decline in newspaper revenues. The latter is linked also to the changes in advertising practices. Given the fact that advertisers opted for the online market places like search engines, news aggregators or social media,[1025] the reduction of expenditure on print press was inevitable.[1026] The problem becomes more complex if we add that press publishers for a long time have made a large amount of their content for free online. Now, while trying to adapt their business models to new reality, they propose to readers, in majority of the cases, the paid services such as subscriptions, which have a deterrent effect on the preferences of news consumers as regards their sources of information.[1027]

Although the growing audience of newspapers[1028] online is noticeable, the increase of publishers' digital revenues according to the European Commission has not made up for the decline of print.[1029] In light of the data provided by the Commission, the decrease in the sources of the revenues of press publishers and the necessity to adapt to the challenge of new technologies are the important arguments for the adoption of the new rights, especially while considering the role of free and pluralist press for the proper

[1023] European Commission, Commission Staff Working Document Impact Assessment on modernization of EU copyright rules Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the copyright in the Digital Single Market, SWD 2016 301 final, 2016, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52016SC0301, accessed: 27.10.2022, hereinafter: Impact Assessment.

[1024] Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - COM(2016)593, https://digital-strategy.ec.europa.eu/en/library/proposal-directive-european-parliament-and-council-copyright-digital-single-market, accessed:27.10.2022.

[1025] See: M.M. van Eechoud, A publisher's intellectual property right. Implications for freedom of expression, authors and open content policies, 2017, https://www.openforumeurope.org/wp-content/uploads/2017/01/OFE-Academic-Paper-Implications-of-publishers-right_FINAL.pdf, accessed: 27.10.2022,p.14.

[1026] See: European Parliament, Strengthening …, p.13.

[1027] See chapter I section 4.

[1028] The European Commission underlined that for 42% of users in the EU, newspaper and magazine's websites and apps are the main services used to access news. See: Annex 13 A of Impact Assessment, part 1/3, 2016.

[1029] The European Commission provides a comprehensive data regarding the shift form print to digital in the press publishing industry, the trend of print circulation of daily newspapers, proportion of consumers who indicated that the Internet was their main source to access news or the decline in publishers' print revenues. See: Impact Assessment, p.156.

functioning of a democratic society.[1030] However, it should be noted that in the official documents accompanying the CDSM directive only residual data on the expected increase of revenues of the press publishers following the introduction of the new rights has been provided.[1031] According to the Impact Assessment, "the introduction of a new related right could lead to a 10 % increase in revenues or between 10-15 % in publishers' operating profit margin." [1032] The Commission neither provides more detailed data, nor indicates how these expected results were calculated. It should be considered as a significant deficiency in the argumentation as to the reasons for establishing the new rights since their fundamental outcome in the form of increased revenues of press publishers is difficult to estimate.

According to recital 54 of the CDSM Directive, the licensing and the enforcement of rights in the press publications in framework of their online uses by ISSP are often complex and inefficient. The European Commission explains that before the adoption of the related rights, in case of infringement, the publisher as licensee or transferee, were asked by the Court to prove their ownership of the allegedly infringed rights and to show the legal titles to the works included in the press publication.[1033] Given the important number of the protected elements included in the press publication and therefore, a large number of legal titles, demonstrating them all was an arduous task. The problem has been voiced also in the literature. According to some scholars, in case of mass exploitation, the necessity to demonstrate the transfer of rights from the authors of the respective works or the grant of an exclusive license could cause the significant difficulties. [1034] As for the expected result of the adoption of the new rights, the European Commission indicates that press publishers would be treated as original rightholders and not as licensees and will be able to easier get injunctive relief or institute infringement proceeding before the

[1030] Recital 54 of the CDSM Directive.

[1031] Impact assessment, p.167. See: Ch.Geiger, G. Frosio, O.Bulayenko, Opinion of the CEIPI on the European Commission's Copyright Reform Proposal, with a Focus on the Introduction of Neighbouring Rights for Press Publishers in EU Law, CEIPI Research Paper 2016, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2921334, accessed: 27.10.2022, pp.14-15; M.M.van Eechoud, A publisher's …,p.11, https://www.openforumeurope.org/wp-content/uploads/2017/01/OFE-Academic-Paper-Implications-of-publishers-right_FINAL.pdf, accessed: 27.10.2022.

[1032] Impact Assessment, p.167.

[1033] Impact Assessment, p.166.

[1034] T. Hoppner, EU Copyright Reform: The case for a publisher's right, 2018, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3081733, accessed: 27.10.2022, p.13. Different opinion is presented by Ch. Geiger, G. Frosio, O. Bulayenko, Opinion …, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2921334, accessed: 27.10.2022.

court.[1035] In consequence, the related right would increase legal certainty and would simplify the process of asserting the publishers' rights and defend their interests.

In recital 55 of the CDSM Directive the need to recognise and encourage the organisational and financial contribution of publishers in producing press publications is expressed. The objective is to ensure the sustainability of publishing industry and to foster the availability of reliable information. Press publishers are considered to be insufficiently protected in comparison with the level of protection granted to film producers, phonogram producers and broadcasting organisations, recognised as holders of related rights.[1036] It has been recalled in the Impact Assessment that despite the important role in assembling and editing the content of press publications[1037] and the comparable engagement in terms of investment, the protection resulting from the related rights' regime does not extend to press publishers. What is missing in the argumentation provided in the Impact Assessment, is the inquiry on the extent to which the legal situation of the holders of related rights has improved following to the introduction of their rights and in consequence, what could change for the press publishers' situation following the adoption of the new rights.[1038]

3.2.News - aggregators and media monitoring services

According to recital 54 of the CDSM Directive, "the wide availability of press publications online has given rise to the emergence of new online services, such as news-aggregators or media monitoring services, for which the reuse of press publications constitutes an important part of their business models and a source of revenue". Social media, news aggregators and search engines, which taken together, in 2016, constituted the main source of news online for 57 % of users.[1039] They were accused by press

[1035] Impact Assessment, p.166.
[1036] See: L. Franceschini, Rapport sur l'objet et le champ d'application du droit voisin des éditeurs de publication de presse, 2018, p.13.
[1037] Impact Assessment, p.159. See critically : M.Kretschmer, S.Dusollier, P.B. Hugenholtz, Ch. Geiger, The European Commission's public consultation on the role of publishers in the copyright value chain: A response by the European Copyright Society, CREATe Working Paper, 2016, pp.5-6; European Parliament, Strengthening …, p.23.
[1038] L. Bently made an interesting parallel with the situation of broadcasters and pointed out to the fact that their legal situation has not improved significantly as the result of the protection within the related rights regime. The author does not precise to what moment in the development of the protection resulting from related rights he refers. See: L. Bently in: Copyright, related rights and the news in the EU: Assessing potential new laws, Transcript of Conference, University of Amsterdam, 2016, p.52, https://resources.law.cam.ac.uk/cipil/documents/potential_legal_responses_complete_transcript.pdf, accessed:27.10.2022.
[1039] Impact Assessment p.157.

publishers of free – riding since they use the content provided by the latter mostly without seeking permission.[1040] Moreover, press publishers and online services were considered as competitors for the advertising revenues[1041] since they act with the same purpose of disseminating information. The European Commission recognised that the role of the news - aggregators and media monitoring services is complex. On the one hand they "increase the visibility of press content and bring new traffic and thus advertising revenues to newspaper websites"[1042] while on the other hand, they provide enough information to satisfy the readers and in consequence, they do not encourage them to click on the link and to go to the website from which the press material originated, which in turn has the effect of reducing publishers' revenues.[1043]

The aim was also to strengthen the bargaining position of publishers. It has been observed that publishers were in difficult situation to negotiate on an equal footing with the large online service providers. Their attempts to conclude licenses with the latter for uses of their content were not very successful.[1044]Even though some agreements were reached[1045]between these two actors, it has not contributed to the significant and general improvement of the press publishers' situation. The fragmented solutions adopted only in some Member States also proved to be insufficient. They concerned only a limited number of entities and mostly did not relate to the specific problem of unauthorised use of press publications but rather to the digital transition in general.[1046]According to the Impact Assessment, the adoption of the publishers' rights and in consequence, "the clear identification of press publishers as rightholders is likely to prompt more online service

[1040] See F. Pollaud- Dulian, Droit d'auteur et droit voisins dans le marché numérique, Revue trimestrielle de droit commercial et de droit économique, no.3, 2019, p.661; T. Pihlajarinne, J. Vesala, Proposed right of press publishers: a workable solution?, 2018, p.1, https://helda.helsinki.fi/bitstream/handle/10138/312548/Pihlajarinne_Vesala_2018_proposed_right_of_press_publishers.pdf?sequence=1,accessed: 27.10.2022.

[1041]See: T. Hoppner, EU Copyright Reform…, p.11, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3081733, accessed: 27.10.2022,

[1042] Impact Assessment, p.157.

[1043] According to the Impact Assessment, 47% of consumers browse and read news extracts on these websites without clicking on links to access the whole article in the newspaper page which erodes advertising revenues from the newspaper webpages. See: Impact Assessment, p.157. (data provided for 2015, 2016).

[1044] Impact Assessment, p.157.

[1045] The private agreement between press publishers and Google was reached for example in France in 2013 in order to support digital transition, investments and innovations to the benefit of the press. See: https://www.france24.com/en/20130201-google-france-reach-landmark-agreement, accessed: 28.10.2022. See: Ch. Geiger, O. Bulayenko, G. Frosio, The introduction of a neighbouring right for press publisher at EU level: the unneeded (and unwanted) reform, European Intellectual Property Review, vol. 39, no. 4, 2017, pp.203-204, pp.202-210.

[1046] See: Ch. Dickes, Mr. Smith, Google & the EC, https://www.linkedin.com/pulse/mr-smith-google-ec-christophe-dickès, accessed: 28.10.2022.

providers to conclude agreements with publishers for the use of their content online, thus accelerating the cooperation which is starting to emerge between larger online service providers and the publishing sector."[1047]

3.3.German and Spanish's experiences

It has been explained in the Impact Assessment that the intervention at the EU level will strengthen the bargaining power of press publishers in more effective way in comparison with the national measures adopted in Germany and Spain[1048]. In 2013, in Germany, the one-year related right for press publishers which covered the making available for commercial purposes of publications and fragments thereof (except of individual words or very short text excerpts) was introduced.[1049] The exclusive right applied against commercial operators of search engines making press products or parts thereof available to the public[1050].

This legislative step was criticised by scholars as not accommodating the publishers' financial interests who were interested in signing paid-for licensing agreement.[1051]

[1047] Impact Assessment, p.168.

[1048] Impact Assessment, p.167.

[1049]Sections 87f to 87h of Urheberrechtsgesetz, as amended by Law of 1 October 2013, Bundesgesetzblatt (Federal Official Journal) Vol. I, 3728. German version: https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//*%5B@attr_id=%27bgbl113s1161.pdf%27%5D#__bgbl__%2F%2F*%5B%40attr_id%3D%27bgbl113s1161.pdf%27%5D__1667226734379, accessed: 31.10.2022, English version from: Strengthening …, p.14:

Section 87f (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 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 The author shall be entitled to an appropriate share of the remuneration.

[1050] The right has been declared inapplicable with retroactive effect by the CJEU by default of notification to the Commission in accordance with Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services.

[1051] See: Ch. Kersting, S. Dworschak, Leistungsschutzrecht für Presseverlage: Müsste Google wirklich zahlen? – eine kartellrechtliche Analyse (Ancillary Copyright Law for News Publishers: Would Google

Google, in reaction to the adopted right, refused to negotiate with representatives of press publishers. In consequence, press publishers had a choice between agreeing for the display of their content for free or for removal or at least significant reduction of their presence on the news aggregator. Stopping publishers' content from being displayed on aggregators meant a reduction in their profits due to less traffic on their sites.[1052] The VG Media Group representing many press publishers in Germany highlighted the important market power of Google and the weak bargaining position of publishers[1053]. R.M. Herty and V. Moscon considered the right adopted in Germany of having only negative effects and pointed out in particular to its detrimental effect on start-ups and small businesses by restraining "innovative services from offering new forms of providing online access to information". [1054] M. Kretschmer, S. Dusollier, P.B. Hugenholtz, Ch. Geiger highlight the negative impact of the right on the freedom of information.[1055]According to the analysis of the German case, the publishers who did not opt in the policies provided by Google News after the adoption of the related right experienced the 8% of reduction in daily visits on their news outlets. [1056] It shows firstly, the negative impact of the right on the publishers' interests and secondly, strong interdependencies between press publishers and online platforms.

In 2014 in Spain, the quotation exception has been amended. According to art. 32 (2) of the Ley de Propiedad Intelectual, the making available to the public of the non - significant fragments of content available to the public by internet service providers and

Really Have to Pay? – An Antitrust Law Analysis), NZKart - Neue Zeitschrift für Kartellrecht (New Journal of Competition Law) vol. 46, 2013; See also: Stellungnahme zum Gesetzesentwurf für eine Ergänzung des Urheberrechtsgesetzes durch ein Leistungsschutzrecht für Verleger, Max-Planck-Institut für Immaterialgüter- und Wettbewerbsrecht, https://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/leistungsschutzrecht_fuer_verleger_01.pdf, accessed:31.10.2022.

[1052] See: H.T. Wolde, E. Auchard, Germany's top publisher bows to Google in news licensing row, Reuters, https://www.reuters.com/article/us-google-axel-sprngr-idUSKBN0IP1YT20141105, accessed: 31.10.2022.

[1053] See: First Decision on Ancillary Copyrights for Press Publishers, 2015, https://www.corint-media.com/en/first-decision-on-ancillary-copyright-for-press-publishers-google-is-obliged-to-pay/, accessed:31.10.2022.

[1054] R.M. Hilty, V.Moscon, Part E – Protection of Press Publications Concerning Digital Uses (Article 11 COM(2016) 593 final) in. R.M. Hilty, V. Moscon (eds.), Modernisation of the EU Copyright Rules Position Statement of the Max Planck Institute for Innovation and Competition, Max Planck Institute for Innovation and Competition, 2017, p.84.

[1055] M.Kretschmer, S. Dusollier, P.B. Hugenholtz, Ch. Geiger, The European Commission's …, p.5.

[1056] J. Calzada, R. Gil, What Do News Aggregators Do? … https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2837553,accessed: 31.10.2022, p.4.

content aggregators was authorised subject to unwaivable equitable compensation, managed by collecting societies.[1057]

R. Xalabarder criticised this legislative step for being not very clearly formulated[1058]. Moreover, the negative and discriminatory impact of the right on the entry of the new operators into the market of news aggregators or its effects discouraging press publishers from developing new business models have been pointed out in the literature.[1059] Contrary to the German legislation, the Spanish publishers' right to compensation could not be waived. In reaction to that, Google News and others smaller news aggregators withdrew from Spanish market.[1060] The effect was the decrease on average 6,1% and even 13,5% in case of small publishers of the online traffic to their websites.[1061]

[1057] Art.32.2 Ley de Propiedad Intelectual, 5 November 2014; version of the article from 2014, Spanish version: https://www.boe.es/buscar/act.php?id=BOE-A-1996-8930&b=52&tn=1&p=20190302#a 32, accessed: 23.11.2022,

English version from: Strengthening…, pp.14-15:
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 authorisation, 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 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.

[1058] R. Xalabarder criticizes for example the use of the term "non-significant fragments of contents" considering the language as insufficiently clear. Scholar points also to the fact, that according to the Spanish regulation, the reproduction is not included in the statutory license without further explanation from Spanish legislator of the reasons of such an approach. See: R. Xalabarder, The remunerated statutory limitations for news aggregation and search engines proposed by the Spanish Governement; Its compliance with international and EU law, 2014, http://infojustice.org/wpcontent/uploads/2014/10/xalabarder.pdf , accessed: 01.11.2022.

[1059] S. Scalzini, Is there free-riding? A comparative analysis of the problem of protecting publishing materials online in Europe, Journal of Intellectual Property Law & Practice, vol. 10, no. 6, 2015, p.463, pp.454-464.

[1060] The Guardian, Google News Spain to be shut down: what does it mean?, https://www.theguardian.com/media-network/2014/dec/12/google-news-spain-tax-withdraws, accessed: 01.11.2022.

[1061] Impacto del Nuevo Artículo 32.2 de la Ley de Propiedad Intelectual, Informe para la Asociación Española de Editoriales de Publicaciones Periódicas (AEEPP), 2015, https://clabe.org/pdf/InformeNera.pdf, accessed : 01.11.2022, pp. 53-55. (English version see : https://clabe.org/pdf/Informe_NERA_para_AEEPP_(INGLES).pdf, accessed:0111.2022).

The Commission, in the Impact Assessment, acknowledged the shortcomings of these two discussed national legislations. It expected the positive effect of the related rights proposed in the CDSM Directive and reassured that the latter would be more effective since it was proposed at the EU level. The Commission considered that the differences between the provision from art. 15 of the CDSM Directive and the legislative steps taken in Germany and Spain would guarantee a more efficient way of strengthening the publishers' position. Amongst these differences, the Commission indicated that German right could only be exercised against specific categories of online service providers, and Spanish solution was not an exclusive right but an unwaivable right to a compensation. Therefore, "the related right at EU level would leave press publishers a greater margin of manoeuvre to negotiate different types of agreements with service providers than it has been the case in Germany and in Spain and is therefore expected to be more effective for them in the long run."[1062]

T. Hoppner recognises that the rights proposed in the CDSM Directive represent a different approach taken and argues that it is not true that the legislative steps taken in Germany and Spain have entirely failed.[1063] However, there is little support for such an argumentation. S. Dusollier claims that the European Union has not learnt the lessons from the legislative failures in regulating the press publishers' issue in Spain and Germany,[1064] A. Peukert answers the Commission's point on the effectiveness of the press publishers' rights on the EU scale by arguing that the same competitive conditions are characteristic for the EU online news market and for the German or Spanish one, so "there is no reason to believe that the mere size of the EU Digital Single Market will make a difference".[1065] A. Ramalho points interestingly that the press publishing market is language-based. Competition and cross-border trade in the publishing field is limited to a significant extent to the borders of every Member States.[1066] The conclusion is that if the regulation of the press publishers' issue at the national level failed, the chances for the adoption of an effective solution to the problem at European level are rather low.

[1062] Impact Assessment, p.160.
[1063] T. Höppner in: T. Höppner, M. Kretschmer, R. Xalabarder, CREATe public lectures on the proposed EU right for press publishers. European Intellectual Property Review, vol. 39, no.10,2015, pp. 607-622.
[1064] S. Dusollier, The 2019 Directive on Copyright in the Digital Single Market: Some progress, a few bad choices, and an overall failed ambition, Common Market Law Review, vol.57, no.4, 2020, p.1005, pp.973-1030.
[1065] A. Peukert, An EU related right for press publishers concerning digital uses. A legal analysis, Goethe Universitat, Faculty of Law, Research Paper, no.22, 2016, p.12.
[1066] A. Ramalho, The competence …, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2842313, accessed: 01.11.2022, p.12.

3.4.Media pluralism

The weak legal position of press publishers has been considered as having a negative impact on media pluralism, democratic debate, quality of information and cultural diversity in the European society.[1067] In recital 54 of the CDSM Directive the role of free and pluralist press to ensure quality journalism and citizens' access to information is expressed. The new right is considered to provide a fundamental contribution to public debate and the proper functioning of a democratic society. Moreover, according to the Impact Assessment "better market conditions for the press publishing industry could give rise to the development of innovative offers for the digital distribution of press content, with larger catalogues and more choice."[1068]

The concerns of consumers that the new rights can lead to the interventions of online services restricting the access to press content and the introduction of new burdens for users are mentioned in the Impact Assessment.[1069] However, the Commission answered them by concluding that the problems which had arisen in Spain are not expected to arise under the proposed at the EU level solution since the latter is different from the measures adopted in Spain.[1070]

To conclude:

- The decrease in the sources of revenues for press publishers and the necessity to adapt to the challenge resulting from digital dissemination of information are the justifications given in favor of the adoption of the new rights. The adoption of the related rights of press publishers was also justified by the need to strengthen the legal position of press publishers. Their important role in assembling and editing the content of press publications and the comparable engagement in terms of investment to the holders of other related rights has been highlighted. The positive impact of the related rights on the right to receive information and media pluralism is mentioned repeatedly to justify the adoption of the new rights.

- The complex relationship between news aggregators and press publishers as well as weak bargaining position of the latter constituted a justification for the adoption of the new rights. It has not been further specified whether their introduction will equally improve the negotiating position of all publishers, regardless of their size.

[1067] Impact Assessment, p.160.
[1068] Impact Assessment, p.169.
[1069] Impact Assessment, p.163.
[1070] Impact Assessment, pp.169-170.

- The positive impact (to some extent) of news aggregators on press publishers has been acknowledged in the Impact Assessment but the balancing task as regards the potential limiting impact of the new rights on this positive side has not been conducted by the Legislator.

- The shortcomings of German and Spanish legislations have been acknowledged by the EU legislator who expected the positive effect and the effectiveness of the new rights due for example to the fact that they would be adopted at the EU level so at the larger scale.

4. Press publication – subject matter of the press publishers' rights

A. The CDSM Directive

According to art. 2 (4) of the CDSM Directive "press publication' means a **collection** composed mainly of literary works of a **journalistic nature**, but which can also include other works or other subject matter, and which:
(a) constitutes an individual item within a **periodical or regularly updated publication** under a single title, such as a newspaper or a general or special interest magazine;
(b) has the purpose of providing the general public with information related **to news or other topics**; and
(c) is published in any media under **the initiative, editorial responsibility and control of a service provider**. Periodicals that are published for scientific or academic purposes, such as scientific journals, are not press publications for the purposes of this Directive."

Press publication is a collection. According to the Cambridge Dictionary, a collection is "a group of objects of one type that have been collected by one person or in one place".[1071] Press publication includes therefore different elements of one type, namely, of journalistic type. The provision discussed does not provide any information on how large the collection should be and how many elements at least it should contain to be qualified as a collection under art. 2(4) of the CDSM Directive. In order to establish it, the inspiration could be drawn from the Databases Directive, in which the term 'collection' is used. According to recital 13 of the latter, this Directive protects **collections**, sometimes called 'compilations', of works, data or other materials which are arranged, stored and accessed by means which include electronic, electromagnetic or

[1071]Camridge Dictionnary, https://dictionary.cambridge.org/dictionary/english/collection, accessed: 14.06.2023.

electro-optical processes or analogous processes. According to art. 1 (2) of the Directive, for the purposes of this Directive, 'database' shall mean a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means. There is however no formulated threshold of how many elements a collection should consist of, and from how many elements a given combination will be a collection. In the literature, it has been pointed out that in order for a collection to be considered as a database, there must be such a number of data, materials or other elements that it is possible to structure them. Although there is no statutory requirement as to the size of the collection, the amount of information included in the database may affect the granting of protection. A single piece of information, even if particularly valuable, will never be granted database status[1072]. In consequence, the elements of database, in order to constitute a collection, should be numerous and form a certain structure.

Adapting it to the definition of press publication and keeping in mind the specifity of the protection of databases, it could be said that a press publication should consist of a number of elements which will form a structure based on a thematic link, on the same journalistic type or common aim which is the dissemination of information.

As to the minimum number of elements, M. van Eechoud underlines that a press publication should contain "at least several 'literary works of a journalistic nature'"[1073], according to E. Czarny – Drożdżejko, "two or three elements are enough, or maybe it is necessary to combine more elements."[1074] E. Rosati proposes that the "assessment shall be conducted on a case-by- case basis"[1075]. In my view for a collection to arise, it should contain at least two elements.

Press publication includes different elements of journalistic type. The latter has not been further defined by the EU legislator. The CJEU provided some guidelines on the understanding of the journalistic activities. Their objective should be "the disclosure to the public of information, opinions or ideas, irrespective of the medium which is used to transmit them. They are not limited to media undertakings and may be undertaken for

[1072] Z. Zawadzka, Sui Generis Ochrona Baz Danych, in: J. Sieńczyło – Chlabicz (ed.), Prawo własności intelektualnej. Teoria i praktyka, Wolters Kluwer Polska, 2021, LEX.
[1073] M.M. van Eechoud, A publisher's …, https://www.openforumeurope.org/wp-content/uploads/2017/01/OFE-Academic-Paper-Implications-of-publishers-right_FINAL.pdf, accessed: 27.10.2022,p.33.
[1074] E. Czarny – Drożdżejko in: E. Czarny – Drożdżejko, The subject-matter of press publishers' related rights under directive 2019/790 on copyright and related rights in the Digital Single Market, IIC - International Review of Intellectual Property and Competition Law, no. 51, 2020, p.627.
[1075] E. Rosati, Copyright in the Digital Single Market, Oxford University Press,2021, p.262.

profit-making purposes."[1076] The journalistic nature of press publication in my opinion does not imply that the elements included in a press publication need to be written/made by the journalists. In the vast majority of cases, they will be the authors of such elements but the introduction of such a limitation in the text of the provision discussed would not be adapted to the current development in the press sector, namely to the deprofessionalisation[1077] or the use of AI[1078]. I propose to understand the journalistic type as relating to the dissemination of information, opinions and ideas to the public.

The elements of the collection being a press publication are **mainly** the literary works. It means that a press publication containing only the videos will not meet the requirement from art.2 (4) of the CDSM Directive. Term 'press publication' is rather associated with the literary works, term 'mainly' indicates that the literary character of works should be dominant. A collection will be considered as a press publication only if it will include literary works of journalistic nature. Since the EU legislator uses the plural, the conclusion must be drawn that the collection must include at least two such works.

Press publication, in addition to literary works, can include **other works** which are for example photographs and videos and **other subject matters**.[1079] According to French version of art. 2 (4) of the CDSM Directive "publication de presse est une collection composée principalement d'œuvres littéraires de nature journalistique, mais qui peut également comprendre d'autres œuvres ou objets **protégés**". It means that the press publication can include literary works, other works or other protected subject matters. It is also the case of Polish version of the provision discussed, according to which „publikacja prasowa oznacza zbiór złożony głównie z utworów literackich o charakterze dziennikarskim, mogący jednakże obejmować także inne utwory lub inne przedmioty **objęte ochroną**". The difference is that the adjective **protected** does not appear in the English version in relation to other subject matters in case of the provision from art. 15 of the CDSM Directive. The question arises therefore how to understand term 'subject matter' and whether it is protected, for example on the basis of the related rights' regime or it constitutes a non-protected element.

[1076] CJEU Tietosuojavaltuutettu V Satakunnan Markkinapörssi Oy, Satamedia Oy, Case C-73/07, 16 December 2008, para.61.
[1077] R. K. Nielsen, A. Cornia, A. Kalogeropoulos points to the raise in popularity of non–profit media, volunteer media or "citizen journalism" See: R. K. Nielsen, A. Cornia, A. Kalogeropoulos, Challenges …, https://rm.coe.int/16806c0385, accessed: 06.11.2022. See chapter 1 point 4.2.
[1078] See: chapter 1, point 4.2. Differently E. Czarny – Drożdżejko in: E. Czarny – Drożdżejko, The subject-matter …, pp.627-632.
[1079] See recital 56 of the CDSM Directive.

The analysis of the English text of the CDSM Directive in its entirety shows that both terms, namely, 'subject matter' and 'protected subject matter' are used. The latter is used for example in recital 2 of the Directive according to which: "The directives that have been adopted in the area of copyright and related rights contribute to the functioning of the internal market, provide for a high level of protection for rightholders, facilitate the clearance of rights, and create a framework in which the exploitation of works and **other protected subject matter** can take place". According to recital 64: "It is appropriate to clarify in this Directive that online content-sharing service providers perform an act of communication to the public or of making available to the public when they give the public access to copyright-protected works or other **protected subject matter** uploaded by their users". According to the definition of online content - sharing provider from the same article 2 of the CDSM Directive, in which the definition of press publication is provided, " online content-sharing service provider means a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or **other protected subject matter** uploaded by its users, which it organises and promotes for profit-making purposes". Lastly, according to art.17 (1) of the DSM Directive, "Member States shall provide that an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or **other protected subject matter** uploaded by its users".

All of these examples, except the first one, relate to the situation of the provision of access to the content by online content-sharing service provider which encompasses works and other protected subject matters, the latter understood as subject matters protected for example on the ground of the related rights' regime. On the basis of the provided examples we can notice also that the EU legislator uses term 'copyright-protected works'. In this context, the lack of consistency should be noted since for example in the discussed art. 2(4) of the DSM Directive the term 'work' is used and the meaning of both of these terms is the same.

The EU legislator uses term 'other subject matter' much more frequently in the CDSM Directive than the term 'protected subject matter'. The examples of such use are: recital 3 of the DSM Directive, according to which: "Rapid technological developments continue to transform the way works and **other subject matter** are created, produced, distributed and exploited. According to recital 6: "The exceptions and limitations

provided for in this Directive seek to achieve a fair balance between the rights and interests of authors and other rightholders, on the one hand, and of users on the other. They can be applied only in certain special cases that do not conflict with the normal exploitation of the works or **other subject matter** and do not unreasonably prejudice the legitimate interests of the rightholders". According to recital 16: In view of a potentially high number of access requests to, and downloads of, their works or **other subject matter**, rightholders should be allowed to apply measures when there is a risk that the security and integrity of their systems or databases could be jeopardised. According to art.4 (1) of the DSM Directive, Member States shall provide for an exception or limitation to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, Article 4(1)(a) and (b) of Directive 2009/24/EC and Article 15(1) of this Directive for reproductions and extractions of lawfully accessible **works and other subject matter** for the purposes of text and data mining".

From the perspective of analysis conducted, it is important to examine the provision from art. 1 (1) of the DSM Directive, according to which: "This Directive lays down rules which aim to harmonise further Union law applicable to **copyright and related rights** in the framework of the internal market, taking into account, in particular, digital and cross-border uses of protected content. It also lays down rules on exceptions and limitations to copyright and related rights, on the facilitation of licences, as well as rules which aim to ensure a well-functioning marketplace for the exploitation of works and **other subject matter"**. The scrutiny of this provision makes it possible to conclude that the EU law harmonisation applies to copyright and related rights and in consequence, concerns works and other subject matter protected under the related rights' regime. The examples, enumerated above, show that each time the term subject matter was used, the legislator referred, although not explicitly, to **protected** subject matter.

What does it mean, in the context of the understanding of subject matter included in press publication? It means firstly, that the English text of the DSM Directive is not consistent as regards the use of terms such 'work', 'copyright protected work', 'subject mater', 'protected subject matter'. It is difficult, if not impossible to find a rational justification for such a differentiation. Additionally, it should be mentioned that for example in Italian version of the DSM Directive, a press publication consists mainly of literary works of a journalistic character but may also include other works or other

materials, and the latter should be understood as non-protected materials.[1080] It can lead to many interpretative doubts.

Secondly, in light of the examples provided from the English version of the CDSM Directive the conclusion can be drawn that the term 'subject matter' is understood as a protected subject matter mostly on the basis of the related rights' regime. Therefore, the conclusion is that press publication contains subject matters which are protected on the basis of the related rights' regime or, as pointed out for example by R. Markiewicz on the basis of sui generis regime.[1081] The opposite interpretation, leading to the conclusion that only works, and (unprotected) subject matters are included in a press publication, would lead to the conclusion that subject matters protected under related rights could not be a part of press publication at all, and such an interpretation must be considered erroneous.

What does the established interpretation of the elements of press publication means for the protection of press publishers? Firstly, from a purely practical perspective, it seems difficult to achieve in every case that a press publication contains only protected elements. The non - protected elements can be the technical elements for linking the components of the collection, or for example short information on weather or sport. A question arises, whether a collection including also the non-protected elements could be considered as a press publication according to art. 2(4) of the CDSM Directive?

Secondly, as it stems from the study of the related rights' regime conducted earlier in this chapter, the protection resulting form the related rights has so far not been conditioned by the requirements of already granted protection to the subject matters included therein under copyright or related rights' regime. The understanding of press publication which conditions its protection on the protection of its elements creates for publishers an unprecedented in the case of the related rights'regime requirement. Moreover, partially, the protection under the related rights' regime in this case depends on the creative nature of the elements of press publication, since it should include literary and other works.

The solution which I propose is to understand a press publication as a collection composed mainly of literary works of journalistic nature, but which can also include other

[1080] English version by the author. According to art. 2(4) of the Italian version of the DSM Directive: «pubblicazione di carattere giornalistico»: un insieme composto principalmente da opere letterarie di carattere giornalistico ma che può includere anche altre opere o altri materiali, e che (…).
[1081] R. Markiewicz, Prawo pokrewne wydawców prasy, Zeszyty Naukowe Uniwersytetu Jagiellońskiego, no.4, 2019, p.7.

works or other subject matter. We should therefore focus on what has to be included in a press publication. If the literary works are included, and potentially other works or subject matters, then in my opinion, the fact that the collection in question contains also unprotected elements should not prevent it from being granted protection under the new law. However, if a non - protected element is included in a press publication - and is then used by ISSPs there will be not an encroachment on the publishers' exclusive rights[1082]. The opposite assertion would be contrary to the provision from art. 15 of the CDSM Directive according to which a press publication is a collection composed mainly of literary works of journalistic nature, but which can also include other works or other subject matter. The fact of inclusion of a non-protected element in my view cannot exclude the qualification of the entire collection as a press publication. If this were the case, the use of a protected element from the collection would not imply the press publishers' protection, because the collection could not be considered a press publication due to the fact that it would also contain unprotected elements. Nevertheless, it would be going too far to conclude that the use of an element from public domain which has been included in a press publication leads to an encroachment on the publisher's rights in that publication. To illustrate, following the provided reasoning, the picture generated by AI without human creative input is not protected by copyright. The fact of its inclusion in a collection of literary works, other works and subject matter will not make the collection as such ineligible as a press publication. Nevertheless, the use of such a picture by ISSP will not require the authorisation of press publisher.

According to art. 15 (2) of the CDSM Directive the rights provided for in paragraph 1 shall not be invoked to prohibit the use of works or other subject matter for which protection has expired. It implies firstly, that in a press publication may be included the subject matters which are not protected and secondly, that the press publishers' protection does not apply to the uses of such elements.

The works and subject matters incorporated in a press publication can originate from one or many authors or other holders of rights.[1083] They have to be acquired legally.[1084] Press publisher has to have the legal tittles to each of them, even though the

[1082] See differently: R. Markiewicz, Prawo pokrewne …, p.14.
[1083] E. Rosati notes that whether the authors of the works and/ or other subject matters incorporated in a press publication must be different (each element comes from different author) should be assessed on a case-by-case basis. See: E. Rosati, Copyright …, pp.261-262.
[1084] See: R. Markiewicz, Prawo autorskie na jednolitym rynku cyfrowym…, p.185.

protection resulting from the publishers' related rights is not conditional on the demonstration of these legal titles.[1085]

It is worth pointing out that the EU legislator uses the term 'publication' twice in the provision discussed. Firstly, by making reference to the **'press publication'** meaning a collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matters and secondly, by stating that the press publication has to constitute an individual item within a periodical or regularly updated **publication** under a single title. Press publication can be for example an issue of a daily, weekly, monthly newspaper. It may be counter-intuitive to the understanding of press publication as a press article as it has been proposed in chapter II of this dissertation. According to the definition of press publication from art. 2 (4) of the CDSM Directive an article can be rather a part of a press publication.

Press publication can contain also the elements such as table of contents, photos, video, graphics, podcasts. A layout may also be an element of press publication. With regard to the latter, however, in my opinion if the exploitation concerned only the layout without the text, the protection of press publishers would not apply. This view is shared in the literature by V. Moscon[1086] or E. Laskowska – Litak[1087]. It is reflected also in practice since, what is mostly used by ISSPs within the services such as news aggregators from the content published by press publishers are the extracts from the press publications and photos and not the layout. Newspaper, a general or special interst magazine as exemplified by the EU legislator will constitute a publication.

Press publication constitutes an individual item within a periodical or regularly updated publication under a single title. The list of examples of single titles provided in the provision is not exhaustive. Therefore, it should be asked whether the publications published on news websites such as Polish onet.pl or websites of news televisions such as French France 24 would meet the requirement of press publication from the article discussed. The question arises whether the single title could be understood also as a name of online news service or news website and not only of a newspaper or magazine. While

[1085] See: Ch. Geiger, G. Frosio, O. Bulayenko, Opinion …, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2921334, accessed: 27.10.2022, p.16.
[1086] V. Moscon, Neighbouring rights: in search of a dogmatic foundation. The press publishers' case, Max Planck Institute for Innovation and Competition Research Paper No. 18-17, 2018, p.9, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3208601, accessed: 22.01.2024.
[1087] E. Laskowska – Litak, Sprawa upadłej dyrektywy prawnoautorskiej i (nie)jednolitego rynku cyfrowego, Europejski Przegląd Sądowy, no.9,2018, p.8.

comparing the publications from Le Figaro[1088], onet.pl[1089] and France 24[1090] not many differences will be noticed, and the ones that will be, will depend more on the style of the respective websites. It is worth to be mentioned, that Google publishes on its service - Google News, the headlines of press publications also from these sources what, in a way, is a significant argument in favor of this broad interpretation. In support of this, it should be noted that the EU legislator in recital 56 explicitly indicates that the press publications that should be covered by the definition from art. 2 (4) of the CDSM directive can be published also on news websites. Having regard to the above, individual item can be understood as a news website and not only as an online version of a newspaper or magazine.

Publication containing a press publication has to be updated regularly under a single title. The question arises whether the requirement to update the publication regularly should be understood in such a way that all the elements included in a press publication should be published in at once as a part of one issue or they can be published regularly on the website of press publisher at specific intervals, several times a day or a week. The latter is becoming increasingly popular as regards the business models adopted by press publishers. The more and more often they update the press walls of their websites several times per day. In my opinion, in both cases the requirement of updating publication regularly is met[1091].

A dissonance within the definition of a press publication that should be noted, is that press publication means a collection which constitutes at the same time an individual item. In other words, the collection should be a finite set that will be a *de facto* a one and individual item. Although it cannot be said that the qualification of a subject matter as a collection excludes the possibility to qualify the same subject matter as an individual item, in the provision discussed the criteria specifying the conditions according to which a given collection constitutes an individual item are missing. Moreover, it is easy to

[1088] E. Pierson, Sous-marin disparu : comment interpréter les «cognements» détectés sous l'eau, le Figaro, https://www.lefigaro.fr/international/sous-marin-disparu-les-bruits-detectes-sous-l-eau-permettent-ils-d-esperer-20230621, accessed : 21.06.2023.

[1089] P. Halicki, M. Gałczyńska, Dlaczego odnalezione małżeństwo nie zostało zatrzymane? Pytamy ekspertów, Onet.pl, 2023, https://www.onet.pl/informacje/onetwarszawa/dlaczego-odnalezione-malzenstwo-nie-zostalo-zatrzymane-pytamy-ekspertow/ens4s63,79cfc278, accessed: 21.06.2023.

[1090] France 24, Ukraine says Kakhovka dam collapse caused €1.2 billion in damage, 2023, https://www.france24.com/en/europe/20230620-[redacted]-live-russia-launches-overnight-air-attack-on-cities-across-ukraine , accessed: 21.06.2023.

[1091] See: R. Danbury, The DSM Copyright Directive: Article 15: What? – Part II, 2021, Kluwer Copyright Blog, http://copyrightblog.kluweriplaw.com/2021/04/29/the-dsm-copyright-directive-article-15-what-part-ii/,accessed: 15.11.2022.

imagine an issue of a newspaper, constituting a finite set, an item. It is however more complicated to see as such a news website which is updated constantly with a changing content since one article is added, another article becomes no longer available. The assessment of what elements are included in a collection, in this case, should be carried out either from the perspective of the moment when the ISSP uses a press publication or its part or from the perspective of the moment when the user accesses the press publication.

It has been already specified that press publication should have the purpose of providing the general public with information related to news or other topics. E. Rosati points out that such other topics "should in any case relate to current affairs".[1092] I will not agree with the latter since, on the basis of the purposive interpretation of the provision, the aim of the EU legislator was to adopt a protection which will apply to all press pulbishers and not only to those who publish on the current affairs issues.

Periodicals that are published for scientific or academic purposes, such as scientific journals do not constitute a press publication according to art. 2 (4)(b) of the CDSM Directive. Press publication can be published in any media. In recital 56 of the CDSM Directive the EU legislator specified that the media includes also paper. The rationale behind this specification can be the willingness of the EU legislator to highlight that not only network media but also the traditional ones should be taken into consideration. However, as it was demonstrated in chapter one, the prevalence of the latter is decreasing.

Important is the initiative, editorial responsibility and control of a service provider such as news publisher. Therefore, in recital 56, the EU legislator excludes websites such as blogs from protection granted to press publications in case when they provide information as part of activity that is not carried out under the initiative, editorial responsibility and control of a service provider. Therefore, if the involvement of the person publishing blog will meet these criteria, the protection will apply. Editorial responsibility should be understood according to T. Höppner as consisting of distinguishing "reliable information from unreliable sources. Consequently, this responsibility requires significant investements in the verification of information and the editing articles. The corresponding legal liability for any false information ensures the

[1092] See: E. Rosati, Copyright …, p.261.

maintenance of the necessary high standards."[1093] The concept of editorial responsibility appears in the Audiovisual Media Services Directive in the context of audiovisual media services provided by media service provider[1094]. Striving for consistency in the interpretation of the EU law, its definition could serve to elucidate the scope of the engagement of press publishers.

According to art. 1 (c) of the Audiovisual Media Services Directive of 2010: 'editorial responsibility' means the exercise of effective control both over the selection of the programmes and over their organisation either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services. Editorial responsibility does not necessarily imply any legal liability under national law for the content or the services provided.

Effective control encompasses, according to the literature, the actual and legal control and consists of the possibility of taking the final decisions.[1095] Such a final decision concerns firstly, whether a content will be included (criterion of selection) and secondly how it will be structured (criterion of organisation). The selection and organisation of the content follow the professional guidelines on ethics.[1096]

When adapting these considerations to the definition of editorial responsibility to the press publishing sector, it could be understood as the exercise of effective control meaning the possibility of taking the final decisions both over the selection of materials included in a press publication and over their organisation which follows the professional ethics and which does not necessarily imply any legal liability under national law for the content provided. Initiative could be understood as the act of initiating the publishing process, control as conducting supervision over the process of publishing overlapping with or concerning other fields that these controlled in the framework of editorial responsibility.

[1093] T. Höppner, The proposed Directive on Copyright in the Digital Single Market (Articles 11, 14 and 16) Strengthening the Press Through Copyright, European Parliament, https://www.europarl.europa.eu/RegData/etudes/BRIE/2017/596835/IPOL_BRI(2017)596835_EN.pdf, accessed:22.10.2024.

[1094] See: art. 1 (c) of the Audiovisual Media Services Directive; K. Klafkowska – Waśniowska, Nowe formy usług medialnych a przesłanka odpowiedzialności redakcyjnej w dyrektywie o audiowizualnych usługach medialnych, Zeszyty Naukowe. Prace z Prawa Własności Intelektualnej, no.124, 2014.

[1095] W. Schulz, S. Heilmann, IRIS Special: Editorial Responsibility, European Audiovisual Observatory, 2008, p.16, https://rm.coe.int/1680783c0e, accessed: 24.01.20224.

[1096] W. Schulz, S. Heilmann, IRIS Special: Editorial Responsibility…, p.18, https://rm.coe.int/1680783c0e, accessed: 24.01.20224. See also: H. Aguinis, S.J. Vaschetto, Editorial Responsibility: Managing the PublishingProcess to Do Good and Do Well, Management and Organization Review, vol. 7, no.3, 2011, pp. 407–422.

All the conditions listed in art. 2 (4) of the CDSM Directive must be met cumulatively. The definition of press publication does not contain any requirement regarding the minimum of the investment necessary for the protection to arise. It could lead to the conclusion that the protection will extent to every collection composed mainly of literary works and other subject matters which meets the criteria from art. 2 (4) of the CDSM Directive regardless the substance of investment what in consequence will contribute to the widening of its scope.

This point echoes in the literature.[1097] P.B. Hugenholtz argues that the absence of a threshold test "will lead to overprotection and create uncertainty regarding the scope of the press publisher's right."[1098] However, the analysis of the related rights' regime conducted earlier in this chapter showed that no related right contains a specific investment threshold. As it has been already discussed in point 2.1.2. of this chapter, the costs incurred for the first fixation of film, fixation of phonogram or broadcast constitute already an investment. Of course, the size of these investments varies but it may be debatable how such a threshold should be formulated if the legislator would like to adopt one. The adoption of vague concepts which are difficult to define may raise the significant interpretative problems but allows for flexibility. On the other hand, the adoption of a clear threshold would be arbitrary and rapidly outdated in the age of technological change. Another possibility would be to follow the path of Databases Directive and to introduce the requirement of the substantial investment[1099]. However, it should be noted that the large investments do not always mean a good quality of press publication. Therefore, it cannot be excluded that lack of investment threshold could lead to the overprotection of press publishers due to the extensive formulation of the press publication' s definition. Nevertheless, its introduction does not correspond to the construction of related rights' regime in general and there is no certainty as to its positive impact on the quality of press publications and their protection. Press publication constitutes an autonomous notion of

[1097] CH. Geiger, O. Bulayenko and G. Frosio point to the fact that lack of threshold of investment means that "making available on a "news website" trivial information would attract the same protection as the publication of an article resulting from months of investigative journalism" See: Ch.Geiger, G. Frosio, O.Bulayenko, Opinion …, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2921334, accessed: 27.10.2022, p.16; S. Scalzini observes that the lack of an investment threshold "renders the extent of the subject-matter encompassed by the provision vague, with a risk of overprotection of press publications with little or no underlying investment to recoup." See: S. Scalzini, The new related right for press publishers: what way forward?, in: E. Rosati (ed.), Routledge Handbook of EU Copyright Law, 2021, p.108, pp.101-119.
[1098] P.B. Hugenholtz, Neighbouring …, pp. 1010-10111.
[1099] See: art. 7 of the Databases Directive.

the EU law which means that "it should be given a uniform application throughout the European Union".[1100]

To conclude:

- The use of term 'subject matter' in the English text of the CDSM Directive lacks consistency. It leads to the interpretative doubts whether a subject matter is protected or not and it impacts the understanding of press publication which means a collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matter. The analysis conducted in this point showed that the latter should be understood as the subject matter protected under related rights' regime or sui generis' regime.

- I propose to understand a press publication as a collection composed mainly of literary works of journalistic nature, but which can also include other works or other subject matters. If the literary works are included, and potentially other works or subject matters, then in my opinion the fact that the collection in question would contain also unprotected elements should not prevent it from being granted protection under the exclusive rights of press publishers. If a non - protected element is included in a press publication and is then used by ISSPs to the extent indicated in the CDSM Directive, there will not be an encroachment on the publishers' exclusive rights.

- Press publication contains different elements of one type, namely, of journalistic type. The latter should be understood from the perspective of its purpose being the disclosure to the public of information, opinions or ideas and should not imply that their authors are journalists.

- Press publication as a collection should consist of a number of elements which will form a structure resulting, for example, from thematic link or common aim which is the dissemination of information. It should consist of at least two elements.

- The regularity of update of press publication should be understood broadly as encompassing also the update of press walls of news websites or websites published by press publishers taking place several times per day or per week.

- Press publication should be published under the initative, editorial responsibility and control of a service provider. Editorial responsibility should be understood as the exercise of the effective control both over the selection of materials included in a press publication and over their organisation which does not necessarily imply any legal liability under national law for the content provided.

[1100] E. Rosati, Copyright …, p.261.

- All the conditions listed in art. 2 (4) of the CDSM Directive must be met cumulatively.

- Press publication constitutes an autonomous notion of the EU law.

B. French and Polish law

art. L.218-1 of the French Intellectual Property Code	**art. 99 [7] (1) of the draft of the act amending the Polish Copyright Act**
A press publication within the meaning of this chapter is a collection composed mainly of literary works of a journalistic nature, which may also include other protected works or protected subject matters, in particular photographs or videograms, and which constitutes a distinct whole within a periodical or regularly updated publication bearing a single title, with the aim of providing the public with information on current events or other topics, in any medium, on the initiative, under the editorial responsibility and control of the press publishers or a press agency. Periodicals that are published for scientific or academic purposes, such as scientific journals, are not covered by this definition. [1101]	A press publication is a collection of works or subject matters of related rights composed principally of literary works of a journalistic nature which constitutes a distinct whole within a periodical or regularly updated publication under a single title, such as a newspaper or periodical, in particular a daily, weekly or monthly journal of general or specialised interest and an online news service, distributed for information purposes in any form and by any means within the scope of the economic activity of the entity which exercises actual and legal control over the selection of the content disseminated. Periodical publications published for scientific or academic purposes are not press publications.[1102]

[1101] English version by the author. French version of art. L.218-1 (I) of French Intellectual Property Code: On entend par publication de presse au sens du présent chapitre une collection composée principalement d'œuvres littéraires de nature journalistique, qui peut également comprendre d'autres œuvres ou objets protégés, notamment des photographies ou des vidéogrammes, et qui constitue une unité au sein d'une publication périodique ou régulièrement actualisée portant un titre unique, dans le but de fournir au public des informations sur l'actualité ou d'autres sujets publiées, sur tout support, à l'initiative, sous la responsabilité éditoriale et sous le contrôle des éditeurs de presse ou d'une agence de presse.
Les périodiques qui sont publiés à des fins scientifiques ou universitaires, tels que les revues scientifiques, ne sont pas couverts par la présente définition. https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038826730, accessed : 10.07.2023.

[1102] English version by the author. Polish version of art. Art. 99[7] : 1)Publikacją prasową jest zbiór utworów lub przedmiotów praw pokrewnych złożony głównie z utworów słownych o charakterze dziennikarskim, stanowiący odrębną całość w ramach periodycznej lub regularnie aktualizowanej pod jednym tytułem publikacji, takiej jak gazeta lub czasopismo, w szczególności dziennik, tygodnik lub miesięcznik o tematyce ogólnej lub specjalistycznej oraz internetowy serwis informacyjny, rozpowszechniany w celach informacyjnych w dowolnej formie i w dowolny sposób w ramach działalności gospodarczej podmiotu, który sprawuje faktyczną i prawną kontrolę nad doborem rozpowszechnianych treści. Publikacjami prasowymi nie są publikacje periodyczne publikowane do celów naukowych lub akademickich. 3. Przepisu ust. 2 nie stosuje się do: (…)
5) utworów lub przedmiotów praw pokrewnych zawartych w publikacji prasowej, których ochrona wygasła https://legislacja.rcl.gov.pl/docs//2/12360954/12887989/12887990/dokument561868.pdf, accessed: 10.07.2023.

French and Polish definitions of press publication follow the wording of provision from art. 2 (4) of the CDSM Directive. However, some interesting differences should be highlighted.

Firstly, French legislator decided to add the examples of other works or subject matters that can be included in press publication by mentioning the photographs or videograms.[1103] These two subject matters are protected by two different regimes, namely by copyright and related rights. The rationale behind it could be to show that the term 'protected' relates not exclusively to copyright protection. These two examples do not constitute an exhaustive list since the legislator uses the term 'in particular'. Polish legislator does not propose any examples in this field but he introduction of the examples is not essential for the completeness of definition.

Secondly, it should be noted that a press publication, according to the French and Polish provisions, can include literary works of a journalistic nature, and other **protected** works or **protected** subject matters. Therefore, it could be said that *a contrario*, the subject matters that are not protected should not be the elements of press publication. I suggest however, to follow the interpretation of press publication proposed in the previous point.

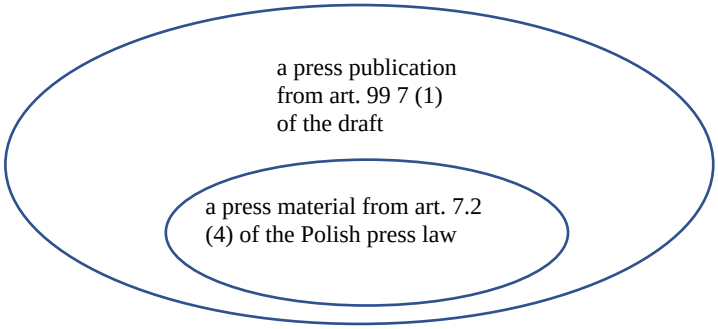
Thirdly, the French implementation does not include any examples of publication. Such a lack can be understood as an approach towards leaving the definition neutral with respect to the technological developments and the emergence of new media. Amongst the examples of publication given by Polish legislator are a newspaper or a periodical, in particular a daily, weekly or monthly journal of general or special interest and an online news service. The inspiration drawn from recital 56 of the CDSM Directive as to these examples is noticeable. Interestingly, in the Polish draft, the online news services are indicated amongst the examples of publications. Since the publishers of online news services are just as affected by the activities of news aggregators as publishers of press *stricto sensu*, the rationale of Polish legislator could be to expressly highlight that online news services are also covered by the definition of publication.

Finally, the scope of the definition of press publication should be assessed from the perspective of definitions of press publication from press law, to determine the relationship between them. The objective is to the definition of press publication against the previously adopted regulations in press law discussed in chapter 1. My aim is to

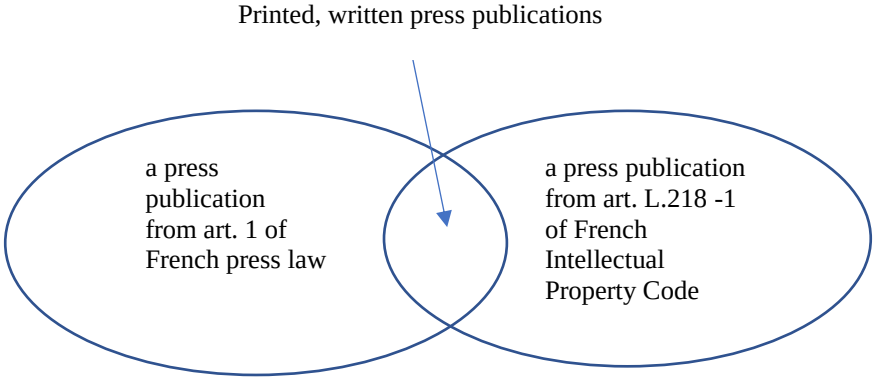
[1103] In recital 56 of the CDSM Directive the photographs and videos as examples of works and other subject matters are mentioned.

examine whether the national implementations are based on the existing solutions in the press law and to determine the relation between them.

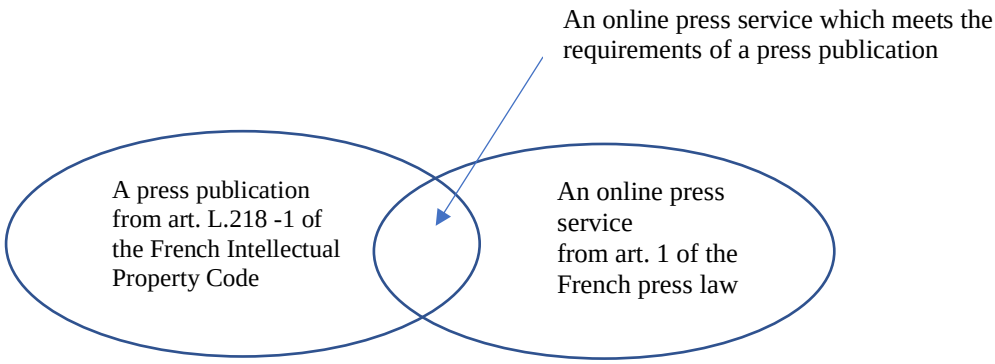
In the Polish press law there is a definition of a press material (art. 7.2. (4)) understood as any text or image of an informative, journalistic, documentary or other nature published or submitted for publication in the press, regardless of the medium, type, form, purpose or authorship are provided. Every press publication from art. 99 [7] (1) of draft of the act amending Polish Copyright Act will include the press materials from art. 7.2. (4) of Polish press.



In France, it has been a definition of a press publication which relates to the printed press already before the implementation of the CDSM Directive. According to art. 1 of the French press law it is any service using a written mode of dissemination of thoughts made available to the public in general or to the categories of public and appearing at regular intervals. In consequence, the press publication including also other tools to communicate the information such as video or podcast will not meet the requirement from the said provision. Therefore, the definition implementing art. 2 (4) from the CDSM Directive has a broader scope. There may be a press publication which meets this definition, but there may also be those, having not only written character which do not, because of the fact that they include the exemplified video or podcasts. In this case there is a cross-over relationship.



The French legislator introduced also a definition of online press service[1104] which according to art. 1 of the French press law shall mean any online public communication service published on a professional basis (…) consisting of the production and provision to the public of the original content **of general interest**, renewed regularly, composed of information **linked to current events and news** and having been processed in a journalistic manner, which does not constitute a promotional tool or an accessory to an industrial or commercial activity. Since according to this definition, the product of online press service should be of general interest and linked to current events and news, the scope of press publication is limited, and the specific topics such as for example chess, fishing, or interior design would be excluded. As to the definition of press publication from art. L.218 - 1 of the French Intellectual Property Code it is not limited to one particular theme. The cross - over relationship between these two terms should be identified. A product of online press service can meet the requirements resulting from the definition of press publication, but in its definition, there is for example no requirements as regards the plurality of elements constituting a collection so there may be a product of online press service which will not meet the requirements of press publication.



To conclude:

- Press materials from the Polish press law can be considered as the elements of press publication from art. 99^{7} (1) of the Polish draft.

- There is a cross - over relationship as regards the definition of online press service from the French press law and of press publication from art. L.218-1of the French Intellectual Property Code since the latter is not limited as regards the topic of the press publication and has to be a collection of works and other subject matters.

[1104] See chapter I point 4.1.

The same relationship occurs between a press publication from art. 1 of the French press law and a press publication from art. L.218-1 of the French Intellectual Property Code.

4.1. Individual words or very short extracts of press publication

A. The CDSM Directive

According to recital 58 of the CDSM Directive "the use of press publications by ISSPs can consist of the use of the entire press publication but also of its parts since such uses have also gained economic relevance. However, the part of press publication should be longer than the very short extract of publication or the individual word which are excluded from the protection according to art. 15 (1) of the CDSM Directive".[1105]

According to recital 58 of the CDSM Directive "the use of individual words or very short extracts of press publications by ISSPs may not undermine the investments made by press publishers. Therefore, it is appropriate to provide that the use of individual words or very short extracts of press publications should not fall within the scope of the rights provided for in this Directive". [1106] The publishers' rights do not apply to individual words of very short extracts of press publication. If a press publication is a today's issue of Polish Gazeta Wyborcza, it means that the use of very short extract from this newspaper is allowed. Nothing prevents the use of several short extracts from a single press publication, but on condition that the replacement of the press publication by these short extracts does not occur. The EU legislator specified in recital 58 of the CDSM Directive that "Taking into account the massive aggregation and use of press publications by information society service providers, it is important that the exclusion of very short extracts be interpreted in such a way as not to affect the effectiveness of the rights provided for in this Directive."[1107]

The exclusion of individual words and very shorts extracts is of limiting nature as regards the understanding of the scope of press publication. The EU legislator does not provide any definition of the concept of very short extracts. Intuitively we would say that they consist of a sequence of words. The examples of such a sequence could be a headline of the press publication or a snippet, defined as a small and often interesting piece of

[1105] The exclusion of individual words and very short extracts from the scope of protection was foreseen also in German and Spanish press publishers right adopted before the CDSM Directive.
[1106] Recital 58 of the CDSM Directive.
[1107] Recital 58 of the CDSM Directive.

news, information, or conversation[1108]. It should be noted however that the simplification and the general classification that all headlines and snippets are subject to exclusion or on the contrary, that all of them constitute an element of press publication within of art. 2 (4) of the DSM Directive is contrary to the wording of provision.[1109]

The devil is in detail and in this context, in the way of understanding of very short extracts. The EU legislator in recital 58 firstly explains that the use of individual words or very short extracts of press publications by ISSPs **should not have the negative impact** on the investments made by publishers of press publications in their production. Right after it explains that it is important to interpret the exclusion of very short extracts in such a way as not to affect **the effectiveness of the rights** provided for in the CDSM Directive.

Study of recital 58 leads to the conclusion that the term should be understood restrictively[1110] meaning that only these very short extracts which evidently lack an independent value could be "freely appropriable"[1111]. For example, the short extracts which do not summarise nor contain the principle ideas of a press publication could be considered as such, or the sentences which taken out of context do not transmits a lot as regards the content of a press publication. However, too restrictive approach may negatively impact the free flow of information, interfering with what information and how is communicated[1112] to the public and in consequence, affect the users' freedom to receive information.

The understanding of the short extracts of press publication as lacking the independent value can in my opinion lead to the conclusion that for example pictures cannot be treated as such. Moreover, following the linguistic interpretation of the exclusion from art.15 of the CDSM Directive, the EU legislator decided to exclude from the scope of protection the individual words or very short extracts of press publication, and the latter could be understood as a sequence of individual words put together.

The question arises whether the quantitative approach would be more adequate to provide a clear understanding of 'very short extract' of press publication. In this context

[1108]Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/snippet, accessed: 09.11.2022.
[1109] Differently E. Czarny – Drożdżejko in: E. Czarny – Drożdżejko, The subject-matter …, p.632.
[1110] See: R. Markiewicz, Prawo autorskie …, p.160.
[1111] G. Ghidini, F. Banterle, Copyright, news, and "information products" under the new CDSM Directive, https://www.researchgate.net/publication/342707640_Copyright_news_and_information_products_under_the_new_DSM_Copyright_Directive,accessed:09.11.2022, p.6.
[1112] See chapter V, point 2.4., 5.1.1.

the reference could be made to Infopaq case where the CJEU was asked whether the text extract from an article in a daily newspaper, consisting of a search word and the five preceding and five subsequent words could be regarded as a work and be subject of an act of reproduction within the meaning of art. 2(a) of the InfoSoc Direcitve.[1113] There is one similarity between the issue of understanding of 'very short extracts' from art. 15 of the CDSM Directive and the problem assessed in the Infopaq case. This is the search for an answer how long enough despite its shortness should be the product to be protected. However, there are some differences between these two cases. In Infopaq, the subject of analysis is whether the sequence of 11 words could be considered as a work, being original, artistic or literary expression constituting an author's own intellectual creation protected by copyright. In case of a press publication, the use of which is protected under the related rights' regime, there is no question of its originality. Press publication has not to be assessed as to whether, as a whole, it constitutes or not a work within copyright meaning. The question is rather of how short should be the very short extract of press publication so as not to undermine the effectiveness of the related rights. Despite some similarities in the framework of these two cases, the answers to two completely different questions are sought and therefore, their comparison may be misleading.

Quantitative approach could provide a concrete answer, according to which for example 10 words or 7 words would constitute a very short extracts of press publication exempted from protection. However, this solution of arbitrary nature was not chosen by the EU legislator, it could be done at the national level in the framework of implementation.

Key in determining what is a very short extract of press publication is to assess whether this extract exempts the reader from reading the entirety of a press publication or not. What does very short extracts mean should depend on the impact of their appropriation on the economic sphere.[1114] This way of understanding of the concept could constitute a remedy for ambiguity and uncertainty about its interpretation. What should be taken into account by the national court while assessing the case arising in this context would be firstly, the impact of the extract on the reader. In other words, it should be verified what is the relevance of the short extract for the reader. An important clue could

[1113] CJEU, Infopaq, para. 27, question 1.
[1114] See: J. C. Ginsburg, Floors and Ceilings in International Copyright Treaties Berne, TRIPS, WCT Minima and Maxima, in: H. G. Ruse-Khan, A. Metzger (eds.), Intellectual Property Ordering beyond Borders, Oxford University Press, 2022, p.298, pp.288-308.

be whether the reader would identify the selected passage as an excerpt from a specific publication if he knew it. If the short excerpt had no autonomous meaning, the likelihood of this happening would be minimal. Secondly, it should be assessed what kind of information is included in the short extract. Key information from the perspective of press publication, the one which makes the reader learn enough about its content to not feel the need to read the whole text, may indicate that the extract is too long. Thirdly, and in relation to what has been said before, it should be examined what are the economic consequences of the use of the extracts of press publication. The use of short extracts containing enough information for the reader, who having read it, does not click on the the publication to read it in its entirety on the publishers' website, leads to significant losses for press publishers. In consequence, these short extracts should not be qualified as short enough to be excluded from the protection. The criteria discussed offer great flexibility. Flexibility and a high degree of discretion, in my opinion, may be problematic in the context of technological developments as regards the flow of information. News aggregators operate in a highly automated manner, so being able to parameterise which extracts meet the criteria of 'very short extracts' from art. 15 of the CDSM Directive, would allow a certain amount of predictability for both them and the publishers and would perhaps prevent numerous legal disputes. Member States, in the framework of the implementation of the CDSM Directive, can clarify the understanding of the concept what I would advise.

To conclude:

- To ensure the effectiveness of the publishers' rights, very short extracts should be understood restrictively which means that only these very short extracts which evidently lack an independent value could be freely appropriable. This restrictive approach however can negatively impact the free flow of information, interfering with what information and how is communicated to the public.

- Since the EU legislator does not define the concept of very short extracts of press publication, the factors which should be taken into account in the process of the assessment of the shortness of the short excerpts of press publication are the impact of the extract on the reader and his willingness to click to read the press publication in its entirety, the kind of information included in the short extract and finally, the economic consequences of the use of the extracts of press publication on the interests of press publishers.

B. French and Polish law

Art. L211-3-1 of the French Intellectual Property Code[1115]	**Art. 97 [7] (3) of the draft of the act amending the Polish Copyright Act**[1116]
The beneficiaries of the rights provided for in Article L. 218-2 cannot prohibit : 2° The use of individual words or very short extracts from a press publication. This exception should not affect the effectiveness of the rights provided for in the same article L. 218-2. This effectiveness´ is notably affected when the use of very short extracts replaces the press publication itself or dispenses the reader from reading it.	The provision of paragraph (2) shall not apply to: 3) individual words or very short extracts from a press publication;

According to art. L211-3-1 (2) of the French Intellectual Property Code, the beneficiaries of the rights provided for in article L. 218-2 cannot prohibit the use of individual words or very short extracts from a press publication. However, it has been specified that such a use should not affect **the effectiveness** of these rights. It means that the use of very short extracts should not replace the press publication itself or dispense the reader from reading it[1117]. The rationale behind adding this specification is to define and to delimit the boundaries of the exclusion. French legislator does it in two ways: firstly, by stating that the effectiveness of the right should not be affected by the use of individual words or very short extracts from a press publication and secondly, by explaining that the latter cannot be used as a substitute of press publication or have an effect of dissuading the reader from reading the press publication.[1118] This is a value added to the text of the Directive which contributes to defining the meaning of the very

[1115] English version by the author. French version of art. L211-3-1 of French Intellectual Property Code : Les bénéficiaires des droits ouverts à l'article L. 218-2 ne peuvent interdire :
1° Les actes d'hyperlien ;
2° L'utilisation de mots isolés ou de très courts extraits d'une publication de presse. Cette exception ne peut affecter l'efficacité des droits ouverts au même article L. 218-2. Cette efficacité´ est notamment affectée lorsque l'utilisation de très courts extraits se substitue a` la publication de presse elle-même ou dispense le lecteur de s'y référer ;
https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038826394, accessed : 11.07.2023.

[1116] English version by the author. Polish version of art. 97 [7] (3) of the draft of the act amending Polish Copyright Act: przepisu nie stosuje się do pojedynczych słów lub bardzo krótkich fragmentów publikacji prasowej; https://legislacja.rcl.gov.pl/docs//2/12360954/12887989/12887990/dokument561868.pdf, accessed: 10.07.2023.

[1117] See : Cour de cassation, Assemblée plénière, Microfor contre Le Monde, 30 octobre 1987, 86-11918, https://juricaf.org/arret/FRANCE-COURDECASSATION-19871030-8611918, accessed : 25.11.2022. Cour de cassation assess *inter alia* whether the descriptive summaries consisting exclusively of one or more sentences taken from articles of Le Monde and Le Monde diplomatique published in form of index of the French written press by Microfor could be considered as exempting reader from reading the whole publication, as deforming the work and in consequence as violating the authors' rights.

[1118] See: T. Azzi, Commentaire de la loi du 24 juillet 2019 tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse, Dalloz IP/IT 2020, p.63.

short extract of press publication and provides a guidance on its understanding. It may serve to increase the effectiveness of the publishers'rights. Another question is whether such specifications added at the national level in the framework of implementation will not come at the expense of the free flow of information. The provision from this perspective will be assessed in the last chapter of the thesis.

Polish legislator proposes to copy the wording from art.15(1) the fourth subparagraph of the CDSM Directive without adding any specification. It notes in the explanatory memorandum accompanying the draft that any attempt to define this vague term of 'very short extracts of press publication' by setting a word or character limits can raise the legitimate doubts on the compliance with the CDSM Directive.[1119] According to the Polish legislator it should be borne in mind that the European Commission does not encourage to clarify in national laws the general concepts used in the CDSM Directive since this can results in an uneven application of EU law across Member States.[1120] In the the objectives of the Polish implementation of the CDSM Directive published at the beginning of 2024 it is also indicated that these terms will not be defined.[1121]

This is an example of passive approach towards the undefined and somehow vague concepts proposed in the CDSM Directive. It has the advantage of not creating differences between implementations in Member States. On the other hand, this passivity means accepting the adoption into national legislation of legal solutions which themselves raise the interpretative questions.

To conclude:

- The French legislator added a specification that the use of very short extract of press publication is excluded from the protection in case when such a use does not affect the effectiveness of the related rights of press publishers. The effectiveness of the related rights can be affected in case when the use of very short extracts replaces the press publication itself or dispenses the reader from reading it. Such clarification contributes to defining the meaning of the very short extract of press

[1119] Uzasadnienie do projektu ustawy o zmianie ustawy o prawie autorskim i prawach pokrewnych oraz niektórych innych ustaw, https://bip.mkidn.gov.pl/media/pu_prawo_autorskie_20220620/Uzasadnienie_do_ustawy.pdf, accessed:19.11.2022, pp.46-47.

[1120]Uzasadnienie,…, https://bip.mkidn.gov.pl/media/pu_prawo_autorskie_20220620/Uzasadnienie_do_ustawy.pdf,accessed:19.11.2022,pp.46-47.

[1121] Kacelaria Prezesa Rady Ministrów, Projekt ustawy o zmianie ustawy o prawie autorskim i prawach pokrewnych oraz niektórych innych ustaw, https://www.gov.pl/web/premier/projekt-ustawy-o-zmianie-ustawy-o-prawie-autorskim-i-prawach-pokrewnych-oraz-niektorych-innych-ustaw3,accessed: 06.02.2024.

publication and although still leaving some margin of uncertainty provides guidance on its understanding.

4.2. Term of protection of press publication

A. The CDSM Directive

According to art. 15 (4) of the CDSM Directive the rights provided for in paragraph 1 of art. 15 of the CDSM Directive shall expire two years after the press publication is published. That term shall be calculated from 1 January of the year following the date on which that press publication is published. Paragraph 1 shall not apply to press publications first published before 6 June 2019.

The act of publishing of press publication triggers the protection of press publishers. It should be clarified when such an act occurs. The protection arises at the moment of publication of a press publication. Some scholars point to the fact that normally the protection granted under the related rights' regime arises from the first fixation of the subject matter, for example of phonogram or videogram.[1122] However, in case of the publishers' rights, it should be kept in mind that the works which are included in press publication in most of the cases were already fixed by their authors.

The act of publication of a press publication occurs when an issue of a newspaper or magazine is published. If a newspaper is published every day, then every day a press publication is published. The same applies to an online version of such a newspaper if updated for example every day, weekly magazine if updated every week etc. The matter becomes more complicated if the elements of a press publication are not published at the same time, at once, but on the basis of a continuous update of the website. In other words, if, for example, a new article appears every hour on the online press service, how the moment of publication of a press publication should be determined? In my opinion, in such a case, the protection arises at the moment of publication of the elements included in a press publication in the framework of such a publication. To illustrate, if every hour a new press article is added on a news website, the protection arises at the moment of its publication in the framework of a press publication and this protection applies to the whole press publication, including also the said article. As each hour, in the discussed

[1122] A. Lebois, La légitimité du nouveau droit voisin de l'éditeur et de l'agence de presse. Légipresse, Victoires Éditions, 2019, p.133, pp.127- 138, https://www.cairn.info/revue-legipresse-2019-HS2-page-127.htm, accessed : 13.11.2022 ; M.Kretschmer, S.Dusollier, P.B. Hugenholtz, Ch. Geiger, The European Commission's public consultation on the role of publishers in the copyright value chain: A response by the European Copyright Society, European Intellectual Property Review, vol.38, no.10, 2016, p.593.

case, what is included in press publication may change, the protection will last, from the moment the element in question is firstly published as part of a press publication.[1123]

According to the Term Directive, the rights of performers, of producers of phonograms and producers of the first fixation of film as well as of broadcasting organisations shall expire 50 years after the act triggering the protection is made. For publishers of previously unpublished works the protection lasts 25 years and in case of the optional right protecting the publication of critical and scientific publications of works which have come into the public domain the maximum of protection is 30 years. The period of 2 years in case of press publication, compared to the previously mentioned terms appears to be therefore rather short. The initial proposal of the Directive foresaw the protection to last twenty years[1124] but it was considered as too long, inadequate to the nature of the news and their rapid obsolescence. Much criticised[1125], the initial term has been shortened to 2 years, [1126] although one can still wonder whether this period of two years is not too long.

B. French and Polish law

Article L. 211-4 V of the French Intellectual Property Code[1127]	**Article 99^8 and 99^7 (3) of the draft of the act amending the Polish Copyright Act[1128]**
The duration of the economic rights of press publishers and press agencies shall be two years from	**Article 99^8** The right referred to in Article 99^7(2) shall expire at the end of two years following the year in which the press publication was first published.

[1123] See: R. Markiewicz, Prawo autorskie …, p. 149.

[1124] The original proposal of art. 11(4) of the DSM Directive: 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. https://digital-strategy.ec.europa.eu/en/library/proposal-directive-european-parliament-and-council-copyright-digital-single-market, accessed: 08.11.2022

[1125]See for example: Ch. Geiger, G. Frosio, O.Bulayenko, Opinion …, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2921334, accessed: 27.10.2022, p.19.

[1126] Interestingly, P.B. Hugenholtz gives the examples of attempts to regulate the protection of news industry in United States that could last 24 or 48 hours, see: P.B. Hugenholtz in: Copyright, related rights and the news in the EU: Assessing potential new laws, Transcript of Conference, University of Amsterdam, 2016, https://resources.law.cam.ac.uk/cipil/documents/potential_legal_responses_complete_transcript.pdf, accessed:12.11.2022, p.80.

[1127] English version by the author. French version of Article L. 211-4 V of the French Intellectual Property Code: La durée des droits patrimoniaux des éditeurs de presse et des agences de presse est de deux ans à compter du 1er janvier de l'année civile suivant celle de la première publication d'une publication de presse, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000043499688, accessed: 11.07.2023.

[1128] English version by the author. Polish version of Article 99^8 of the draft of the act amending Polish Copyright Act: Prawo, o którym mowa w art. 99^7 ust. 2, wygasa z upływem dwóch lat następujących po roku, w którym publikacja prasowa została opublikowana po raz pierwszy. https://legislacja.rcl.gov.pl/docs//2/12360954/12887989/12887990/dokument561868.pdf, accessed: 10.07.2023.

1 January of the calendar year following that of the first publication of a press publication.	**Article 99[7] (3)** The provision of paragraph (2) shall not apply to: (..) 4) press publications published before 6 June 2019

French and Polish implementations mirror the provision from art. 15 (4) of the CDSM Directive. The observations made within the analysis conducted in the precedent point apply.

To conclude:

- The protection arises at the moment of the publication of the press publication. If the elements of a press publication are not published at the same time, at once, but on the basis of a continuous update of a news website, the protection arises at the moment of the publication of the elements included in a press publication in the framework of such a publication. The protection will last, from the moment the element in question is firstly published as part of a press publication.

- The term of two years is considerably shorter compared to the term of protection of holders of other related rights due to the to the nature of the news and their rapid obsolescence.

5. Publisher of press publication

A. The CDSM Directive

The protection resulting from the provision from art. 15 of the CDSM Directive arises for **publishers of press publication established in a Member State.** According to recital 55 of the CDSM Directive the concept of publisher of press publication should be understood as covering service providers, such as **news publishers** or **news agencies**, who have their registered office, central administration or principal place of business within the Union when they publish press publication within the meaning of this Directive.

The definitions of terms ‘news publisher’ and ‘news agency’ are not provided in the Directive. It should be highlighted that since the legislator indicates news publishers as an example of publishers of press publication, the scope of the term should be considered as not limited to the press publishers *sensu stricto* but including also providers of news services such as France.24 or news websites such as onet.pl. The example of

news publishers is Ringier Axel Springer Polska publishing Polish "Fakt", the example of news agency is French Press Agency.

According to the provision discussed, publishers publish a **press publication.** It has not been specified by the EU legislator that publisher should be responsible also for publishing of publication which includes a press publication[1129]. The question arises as to whether it was the intention of the legislator to allow for the possibility that publisher of press publication would not be the publisher of the publication which encompasses different issues of press publications. Such an approach from the market perspective appears to be rather impossible. It is difficult to imagine the case in which there would be two publishers, one responsible for publishing of a press publications and another one of publication, knowing that press publication means an issue of a publication. Therefore, a press publication is published by publisher who publishes also a publication. The wording of the provision could be explained also by the fact that the EU legislator assumed that since these are the press publications that are used in whole or in part by ISSPs, it will focus on publishers in relation to them, knowing that press publications are part of greater whole which are publications.

As to the scope of the publishers' involvement, a press publication is published under his initiative, editorial responsibility and control.[1130] In other words, press publisher is responsible for the process of production and distribution of a press publication. It should be clarified that for the protection resulting from the related rights' regime to arise the creative character of the engagement of publishers is not necessary and is not examined from such a perspective.

According to recital 56 of the CDSM Directive press publisher should publish a press publication in the context of an economic activity which constitutes a provision of services under EU law. In art. 57 of the TFEU a non-exhaustive list of what should be qualified as a service including: activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; (d) activities of the professions is provided.

The publisher should be established in a Member State. Freedom of establishment of EU according to art. 49 of TFEU, relates to the establishment of natural persons or

[1129] See: chapter III, section 4.
[1130] See: chapter III, section 4.

companies in other Member States on a permanent basis.[1131] The question arises whether the protection could be extended to the publishers based in non - EU Members States at the implementation stage. S. Dusollier claims that it could be possible without specifying any details nor consequences of such an extension.[1132] R. Markiewicz points to its possible negative effects on the competition rules in the European Single Market.[1133] Moreover, according to the CJEU, the notion of establishement encompasses a "permanent presence in the host Member State"[1134]. Despite the lack of direct interdiction, it does not seem to be the intention of the legislator to extend this scope beyond the European Member States at the implementation stage. The wording of the provision is rather clear as regards the publisher of press publication being established in a Member State. Since the objective of the CDSM Directive is to adapt the European copyright framework to the technological development, the extension of the provision to the publishers established in non-EU Members States does not seem to be justified. Although perhaps an important factor to consider in this context would be what audience is targeted and whether it is predominantly an audience from EU Member States or not. This issue should be left as a matter for clarification for the CJEU.

The provision discussed does not provide any specification as to whether publisher of press publication is natural or legal person. According to recital 55 the term covers service providers, such as news publishers or news agencies.[1135] As results from art. 49 and art. 56 of TFEU nationals of EU Member States, natural persons, have freedom to provide services and freedom of establishment in another Member States. Therefore, if they conduct the activity corresponding with the requirements from art. 15 of the CDSM Directive, namely they publish a press publication within the meaning of art.2 (4) of the CDSM Directive, they could be considered as publishers of press publication.

[1131] Art.49 of TFEU: Within the framework of the provisions set out below, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. Such prohibition shall also apply to restrictions on the setting-up of agencies, branches or subsidiaries by nationals of any Member State established in the territory of any Member State. Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings, in particular companies or firms within the meaning of the second paragraph of Article 54, under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital. https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12008E049&from=EN, accessed: 05.11.2022.

[1132] S. Dusollier, The 2019 Directive …, p.1007.

[1133] R. Markiewicz, Prawo autorskie …, p.139.

[1134] CJEU, Centro di Musicologia Walter Stauffer v Finanzamt München für Körperschaften, case C-386/04, 14 September 2006, para.19.

[1135] See: T. Höppner in: T. Höppner, M. Kretschmer, R. Xalabarder, CREATe public lectures on the proposed EU right for press publishers. European Intellectual Property Review, vol. 39, no.10,2015, p.611.

The provision discussed does not differentiate between the types of press publishers depending on what content they publish. It could be stated that the legislator's aim was to treat the group of press publishers as a homogeneous group. Consequently, national legislation should not make such distinctions as regards, for example, the issue of remuneration by favoring some press publishers publishing, the same applies at the stage of application of the publishers' rights.

To conclude:

- Publisher of press publication should be established in a Member State. The interpretation extending the understanding of press publishers to publishers from outside the EU should be excluded.

- The wording of the provision discussed is not sufficiently clear as to whether publisher publishes only a press publication or also a publication. From practical perspective it is irrelevant since the protection applies to the use of all or part of a press publication.

- Press publisher should publish a press publication in the context of an economic activity which constitutes a provision of services under the EU law.

- The provision discussed does not differentiate between the types of press publishers depending on what content they publish. The EU legislator considers press publishers as a homogeneous group. Consequently, national legislators while implementing the CDSM Directive should not make such distinctions, it should not be done either by courts while applying the publishers'rights.

B. French and Polish law

Article L. 218-1 of the French Intellectual Property Code[1136]	**Articles 99[7], 99[10] of the draft of the act amending the Polish Copyright Act**[1137]

[1136] English version by the author. French version of Article L218-1 of French Intellectual Property Code
II On entend par agence de presse au sens du présent chapitre toute entreprise mentionnée à l'article 1er de l'ordonnance n° 45-2646 du 2 novembre 1945 portant réglementation des agences de presse ayant pour activité principale la collecte, le traitement et la mise en forme, sous sa propre responsabilité, de contenus journalistiques.
III On entend par éditeur de presse au sens du présent chapitre la personne physique ou morale qui édite une publication de presse ou un service de presse en ligne au sens de la loi n° 86-897 du 1er août 1986 portant réforme du régime juridique de la presse.
IV Le présent chapitre s'applique aux éditeurs de presse et agences de presse établis sur le territoire d'un Etat membre de l'Union européenne, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038826730, accessed: 11.07.2023.
[1137] English version by the author. Polish version of Article 99[7] and 99 [10] of the draft of the act amending Polish Copyright Act: art. 99[7] 1)Publikacją prasową jest zbiór utworów lub przedmiotów praw pokrewnych

I A press publication within the meaning of this chapter is a collection composed mainly of literary works of a journalistic nature, which may also include other protected works or protected subject matters, in particular photographs or videograms, and which constitutes a distinct whole within a periodical or regularly updated publication bearing a single title, with the aim of providing the public with information on current events or other topics, in any medium, **on the initiative, under the editorial responsibility and control of the press publishers or a press agency.** Periodicals that are published for scientific or academic purposes, such as scientific journals, are not covered by this definition. [1138] II A press agency within the meaning of this Chapter shall mean any undertaking mentioned in Article 1 of Order No 45-2646 of 2 November 1945 regulating press agencies whose main activity is the collection, processing and editing, under its own responsibility, of journalistic content. III A press publisher within the meaning of this chapter shall be understood to be a natural or legal person who publishes a press publication or an online press service within the meaning of Law	**Article 99[7]** 1)A press publication is a collection of works or subject matters of related rights composed principally of verbal works of a journalistic nature which constitutes a distinct whole within a periodical or regularly updated publication under a single title, such as a newspaper or periodical, in particular a daily, weekly or monthly journal of general or specialised interest and an online news service, distributed for information purposes in any form and by any means within **the scope of the economic activity of the entity which exercises actual and legal control over the selection of the content disseminated**. Periodical publications published for scientific or academic purposes are not press publications. **Article 99[10]** The provisions of the Act shall apply to press publications by: 1) a publisher who has the place of residence or the seat in the territory of the Republic of Poland or 2) a publisher who has a place of residence or registered office in the territory of a European Union Member State or a Member State of the

złożony głównie z utworów słownych o charakterze dziennikarskim, stanowiący odrębną całość w ramach periodycznej lub regularnie aktualizowanej pod jednym tytułem publikacji, takiej jak gazeta lub czasopismo, w szczególności dziennik, tygodnik lub miesięcznik o tematyce ogólnej lub specjalistycznej oraz internetowy serwis informacyjny, rozpowszechniany w celach informacyjnych w dowolnej formie i w dowolny sposób w ramach działalności gospodarczej podmiotu, który sprawuje faktyczną i prawną kontrolę nad doborem rozpowszechnianych treści. Publikacjami prasowymi nie są publikacje periodyczne publikowane do celów naukowych lub akademickich.

art.99 [10] Przepisy ustawy stosuje się do publikacji prasowych:

1) wydawcy, który ma miejsce zamieszkania lub siedzibę na terytorium Rzeczypospolitej Polskiej lub

2) wydawcy, który ma miejsce zamieszkania lub siedzibę na terytorium państwa członkowskiego Unii Europejskiej lub państwa członkowskiego Europejskiego Porozumienia o Wolnym Handlu (EFTA) – strony umowy o Europejskim Obszarze Gospodarczym, https://legislacja.rcl.gov.pl/docs//2/12360954/12887989/12887990/dokument561868.pdf, accessed: 10.07.2023.

[1138] English version by the author. French version of art. L.218-1 (I) of French Intellectual Property Code: On entend par publication de presse au sens du présent chapitre une collection composée principalement d'œuvres littéraires de nature journalistique, qui peut également comprendre d'autres œuvres ou objets protégés, notamment des photographies ou des vidéogrammes, et qui constitue une unité au sein d'une publication périodique ou régulièrement actualisée portant un titre unique, dans le but de fournir au public des informations sur l'actualité ou d'autres sujets publiées, sur tout support, à l'initiative, sous la responsabilité éditoriale et sous le contrôle des éditeurs de presse ou d'une agence de presse.
Les périodiques qui sont publiés à des fins scientifiques ou universitaires, tels que les revues scientifiques, ne sont pas couverts par la présente définition. https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038826730, accessed : 10.07.2023.

No. 86-897 of 1 August 1986 on the reform of the legal regime of the press. IV This Chapter shall apply to press publishers and press agencies established in the territory of a Member State of the European Union	European Free Trade Association (EFTA) - a party to the Agreement on the European Economic Area.

In the French implementation of the art. 15 of the CDSM Directive, the right of reproduction and communication to the public is granted to press publisher or press agency. Press publisher according to article L218-1 (III) of Code de la propriété intellectuelle is a natural or legal person who publishes a press publication or online press service within the meaning of the French Press Law.[1139]

The role of press publisher according to French law consists in having the initiative, editorial responsibility and control what mirrors the provision from art. 2(4) of the CDSM Directive. A press publisher, according to the French implementation, publishes a press publication or an online press service within the meaning of Law No. 86-897 of 1 August 1986 on the reform of the legal regime of the press which were discussed already in section 4 of this chapter. As it has been demonstrated in the analysis conducted therein, the scope of the definition of press publication from the implementation of the CDSM Directive is not the same as the scope of press publication and online press service within the French Press law. Therefore in art. L.218-1 of French Intellectual Property Code it has been provided that a press publication (introduced in the CDSM Directive) is also published by press publisher, who since then publishes press publications (written and printed), online press services and press publications (introduced in the CDSM Directive).

As results from the analysis conducted in point 4.1 of the chapter I as regards the French press law, in the French doctrine, the role of press publisher is described as consisting in provision of a structure and necessary resources for the press materials to be created. Press publisher is not involved directly in the creative process which is based on the engagement of journalists and editor-in-chief but makes it possible, has control over it.

[1139] Loi n° 86-897 du 1 août 1986 portant réforme du régime juridique de la presse (Law n° 86-897 of 1 August 1986 reforming the legal regime of the press), https://www.legifrance.gouv.fr/loda/id/JORFTEXT000000687451, accessed: 16.11.2022. See section 4 of chapter 3 and point 4.1. of chapter 1 for the analysis of the definitions of press publication and online press service under French Press law.

Press agency according to article L218-1(II) of the French Intellectual Property Code is any undertaking mentioned in article 1 of Ordonnance n° 45-2646 du 2 novembre 1945 portant réglementation des agences de presse[1140]. According to the latter, press agency is any commercial undertaking which collects, process, formats and supplies on a professional basis the information which have been subject of journalistic processing under their own responsibility. At least half of its turnover derives from the supply of such information items to press publishers publishing the press publications within the meaning of French press law, to publishers of electronic communication services to the public, and to press agencies.[1141] The activity of press agencies should consist of collecting information, processing, formatting and supplying them. Important is the journalistic involvement in production of such informative products. It is highlighted that at least half of their turnover should derive from the supply of informative products to press publishers, to press agencies and publishers of electronic communication services. The role of press agency is therefore to provide an information product that will be subsequently used by press publishers or another press agency.

According to the French implementation, press publishers and press agencies to whom the related rights of press publishers apply have to be established in the territory of a Member State of the European Union. Therefore, it has not been extended to publishers from outside of EU. French legislator did not specify whether the audience targeted by the press publishers and press agencies should be principally, or exclusively from EU or not.

There is no express definition of the term ‘press publisher’ in the Polish draft. According to art. 99 [7] (1) a press publication should be distributed for the informative purposes within the scope of the economic activity of the entity which exercises actual and legal control over the selection of the content disseminated. There is no reference to the provision regarding press publisher from art. 8 of Polish press law.[1142]

[1140] Ordonnance n° 45-2646 du 2 novembre 1945 portant réglementation des agences de presse (Ordonnance No 45-2646 of 2 November 1945 regulating press agencies whose main activity is the collection, processing and editing, under its own responsibility, of journalistic content), https://www.legifrance.gouv.fr/loda/article_lc/LEGIARTI000025576985,accessed:16.11.2022.
[1141] English version made by author. French version : Sont considérées comme agences de presse, au sens de la présente ordonnance, les entreprises commerciales qui collectent, traitent, mettent en forme et fournissent à titre professionnel tous éléments d'information ayant fait l'objet sous leur propre responsabilité d'un traitement journalistique et dont la moitié au moins du chiffre d'affaires provient de la fourniture de ces éléments à des entreprises éditrices de publications de presse, au sens de la loi n° 86-897 du 1er août 1986 portant réforme du régime juridique de la presse, à des éditeurs de services de communication au public par voie électronique et à des agences de presse.
[1142] See: point 4.1. of chapter 1.

Press publisher should publish the press publication in the framework of his economic activity. His role consists in exercising actual and legal control over the selection of the content which is disseminated. Neither in the CDSM Directive nor in French implementation, the term 'actual and legal control' is used. It has not been further elaborated by Polish legislator.

'Actual control' could be understood, following the conclusion reached in the section 4 of this chapter, as the exercise of effective control meaning the possibility of taking the final decisions both over the selection of materials included in a press publication and over their organisation which follows the professional ethics. I propose to understand 'legal control' as having a legal basis for the production and dissemination of press publication that could for example consist in acquiring the legal titles to the works included in a press publication.

According to art.99[10] a publisher who has the place of the residence or the seat in the territory of the Republic of Poland or a publisher who has a place of residence or registered office in the territory of a European Union Member State or a Member State of the European Free Trade Association (EFTA) - a party to the Agreement on the European Economic Area should be concerned.

To conclude:

- French legislator, in defining terms 'press publisher' and 'press agency', refers to the concepts existing in press law. Polish legislator does not. It should be acknowledged that the Polish definition of publisher from art. 8 of the Polish press law is limited only to the examples of who publisher could be and does not provide any specification as regards the scope of his involvement. Therefore, the Polish legislator's endeavour to define the role of the publisher in the framework of the implementation of the CDSM Directive in the context of the rights of press publishers is justified.

- The role of press publisher is outlined in the Polish draft by referrence to the publishers' legal and actual control over the process of production and dissemination of content which I propose to understand as the exercise of effective control meaning taking the final decisions both over the selection of materials included in a press publication and over their organisation which follows the professional ethics and having the supervision over the legal basis for the production and dissemination of press publication that could for example consist in acquiring the legal titles to the works included in a press publication.

6. Authors and other rightholders of the works and other subject matters incorporated in a press publication

A. The CDSM Directive

According to art.15 (2) of the CDSM Directive, the rights provided for 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 matters incorporated in a press publication. The rights provided for in paragraph 1 shall not be invoked against these authors and other rightholders and, in particular, shall not deprive them of their right to exploit their works and other subject matter independently from the press publication in which they are incorporated. When a work or other subject matter is incorporated in a press publication on the basis of a non-exclusive licence, the rights provided for in paragraph 1 shall not be invoked to prohibit its use by other authorised users.

Since press publication is a collection including works and other subject matters, it was necessary to regulate the relationship between authors of these works, other rightholders and publishers of press publication. Rights granted to the latter should not affect the rights provided to authors and other rightholders of the content included in press publication. The authors and other rightholders should not be deprived of their right to exploit their works and other subject matters independently from the press publication in which they are incorporated. This is to safeguard the interests of authors and other related rights holders against the introduction of a new layer of protection to another group of entities. The creation of a new protected subject matter cannot limit the exploitation of works and other subject matter included therein by rightholders and affect their protection.

To illustrate, a photograph protected as a work under copyright law is included in a press publication. Its author, despite the fact of inclusion of his work in a press publication should be able to exploit this work independently, for example by authorising the use of the photograph under licence by other entities if it is included in a press publication on the basis of non-exclusive licence. Publisher of this press publication cannot invoke his rights to press publication against the author of the photograph.

The regulation is consistent with provisions adopted at the international level, in the Rome Convention and the WPPT, and in the EU law, in Rental and lending rights Directive and InfoSoc Directive. Its aim is to secure the rights of authors in view of the

introduction of protection to a new category of entities. It should be considered as an example of legislative consistency. The same should be said as regards the relation between related rights holders or holders of rights to other subject matters, a provision of similar scope has already been introduced in art. 2 of the InfoSoc Directive.

Interestingly, the EU legislator opted for a strong safeguard. Firstly, press publishers' rights 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 matters incorporated in press publications. Secondly, the press publishers' rights shall not be invoked against these authors and other rightholders and, in particular, shall not deprive them of their right to exploit their works and other subject matters independently from the press publication in which they are incorporated.[1143]

To conclude:

- The adoption of the safeguards of the situation of authors and other rightholders having the rights to works and subject matters included in a press publication is justified by the willingness to secure their rights in the context of the emergence of a new category of rightholders. This solution constitutes a limitation of the publisher's monopoly over the elements of a press publication, since the same element, if not transferred to the publisher under the exclusive licence, may, in addition to being an element of the press publication, be exploited elsewhere, for example in another press publication.

B. French and Polish law

Art. L.211-1 of the French Intellectual Property Code[1144]	**art. 99[7] (2) and (3) of the draft of the act amending the Polish Copyright Act[1145]**
	article 99 [7] (2)

[1143] See: T. Hoppner, in: T. Höppner, M. Kretschmer, R. Xalabarder, CREATe …, pp. 607-622.

[1144] English version by the author. French version of art. L. 211-1of French Intellectual Property Code: Les droits voisins ne portent pas atteinte aux droits des auteurs. En conséquence, aucune disposition du présent titre ne doit être interprétée de manière à limiter l'exercice du droit d'auteur par ses titulaires, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006279025, accessed : 12.07.2023.

[1145] English version by the author. Polish version of art. 99[7] (2) of the draft of the act amending Polish Copyright Act: 2) Wydawcom, bez uszczerbku dla praw twórców i pozostałych uprawnionych, przysługuje wyłączne prawo do korzystania ze swoich publikacji prasowych i rozporządzania nimi w zakresie umożliwiania dostawcom usług społeczeństwa informacyjnego:
1) zwielokrotniania publikacji prasowych techniką cyfrową;
2) publicznego udostępniania publikacji prasowych w taki sposób, aby każdy mógł mieć do nich dostęp w miejscu i czasie przez siebie wybranym,
https://legislacja.rcl.gov.pl/docs//2/12360954/12887989/12887990/dokument561868.pdf, accessed: 10.07.2023.

Related rights shall not infringe the rights of authors. Consequently, no provision of this Title shall be interpreted in such a way as to limit the exercise of copyright by its holders.	Publishers shall, without prejudice to the rights of authors and other right holders, have the exclusive right to use and dispose of their press publications to the extent of enabling information society service providers to: 1) reproducing press publications digitally; 2) make press publications available to the public in such a way that anyone can access them at a time and place individually chosen.

According to art. L. 211-1 of the French Intellectual Property Code, related rights shall not infringe the rights of authors. They should not be interpreted in such a way as to limit the exercise of the latter. Interestingly, the clause of non-enforceability of the press publishers' rights against holders of related rights has not been adopted in France despite the fact that the provision from art. 15 (2) of the CDSM Directive relates to all copyright and related rights' holders.[1146] It is difficult to find a justification of such an exclusionary approach. To illustrate, if a press publication consists, amongst others, of a phonogram, according to the French implementation, the exercise of the rights to this subject matter by phonogram producers is not secured against the potential limitation by press publishers in the framework of the exercise of the rights adopted in the CDSM Directive.

Polish legislator proposes to implement the provision from art. 15 (2) of the CDSM Directive quite briefly by indicating in art. 99^7 (2) of Polish proposal that publishers shall, without prejudice to the rights of authors and other rightholders, have the exclusive reproduction and making available right.

To conclude:

- French implementation does not include the safeguard of the rights of holders of related rights to the subject matters included in a press publication which is an unjustified omission in relation to the provision from art.15 of the CDSM Directive.

7. Appropriate share of revenues for authors of works incorporated in a press publication

A. The CDSM Directive

[1146]See: T. Azzi, Commentaire … p.65. ; E. Derieux, Droits voisins des éditeurs de presse : mesures conservatoires à l'encontre de Google, Revue Lamy Droit de l'Immatériel, no.170, 2020, pp. 8-12.

According to the last paragraph of art. 15 of the CDSM Directive, Member States shall provide the authors of works incorporated in a press publication with an appropriate share of the revenues that press publishers receive for the use of their press publications by ISSPs. In recital 59 of the CDSM Directive it is specified that "this should be without prejudice to national laws on ownership or exercise of rights in context of employment contracts, provided that such laws are in compliance with the Union law".

As to the rationale of this solution, M. van Eechoud underlines the difficult situation of journalists, their weak bargaining position when it comes to concluding exploitation agreements.[1147] This solution constitutes an answer to the fears that the new rights would lead to the decrease of the authors' share.

Authors have a right to claim an appropriate share. The term 'appropriate' has not been further defined by the EU legislator in relation to the provision from art. 15 of the CDSM. E. Rosati proposes to understand it as proportionate.[1148] It implies however the question in relation to what should this share be proportionate? To the scope of the author's contribution in relation to the press publication as a whole, to the extent to which ISSPs use this contribution, to the frequency of such a use?

To answer the following questions, it should be pointed out that the term 'appropriate' has been used by the EU legislator also in relation to the provision from art.18 of the CDSM Directive, introducing a principle of appropriate and proportionate remuneration due to authors and performes. In recital 73 of the CDSM Directive it is specified that "The remuneration of authors and performers should be appropriate and proportionate to the actual or potential economic value of the licensed or transferred rights, taking into account the author's or performer's contribution to the overall work or other subject matter and all other circumstances of the case, such as market practices or the actual exploitation of the work."

While adapting these explanations to the situation of authors of works included in a press publication, the appropriateness of their share could be determined on the basis **of the scope of their contribution to the overall press publication, market practices and the scope of the exploitation of the press publication and their contribution**. A. Lucas-Schloetter, in reference to the German law explains that: " A remuneration is

[1147]M. M. van Eechoud, A publisher's …, https://www.openforumeurope.org/wp-content/uploads/2017/01/OFE-Academic-Paper-Implications-of-publishers-right_FINAL.pdf, accessed: 13.11.2022, pp.26-37.
[1148] E. Rosati, Copyright …, p.293.

deemed appropriate if it conforms to what is regarded as customary and fair in business relations, having regard to the nature and scope of the rights granted, in particular the duration (Dauer), frequency (Haüfigkeit), extent (Ausmaß) and moment (Zeitpunkt). If the rights granted are unlimited in time and scope, a lump sum payment will usually not be sufficient"[1149]

I acknowledge that the determination of what does 'appropriate' mean will vary in various Member States and **will depend on factors such as market realities of press sector or already existing provisions regulating the share of revenues between authors and holders of other related rights.** This view is shared by R. Xalabarder who points out that " 'Appropriate' would also require that the remuneration is adjusted to cultural and economic circumstances of each country and market, and to the different markets and means of exploitation."[1150] In conclusion, the clarification of this concept within more specific provision will be necessary to be introduced at the stage of implementation of the CDSM Directive in the Member States.

The right to appropriate share for authors of works incorporated in press publication has a specific nature. In the first step, press publishers have to acquire the legal title to the elements of a press publication on the basis of transfer of the exclusive rights or a license. It occurs normally in exchange for a remuneration due to the authors of these elements. In the second step, the authors have the claim for a share of the remuneration received by press publishers for the use of press publications by ISSPs. The provision from art. 15(5) of the CDSM Directive relates therefore not to the initial stage of transfer or license of the exclusive rights to the components of press publication, but to the stage of the use of the press publication by ISSPs, the benefits of which should be reaped by the press publishers and shared with the authors.

The problem arises whether the authors of works incorporated in a press publication would be remunerated two times for the same input. Since the related rights are designed to remunerated the investment, the obligation to share the revenues resulting from the investment made in creation and distribution of press publication with authors of its elements could appear to be surprising.[1151] A. Lebois doubts the logic behind such

[1149] A. Lucas- Schloetter, European Copyright Contract Law: A Plea for Harmonisation, IIC – International Review of Intellectual Property and Competition Law, vol.48, 2017,p.898, https://link.springer.com/article/10.1007/s40319-017-0646-2, accessed: 24.01.2024.
[1150] R. Xalabarder, The Principle of Appropriate and Proportionate Remuneration for Authors and Performers in Art.18 Copyright in the Digital Single Market Directive, InDret, vol.4, 2020, p.15, https://indret.com/wp-content/uploads/2020/10/1591.pdf,accessed: 24.01.2024.
[1151] See: S. Dusollier, The 2019 Directive …, p.1008.

a solution and claims the borderline between journalists' protection under copyright and new related rights to be blurred.[1152] On the other hand, such solution should be considered as complementary to the general objective of the rights of press publishers intending to support and strengthen the functioning of press sector.

A difference between the provision from art. 15 (5) and art. 18 of the CDSM Directive should be noted. The former does not apply to the transfer of rights or a license to the works included in a press publication, but to the situation which follows, that is, to the situation of the use of the press publication in which this work is included by ISSP. According to art. 18 of the CDSM authors and performers are entitled to receive appropriate and proportionate remuneration in case of license or transfer of their exclusive rights for the exploitation of their works or other subject matter. In case of this provision, the remuneration is conditioned by the transfer or license of the exclusive rights and not by their subsequent transfer or license, although such factors may affect its amount. In case of art. 15(5) the authors receive a share of the press publishers' remuneration in case of the reproduction and making available of press publication in which their work is included by ISSPs and in case when such acts are conducted against remuneration. The EU legislator did not exclude the possibility of waiving the press publishers' rights by press publishers which means that in such situation the authors will not receive any share.

Ch. Geiger and O. Bulayenko points out that art. 15 (5) similarly to art.18 of the CDSM Directive "does not require Member States to implement the remuneration principle by granting authors a right to remuneration. Yet, it is one of the ways it which this provision of the CDSM Directive could be transposed into national law of Member States."[1153] In art. 18 (2) it is specified that in implementing this principle, Member States shall be free to use different mechanisms and take into account the principle of contractual freedom and a fair balance of rights and interests.

National legislators when implementing the Directive are free to propose the manner of calculating the remuneration and to specify its amount, subject to the appropriateness criterion. The EU legislator did not specify whether the right to the share

[1152] A. Lebois, La légitimité …, p.133, https://www.cairn.info/revue-legipresse-2019-HS2-page-127.htm, accessed : 13.11.2022.
[1153] Ch. Geiger, O. Bulayenko, Creating Statutory Remuneration Rights in Copyright law: What Policy Options under the International Framework?, Centre for International Intellectual Property Studies Research Paper,vol.5, 2020, p.33.

is transferable or not and how it should be collected and distributed. This needs to be clarified at the implementation stage.

It should be noted that only the authors and not holders of rights to other subject matters included in a press publication should receive the appropriate share. Such approach should certainly be considered as an answer to the mentioned above fears of this group of actors. However, on the other hand, the question may arise as to why others groups protected by the related right regime are excluded.

To conclude:

- The obligation to share the press publishers' revenues with authors is justified by the difficult situation of journalists and their weak bargaining position. Since the rationale of the related rights' regime is to reward the investments made, the logic behind the obligation to share the remuneration due to press publishers with authors is difficult to be justified. In my opinion however, such approach corresponds to the main objective of the related rights of press publishers, which is to support the press sector (in general).

- Term 'appropriate' in relation to the authors' share of revenues that press publishers receive for the use of their press publications by ISSPs should be determined by Member States on the basis of the scope of the authors' contribution to the overall press publication, of market practices and the scope of the exploitation of the press publication and their contributions. The determination of what does appropriate mean will vary in various Member States and will depend on factors such as market realities, the functioning of press sector or already existing provisions regulating the share of revenues between authors and holders of other related rights.

- The principle of appropriate share due to the authors of works incorporated in a press publication does not apply to the initial transfer of rights or a license to the works included in a press publication, but to the situation which follows, that is, to the situation of the use of the press publication by ISSPs which if nothing else agreed entails the payment of the remuneration to the press publishers, and the latter should be shared with the authors.

- Member States while implementing art.15 of the CDSM should clarify the term appropriate by proposing the way of calculation the remuneration or the threshold. Moreover, it should be specified whether the right to the share is transferable or not and how it should be collected and distributed. The EU legislator, aware of market differences, and the legislative traditions of the Member States, guarantees a large degree of flexibility in this field.

B. French and Polish law

Art. L. 218-5 V the French Intellectual Property Code[1154]	**Art. 99[9] of the draft of the act amending the Polish Copyright Act**[1155]
I Professional journalists or those treated as such, within the meaning of Articles L. 7111-3 to L. 7111-5 of the Labour Code, and other authors of works included in the press publications mentioned in Article L. 218-1 of this Code shall be entitled to an appropriate and equitable share of the remuneration mentioned in Article L. 218-4. This share as well as the modalities of its distribution among the authors concerned shall be fixed under conditions determined by a company agreement or, failing that, by any other collective agreement within the meaning of Article L. 2222-1 of the Labour Code. For other authors, this share shall be determined by a specific agreement negotiated between, on the one hand, the representative professional organisations of press enterprises and press agencies and, on the other hand, the professional organisations of authors or the collective management	The authors of a press publication shall be entitled to 50% of the remuneration due to the publisher for exercising the right referred to in Article 99[7](2).

[1154] English version by the author. French version of Article L218-5 of French Intellectual Property Code: I.-Les journalistes professionnels ou assimilés, au sens des articles L. 7111-3 à L. 7111-5 du code du travail, et les autres auteurs des œuvres présentes dans les publications de presse mentionnées à l'article L. 218-1 du présent code ont droit à une part appropriée et équitable de la rémunération mentionnée à l'article L. 218-4. Cette part ainsi que les modalités de sa répartition entre les auteurs concernés sont fixées dans des conditions déterminées par **un accord d'entreprise ou, à défaut, par tout autre accord collectif au sens** de l'article L. 2222-1 du code du travail. S'agissant des autres auteurs, cette part est déterminée par un accord spécifique négocié entre, d'une part, les organisations professionnelles d'entreprises de presse et d'agences de presse représentatives et, d'autre part, les organisations professionnelles d'auteurs ou les organismes de gestion collective mentionnés au titre II du livre III de la présente partie. Dans tous les cas, cette rémunération complémentaire n'a pas le caractère de salaire.

II.-A défaut d'accord dans un délai de six mois à compter de la publication de la loi n° 2019-775 du 24 juillet 2019 tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse et en l'absence de tout autre accord applicable, l'une des parties à la négociation de l'accord d'entreprise ou de l'accord spécifique mentionnés au I du présent article peut saisir la commission prévue au III. La commission recherche avec les parties une solution de compromis afin de parvenir à un accord. En cas de désaccord persistant, elle fixe la part appropriée prévue au I ainsi que les modalités de sa répartition entre les auteurs concernés.
III.-Pour la mise en œuvre du II, il est créé une commission présidée par un représentant de l'Etat et composée, en outre, pour moitié de représentants des organisations professionnelles d'entreprises de presse et d'agences de presse représentatives et pour moitié de représentants des organisations représentatives des journalistes et autres auteurs mentionnées au I. Le représentant de l'Etat est nommé parmi les membres de la Cour de cassation, du Conseil d'Etat ou de la Cour des comptes, par arrêté du ministre chargé de la communication.
A défaut de solution de compromis trouvée entre les parties, la commission rend sa décision dans un délai de quatre mois à compter de sa saisine.
L'intervention de la décision de la commission ne fait pas obstacle à ce que s'engage dans les entreprises concernées une nouvelle négociation collective. L'accord collectif issu de cette négociation se substitue à la décision de la commission, après son dépôt par la partie la plus diligente auprès de l'autorité administrative, conformément à l'article L. 2231-6 du code du travail.
IV.-Les journalistes professionnels ou assimilés et les autres auteurs mentionnés au I du présent article reçoivent au moins une fois par an, le cas échéant par un procédé de communication électronique, des informations actualisées, pertinentes et complètes sur les modalités de calcul de la part appropriée et équitable de rémunération qui leur est due en application du même I.
V.-Un décret en Conseil d'Etat fixe les conditions d'application du présent article, notamment la composition et les modalités de saisine et de fonctionnement de la commission, les voies de recours juridictionnel contre ses décisions et leurs modalités de publicité.https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038826736, accessed : 12.07.2023.

[1155] English version by the author. Polish version of art. 99[9] of the draft of the act amending Polish Copyright Act: Twórcy publikacji prasowej przysługuje prawo do 50% wynagrodzenia należnego wydawcy z tytułu korzystania z prawa, o którym mowa w art. 99[7] ust. 2.
https://legislacja.rcl.gov.pl/docs//2/12360954/12887989/12887990/dokument561868.pdf, accessed: 10.07.2023.

bodies mentioned in Title II of Book III of this Part. In all cases, this additional remuneration shall not have the character of a salary. II In the absence of an agreement within six months of the publication of law n° 2019-775 of 24 July 2019 tending to create a related right for the benefit of press agencies and publishers and in the absence of any other applicable agreement, one of the parties to the negotiation of the company agreement or specific agreement mentioned in I of this article can refer the matter to the commission provided for in III. The committee shall seek a compromise solution with the parties in order to reach an agreement. In case of persistent disagreement, it shall determine the appropriate share provided for in I as well as the modalities of its distribution between the authors concerned. III For the implementation of II, a commission is created, chaired by a representative of the State and composed, in addition, for half of representatives of professional organisations of press companies and press agencies and for half of representatives of organisations representing journalists and other authors mentioned in I. The State representative shall be appointed from among the members of the Court of Cassation, the Council of State or the Court of Auditors, by order of the Minister responsible for communication. In the absence of a compromise solution found between the parties, the commission shall render its decision within four months from the date of referral.The intervention of the commission's decision does not prevent new collective bargaining from taking place in the companies concerned. The collective agreement resulting from this negotiation shall replace the decision of the commission, after it has been filed by the most diligent party with the administrative authority, in accordance with Article L. 2231-6 of the Labour Code. IV Professional journalists or similar and other authors mentioned in I of this article shall receive at least once a year, if necessary by an electronic communication process, updated, relevant and complete information on the methods of calculating the appropriate and equitable share of remuneration due to them in application of the same I. V A decree in the Council of State shall lay down the conditions for the application of this article, in particular the composition and procedures for referral to and operation of the commission, the means of judicial appeal against its decisions and the procedures for publicising them.	

According to art. L218-5 of the French Intellectual Property Code, professional journalists (1) or those treated as such (2) and other authors of works included in the press publications (3) shall be entitled to **an appropriate and equitable** share of remuneration obtained by press publishers following the agreement reached with ISSPs.

Professional journalists are the journalists practicing their profession in one or more companies communicating to the public by electronic means according to art. L7111-5 of the French Labour Code.[1156] Next to them and to those treated as professional journalists, for example freelancers, the authors of works included in a press publication

[1156] English version by the author. French version of art. art. L7111-5 of French Labour Code: Les journalistes exerçant leur profession dans une ou plusieurs entreprises de communication au public par voie électronique ont la qualité de journaliste professionnel. https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006904513, accessed : 13.07.2023.

are entitled to the share. The French legislator makes a distinction that was not included in the CDSM Directive, which refers only to the authors of the elements included in press publication. This distinction is unnecessary since journalists has to be the authors of the works included in press publication in any case to be able to receive the share of remuneration. However, such an approach can be considered firstly, as an answer to the deprofessionalisation taking place in press sector, secondly, as a distinction between negotiating actors due to the different negotiation routes provided for them and lastly, as a a potential indication that the amount of share should depend on which of these categories the entity falls into.

The French legislator refrained from introducing quantitative measures to specify the amount of this remuneration and relied on abstracts and subjective terms as 'appropriate' and 'equitable'. This guarantees flexibility, but on the other hand is likely to lead to discretion and significant differences in the authors' share.

The remuneration should be negotiated collectively and set in a company agreement or other collective agreement. It has been specified that the remuneration of other authors should also be negotiated between, on the one hand, the representative professional organisations of press enterprises and press agencies and, on the other hand, the professional organisations of authors or the collective management bodies.

The negotiated remuneration has an additional nature, and cannot be considered as a salary. Therefore, journalists employed by a press publisher who are the authors of a work included in a press publication should receive, in addition to their remuneration, a share of remuneration received by press publishers under the related rights of press publishers.

In the absence of an agreement within six months of the adoption of the press publishers' rights in France, the negotiating party can refer to a specially created body called Copyright and Related Rights Commission (hereinafter: CDADV)[1157] with an objective to seek a compromise solution. In case of persistent disagreement, the body shall determine the appropriate share and the modalities of its distribution between the authors concerned. There is no obligation to refer to this body. According to the provision, the appropriate and equitable share has to be determined by an agreement. Therefore,

[1157] Commission droits d'auteur et droits voisins (CDADV), https://www.culture.gouv.fr/Thematiques/Presse-ecrite/Commissions/Commission-droits-d-auteur-et-droits-voisins-CDADV, accessed : 13.07.2023.

from this provision follows the obligation to reach an agreement. In case of disagreement, a supportive role and, ultimately, a substitute role has the commission.

The example of such an agreement concluded in France between press publishers and authors is a collective agreement signed between National Union of Journalists (SNJ) and French Press Agency in 2022. In practice, almost 1,600 journalists will receive an annual package of 275 euros (for a full year's work).[1158] However, many negotiations have not been successful. The first intervention of CDADV took place in January 2023 to rule on a referral from the National Union of Journalists (SNJ) concerning a minority agreement on the share of revenues under related rights of press publishers paid by the group EBRA[1159]to journalists. Due to a disagreement between the negotiating parties, SNJ decided to refer the matter to the Commission. The latter has approved a proportional payment with a rate of 18% and a fixed ceiling of around 680 euros of the sums paid to the EBRA group.[1160]

According to art. 99^{9} of the Polish proposal, the authors of a press publication shall be entitled to 50% of the remuneration due to the publisher for the exercise of the rights referred to in Article 99^{7}(2).

First of all, it should be pointed out that the wording of the provision is not very well chosen. According to the Polish legislator these are the authors of press publications who should be entitled to the share. However, according to the provision from art.15 of the CDSM Directive those who are entitled to the share are the authors of works incorporated (on the basis of transfer or license of exclusive rights) in a press publication. The questions arise whether the Polish legislator understands in same way a press publication from art. 99^{9} and 99^{7} (1) of the draft and who is the author of a press publication. In case when the engagement of a press publisher has a creative character and results in an original work, he can be granted the exclusive rights to collective work – press publication, if the criteria of protection of collective work are met[1161]. The

[1158]La Correspondance de la Presse, Droits voisins : sur la base de l'accord conclu entre l'AgenceFrance-Presse (AFP) et Google, le SNJ de l'AFP a signé un accord collectif relatif à la réversion de la "part appropriée et équitable" des journalistes de l'agence de presse, 2022, accessed : 13.07.2023.

[1159] A French regional daily press group operating in eastern France. Wholly owned by Crédit Mutuel Alliance Fédérale, it claims to be France's largest press group as regards the press circulation. See: Ebra, https://www.ebra.fr, accessed: 13.07.2023; Groupe EBRA, https://fr.wikipedia.org/wiki/Groupe_EBRA, accessed: 13.07.2023.

[1160] La Correspondance de la Presse, Droits voisins : la Commission droits d'auteur et droits voisins aurait validé une répartition proportionnelle (18 %) aux journalistes du groupe EBRA des sommes versées par les GAFAM avec un plafond forfaitaire fixé autour de 680 euros bruts annuels, 2023, source : Europresse, https://nouveau-europresse-com.budistant.univ-nantes.fr/Search/ResultMobile/0, accessed : 13.07.2023.

[1161] See: chapter V, section 2.1.2.

protection under related rights does not exclude the protection resulting from copyright in case when the necessary requirements are met. So, the conclusion could be drawn that in some cases press publisher will pay the remuneration to himself. The wording of the provision discussed constitutes a shortcut and proves that Polish legislator implementing the CDSM Directive does not understand and distinguish between the concepts contained therein. It leads to the serious terminological and interpretative doubts. In the objectives of the implementation of the CDSM Directive in Poland published at the beginning of 2024 the same wording of the provision discussed is provided.[1162] Given that legislative work is ongoing in Poland and the CDSM Directive has not been implemented yet[1163], there is still a chance to remove these doubts and use precise terminology what I would advise.

The authors of works incorporated in a press publication shall be entitled to 50% of the remuneration due to the press publisher for the exercise of the exclusive rights of reproduction and making available of press publication. The question arises as to the nature of this entitlement and more specifically, whether such an entitlement should be seen as a right to remuneration from art. 17 of the Polish Copyright Act according to which: unless this Act stipulates otherwise, the author shall have an exclusive right to use the work and to manage its use throughout all the fields of exploitation and to receive remuneration for the use of the work[1164]. It should be specified that the right to receive remuneration for the use of the work relates to the situation of the use of the work, which in this specific case is made by the ISSPs while exploitating a press publication. I am aware of the long-standing discussion in the Polish doctrine as regards the nature of the right from art. 17 considered by some academics as arising as the result of the disposition of the right to exploit the work[1165] and by others as arising in the situation when the rightholder is entitled to a specific remuneration, functioning as an independent right, and therefore, not derived from the exercise of the right to use and dispose of the work.[1166] A. Niewęgłowski specifies that right to remuneration from art. 17 of Polish Copyright Act

[1162] Kancelaria Prezesa Rady Ministrów, https://www.gov.pl/web/premier/projekt-ustawy-o-zmianie-ustawy-o-prawie-autorskim-i-prawach-pokrewnych-oraz-niektorych-innych-ustaw3, accessed: 06.02.2024.
[1163] Time of last check: 07.02.2024.
[1164] English version by the author. Polish version of art. 17 of the Polish Copyright Act: Jeżeli ustawa nie stanowi inaczej, twórcy przysługuje wyłączne prawo do korzystania z utworu i rozporządzania nim na wszystkich polach eksploatacji oraz do wynagrodzenia za korzystanie z utworu.
[1165] See: E. Traple, Komentarz do art. 17 in: J. Barta, R. Markiewicz (eds.) , Ustawa o prawie autorskim i prawach pokrewnych. Komentarz, 2011, LEX, point 3.
[1166] Z. Okoń, Komentarz do art. 17 Ustawy o prawie autorskim i prawach pokrewnych in: D. Flisak (ed.), Prawo autorskie i prawa pokrewne. Komentarz, 2015, LEX.

is granted in the situation when the author is entitled to claim a remuneration and this should be seen as a compensation for the fact that he is not able to prohibit the exploitation of his work.[1167] The example is a provision from art. 20 of the Polish Copyright Act according to which artists, performers and producers of phonograms shall be entitled to a specified amount of the fees from the sale of tape recorders and other similar devices.

The situation of the authors of works incorporated in a press publication does not relate to the situation of the entitlement to the remuneration on the basis of the transfer or license of their exclusive rights. According to the Polish proposal of the implementation of the CDSM Directive the authors are entitled to the share of the remuneration obtained by press publishers for the exercise of their rights. Therefore, they are entitled to a part of the remuneration due to press publishers. Although it does not stem directly from the wording of the provision this is a remuneration for the use of their works in the framework of the use of press publication. The latter could be a convincing justification to understand this remuneration as a remuneration falling into the scope of art. 17 of the Polish Copyright Act bearing in mind all the specificities of this entitlement.

It should be specified by the Polish legislator whether this right is transferable or not as it has been specified for example in art. 18 (3) of the Polish Copyright Act. I would urge consistency in this area. Since the Polish legislator did not specified in the draft whether the share has to be collected and distributed by the Collective Management Organisations, it should be stated that their intermediation is not of mandatory nature.

The Polish legislator did not determine the relationship between the implementation of the principle of the authors' share and the employement relationship. According to recital 59 of the CDSM Directive "Authors whose works are incorporated in a press publication should be entitled to an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers. That should be without prejudice to national laws on ownership or exercise of rights in the context of employment contracts, provided that such laws are in compliance with Union law." It should be decided, at the implementation stage in Poland, whether the remuneration resulting from the emplyement contract excludes the payment of the share to the authors. In this matter, I propose to draw inspiration from the solution adopted in French law.

[1167] A. Niewęgłowski Komentarz do art. 17 Ustawy o prawie autorskim i prawach pokrewnych in: A. Niewęgłowski (ed.), Prawo Autorskie. Komentarz, Wolters Kluwer Polska, 2021, LEX, points 12-15.

According to the Polish proposal the authors shall be entitled to 50% of the remuneration received by press publishers from ISSPs for the use of press publications. To compare, France proposed an appropriate and equitable share, Spain, an appropriate share[1168], Germany adopted a provision according to which the share should be at least one third of the press publishers' remuneration[1169] and Italy that it should be between 2% and 5% of press publishers' remuneration from the exercise of the reproduction and making available rights[1170].

Amongst these legislations, Polish example is the only one of fixed threshold of a remuneration. Doubts arise as to whether it is justified to impose such a fixed threshold and whether this could affect the freedom of contract. On the other hand, the lack of threshold for example in France leaves a great scope of discretion. Therefore, the best solution seems to be the specification of the threshold as it has been done in Italy or in Germany.

During the legislative works in Poland, it was assumed that the proposed solution fairly reflects the contributions of authors for a press publication to arise. It was supported during the public consultations by, among others, the authors' association ZAiKS or the REPROPOL the Polish Association of Journalists and Publishers.[1171] Moreover, the share of 50% has been formulated in analogy to the share already enshrined in the Polish legal order. According to art. 20 (2) (1) of the Polish copyright law producers should share 50 % of their revenues from the sale of tape recorders, other similar devices and blank carriers with authors. This is an example of consistency of Polish legislator in relation to the already adopted provisions in the area of copyright and related rights. However, the consistency within the legislative framework is not always advisable and justifiable. In case of press publishers, the share of 50% can be quite a significant burden for press publishers and a large, not entirely justified income for authors who already receive remuneration due to transfer or license of their exclusive rights. What is more, the European legislator provides authors with 'appropriate' share of remuneration what is a

[1168] See: art. 129 bis of Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia, https://www.boe.es/buscar/act.php?id=BOE-A-1996-8930, accessed: 11.07.2023.

[1169] See: §87k of Urheberrechtsgesetz – UrhG, https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html, accessed: 13.07.2023.

[1170] See: art.43 bis of legge 22 aprile 1941, n. 633, https://www.gazzettaufficiale.it/eli/id/2021/11/27/21G00192/sg, accessed: 13.07.2023.

[1171] Uzasadnienie ..,https://bip.mkidn.gov.pl/media/pu_prawo_autorskie_20220620/Uzasadnienie_do_ustawy.pdf, accessed: 23.11.2022. p.47.

guarantee of a certain freedom and flexibility to determine it. Polish legislator seems to take this freedom and flexibility to set an appropriate threshold away by imposing high and rigid percentage split. It leads to far-reaching but not impossible conclusion that for press publishers who are already in a weaker position against platforms and struggle to negotiate with them the remuneration, it will be another heavy financial burden. This percentage split has been maintained in the objectives of the implementation of the DSM Directive in Poland published at the beginning of 2024.[1172]

To conclude:

- French legislator did not specify the threshold of the share of the remuneration obtained by press publishers. It specified that the share should be appropriate and equitable. Lack of the threshold can be a guarantee of flexibility but on the other hand, it can lead to discretion and significant differences in the remuneration between authors. I see an important remedy to such issues in the adoption of the negotiation mechanism and the involvement granted to Copyright and Related Rights Commission having supportive and, in some cases, substitutive nature in case of disagreement.

- The wording of Polish provision leads to the terminological and interpretative doubts since the Polish legislator, contrary to the provision from art.15 of the CDSM Directive provides that the author of press publication and not the author of works incorporated in press publication should receive a share. The share of 50% of the remuneration of press publishers received under the related rights of press publishers constitutes a heavy burden for the interests of press publishers and a significant limitation of the flexibility foreseen by the EU legislator and provided within the implementation of the CDSM Directive in other national implementations.

8. Conclusion

The aim of the adoption of the related rights is to reward the effort of dissemination of works, to reward all the investments made regardless of their size and to adapt the legal framework to the challenges resulting from the use of new technologies.

The EU legislator while justifying the adoption of the related rights of press publishers took into account the digital change in the press publishing sector and the shift from

[1172] Kancelaria Prezesa Rady Ministrów, Projekt ustawy o zmianie ustawy o prawie autorskim i prawach pokrewnych oraz niektórych innych ustaw, https://www.gov.pl/web/premier/projekt-ustawy-o-zmianie-ustawy-o-prawie-autorskim-i-prawach-pokrewnych-oraz-niektorych-innych-ustaw3, accessed:05.02.2024.

offline printed newspaper to the use of online media resulting in a decline in newspaper revenues. The fact that the latter is due also to the business models adopted by press publishers was not considered. The need to reinforce the legal situation of press publishers was explained by their role, important from the perspective of dissemination of information and safeguard of media pluralism. The complexity of the relationship between news aggregators and press publishers was mentioned by the legislator who focused exclusively on its negative impact on the publishers' interests.

I understand the press publication as a collection composed mainly of literary works of journalistic nature, but which can also include other works or other subject matters. If the literary works are included, and potentially other works or subject matters, then the fact that the collection in question would contain also unprotected elements should not prevent it from being granted protection under the press publishers' rights. If a non - protected element is included in a press publication and is then used by ISSPs to the extent indicated in the CDSM Directive, there will not be an encroachment on the publishers' exclusive rights.

Press publication contains different elements of one type, namely, of journalistic type. The latter should be understood from the perspective of its purpose being the disclosure to the public of information, opinions or ideas and should not imply that their authors are journalists.

Press publication as a collection should consist of a number of elements which will form a structure resulting, for example, from a thematic link or common aim which is the dissemination of information. It should consist of at least two elements. The regularity of the update of a press publication should be understood broadly as encompassing also the update of press walls of news websites or websites published by press publisher taking place several times per day or per week. Press publication should be published under the initiative, editorial responsibility and control of a service provider. Editorial responsibility should be understood as the exercise of the effective control both over the selection of materials included in a press publication and over their organisation which does not necessarily imply any legal liability under national law for the content provided. All the conditions listed in art. 2 (4) of the CDSM Directive must be met cumulatively.

Press publishers' rights do not apply to the use of individual words or very short extracts of press publication. Since EU legislator does not define the concept of very short extracts of press publication the factors which should be taken into account in the process of the assessment of the shortness of the short excerpts of press publication are: the impact

of the extract on the reader and his willingness to click in the link to a press publication, the kind of information included in the short extract and finally, the economic consequences of the use of the extracts of press publication on the interests of press publishers. The lack of the definition at EU level does not exclude the possibility of adoption of a quantitative threshold or a definition of short extracts in the implementations of the CDSM Directive.

The French legislator added a specification that the use of a very short extract of press publication is excluded from protection in case when such a use does not affect the effectiveness of the related rights of press publishers. The effectiveness of the related rights can be affected in case when the use of very short extracts replaces the press publication itself or dispenses the reader from reading it. Such clarification contributes to defining the meaning of the very short extract of press publication although still leaving some margin of uncertainty.

Press publisher is a natural or legal person established in a Member State publishing in the context of an economic activity that constitutes a provision of services under EU law. It should be noted that the EU legislator did not introduce any distinction between the types of press publishers depending on what content they publish provided that they publish press publication within the meaning from art. 2(4) of the CDSM Directive. This is an important indication at the stage of implementation and application of the law so as not to introduce such differentiation

Press publishers are obliged to share their revenues obtained from the ISSPs for the use of press publications with authors of works incorporated in press publications. The introduction of such an obligation is criticised as incompatible with the nature and purpose of the related rights aiming at rewarding the investment. In my opinion however, it corresponds to the main objective of the related rights of press publishers, which is to support the press sector (in general). The EU legislator, by using the word ‘appropriate’ to describe the threshold of the share privileged some kind of flexibility. The latter has not been provided by the Polish legislator who proposed the share of 50%. It can constitute quite a significant burden for press publishers. Nor EU legislator neither French, Polish legislators provided for a solution to safeguard the interests of authors in case when press publishers decide to waive their rights which is not forbidden. The EU legislator left an important margin of discretion as regards the clarification of the details of nature and determination of the share. The fact that the Polish legislator in the draft of the implementation of the CDSM Directive leaves unspecified the issue such as the nature

of the right to share or the impact of the employment relationship on it, may affect its effectiveness.

Chapter IV: Exclusive rights of press publishers in light of the CDSM Directive and national laws

1. Introduction

The analysis conducted in this chapter aims firstly at determining the scope of the exclusive rights granted to press publishers. To this end, the provisions from art. 2 and 3 of the InfoSoc Directive which apply to press publishers will be discussed as well as the Polish proposal and the French implementation of the publishers' rights in this regard. The attention will be paid to the understanding of the exclusions from the scope of protection of private or non - commercial uses of press publications by individual users and acts of hyperlinking. Moreover, the ISSPs as the entities against whom the publishers' rights apply will be characterised.

Secondly, the exercise of the publishers' rights and the claims in case of the infringement of these rights will be discussed. The focus will be also on the nature of the intermediation of collective management organisations.

Thirdly, through a case study of the legal situation of French press publishers after the adoption of the related rights, who strived to ensure the effectiveness of their protection through the competition law, the deficiencies, inaccuracies, grey areas in the text of the French implementation will be identified. It is too early to assess whether the protection granted to press publishers is effective or not. It is however not too late to identify the shortcomings of the French implementation revealed in practice, that could potentially impact the effectiveness of the regulation, especially in the context of free flow of information and the safeguard for media pluralism, to avoid such shortcomings at the stage of implementation of the Directive or the application of the publishers' rights.

Finally, the selected elements of Belgian, Spanish and Italian implementations of art. 15 of the CDSM Directive will be discussed. These Member States implemented the press publishers' rights later than France and provided some mechanisms to strengthen the effectiveness of the publishers' protection on the basis of the lessons learned from France.

These considerations will be of vital importance for the final stage of the analysis focused on developing how the implementation of art.15 of the CDSM Directive should look like. It is necessary to identify which legal solutions from French implementation should have been improved, and what legislative solutions have been introduced in later implementations of art. 15 of the CDSM Directive in other Member States to address

these deficiencies to ensure or strengthen the effectiveness of the regulation, particularly in the context of access to information and media pluralism.

2. Exclusive rights of press publishers

Since the adoption of the CDSM Directive, the reproduction and making available rights extend to publishers of press publications. They have the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part of press publications by ISSPs and to authorise or prohibit the making available to the public of press publication by ISSPs, by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen. This is an example of maximum harmonisation, the protection granted to press publishers at the national level as result of the Directive's implementation cannot be more or less intense. Press publishers are granted two separate rights to authorise or prohibit the reproduction and the making available of press publications which are independent of each other. Rights of authorising or prohibiting the reproduction and making available of press publication can be waived.

The scope of the right is limited to the **online** use of press publication. As observed by some scholars, it reflects the targeting of regulation at the activities of "big commercial re-users of journalistic content."[1173]

The protection extends to publishers of press publications in case when the online use of their press publications is made by ISSPs. Therefore, the provision applies against specific category of actors not against everyone what would normally result from the *erga omnes* character of the exclusive rights[1174]. It is interesting to note that in the art. 11 of the initial proposal of the CDSM Directive which concerned the protection of press publication, it had not been specified that press publishers' rights apply only against ISSPs. This has been added at the later stage of the legislative work.[1175] The final wording

[1173]A. Lazarova, Re-use the news…, p.239.
[1174] See: A. Lazarova, Re-use …, p.236; R. Markiewicz, Prawo autorskie …, p.146.
[1175] The original proposal of art. 11(1) of the DSM Directive: 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. https://digital-strategy.ec.europa.eu/en/library/proposal-directive-european-parliament-and-council-copyright-digital-single-market, accessed: 08.11.2022, the specification that the use of the press publication should be done by information society service providers has been added during the legislative works at the EP and appears in the EP text, council text doc.9134/18, and in the compromise text as it results from the Political Agreement reached with the EP at the trilogue on 13 February 2019 https://www.create.ac.uk/policy-responses/eu-copyright-reform/#table, accessed: 08.11.2022, p.59.

of art. 15 and limitation of the circle of actors against whom the rights of reproduction and making available can be used to only ISSPs represents a significant limitation of the scope of protection.

Such a legal construction is complex and difficult to assess from the legal perspective. *Erga omnes* nature by its construction, refers to the institution of property rights.[1176] R. Markiewicz explains that the corelate of the rights effective *erga omnes* is an obligation on an unlimited number of persons to behave passively, i.e. not to prevent the holder from exercising the right and not to interfere with it.[1177] *Erga omnes* nature implies that the right or obligation can be enforced against **everyone**, contrary to *inter partes* nature, which means that the right is enforceable against some entities. The latter is characteristic for contract law,[1178] it applies to the entities who are individually identified, and this individualisation must take place at the latest, at the time of the fulfillment of the contract. For these reasons, the related rights of press publishers cannot be considered as having *inter partes* nature. It does not originate from the contract law and the entities concerned are not individually identified. They are only identified as ISSPs which cannot be considered as individual identification.

It is however difficult to state with certainty that the publishers' related rights have an *erga omnes* character due for example to the fact that they apply only against some entities. The legal challenge is therefore to determine their nature.[1179] I propose to split the analysis into two stages. Firstly, the conclusion can be drawn that publishers of press publications are granted the exclusive rights. As it has been already observed, exclusive rights have an *erga omnes* nature being enforceable against everyone. Secondly, it should be noted that the exclusive rights granted to press publishers apply in the specific circumstances, namely in case when press publication or its part is used online by ISSPs.

[1176] See the judgement of Court of Appeal in Gdańsk, 3.01.2019 r., V AGa 129/18, LEX nr 2763417; Z. Radwański, A. Olejniczak, Prawo cywilne – część ogólna, C.H. Beck, 2015, p.90; M. Pyziak-Szafnicka in: M. Safjan (ed.), Prawo cywilne– część ogólna, System prawa prywatnego, vol.1, 2012, p. 838; W. Machała, Komentarz do art. 17 ustawy o prawie autorskim i prawach pokrewnych, in: W. Machała, R.M. Sarbiński (eds.), Prawo autorskie i prawa pokrewne. Komentarz, Wolters Kluwer Polska, 2019, LEX.

[1177] R. Markiewicz, Ilustrowane prawo autorskie, Wolters Kluwer Polska 2018, point 6.3, LEX; See also: C. Sganga, Proprietizing …, p.246.

[1178] See: P. de Filippi. Copyright in the Digital Environment: From Intellectual Property to Virtual Property. 7th International Workshop for Technical, Economic and Legal Aspects of Business Models for Virtual Goods, 2009, p.79; see also: P.B. Hugenholtz, Data Property: Unwelcome Guest in the House of IP in: Better Regulation for Copyright. Academics meet Policy Makers, 2017, pp.59-63, https://felixreda.eu/wp-content/uploads/2017/09/2017-09-06_Better-Regulation-for-Copyright-Academics-meet-Policy-Makers_Proceedings.pdf, accessed: 08.11.2022.

[1179] See: G. Sartor, Fundamental legal concepts: A formal and teleological characterisation, Artificial Intelligence and Law, vol.14, 2006, pp. 101–142.

Therefore, not only the specification as regards the group of entities against whom the right is addressed but also the specification as regards the place of use (digital environment) has been adopted. In consequence, press publishers are granted the exclusive rights of *erga omnes nature* the scope of which is limited in practice and allows claims to be directed against a specific group of entities using a press publication in a specific, online environment[1180].

The rationale may be that in case of the right discussed, the threat to publishers' interests came from this specific group of actors, news aggregators and media monitoring services. Therefore, to balance the interests of various groups, the rights were addressed only against them. As to the interests of others groups protected by the related rights' regime, they were threatened by the broadly understood phenomenon of piracy. The identification of a single responsible entity or of a group of entities behind it would be more difficult.[1181]

A. EU law

2.1.Reproduction right

The act of reproduction of press publication by ISSPs occurs for example in case of provision of press clippings on request, which involves the necessary prior reproduction of all (chosen) newspapers/magazines from a given period of time by news monitoring organisations.[1182] It occurs also as regards the use of services indexing, scanning and storing press publications requiring their prior reproduction. Algorithmisation of the press sector is linked to the increasing reliance on the act of reproduction of press publications in order to provide learning materials for AI without making these press publications available to the public.[1183] It constitutes an internal phase of production of news by AI. The latter is also used to extract the facts/ news from already written press publications to propose on this basis new news items. Here also the act of reproduction of press

[1180] For simplicity of further analysis, I will consider the nature of the related right as having practical non *erga omnes* nature.
[1181] See: chapter III point 2.1.3.
[1182] This activity and the copyright qualification of its results become a bone of contention in Infopaq case, see point 3.2.2.1. of chapter 2.
[1183] M.F. de Lima Santos, W. Ceron, Artificial Intelligence in News Media: Current Perceptions and Future Outlook, Journalism and Media, 2022, https://www.mdpi.com/2673-5172/3/1/2, accessed: 23.06.2023.

publication or rather its parts takes place.[1184]

The act of reproduction is exempted from the reproduction right according to art. 5(1) of the InfoSoc Directive only if it fulfils the following conditions: it has to be temporary, transient or incidental and it has to constitute an integral and essential part of a technological process. Moreover, the act should not have independent economic significance.[1185] Those conditions are cumulative[1186] and should be understood strictly[1187].

In the case of the exception discussed, the act of reproduction does not directly facilitate the enjoyment and access to works, it should constitute an internal element of larger technological process enabling the provision of services. However, the assessment of the conditions enabling to decide whether the act of reproduction meets the requirements from art. 5(1) of the InfoSoc Direcitve is complex and leaves much room for discretion. The CJEU specified that an act can be held to be 'transient' if its duration is "limited to what is necessary for the proper completion of the technological process in question, it being understood that that process must be automated so that it deletes that act automatically, without human intervention, once its function of enabling the completion of such a process has come to an end."[1188] According to the Court, the act of reproduction qualified as transient should be automated and its results have to be deleted automatically, without human intervention, once the process is completed. However, in Meltwater, the case which concerned the dispute between publisher, the NLA, and Meltwater, a provider of online monitoring press reports online, as to whether the making of "cached" copies which were automatically saved on a computer while browsing the web could be covered by the exclusion related to making transient copies from art. 5 (1) of the InfoSoc Directive, the Court noted that "the requirement of automatic deletion does not preclude such a deletion from being preceded by human intervention directed at terminating the use of the technological process. It is permissible for the technological process at issue in the main proceedings to be activated and completed manually"[1189]. Therefore, the transient character cannot be denied due to the termination of the

[1184] See: J. Diaz- Noci, Artificial Intelligence Systems-Aided News and Copyright: Assessing Legal Implications for Journalism Practices, Future internet,2020, https://www.mdpi.com/1999-5903/12/5/85, accessed: 23.06.2023.
[1185] CJEU, Infopaq, para. 54.
[1186] CJEU, Infopaq, para. 55.
[1187] CJEU, Infopaq, para. 56.
[1188] CJEU, Infopaq, para. 64.
[1189] CJEU, Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others, case C-360/13, 5 June 2014, para.42.

technological process by the end-user.

The incidental character should be understood as dependent on the technological process that it contributes to. The limitation of art. 5(1) only applies to the reproductions that takes place due to technical necessities.[1190] The last condition is that the reproduction must have no independent economic significance. For some scholars it makes the line between infringing and non-infringing acts unpredictable[1191], concerns related to legal certainty can be raised.[1192]

The CJEU specified that the technical copies may create the economic value while facilitating the use of subject matter[1193] but economic advantage derived from the implementation of acts of temporary reproduction should be neither distinct nor separable from the economic advantage derived from the lawful use of the work concerned. Moreover, it must not generate an additional economic advantage "going beyond that derived from that use of protected work".[1194] The advantage derived from an act of temporary reproduction, as observed by the Court is "distinct and separable if the author of that act is likely to make a profit due to the economic exploitation of the temporary reproductions themselves."[1195]

To put these considerations in the context of the use of press publications, the reproduction of press publication will not have an additional economic advantage if it will not generate a distinct or separable profit. Therefore, the act of reproduction conducted in order to fill out the bases of AI needed for its learning process which will enable AI to produce a news item later, if not leading to the additional profits, will not have the economic significance. However, the counter- argument can be that it may contribute to the increase of the economic value of the act that will occur thanks to this temporary reproduction, thus, will contribute to the increase of economic value of the final result of this process. The richer the AI database implies the higher quality of the produced news item and the higher is its value.

[1190] S. Bechtold in: T. Dreier, B. Hugenholtz (eds.), Concise European Copyright Law, Kluwer Law International, 2006, p. 457.
[1191] M.van Echoud *et al.,* Harmonizing …, p.112.
[1192] See: M.van Echoud *et al.,* Harmonizing …, p.112; L. Guibault *et al.,* Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, Institute for Information law, 2012, p.35.
[1193] CJEU, Murphy, paras.174-175.
[1194] CJEU, Murphy, para 175.
[1195] CJEU, Infopaq International A/S v Danske Dagblades Forening, Case C-302/10, 17 January 2012, (Infopaq, II,), paras. 50-52.

2.2.Making available right

Media monitoring services or news aggregators do not only reproduce press publications for the purposes of their activity but also enable public access to them from a place and at time individually chosen. It can take place in a **direct way** and consist in providing access to the whole press publications or the parts of them on their websites or **in indirect way**[1196] and consist in providing access to press publication by publishing hyperlinks. The question arises how such activities should be qualified from the exclusive rights perspective and especially, in the context of rights granted to publishers of press publications.

The right of making available to the public is included in a more general right of communication to the public and should be interpreted consistently[1197] with it. According to art. 3 (1) of the InfoSoc Directive the right of making available is granted to the authors and according to art. 3(2) of the InfoSoc Directive the protection is extended to the holders of related rights.

S. Bechtold explains that the right covers "the act of providing a work to the public"[1198]. It is enough for the protection to be triggered if **a possibility of access**[1199] being a result of the transmission exists.[1200] The right requires that public may access the work 'on demand' meaning, from a place and at a time individually chosen. It refers to the interactive services, and does not require simultaneous[1201] reception of work by the public. It is linked to services based on "user-initiated modes of communication, such as offers to download a work from a public website or online streaming services that allow the consumer to 'pull' content at his/her convenience."[1202] Since the right of making available should be interpreted consistently with the understanding of the communication right from art. 3(1) of the InfoSoc Directive, the situation of press publishers granted the

[1196] The distinction proposed by the author.
[1197] Ch. Geiger, F. Chönherr, The Information Society Directive, in: I. Stamatoudi, P. Torremans (eds.), EU Copyright Law. A Commentary, Edward Elgar Publishing, 2014, p.11.24.
[1198] S. Bechtold, in: T. Dreier, B. Hugenholtz (eds.), Concise European Copyright Law, Kluwer Law International, 2006, p.361.
[1199] See: J. Koo, The right …, pp.73-77.
[1200]T. Rendas, Exceptions …, p.52. See: CJEU, Land Nordrhein-Westfalen v Dirk Renckhoff, Case C-161/17,7 August 2018.
[1201] What differs the right of making available from the right of broadcasting. In case of the latter, according to Ch. Geiger "even when the user selects the place and time to use the work, transmission and use are simultaneous." See: Ch. Geiger, F. Chönherr, The Information …, p.11.24.
[1202] C. Angelopoulos, On Online …, p.18, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800, accessed: 16.08.2022.

making available right should be interpreted in light of the considerations provided in relation to the communication to the public right in chapter II.

The activity of news aggregator being an ISSP as regards the use of press publication will be subject to authorisation or prohibition:

- If it consists of providing access to press publication in deliberate and intentional way or at least facilitating access to press publication. When considering that activity of news aggregators is based on provision of access to press publication, this criterion of deliberate and intentional intervention will be met.

- If press publication to which the access is provided was published without the authorisation of right holder and on the news aggregator side there was a knowledge or a possibility to know about it. This situation will rather not occur as regards the activity of news aggregators consisting of "republishing" of whole press publication or its part published for example on websites of the newspapers and magazines assuming that they were published there legally.

- If it is of profit - making nature and it will be the case since it meets the requirements of ISSPs. However, it should be noted that according to the interpretation provided by the CJEU it is an important but not indispensable factor for concluding that the act of communication to the public occurs.

- If the engagement of news aggregators does not consist of providing exclusively the physical facilities enabling the act of communication to the public and it will not be the case since the activity of news aggregators consist of providing access to press publications and not the physical facilities enabling this access.

- If is directed towards new public which will be the case (apart from the case of linking) in any situation where the whole press publication or its part will be published on the website of news aggregators since this public was not envisaged by press publisher while publishing press publication on its website.

B. French and Polish law

Article L218 – 2 of the French Intellectual Property Code[1203]	**art. 99^7 (2) of the draft of the act amending the Polish Copyright Act**[1204]
The authorisation of the press publisher or press agency shall be required before any reproduction or communication to the public of his/its press publications in entirety or in part in digital form by information society service provider.	Publishers shall, without prejudice to the rights of authors and other right holders, have the exclusive right to use of their press publications to the extent enabling information society service providers to: 1) reproducing press publications online; 2) make press publications available to the public in such a way that anyone can access them at a time and place individually chosen.

According to art. L.218-2 of the French Intellectual Property Code the authorisation of the press publisher or press agency shall be required before **any reproduction or communication to the public** of his/its press publications in entirety or in part in digital form by ISSP. The harmonisation should be maximum what means that the protection should be neither less no more intense that the one foreseen in art. 15 of the CDSM Directive. French implementation provides press publishers with the right of reproduction and communication to the public. As to the latter, the scope of the right is wider since the text of the Directive grants press publishers the right of making available which is included in the broader right of communication to the public. T. Azzi explains that is in line with the French tradition, according to which all holders of related rights are granted the right of communication to the public and not the right of making available.[1205] Taking into consideration that the new related right applies exclusively to the online use of press publications, the difference of the act of making available and of communication to the public is of minor importance and therefore, this modification made by France should be considered in conformity with the EU law.[1206]

[1203] English version by the author. French version of Article L218-2 of French Intellectual Property Code: L'autorisation de l'éditeur de presse ou de l'agence de presse est requise avant toute reproduction ou communication au public totale ou partielle de ses publications de presse sous une forme numérique par un service de communication au public en ligne, https://www.legifrance.gouv.fr/loda/article_lc/LEGIARTI000038826732/2020-10-13, accessed : 12.07.2023.

[1204] English version by the author. Polish version of art. 99^7 of the draft of the act amending Polish Copyright Act: 2. Wydawcom, bez uszczerbku dla praw twórców i pozostałych uprawnionych, przysługuje wyłączne prawo do korzystania ze swoich publikacji prasowych i rozporządzania nimi w zakresie umożliwiania dostawcom usług społeczeństwa informacyjnego:1) zwielokrotniania publikacji prasowych techniką cyfrową; 2) publicznego udostępniania publikacji prasowych w taki sposób, aby każdy mógł mieć do nich dostęp w miejscu i czasie przez siebie wybranym. https://legislacja.rcl.gov.pl/docs//2/12360954/12887989/12887990/dokument561868.pdf, accessed: 10.07.2023.

[1205] See : T. Azzi, Commentaire …, p. 62; see the provisions from art. art. L. 218-2, art. L. 212-3, L. 213-1, L. 215-1, L. 216-1 of the Code de la propriété intellectuelle.

[1206] T. Azzi, Commentaire …, pp. 62-63.

According to art. 99 [7] (2) of the Polish proposal, press publishers shall, without prejudice to the rights of authors and other right holders, have the exclusive right to use their press publications to the extent enabling ISSPs to reproduce press publications online and to make them available to the public in such a way that anyone can access them at the time and place individually chosen. Polish legislator shapes the legal position of press publishers by referring to the specific fields of exploitation, namely to the reproduction and making available of press publication.

Wording of Polish provision is different compared to the wording of art. 15 of the CDSM Directive or to French implementation. Publishers, according to art. 99^7 of the draft shall have the exclusive right to **use** their press publications to the extent enabling ISSPs to reproduce and make available press publications. The Polish legislator decided to preserve the consistency as regards the legal situation of the holders of related rights since performers, producers of phonograms and videograms broadcasting organisations are granted the exclusive rights to **use** the subject matter of protection to the indicated extent. It was not necessary to specify that making available of press publication should take place in such a way that anyone can access it at the time and place individually chosen since from the very nature of the act of making available it results that it enables the access to the work/another subject matter at the time and place individually chosen. It seems that Polish legislator wanted to underline the difference between the act of communication to the public and the act of making available but it was not compulsory.

To conclude:

- French legislator provides press publishers with the right of reproduction and communication to the public instead of the right of making available despite the maximum harmonisation in this regard. It reflects the legislative tradition in France where all holders of related rights are granted the right of communication to the public. The latter has however wider scope than the right of making available. Polish legislator also shows the legislative consistency and sticks to the formulation of the scope of the exclusive rights provided also as regards other holders of related rights.

2.2.1. Acts of hyperlinking

A. The CDSM Directive

Protection resulting from art. 15 of the CDSM Directive does not apply to the acts of hyperlinking according to art. 15 (1) of the CDSM Directive. It should be clarified how hyperlinks are defined from technological point of view and assessed whether this definition corresponds with the approach adopted by the EU legislator in the said provision. Then the issue of hyperlinking has to be analysed within the broader perspective of its relationship with the right of communication to the public.

- Definition of hyperlink and its types

Hyperlinks constitute "a technique of reporting, and are essentially different from traditional acts of publication in that, as a general rule, they merely direct users to content available elsewhere on the Internet. They do not present the linked statements to the audience or communicate its content, but only serve to call readers' attention to the existence of material on another website. (…) Hyperlinks contribute to the smooth operation of the Internet by making information accessible through linking it to each other."[1207] Linking makes the works available to the users and allows direct access to them.[1208]

Hyperlinks can be displayed in form of text, images or URLs.[1209] They include deep links, frame links and embedded links.[1210] The latter means that instead of seeing the link, user can see the content which normally is inserted on the original website.[1211] The difference between providing the URL address and embedding[1212] is that in case of the latter the user has not to click on the URL address and can stay on the website he visits[1213]. M. Leistner identifies a sub-category of embedded links, hidden embedded links which

[1207] ECtHR, Magyar Jeti ZRT v Hungary, 11257/16, 04 December 2018, paras. 73-74.
[1208] CJEU, Svensson, para. 18; See: J. Rosen, How much …, pp. 341-347.
[1209] Technopedia, Hyperlink, 2018, https://www.techopedia.com/definition/5175/hyperlink, accessed: 10.11.2022.
[1210] M. Leistner, Copyright Law on the Internet in Need of Reform: Hyperlinks, Online Platforms and Aggregators, Journal of Intellectual Property Law & Practice, Vol. 12, no. 2, 2017, pp.136–149.
[1211] See: CJEU, BestWater International GmbH v. Michael Mebes, Stefan Potsch, case C-348/13, 21 October 2014, paras. 17-18, hereinafter: BestWater; B.Schuetze, Bestwater: CJEU embeds decision on framed content in order, Kluwer Copyright Blog, 2014, http://copyrightblog.kluweriplaw.com/2014/11/03/bestwater-cjeu-embeds-decision-on-framed-content-in-order/, accessed: 10.11.2022.
[1212]See: E. Rosati, DSM Directive Series #6: 'hyperlinking' in the press publishers' right, IPKat, https://ipkitten.blogspot.com/2019/06/dsm-directive-series-6-hyperlinking-in.html, accessed:10.11.2022.
[1213] See: Nowe media, https://www.nowemedia.org.pl/glossary/embedding/, accessed: 10.11.2022; P. Wasilewski, Dopuszczalność embedowania w świetle ewolucji orzecznictwa Trybunału Sprawiedliwości Unii Europejskiej w zakresie linkowania in: P. Podrecki, T. Targosz (eds.) Experientia docet. Księga jubileuszowa ofiarowana Pani Profesor Elżbiecie Traple, Wolters Kluwer Polska, 2017, LEX.

makes the Internet user unable to recognise whether the content from third-party website has been incorporated into the website of party posting link or it remains on the original website while being display through embedded link.[1214] P. Wasilewski explains that embedding is sometimes treated equally to framing, which is a broader category. Framing essentially involves linking external content on a website in so-called frames, i.e. an enclosed separate space in which the linked content is displayed. A website using this linking technique most often contains several such frames, which also allow their contents to be navigated separately e.g. when another website is inside the frame.[1215] Deep links are a type of link that send users directly to an app[1216], they link to a specific, generally searchable or indexed piece of web content on a website rather than the website's home page.[1217]

- Exclusion of the act of hyperlinking in art. 15 of the CDSM Directive

In English and in French version of art. 15 of the CDSM Directive the term 'act of hyperlinking' is used, Polish version of the CDSM Directive refers to the 'act of linking'[1218], the CJEU in the cases related to the scope of the right of communication to the public mostly mentions the 'clickable links'.[1219] Therefore, the question arises whether hyperlinks and links mean the same and if not, what understanding should be privileged in the context of art. 15 of the CDSM Directive. Numerous are guides, publications and websites which treat hyperlinks and links interchangeably defining one by making reference to another.[1220] The CJEU in its interpretation of the act of communication to the public relates to links but refers also to hyperlinks. The common societal understanding of these terms as similar could be added what leads to the conclusion that these terms should be understood alike.

[1214] M. Leistner, Copyright …, pp.136–149.
[1215] P. Wasilewski, Dopuszczalność embedowania …, LEX.
[1216] Deep link, https://www.adjust.com/glossary/deep-linking/ , accessed:11.11.2022.
[1217] Deep linking, Wikipedia, https://en.wikipedia.org/wiki/Deep_linking, accessed: 11.11.2022.
[1218] See third subparagraph of art. 15 of the DSM Directive: Polish version: Ochrona zagwarantowana w pierwszym akapicie nie ma zastosowania do czynności linkowania, https://eur-lex.europa.eu/legal-content/PL/TXT/PDF/?uri=CELEX:32019L0790&from=EN, assessed:10.11.2022, French version: La protection accordée en vertu du premier alinéa ne s'applique pas aux actes d'hyperliens, https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32019L0790&from=EN, assessed:10.11.2022.
[1219] See: CJEU, Svensson; CJEU, BestWater; CJEU, GS Media, CJEU, FIlmspeler.
[1220]See: Britannica, https://www.britannica.com/technology/hypertext, accessed: 10.11.2022; Digital Guide IONOS, https://www.ionos.com/digitalguide/websites/web-development/hyperlink-definition-and-examples-of-use/, accessed: 10.11.2022; Influencer Marketing Hub https://influencermarketinghub.com/glossary/hyperlink/, accessed: 10.11.2022.

However, being aware of the variety of types of hyperlinks, it should be pointed out that the exclusion from the scope of publishers' protection of the act of hyperlinking *tout court* without any specification or distinction between various types of hyperlinks can have different consequences. S. Dusollier explains that "technically speaking, what Google and similar services do is to refer to media articles by different techniques of hyperlinking, either via a simple underlined and clickable blue text, or via a so-called deep link where the text or image referred to are absorbed by the search engine page, while staying technically hosted by the original webpage."[1221] Advocate General Maciej Szpunar proposed to "draw a distinction between 'clickable' links, to which the Court's case-law refers, and automatic links, which automatically display the resource to which the link leads on the webpage containing that link, without the need for the user to take any action."[1222] This perfectly illustrates that hyperlinks can interfere with the effectiveness of protection with varying degree of intensity.[1223]

It is evident that the links including the URL address should be excluded from the scope of protection having regard to their role in communication and distribution of information. However, the question arises whether hyperlinks containing the additional text, shorter or longer, or pictures should be treated alike. This text may inform the readers of the content of the publication enough to discourage them from reading it in its entirety while still being the hyperlink, subject to the exclusion from protection. At the same time, the value of links regardless of their form for the dissemination of information is significant.

- Act of hyperlinking and act of communication to the public

According to the early cases of the CJEU related to the act of hyperlinking within the right of communication to the public, the act of linking to the work which is freely accessible without any access restrictions on the linked website[1224] do not constitute a communication to the public. The criterion of new public was taken into account and the CJEU specified that all potential website's visitors being able to access the link published are the targeted public considered by rightholder while authorising the original

[1221] S. Dusollier, The 2019 Directive …, p.1007.
[1222] Opinion of Advocate General Szpunar delivered on 10 September 2020, Case VG Bild-Kunst v Stiftung Preußischer Kulturbesitz, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62019CC0392, accessed: 12.11.2022, para. 105.
[1223] See chapter 5 point 2.4.
[1224] CJEU, Svensson, paras. 29-30.

communication and therefore, the new communication to the public within the act of linking does not occur. Moreover, it encompasses different forms of linking such as embedding. [1225]

Since then, with the emergence of new cases on linking within the communication to the public right, this rather clear picture of linking coming from the presented CJEU's interpretation has become much more complex. It was due to the use of evolving new technologies what required new criteria to be referred to and be applied individually, case by case[1226].

The CJEU observed that linking within the technique of framing constitutes an act of communication to the public since the effect of that technique is to make the posted element available to all the potential users of that website.[1227] Nevertheless, it has been specified that it depends on many other criteria. According to the Court's case law, the act of linking should be done with the use of different technical means than these previously used to communicate the protected work to the public on the original website.[1228] As to the online news media services, normally they use the same technical means, namely Internet[1229], what would imply that the communication to public does not occur.

The access to the works concerned on the original website should be subject to the restrictive measures which circumvented by the person making the act of hyperlinking would lead to the act of communication from art.3 of the InfoSoc Directive. The CJEU explains that in the absence of such measures, by making his or her work freely accessible to the public or by authorising the provision of such access, the rightholder envisaged from the outset all Internet users as the public and accordingly, he consented to third parties themselves undertaking acts of communication of that work.[1230] From the analysis provided in first and second chapter of this dissertation, it results that press publishers are not keen on introducing the technological means to limit access of information society service provides to their press publication. They are afraid of being penalised by the latter and being placed in the worse displaying position.[1231] Mostly, press publishers prefer not

[1225]CJEU, BestWater.
See: P. Wasilewski, Dopuszczalność …, LEX.
[1226] CJEU, VG Bild-Kunst v Stiftung Preußischer Kulturbesitz, Case C-392/19, 9 March 2021, paras. 33-34, hereinafter: VG Bild- Kunst.
[1227] CJEU, VG Bild- Kunst, para. 35.
[1228] CJEU, VG Bild- Kunst, para. 36.
[1229] CJEU, Svensson, paras. 24-30.
[1230]CJEU, Soulier and Doke, case C-301/15, 16 November 2016, para. 36, hereinafter: Soulier and Doke.
[1231] T. Hoppner, EU Copyright …, pp.18-19.

to introduce the technological measures which according to the presented reasoning of the Court may mean that they consent to third parties themselves undertaking acts of communication of the work even if they do not actually do so. Economic interests prevail, implying that publishers implicitly consent the act of hyperlinking to their publications.

The entities making the act of hyperlinking should act in full knowledge of consequences of their action to give access to protected work.[1232] The profit - making nature of communication is not irrelevant.[1233] As to the activity of online media services it is clear, that they act with full knowledge by putting hyperlinks to press materials on their websites and with the objective to gain remuneration since in majority of the cases, it constitutes an important part of their business models. According to the CJEU, it is expected from the entity when the posting of hyperlinks is carried out for profit, to check and ensure amongst other that the work concerned is not illegally published on the website to which those hyperlinks lead.[1234] However, in case of press publishers, they have to acquire a legal title to the elements contained by the press publication, therefore, until proven otherwise, they would not be illegally published.

Generally, the act of linking to the work made available with the consent of the right holder and being freely accessible on a source page does not constitute the act of communication to the public within the meaning of the art. 3 of the InfoSoc Directive. According to the opinion of AG Wathelet, the act of posting of hyperlinks by users is both systematic and necessary for the current internet architecture. "(…) If users were at risk of proceedings for infringement of copyright under Article 3(1) of Directive 2001/29 whenever they post a hyperlink to works freely accessible on another website, they would be much more reticent to post them, which would be to the detriment of the proper functioning and the very architecture of the internet, and to the development of the information society."[1235]

The exclusion of the acts of hyperlinking from the scope of the press publishers' protection constitutes an attempt to tackle with the complex and varying interpretation of the legal status of linking provided by the CJEU and the factors that should be taken into account. It should be considered as an answer to public fears that the acts of linking made

[1232] CJEU, Filmspeler, para.31.
[1233] CJEU, GS Media para.38; CJEU, Filmspeler, para. 51.
[1234] CJEU, GS Media, para.51.
[1235] Opinion of Advocate General Wathelet delivered on 7 April 2016 Case C-160/15 GS Media, https://curia.europa.eu/juris/document/document.jsf?text=&docid=175626&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3064600, accessed 18.08.2022, paras. 78-79.

by individual users would become prohibited and to political critics of the initial proposal of the provision.[1236]

The act of hyperlinking excluded from the protection can be conducted by everyone, including ISSPs. The opposite understanding would be contrary to the wording of provision from art. 15 of the CDSM Directive and would be of detrimental effect on the flow of information. Considering how important the act of hyperlinking is from the perspective of disseminating and exchanging information, how many users consider online news media as an important and often only source of information, the limitation of this exclusion to everyone except ISSP would be disproportionate.

To conclude:

- The act of linking to the work or subject matter made available with the consent of the right holder and being freely accessible on a source page does not constitute the act of making available within the meaning of art. 3 of the InfoSoc Directive. Its explicit exclusion from the scope of the publishers' protection can be explained by the willingness of the EU legislator to answer the public fears that the acts of linking made by individual users would become prohibited and to highlight the role of linking from the perspective of free flow of information.

B. French and Polish law

Art. L211-3-1 of the French Intellectual Property Code[1237]	**art. 99^7 (3)(2) of the draft of the act amending the Polish Copyright Act[1238]**
The beneficiaries of the rights provided for in article L. 218-2 cannot prohibit : 1° Acts of hyperlinking ;	The provision of paragraph (2) shall not apply to acts of linking to a press publication made available on a website.

[1236]See: F. Reda, Last-minute attempt to sneak "snippet tax" into copyright report, 2015, https://felixreda.eu/2015/07/last-minute-snippet-tax/, accessed: 10.11.2022; EDRI2o,Join the coordinated calls against EU's Censorship Machine, 2018, https://edri.org/our-work/coordinated-action-censorship-machine-call/, accessed: 27.06.2023; J. Rankin, Battle over EU copyright law heads for showdown, 2018, https://www.theguardian.com/technology/2018/sep/09/battle-over-eu-copyright-law-heads-for-showdown, accessed: 27.06.2023.

[1237] English version by the author. French version of art. L211-3-1 of French Intellectual Property Code: Les bénéficiaires des droits ouverts à l'article L. 218-2 ne peuvent interdire : 1° Les actes d'hyperlien ; https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038826394, accessed : 12.07.2023.

[1238] English version by the author. Polish version of art. 99^7 (3)(2) of the draft of the act amending Polish Copyright Act: 3. Przepisu ust. 2 nie stosuje się do: 1)własnego użytku osobistego, niezwiązanego z prowadzeniem działalności gospodarczej; 2)czynności odsyłania za pomocą linku do publikacji prasowej udostępnionej na stronie internetowej, https://legislacja.rcl.gov.pl/docs//2/12360954/12887989/12887990/dokument561868.pdf, accessed: 10.07.2023.

According to art. L211-3-1 (1) of the French Intellectual Property Code the press publishers cannot prohibit the acts of hyperlinking. According to art. Art. 97 [7] (3)(2) of the Polish draft, the provision on the press publishers' reproduction and making available rights shall not apply to the acts of linking to a press publication made available on a website. Polish legislator uses the term linking and not hyperlinking and relates to the press publication made available on a website without any further specification to which website it refers.

In my opinion, since the press publishers' rights concerns the online uses of press publication, the term website should be understood as a website run by press publisher or/and as a website on which the press publisher's publications are published. It implies that the hyperlink to a press publication not published on the website will not be excluded from the scope of protection. However, the question arises where else could the publication be published than on the website? The justification could be that Polish legislator acknowledges that printed press publication could also be used and put online by ISSP. In this case however, the act of linking to this press publication will not occur since it does not exist in online version. Therefore, in any case, the acts of linking will concern a press publication published on a website.

To conclude:

- The Polish legislator added a specification that the scope of protection of press publishers does not extend to the acts of linking to the press publication published on the website. However, this specification is not necessary since hyperlink leads always to a website and if press publication would be published in print press the act of hyperlinking would not occur.

3. Information society service providers

A. The CDSM Directive

According to art. 15 (1) of the CDSM Directive Member States shall provide publishers of press publications established in a Member State with the rights provided for in art. 2 and art. 3 (2) of InfoSoc Directive for the online use of their press publications by **information society service providers (ISSPs).**

According to art. 2 (b) of the Directive 2000/31/EC on electronic commerce, service provider is any natural or legal person providing an information society service.[1239] Provision from art. 2 (5) of the CDSM Directive indicates that the information society service means a service within the meaning of point (b) of article 1(1) of the Directive 2015/1535, namely any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. For the purposes of this definition: 'at a distance' means that the service is provided without the parties being simultaneously present; 'by electronic means' means that the service is sent initially and received at its destination by means of electronic equipment for the processing (including digital compression) and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means; finally, 'at the individual request of a recipient of services' means that the service is provided through the transmission of data on an individual request.[1240] The examples of the information society service are sales of goods on the platform such as Allegro.pl, auction services such as eBay, booking services such as Booking.com, digital music streaming service such as Spotify or video on demand streaming service such as Netflix.

For many, Google has been the main target of the new rights and the principal actor.[1241] However, the term ISSP relates also to social media platforms like Facebook which are also conflicted with press publishers as regards the use of press publications.[1242] Interestingly, X (Twitter) claims that it is a platform of 'microblogging'[1243] and therefore, the rights of press publishers do not apply to it.[1244] However, the EU legislator has not limited the scope of the definition to some ISSPs carrying out specific activities. It is quite

[1239] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market hereinafter: Directive on electronic commerce, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031&from=EN, accessed:07.11.2022.

[1240] See: point (b) of article 1(1) of Directive 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (codification), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32015L1535&from=pl, accessed: 06.11.2022.

[1241] A. Lazarova, Re-use …, p.236.

[1242] See for example: S. Ray, Twitter Sued For Allegedly Ignoring French Law That Requires It To Pay News Publishers, Forbes, 2023, https://www.forbes.com/sites/siladityaray/2023/08/03/twitter-gets-sued-for-allegedly-not-complying-with-french-law-that-requires-it-to-pay-news-publishers/?sh=28dcfc8f320c, accessed: 15.08.2023.

[1243] Microblogging is the creation and distribution of short content, generally on social networks. See: Brevo ex sendinblue, Le Microblogging, qu'est-ce que c'est et comment en faire profiter votre entreprise, 2021, https://www.brevo.com/fr/blog/microblogging/, accessed : 31.08.2023.

[1244] M. Alcaraz, L'AFP assigne Twitter en justice en vertu du droit voisin de la presse, Les Echos, 2023, accessed via Europresse, 31.08.2023. See for English version of the article : News in France, Neighboring rights: AFP takes Twitter (now X) to court, https://newsinfrance.com/neighboring-rights-afp-takes-twitter-now-x-to-court/, accessed: 31.08.2023.

difficult to find a convincing justification for the reasoning provided by the platform. All actors meeting the criteria of ISSP, regardless the specific nature of their activities, are concerned.

The services of ISSPs should be provided for remuneration. However, the services of news aggregation normally are offered without any remuneration from users since their business model is based mostly on the advertising revenues.[1245] Therefore, it should be clarified whether this kind of services provided at a distance, by electronic means and at the individual request of a recipient of services could be considered as a service within the meaning of point (b) of article 1(1) of Directive 2015/1535.

According to recital 18 of the Directive 2000/31/EC on electronic commerce, economic activity conducted by ISSPs "extends to services which are not remunerated by those who receive them, such as those offering on-line information or commercial communications, or those providing tools allowing for search, access and retrieval of data". The CJEU in Papasavvas case which concerned an action for damages brought against a newspaper from Cyprus for harm caused by articles of an allegedly defamatory nature confirmed that information society services cover the provision of online information services for which the service provider is remunerated, not by the recipient, but by the income generated by advertisements posted on the website.[1246] Therefore, the remuneration has not to be paid by the end-user.[1247]

In the context of news media business models and in particular, in case of news aggregators two main sources of remuneration should be identified.[1248] One is the already mentioned advertisements. Especially for large companies like Facebook or Google, it is an important source of revenue due to the high number of users and the possibility of providing more targeted advertising reaching a large audience.[1249] The second one is the provision of personal data or other data which can be monetised. Information about users

[1245] See chapter 1 point 5.2.
[1246] CJEU, Sotiris Papasavvas v O Fileleftheros Dimosia Etairia Ltd, Takis Kounnafi, Giorgos Sertis, 11 September 2014, case C-291/13, para.30.
[1247] See also the opinion of Advocate General Saugmandsgaard Øe in YouTube/Cyando case. The Advocate General puts the revenues from advertising gained by operators like YouTube, 'YouTube model' in the same range with remuneration from subscriptions 'the Cyando model' when subscriptions constitute also the main source of remuneration for commercial journalism, https://curia.europa.eu/juris/document/document.jsf?text=&docid=228712&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=222587, accessed: 07.11.2022, para.47.
[1248] See chapter 1.
[1249] A. Cornia, A. Sehl, R.K. Nielsen, Digital News …, https://reutersinstitute.politics.ox.ac.uk/sites/default/files/research/files/Cornia%2520-%2520Private%2520Sector%2520Media%2520and%2520Digital%2520News%2520FINAL.pdf, accessed: 06.11.2022, p.17.

can have a monetary value and can be used to provide personalised news, local news but also other personalised services or advertisements. It has been noted in recital 16 of the Directive 2018/1972 establishing the European Electronic Communications Code that remuneration within the understanding discussed of services "should also encompass situations where the end-user allows access to information without actively supplying it, such as personal data, including the IP address, or other automatically generated information, such as information collected and transmitted by a cookie. (…) The concept of remuneration should therefore also encompass situations in which the end-user is exposed to advertisements as a condition for gaining access to the service, or situations in which the service provider monetises personal data it has collected in accordance with Regulation (EU) 2016/679."[1250]

The services, following the understanding discussed, are provided in the course of business activities. Therefore, interesting question is whether Open AI which developed ChatGPT could be considered as an ISSP. The classification of its activities can be problematic since Open AI declares that it is "an AI research and deployment company"[1251] so conducting the activities outside of business activity framework. Open AI consists however also of for-profit subsidiary OpenAI Global, LLC which is, according to the information provided by Open AI fully controlled by the OpenAI Nonprofit[1252]. It would therefore be relevant in this context to ask whether the use of ChatGPT is possible in the framework of profit or non - profit acitivity of Open AI and how this determination might be affected by the fact that the for-profit subsidiary is controlled by OpenAI Nonprofit. The complexity of the situation makes it difficult to assess, but if one were to consider that ChatGPT is provided in the framework of business activity and that the remuneration received is in the form of users' data, OpenAI could be considered as an ISSP and this finding is important in the context of the rights of press publishers and the extent to which their press publications can be used by ChatGPT.

There is no requirement for establishment of ISSPs in a Member State. However, the protection applies in case of the use of press publication of press publishers established in Member States. Therefore, there is a connection with the EU Member States.

[1250] Directive 2018/1972 of the European Parliament and of the Council of 11 December 2018 establishing the European Electronic Communications Code, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32018L1972&from=pl, accessed: 06.11.2022.
[1251] OpenAI, https://openai.com/about, accessed: 06.02.2024.
[1252] OpenAI, https://openai.com/our-structure, accessed: 06.02.2024.

The use of press publication by ISSPs has not been restricted by the legislator to only one service run by a provider[1253]. Nor were there any restrictions made by the legislator between ISSPs in terms of their market relevance, the degree to which press publishers depend on them or their influence when it comes to the dissemination of information. The scope of the publishers' rights was not limited for example to the information society service providers with the greatest market dominance, as it was done in the common law system.[1254]

To conclude:

- Service provider is any natural or legal person providing an information society service being any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. The service should be provided for remuneration understood broadly also as the incomes generated by advertisements or personal data. Publishers' rights apply to all ISSPs regardless of the specific nature of their activities.

B. French and Polish law

Neither the French implementation of the CDSM Directive nor the Polish draft include the definition of the information society service providers. To define this term the reference to the provisions implementing the Directive 2000/31/EC on electronic commerce into national laws[1255] is necessary.

According to art. 2 (6) of the Polish Act of 18 July 2002 on the provision of services by electronic means a service provider is a natural person, a legal person or an organisational unit without legal personality, which provides services electronically, even if only incidentally, in the course of its commercial or professional activity.

According to art. 14 of the French law no. 2004-575 of 21 June 2004 on confidence in the digital economy,[1256] electronic commerce is the economic activity

[1253] For example, Google provides many services such as Google Search, Google News etc.
[1254] See chapter IV, section 9.
[1255] English version by the author, Polish version of art. 2 (6) of ACT of 18 July 2002 on the provision of services by electronic means (Ustawa z dnia 18 lipca 2002 r. o świadczeniu usług drogą elektroniczną, Dz. U. z 2020 r. poz. 344.): usługodawca – osobę fizyczną, osobę prawną albo jednostkę organizacyjną nieposiadającą osobowości prawnej, która prowadząc, chociażby ubocznie, działalność zarobkową lub zawodową świadczy usługi drogą elektroniczną, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20021441204/U/D20021204Lj.pdf, accessed: 11.07.2023.
[1256] English version by the author, French version of art. 14 of law no. 2004-575 of 21 June 2004 on confidence in the digital economy (LOI n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique) : Le commerce électronique est l'activité économique par laquelle une personne propose ou

whereby a person offers or provides goods or services remotely and by electronic means. Electronic commerce also includes services such as the provision of online information, commercial communications and tools for searching, accessing and retrieving data, accessing a communications network or hosting information, including when they are not remunerated by those who receive them. A person is deemed to be established in France within the meaning of this chapter when it has set up there in a stable and lasting manner in order to effectively carry out its activity, regardless of the location of its registered office in the case of a legal person. French implementation includes the enumeration of examples of services, including the provision of information, tools for searching, and hosting information important especially from the perspective of the services provided by ISSP in the context of the related right. Interestingly, French law contains an express indication that the remuneration can be provided also by these entities who do not receive the service.

To conclude:

- The definitions provided in national laws allow the definition of ISSP from the Directive on electronic commerce to be reconstructed. The definition provided in the French law is more exhaustive since it contains the example of the services and the explicit indication that remuneration has not to be paid directly by the receiver of the services provided.

3.1.Private or non-commercial uses of press publications by individual users

A. The CDSM Directive

It is specified in art. 15 of the CDSM Directive that the protection of press publishers as regards the online uses of their press publication by ISSPs shall not apply to private or non-commercial uses of press publications by individual users.

Individual users are those who use press publications for their own, non-commercial needs, without carrying out the activities that could be classified as the ISSPs'

assure à distance et par voie électronique la fourniture de biens ou de services. Entrent également dans le champ du commerce électronique les services tels que ceux consistant à fournir des informations en ligne, des communications commerciales et des outils de recherche, d'accès et de récupération de données, d'accès à un réseau de communication ou d'hébergement d'informations, y compris lorsqu'ils ne sont pas rémunérés par ceux qui les reçoivent. Une personne est regardée comme étant établie en France au sens du présent chapitre lorsqu'elle s'y est installée d'une manière stable et durable pour exercer effectivement son activité, quel que soit, s'agissant d'une personne morale, le lieu d'implantation de son siège social, https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000000801164, accessed: 12.07.2023.

activity. The question arises how should be qualified the activity carried out by non-for profit organisations such as Wikipedia or NGOs such as Panoptykon.[1257] It should be specified that the use of press publications by the said organisations would infringe the new rights only in case when the non-for profit associations or other non-individual actors would conduct an activity allowing them to be qualified as ISSPs using the press publication online, since they are the only entities that may interfere with the press publishers' rights from art. 15 of the CDSM Directive. Interestingly, in the German publishers' right adopted before the CDSM Directive, the exclusion concerned everyone except commercial operators of search engines or commercial operators of services which edit the content[1258], therefore, there were no doubts as regards the legitimacy of use of press publications for example by non - profit organisations.

Having carried out the purposive and systemic interpretation of the provision especially from the perspective of the role of non-for profit organisations and their contribution to the free flow of information, I propose to understand individual users **broadly**, as including also the said organisations. It should be acknowledged that the main threat to the publishers' interests which led to the adoption of their protection was unrestricted use of press publications by online platforms such as Google. Therefore, in my opinion, the inclusion of the category of non-profit organisations in the category of individual users when they use press publications for non-commercial purposes should not be a significant burden for press publishers.

It could be said that since the provision addresses the uses of press publication only by ISSPs, the clarification that it does not extend to private or non-commercial uses of press publications by individual users is not necessary. On the other hand, it could be seen as a confirmation that only uses of press publications by ISSPs will trigger the protection from art. 15 of the CDSM Directive and individual users can use press publications freely.

It should be also assessed whether the conditions of private and non-commercial uses of press publications have to be understood cumulatively or alternatively.[1259] In

[1257] Fundacja Panoptykon, https://panoptykon.org/organizacja, accessed: 22.06.2023.
[1258] See chapter III, point 3.3. (Sections 87g of Urheberrechtsgesetz, as amended by Law of 1 October 2013,
Bundesgesetzblatt (Federal Official Journal) Vol. I, 3728. German version: https://www.bgbl.de/xaver/bgbl/start.xav?startbk=Bundesanzeiger_BGBl&start=//*%5B@attr_id=%27bgbl113s1161.pdf%27%5D#_bgbl_%2F%2F*%5B%40attr_id%3D%27bgbl113s1161.pdf%27%5D_1667226734379, accessed: 31.10.2022, English version from: Strengthening …, p.14.
[1259] See: E. Rosati, Copyright …, p.272.

English version of the CDSM Directive, the private **or** non-commercial use of press publication is excluded from protection. "Or" is also used in French version.[1260] Interestingly, in Polish version of the Directive instead of "or", "**and**"[1261] appears what would suggest that these two conditions should be understood cumulatively. This is also the opinion shared by E. Rosati who suggests that it is preferable to consider that "the exclusion shall apply to uses that are both private and non-commercial since the concept of private serves to elucidate that of commercial: a use shall be regarded as being commercial when it is undertaken with a view to gain and not as private matter."[1262] This is an important point but it should be noted that there are also the activities which are conducted publicly but not with the commercial purpose. Therefore, and taking into consideration the wording of the provision which in principle treats the exclusion of private and commercial uses alternatively, I would suggest to stick to such an understanding in view of preserving the interests of users, their fundamental right to receive information and to contribute to enhancing the flow of information.

It is interesting to examine the relationship between the exclusion discussed and the exception of private use from the InfoSoc Directive. According to art. 5 (2) (b) of the InfoSoc Directive which applies also to the related rights of press publishers,[1263] Member States may provide for exceptions or limitations to the reproduction right in respect of reproductions on any medium made by a natural person **for private use and for ends that are neither directly nor indirectly commercial**, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject- matter concerned.

According to art. 5 (2) of the InfoSoc Directive the private use has to be made by a natural person. There is therefore an explicit exclusion of legal persons making the private use contrary to quite enigmatic wording of art. 15 of the CDSM Directive which excludes publishers' protection to apply in case of use by individual users.

[1260] According to the French version of art. 15 (1) second subparagraph: "Les droits prévus au premier alinéa ne s'appliquent pas aux utilisations, à titre privé **ou** non commercial, de publications de presse faites par des utilisateurs individuels." https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:32019L0790&from=EN, accessed: 09.11.2022.

[1261] According to the Polish version of art. 15 (1) second subparagraph: „Prawa określone w akapicie pierwszym nie mają zastosowania do prywatnych **i** niekomercyjnych sposobów korzystania z publikacji prasowych przez użytkowników indywidualnych." https://eur-lex.europa.eu/legal-content/PL/TXT/PDF/?uri=CELEX:32019L0790&from=EN, accessed:09.11.2022.

[1262] E. Rosati, Copyright …, p.273.

[1263] See chapter IV, point 2.6.

Moreover, according to art. 5 (2) of the InfoSoc Directive, the private use has to be neither directly nor indirectly commercial. As regards the publishers' rights, it does not apply to non-commercial uses, so the provision mirrors to some extent the specification provided in art. 5(2) of the Infosoc Direcitve, except that it is not specified to what extent these activities should not be commercial (e.g. directly or indirectly). Private and non-commercial use in case of the exception should be understood cumulatively. On the basis of art. 15 of the CDSM Direcitve the application of the art. 5(2) of the InfoSoc Directive is possible. The exclusion from art. 15 should not be considered as an exception or limitation to the press publishers' rights but as a specification of the conditions when the protection arises, delineation of the scope of protection.

The protection of press publishers does not arise in case when the press publication is used by individual users for non - commercial or private purposes. In case of the exception from art. 5 (2) (b) of the InfoSoc Directive, press publishers (in this case) are entitled to the protection resulting from art. 2 and 3 of the InfoSoc Directive, it arises, but they do not make use of it.

To conclude:

- Individual user should be understood broadly as also including legal persons, for example non- profit organisations. In such a case the alternative nature of exclusion should be privileged since the use of press publication would not be private but would be for non-commercial purposes.

- The protection of press publishers does not arise in case when the press publication is used by individual users for non - commercial or private purposes. The situation is different is case of the application of the exceptions and limitation, whereas the protection arises but the entities entitled to it do not make use of it.

- The freedom to use a press publication is enjoyed by those who are individual users, who use the publication for their private or non-commercial needs and are not information society service providers.

B. French and Polish law

The French Intellectual Property Code	**art. 99[7] of the draft of the act amending Polish Copyright Act[1264]**
-	3. The provision of paragraph (2) shall not apply to: 1) to the personal use, not related to the conducted business activity

The private or non - commercial uses of press publication by individual users are not expressly excluded from the scope of protection resulting from the related rights in the French implementation. The question asked in the previous point as to the necessity of such exclusion when considering the scope of protection granted to press publishers which applies only in case of the use of press publication by ISSPs remains relevant. The rationale of the French legislator when deciding not to transpose this exclusion was that it could be reconstructed from the very scope of the protection granted to press publishers and this is a legitimate approach.

According to art. 99[7] (3) of the Polish draft, the publishers' rights should not apply to the personal use, not related to the conducted business activity. The term 'personal use' implies the use of press publication by natural person and precludes a broad understanding of the concept of individual users proposed in previous point on the basis of the purposive and systemic interpretation of the provision.

It is difficult to attribute a personal activity to an NGO for example. In consequence, the Polish legislator by referring to 'personal use' mixed 'private uses' with 'individual users' from the CDSM Directive. This combination constitutes a simplification which is not in line with the purpose of the regulation. It limits the scope of the exclusion and has a potentially negative impact on the flow of information online. In this case, the activity of non - profit organisations are explicitly excluded from the exclusion. Although the argument in favor of such an approach could be that in any case the infringement of the rights occurs in a situation when the press publication is used by ISSPs without the authorisation of the rightholder, the question of the legal qualification of the uses of press publication by the non-profit organisations contributing in many cases through their activity to the free flow of information remains unanswered[1265].

[1264] English version by the author. Polish version of art. 99[7] (3) of the draft of the act amending Polish Copyright Act: 3. Przepisu ust. 2 nie stosuje się do: własnego użytku osobistego, niezwiązanego z prowadzeniem działalności gospodarczej; https://legislacja.rcl.gov.pl/docs//2/12360954/12887989/12887990/dokument561868.pdf, accessed: 10.07.2023.

[1265] See chapter V, points: 4.1., 6.5.2.

To conclude:

- The wording of the Polish exclusion precludes a broad understanding of the concept of individual users. This is contrary to the purposive and systemic interpretation of the individual users provided on the basis of art. 15 (1) of the CDSM Directive.

- The legal qualification of the uses of press publications by legal persons which do not conduct a business activity within the draft of the Polish implementation of art. 15 of the CDSM Directive remains problematic.

4. Exceptions and limitations

A. The CDSM Directive

According to art.15 (3) of the CDSM Directive, articles 5 to 8 of the InfoSoc Directive, Directive 2012/28/EU on certain permitted uses of orphan works and Directive (EU) 2017/1564 on certain permitted uses of certain works and other subject matters protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled, shall apply ***mutatis mutandis*** in respect of the rights provided for in paragraph 1 of this article. According to recital 57 of the CDSM Directive, "the rights granted to publishers of press publications under the CDSM Directive should also be subject to the same provisions on exceptions and limitations as those applicable to the rights provided for in the Infosoc Directive, including the exception in the case of quotations for purposes such as criticism or review provided for in Article 5(3)(d) of that Directive". The CDSM Directive introduces in art. 4 to 6 exceptions relating to TDM, digital and cross-border teaching activities and preservation of cultural heritage which should also be applied.

The application of the exceptions and limitations already introduced in three mentioned directives *mutatis mutandis* in respect of the publishers' rights means that Member States, in respect of the rights provided for press publishers, firstly, should adopt the exceptions and limitations that are mandatory, namely, the exception permitting the temporary acts of reproduction from art. 5 (1) of the InfoSoc Directive and the exceptions from art. 4 to 6 of the CDSM Directive. Secondly, they can adopt selected exceptions and limitations amongst those which are optional. It should be noted that they do not have to

be the same optional exceptions that apply in case of works or other subject matters. Thirdly, as in other cases of application of exceptions and limitations, these applied in respect of press publishers' rights will also have to be subject to a three-step test. Member States should not adopt a broader catalogue of exceptions and limitations than the one which results from the mentioned Directives.

Despite the fact that Member States are not free to determine in unharmonised manner the parameters governing the exceptions and limitations, several differences in their understanding emerge. The landscape becomes even more complex taking into account the interpretation of the application of the three-step test varying from Member State to Member State what has been discussed in chapter II. Therefore, the final package of exceptions and limitations that will apply in respect of the press publishers' rights will take shape at the level of implementation in each Member State and will certainly as to the choice of optional exceptions differ one from another.

To conclude:

- The exceptions and limitations already adopted in the EU law should be applied *mutatis mutandis* in respect of rights provided for press publishers. It means that Member States, in respect of rights provided for press publishers, firstly, should adopt the exceptions and limitations which are mandatory, secondly, they can adopt selected exceptions and limitations amongst those which are optional, and thirdly, as in other cases of application of exceptions and limitations, these applied in respect of press publishers' rights will also have to be subject to a three-step test.

B. French and Polish law

Art. L. 211-3 of the French Intellectual Property Code[1266]	**art. 100 of the draft of the**

[1266] English version by the author. French version of Article L211-3 of French Intellectual Property Code: Les bénéficiaires des droits ouverts au présent titre ne peuvent interdire :
1° Les représentations privées et gratuites effectuées exclusivement dans un cercle de famille ;
2° Les reproductions réalisées à partir d'une source licite, strictement réservées à l'usage privé de la personne qui les réalise et non destinées à une utilisation collective ;
3° Sous réserve d'éléments suffisants d'identification de la source :
a) Les analyses et courtes citations justifiées par le caractère critique, polémique, pédagogique, scientifique ou d'information de l'oeuvre à laquelle elles sont incorporées ;
b) Les revues de presse ;
c) La diffusion, même intégrale, à titre d'information d'actualité, des discours destinés au public dans les assemblées politiques, administratives, judiciaires ou académiques, ainsi que dans les réunions publiques d'ordre politique et les cérémonies officielles

	act amending the Polish Copyright Act[1267]
Beneficiaries of the rights granted under this title may not prohibit: 1° Private and free performances made exclusively within the family circle; 2° Reproductions made from a lawful source, strictly reserved for the private use of the person who makes them and not intended for collective use; 3° Subject to sufficient elements of identification of the source: a) Analyses and short quotations justified by the critical, polemical, educational, scientific or informative nature of the work in which they are incorporated; b) Press reviews; c) The broadcasting, even in full, as news, of speeches intended for the public in political, administrative, judicial or academic assemblies, as well as in public meetings of a political nature and official ceremonies;	The exercise of related rights shall be subject respectively to the limitations resulting from the provisions of Articles 23-35.

d) La communication au public ou la reproduction d'extraits d'objets protégés par un droit voisin, sous réserve des objets conçus à des fins pédagogiques, à des fins exclusives d'illustration dans le cadre de la recherche, à l'exclusion de toute activité ludique ou récréative, dès lors que le public auquel cette communication ou cette reproduction est destinée est composé majoritairement de chercheurs directement concernés, que l'utilisation de cette communication ou cette reproduction ne donne lieu à aucune exploitation commerciale et qu'elle est compensée par une rémunération négociée sur une base forfaitaire ;
e) La communication au public ou la reproduction d'extraits d'objets protégés par un droit voisin, à des fins exclusives d'illustration dans le cadre de l'enseignement et de la formation professionnelle dans les conditions prévues à l'article L. 122-5-4. Pour l'application de cet article, l'auteur s'entend du bénéficiaire des droits voisins, les œuvres s'entendent des objets protégés par un droit voisin et la représentation s'entend de la communication au public ;
4° La parodie, le pastiche et la caricature, compte tenu des lois du genre ;
5° La reproduction provisoire présentant un caractère transitoire ou accessoire, lorsqu'elle est une partie intégrante et essentielle d'un procédé technique et qu'elle a pour unique objet de permettre l'utilisation licite de l'objet protégé par un droit voisin ou sa transmission entre tiers par la voie d'un réseau faisant appel à un intermédiaire ; toutefois, cette reproduction provisoire ne doit pas avoir de valeur économique propre ;
6° La reproduction et la communication au public d'une interprétation, d'un phonogramme, d'un vidéogramme, d'un programme ou d'une publication de presse dans les conditions définies au 7° de l'article L. 122-5, au 1° de l'article L. 122-5-1 et à l'article L. 122-5-2 ;
7° Les actes de reproduction et de représentation d'une interprétation, d'un phonogramme, d'un vidéogramme, d'un programme ou d'une publication de presse réalisés à des fins de conservation ou destinés à préserver les conditions de sa consultation à des fins de recherche ou d'études privées par des particuliers, dans les locaux de l'établissement et sur des terminaux dédiés, effectués par des bibliothèques accessibles au public, par des musées ou par des services d'archives, sous réserve que ceux-ci ne recherchent aucun avantage économique ou commercial ;
8° Les copies ou reproductions numériques d'une interprétation, d'un phonogramme, d'un vidéogramme, d'un programme ou d'une publication de presse en vue de la fouille de textes et de données réalisée dans les conditions prévues à l'article L. 122-5-3. Pour l'application de cet article, l'auteur s'entend de l'artiste-interprète, du producteur, de l'entreprise de communication audiovisuelle, de l'éditeur de presse ou de l'agence de presse bénéficiaire d'un droit voisin, les œuvres s'entendent des interprétations, phonogrammes, vidéogrammes, programmes ou publications de presse et les droits d'auteur s'entendent des droits voisins ;
9° La reproduction et la communication au public d'une interprétation, d'un phonogramme, d'un vidéogramme ou d'un programme ou d'une publication de presse dans les conditions définies au 13° de l'article L. 122-5.
Les exceptions énumérées par le présent article ne peuvent porter atteinte à l'exploitation normale de l'interprétation, du phonogramme, du vidéogramme, du programme ou de la publication de presse ni causer un préjudice injustifié aux intérêts légitimes de l'artiste-interprète, du producteur, de l'entreprise de communication audiovisuelle, de l'éditeur de presse ou de l'agence de presse.
Les modalités d'application du présent article sont précisées par décret en Conseil d'Etat, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000044365633/2021-11-26/, accessed : 12.07.2023.

[1267] English version by the author. Polish version of art. 100 of the draft of the act amending Polish Copyright Act: Wykonywanie praw pokrewnych podlega odpowiednio ograniczeniom wynikającym z przepisów art. 23–35.

https://legislacja.rcl.gov.pl/docs//2/12360954/12887989/12887990/dokument561868.pdf, accessed: 10.07.2023.

d) Communication to the public or reproduction of extracts of objects protected by a related right, with the exception of objects designed for educational purposes, for the exclusive purpose of illustration in the context of research, to the exclusion of any entertainment or recreational activity, provided that the audience for which such communication or reproduction is intended is composed mainly of researchers directly concerned, that the use of such communication or reproduction does not give rise to any commercial exploitation and that it is compensated by remuneration negotiated on a flat-rate basis ; e) Communication to the public or reproduction of extracts of objects protected by a related right, for the exclusive purpose of illustration in the context of teaching and vocational training under the conditions set out in Article L. 122-5-4. For the application of this article, the author means the beneficiary of the related rights, the works mean objects protected by a related right and the representation means communication to the public; 4° Parody, pastiche and caricature, taking into account the laws of the genre; 5° Temporary reproduction of a transitory or accessory nature, when it is an integral and essential part of a technical process and its sole purpose is to permit the lawful use of the object protected by a neighbouring right or its transmission between third parties by means of a network using an intermediary; however, this temporary reproduction must not have any economic value of its own; 6° The reproduction and communication to the public of a performance, a phonogram, a videogram, a programme or a press publication under the conditions defined in 7° of Article L. 122-5, in 1° of Article L. 122-5-1 and in Article L. 122-5-2 ; 7° Acts of reproduction and representation of a performance, a phonogram, a videogram, a programme or a press publication carried out for conservation purposes or intended to preserve the conditions of its consultation for research or private study by private individuals, on the premises of the establishment and on dedicated terminals, carried out by libraries accessible to the public, by museums or by archive services, provided that they are not seeking any economic or commercial advantage; 8° Digital copies or reproductions of a performance, a phonogram, a videogram, a programme or a press publication with a view to searching texts and data under the conditions set out in Article L. 122-5-3. For the application of this article, the author means the performer, the producer, the audiovisual communication company, the press publisher or the press agency benefiting from a related right, the works mean performances, phonograms, videograms, programmes or press publications and the copyright means related rights; 9° Reproduction and communication to the public of a performance, a phonogram, a videogram or a programme or a press publication under the conditions defined in 13° of Article L. 122-5.	

In the French implementation, as to the exceptions and limitation applicable to the right of press publishers, there is no provision referring to another provision of the French Intellectual Property Code. Instead, the press publishers' rights have been directly included in the scope of provision from art. L.211-3 of French Intellectual Property Code and are treated in the same way as rights of authors and other related rights holders in relation to exceptions and limitations provided therein. The same applies in relation to the Polish draft of the implementation. According to art. 100 of the draft of the act

amending the Polish Copyright Act, the exercise of related rights, including the press publishers' related rights shall be subject to the provisions on exceptions and limitations.[1268] Therefore, both legislators apply to the related rights of press publishers the adopted already in the Copyright Codes system of exceptions and limitations without making any adaptation or changes in relation to the exceptions and limitations related to the right discussed.

The analysis conducted in chapter II showed that news aggregators cannot refer to press review or quotation exceptions to justify their activity due to the features of this activity which do not comply with the criteria of these exceptions. However, this does not mean that other ISSPs conducting the activities which meet the criteria of the quotation or news reporting exceptions will not be able to justify their activities on this basis[1269] or on basis of other exceptions and limitations provided also that the criteria of the three-step test are met.

5. Exercise of the publishers' rights

Art. L218-3, Article L218-4 of the French Intellectual Property Code[1270]	**Art. 99 [7] of the Draft of the act amending the Polish Copyright Act**
Article L218-3	(2) Publishers shall, without prejudice to the rights of authors

[1268] Articles 23-35 from Ustawa o prawie autorskim i prawach pokrewnych, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19940240083/U/D19940083Lj.pdf, accessed: 23.11.2022.

[1269] See: chapter II, point 6.2.

[1270] English version by the author. French version of art. L218-3 and L218-4 of French Intellectual Property Code:

L218-3: Les droits des éditeurs de presse et des agences de presse résultant de l'article L. 218-2 peuvent être cédés ou faire l'objet d'une licence. Ces titulaires de droits peuvent confier la gestion de leurs droits à un ou plusieurs organismes de gestion collective régis par le titre II du livre III de la présente partie.

L218-4 : La rémunération due au titre des droits voisins pour la reproduction et la communication au public des publications de presse sous une forme numérique est assise sur les recettes de l'exploitation de toute nature, directes ou indirectes ou, à défaut, évaluée forfaitairement, notamment dans les cas prévus à l'article L. 131-4. La fixation du montant de cette rémunération prend en compte des éléments tels que les investissements humains, matériels et financiers réalisés par les éditeurs et les agences de presse, la contribution des publications de presse à l'information politique et générale et l'importance de l'utilisation des publications de presse par les services de communication au public en ligne.

Les services de communication au public en ligne sont tenus de fournir aux éditeurs de presse et aux agences de presse tous les éléments d'information relatifs aux utilisations des publications de presse par leurs usagers ainsi que tous les autres éléments d'information nécessaires à une évaluation transparente de la rémunération mentionnée au premier alinéa du présent article et de sa répartition, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038826732, accessed : 18.07.2023.

The rights of press publishers and press agencies resulting from Article L. 218-2 can be assigned or licensed. Such right holders can entrust the management of their rights to one or more collective management bodies governed by Title II of Book III of this Part. **Article L218-4** The remuneration due in respect of related rights for the reproduction and communication to the public of press publications in digital form is based on the revenue from exploitation of any kind, whether direct or indirect or, failing that, assessed on a flat-rate basis, particularly in the cases provided for in Article L. 131-4 The fixing of the amount of this remuneration shall take into account elements such as the human, material and financial investments made by publishers and press agencies, the contribution of press publications to political and general information and the extent to which press publications are used by online public communication services. The online public communication services shall be required to provide press publishers and press agencies with all the information relating to the use of press publications by their users as well as all the other information necessary for a transparent evaluation of the remuneration mentioned in the first paragraph of this article and its distribution.	and other right holders, have the exclusive right to use and dispose of their press publications to the extent of enabling information society service providers to: 1) reproducing press publications digitally; 2) make press publications available to the public in such a way that anyone can access them at a time and place individually chosen.

According to art. L.218-3 of the French Intellectual Property Code, the rights of press publishers and press agencies resulting from art. L. 218-2 can be assigned or licensed. In case of the assignment of the rights, the exclusive rights pass from the press publishers to the acquirer, meaning that press publishers lose their claims on the rights assigned. The assignment can be limited to certain rights.[1271] Press publishers can also license their rights which means that the exclusive rights remain with them but another party or numerous parties are granted a license to exercise all or part of their rights.[1272]

[1271] See: M.van Eechoud, Choice of law in copyright and related rights. Alternatives to the Lex Protectionis, Kluwer Law International, Information Law Series, 2003, p.193.

[1272] This way of application of press publishers' right has been privileged in France. Many press publishers and agencies such as Alliance of general-interest information press (Alliance de la presse d'information generale) or group le Monde negotiated the application of the right without intermediation of collective bodies. « Apig » : l'Alliance de la presse française contre les GAFA, https://www.mediaspecs.fr/apig-lalliance-de-la-presse-francaise-contre-les-gafa/, accessed: 18.07.2023. See: V. Duby – Muller, L. Garcia, Assemblée Nationale, Rapport d'information …, p.50, https://www.assemblee-nationale.fr/dyn/15/rapports/dv/l15b4902_rapport-information.pdf, accessed : 18.07.2023 ; J.M.de Marchi, Droits voisins : l'OGC des éditeurs médias et des agences de presse lancé avec de grandes ambitions, MindMedia, 2021, https://www.mind.eu.com/media/medias-audiovisuel/droits-voisins-logc-a-designe-son-conseil-dadministration-et-son-conseil-de-surveillance/, accessed : 18.07.2023.

In Poland, the possibility of assignment or license of the rights can be interpreted from art. 99^7 of the draft, according to which publisher have the exclusive right to **manage the use** of their press publications. Economic rights are transferable. It should be noted, that for example, in case of the rights of producers of phonograms there is also no direct provision that these rights may be licensed or transferred, therefore Polish legislator maintains the legislative consistency in this regard. Moreover, explicitly indicated in the Polish Copyright Act are the situations when the right cannot be transferred as it is in the case of the right to additional remuneration of performer granted in art. 95^3 of the Polish Copyright Law. It is not the case of press publishers.

Neither Polish nor French legislator excludes the possibility of waiving of the publishers' rights. Press publisher can transfer by contract all or part of his rights in the form of assignments, licensing or waiving of rights. As results from the analysis conducted in chapter II point 5.5., according to the French and Polish Copyright Law, in the copyright contracts, the type of the rights to be transferred as well as each field of exploitation has to be expressly specified. The contract should also determine the modalities and conditions of the transfer of rights such as the geographical scope and the duration of the transfer. The contract[1273], in case of the discussed relationship between press publishers and ISSPs can set a framework for a use of numerous and not only one press publication from a particular press publisher, which, given the specific nature of this subject of protection, will most often be the case[1274].

The transfer of the rights reasonably entails the payment of a remuneration[1275]. In the literature, the latter is seen as "one of the most important features of a contract"[1276] since the subject matter to which the rights are transferred will bring some profit to the entitites exploiting it, and the investements and risks taken to create such a subject matter should be rewarded. Nevertheless, the authorisation can also be granted either without remuneration or in exchange for another benefit, which may be, for example, a better display position of press publication in search service or on the news aggregator.

[1273] In the analysis conducted the issue of non-performance or improper performance of the contract was left aside.

[1274] A. Franque, Droits voisins : Google signe un accord-cadre avec les éditeurs de presse, Libération, https://www.liberation.fr/france/2021/01/21/droits-voisins-google-signe-un-accord-cadre-avec-les-editeurs-de-presse_1818139/, accessed : 24.01.2024.

[1275] See: P. Ślęzak, Umowy w zakresie współczesnych sztuk wizualnych, Wolters Kluwer Polska, 2012, pp.242-260.

[1276] S. Dussolier et *al.*, Contractual Arrangements Applicable to Creators : Law and Practice of Selected Memebr States, European Parliament, 2014, p.36, https://www.europarl.europa.eu/meetdocs/2009_2014/documents/juri/dv/contractualarangements_/contractualarangements_en.pdf, accessed: 24.101.2024.

5.1.Remuneration for the exploitation of press publication

The EU legislator did not provide any details regarding the conditions of the determination of the remuneration for the use of press publications by ISSPs. Nor is there an obligation for Member States to do so if they do not consider it necessary to ensure the effectiveness of the protection afforded to press publishers. A Member State's decision to regulate the way in which remuneration is calculated that should be taken into account while deciding on the contractual remuneration for the use of press publications, may be motivated by the willingness to protect press publishers having the weaker negotiating position compared to the ISSPs, from agreeing to unbalanced conditions of the use of press publications.

In the Polish proposal, the specific criteria relating to the calculation of the remuneration due to press publishers for the use of press publications have not been specified[1277]. If the remuneration will be negotiated by the collective management organisation[1278], according to art. 40 of the Act of collective management, the collective management organisation shall apply the objective and non-discriminatory criteria when determining the remuneration and other terms and conditions of a contract on the use of works or subject matters of related rights or collection of remuneration for such use concluded with a user. The remuneration claimed by the collective management organisation shall take into account the amount of revenue generated from the use of works or subject matters protected by related rights and the nature and extent of such use.[1279] In Polish legislation there is therefore a general clause as regards the conditions of determination of the remuneration for the use of works and subject matters which will apply also to the negotiations conducted by collective management organisation on behalf of press publishers. If the latter decide to negotiate without intermediation, no criteria for

[1277] The same has been maintained in the assumptions of the new draft of the implementation of the CDSM Directive published at the beginning of 2024.
[1278] See section 7 of this chapter.
[1279] English version by the Author. See Polish version of art. 40 of Act of collective management: Organizacja zbiorowego zarządzania przy ustalaniu wynagrodzenia i pozostałych warunków umowy o korzystanie z utworów lub przedmiotów praw pokrewnych lub pobór wynagrodzenia za takie korzystanie zawieranej z użytkownikiem stosuje obiektywne i niedyskryminujące kryteria.
2. Wynagrodzenie dochodzone przez organizację zbiorowego zarządzania uwzględnia wysokość wpływów osiąganych z korzystania z utworów lub przedmiotów praw pokrewnych oraz charakter i zakres tego korzystania, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20180001293/T/D20181293L.pdf, accessed: 02.10.2023.

the determination of the remuneration are provided in Polish proposal for the transposition of the CDSM Directive.

It is therefore worthy to examine the French implementation in this regard. The focus will be on the mechanisms adopted therein enabling the calculation of the remuneration. My objective is to identify the potential threats resulting from such mechanisms in the context of the effectiveness of the regulation and free flow of information. The following analysis is servant to the study on how the (Polish) implementation of art. 15 of the CDSM Directive should look like. The instruments implemented by the French legislator and their practical application, which will be discussed in the following sections, will allow the assessment of which solutions should be implemented and which ones should be improved within the framework of Polish implementation of art. 15 of the CDSM Directive and its amendments in others Member States, to ensure the effectiveness of the regulation and to safeguard the free flow of information. The conclusions reached in the analysis conducted in this point will be important also at the stage of the application of the publishers' rights. The identification of potential threats resulting from the regulation is conducted on the basis of the characteristic of the functioning of press publishers and news aggregator provided in chapter I of the thesis.

According to art. L218-4 of the French Intellectual Property Code, the remuneration obtained by press publishers **is based on the revenue from the exploitation of press publication of any kind, whether direct or indirect or, failing that, assessed on a flat-rate basis**.[1280] As it has been explained during the legislative works in France, given the rapid evolution of business models, it was important to target the direct or indirect revenues linked to the economic value of a press publication within a more general

[1280] According to art. L. 131- 4 of the French Intellectual Property Code: The author's remuneration may be assessed at a flat rate in the following cases: 1. The basis for calculating the proportional participation cannot be practically determined; 2. The means to control the application of the participation are lacking; 3. The costs of calculation and control operations would be out of proportion to the results to be achieved; 4. The nature or conditions of exploitation make it impossible to apply the rule of proportional remuneration, either because the author's contribution does not constitute one of the essential elements of the intellectual creation of the work, or because the use of the work is only incidental to the object exploited; 5. In the case of transfer of rights in software;6. In the other cases provided for in this Code.
Translation made by author, French version: Toutefois, la rémunération de l'auteur peut être évaluée forfaitairement dans les cas suivants :1. La base de calcul de la participation proportionnelle ne peut être pratiquement déterminée ;2. Les moyens de contrôler l'application de la participation font défaut ;3. Les frais des opérations de calcul et de contrôle seraient hors de proportion avec les résultats à atteindre ;4. La nature ou les conditions de l'exploitation rendent impossible l'application de la règle de la rémunération proportionnelle, soit que la contribution de l'auteur ne constitue pas l'un des éléments essentiels de la création intellectuelle de l'oeuvre, soit que l'utilisation de l'oeuvre ne présente qu'un caractère accessoire par rapport à l'objet exploité ; 5.En cas de cession des droits portant sur un logiciel; 6. Dans les autres cas prévus au présent code, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006278963, accessed : 19.07.2023.

ecosystem, without setting too precise threshold.[1281] The direct revenue comes mainly from the advertising revenue generated by the sale of space to advertisers. For example, Google derives the revenue from the display of press publications, in particular within the Google search service, facilitated by the collection of users' data by Google on its services.[1282] It derives also indirect revenues from the various advertising intermediation services it offers to press publishers, which are based in part on the use of users' data.[1283] It has not been specified whether the remuneration should be calculated proportionally or should constitute a certain percentage of the ISSPs' revenues.

Moreover, the French legislator adopted in art. L.218-4 of the French Intellectual Property Code that **fixing of the amount of this remuneration shall take into account elements such as:**

- **the human, material and financial investments made by press publishers and press agencies,**
- **the contribution of press publications to political and general information**
- **the extent to which press publications are used by online public communication services.**

The list is not exhaustive, criteria do not have to be taken into consideration cumulatively. Therefore, while determining the remuneration due to press publishers based on the revenues from the exploitation of the press publication, the criteria mentioned above should be considered. Which criteria exactly are taken into account and to what extent, should be decided during the negotiation process.

To calculate the press publishers' remuneration, the contribution of press publications to **political and general information** should be considered amongst other criteria. During the legislative process, it was explained that the exclusive mention of political and general information should be justified by its important role to develop, strengthen and defend the democracy[1284] but the intention of the legislator was not to exclude the press

[1281] Ministère de la Culture, Secrétariat général, Droit voisin au profit des agences de presse et des éditeurs de presse. Recueil des travaux préparatoires de la loi n° 2019-775 du 24 juillet 2019 tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse, Service de la coordination des politiques culturelles et de l'innovation Mission de la politique documentaire,2019, p.105.

[1282] Décision 20-MC-01 of 9 April 2020 of French Autorité de la concurrence on requests for interim measures by the Syndicat des éditeurs de la presse magazine, the Alliance de la presse d'information générale and others and Agence France-Presse, point.46. English version : https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2020-06/20-mc-01_en.pdf, accessed : 05.07.2023.

[1283] Décision 20-MC-01 of 9 April 2020 of French Autorité de la concurrence, point 47.

[1284] Ministère de la Culture, Secrétariat général, Service de la coordination des politiques culturelles et de l'innovation Mission de la politique documentaire, Droit voisin au profit des agences de presse et des

publications relating to other topics.[1285]Amongst the arguments in favor of such differentiation, it has been indicated that press publications on this topic were of particular interests for Google News.[1286] In France, the special attention to political and general information has already its long tradition. The Conseil Constitutionnel, in its decision of 1984, referred to political and general news dailies by recognising the constitutional value of pluralism of the daily newspapers providing political and general information[1287].

This provision was subject to criticism. The threat of differencing the remuneration of press publishers depending on the topic of publications, the danger of inconsistency with the wording of recital 54 of the CDSM Directive and of the negative impact on the pluralism of media were pointed out.[1288] In its defence, French legislator underlined that press publications should only **contribute** to political and general information. However, it has not been explained how this contribution should be measured.

In practice, such a distinction introduced by the French legislator has become a field for discriminatory treatment of press publishers by Google. The latter imposed that press publishes who publish on other that political and general information topics would not be paid the remuneration for the exploitation of press publications or such remuneration would be importantly lower.[1289] The criteria introduced by the legislator have become a tool in hand of ISSPs to differentiate press publishers based on the subject of their publications, disadvantaging those publishing on niche subjects. Such legislative approach could be seen as a danger to the effectiveness of the publishers' rights.

Remuneration due to press publishers can be also assessed **on a flat-rate basis** according to the French provision. This will be the case when the calculation of the remuneration on the basis of the revenues from the exploitation of press publication will not be possible. This is similar to a global envelope granted by a digital platform to a geographical area, to be distributed among the various beneficiaries. I identify a danger that this way of fixing the remuneration entails a risk of mixing up the different types of agreements that ISSPs offer to press publishers and press agencies in the form of

éditeurs de presse. Recueil des travaux préparatoires de la loi n° 2019-775 du 24 juillet 2019 tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse, 2019, p.160.

[1285] Ministère de la Culture, Secrétariat général, Service de la coordination des politiques culturelles et de l'innovation Mission de la politique documentaire, Droit voisin au profit …, p.196.

[1286] See: Ministère de la Culture, Secrétariat général, Service de la coordination des politiques culturelles et de l'innovation Mission de la politique documentaire, Droit voisin au profit …, p.223.

[1287] Conseil Constitutionnel, 11 Octobre 1984, Décision n° 84-181 DC, Loi visant à limiter la concentration et à assurer la transparence financière et le pluralisme des entreprises de presse, para. 38.

[1288]Ministère de la Culture, Secrétariat général, Service de la coordination des politiques culturelles et de l'innovation Mission de la politique documentaire, Droit voisin au profit …, pp.243-244.

[1289] Decision of 12 July 2021 of French Autorité de la concurrence, pp.94-95.

partnerships. In consequence, press publisher mostly has no information as to what remuneration comes from the exercise of the related rights of press publishers, and those publishers who do not join the partnership may not receive remuneration at all or it may be significantly lower. It impacts also the obligation to share the remuneration with authors of contributions to press publications. Since press publishers do not know what amount of remuneration they obtain for the use of their press publications, the question arises as to how the share due to the authors should be calculated.

By way of example, Google made the negotiation on the remuneration resulting from the publishers' rights conditional on joining a new global partnership called Publisher Curated News including the Showcase service.[1290]The launch of this new service would not have raised any problem from the perspective of the application of the press publishers' related rights if not the fact that, the contract proposed by Google for the use of all press publications from press publishers did not distinguish between the revenues from the use of works and other subject matters in the context of Showcase service and from the use of press publications protected under the publishers' rights.[1291]

For many publishers, joining the Showcase service was the only guarantee that they would receive remuneration, as Google refused to negotiate remuneration solely on the basis of the related rights of press publishers. Moreover, "Google repeatedly suggested that remuneration for current uses of press content on its services is likely to be insignificant or even non-existent"[1292] which means that despite the repeated request of press publishers, the tech giant did not aim to negotiate and pay press publishers and news agencies under the related rights of press publishers[1293].

According to art. L.218-4 of French Intellectual Property Code, the ISSPs shall be required to provide press publishers and press agencies with all the information relating to the use of press publications by their users as well as all the other information necessary for a transparent evaluation of the remuneration and its distribution.

[1290] The latter was launched in October 2020 and was conceived as a new service based on the reuse of news articles which were previously not available on Google's portals. Showcase service implies news obligations for publishers which consist of creating, organising and completing a number of modules in order to provide press content on a daily basis. In the framework of this new service, press publishers agree to allow the users to access the content which is normally paid on the press publishers' website, for free on the Google's services. See: Decision of 12 July 2021 of French Autorité de la concurrence, p.82.

[1291] Decision of 12 July 2021 of French Autorité de la concurrence, p.83.

[1292] Decision of 12 July 2021 of French Autorité de la concurrence, p.86.

[1293] French Competition Authority considered such practices as the failure to comply with the order to negotiate in good faith, to comply with obligations to communicate to publishers and news agencies the information necessary for a transparent evaluation of the remuneration due and to remain neutral in negotiations. See: Decision of 12 July 2021 of French Autorité de la concurrence, paras:330-331, 488-495.

The access to information on the use of press publications by the ISSPs is essential for calculating the remuneration and in most of the cases only platforms have access to them. The problem may arise if ISSP refuses to provide such data or provides it in limited manner which will make the calculations incomplete. French implementation does not provide any mechanism in case of non-compliance with the obligation to provide data. In other words, the claimant can apply to the court to oblige the platform to hand over the data, but cannot demand anything more than that, such as for example a financial penalty. In this respect, there is a threat of insufficient safeguard of the effectiveness of the exercise of the rights on the grounds that the lack of information or the rudimentary nature of the information concerning the use of press publications means that the remuneration calculated for publishers may be not reflecting the publishers' real due.

To conclude:

- The contribution of press publications to political and general information as one of factors on which the remuneration due to press publishers can be calculated according to the French implementation can be considered as a tool in hand of ISSPs to differentiate press publishers based on the subject of their publications and to disadvantage those publishers publishing on niche subjects. Google, in France, imposed that press publishes who publish on other that political and general information topics will not be paid the remuneration for the exploitation of press publication or such remuneration will be importantly lower. Taking into account the objectives of the regulation and the wording of art. 15 of the CDSM Directive in which the differentiation of the treatment of press publishers is not foreseen, it should be pointed out that the French legislator, using the margin of discretion in the implementation of the directive, has given platforms tools that allow for the practices contradicting the objectives of the adoption of the publishers' rights.

- The evaluation of the use of press publication in order to calculate the remuneration is conditional on the provision of data by ISSPs. The French legislator has not provided for a mechanism in case when the ISSPs do not provide such data or do it in fragmentary way which constitutes a significant deficiency and a threat to the effectiveness of the protection of press publishers.

6. Infringement of the publishers' rights

The infringement of the intellectual property rights constitutes a tort.[1294] Infringement occurs whenever there is an encroachment into the sphere of holder of

[1294] M.van Eechoud, Choice…, p.206.

exclusive rights, in case when the user is not able to prove that this use is based on a title which is effective against the rightholder.[1295]

From the perspective of the online use of press publication by ISSPs, the infringement will occur when the use of press publication will take place without authorisation of press publishers in case when there is no legal justification[1296] of such a use. In such a case press publisher can claim the infringement of the exclusive rights.

According to the Polish implementation of the publishers' rights, art. 79 and 80 of the Polish Copyright Act specyfing the rightholder' s claims in case of the infringement of his rights apply, as to the French law, the provisions included in book III: General provisions relating to copyright, related rights and the rights of database producers (Articles L311-1 to L343-7) of the French Intellectual Property Code apply.

As regards the claims on the basis of civil law[1297] the following claims, *inter alia*, can be made:

- claim to prevent or stop the infringement

According to art. L336-2 of the French Intellectual Property Code in the event of an infringement of copyright or a related rights caused by the content of an online public communication service, the president of the judicial court, ruling under the accelerated procedure on the merits may order, at the request of the holders of exclusive rights, (…), any measure likely to **prevent or stop such infringement** of a copyright or related rights.[1298] The cessation covers two distinct situations, namely, when the infringement is established and continues to produce its effects, the first aim of the action is to prevent it

[1295] A. Drzewicki, Komentarz do art. 79 Ustawy o prawie autorskim i prawach pokrewnych in: E. Ferenc - Szydełko (ed.), Ustawa o prawie autorskim i prawach pokrewnych. Komentarz, 2021, point 1, LEGALIS.
[1296] A. Matlak, T. Targosz, E. Traple, Komentarz do art. 79 Ustawy o prawie autorskim i prawach pokrewnych, in. R. Markiewicz (ed.), Komentarz do ustawy o prawie autorskim i prawach pokrewnych, in: Ustawy autorskie. Komentarze. Tom II, Wolter Kluwers Polska, 2021, point 2, LEX.
[1297] In French and Polish law claims for the infringement of exclusive rights can be based on civil or penal law. Within the analysis conducted in this dissertation the instruments provided by the civil law will be discussed.
[1298] English version by author. French version of art. L336-2 of French Intellectual Property Code: En présence d'une atteinte à un droit d'auteur ou à un droit voisin occasionnée par le contenu d'un service de communication au public en ligne, le président du tribunal judiciaire statuant selon la procédure accélérée au fond peut ordonner à la demande des titulaires de droits sur les œuvres et objets protégés, de leurs ayants droit, des organismes de gestion collective régis par le titre II du livre III ou des organismes de défense professionnelle visés à l'article L. 331-1, toutes mesures propres à prévenir ou à faire cesser une telle atteinte à un droit d'auteur ou un droit voisin, à l'encontre de toute personne susceptible de contribuer à y remédier. La demande peut également être effectuée par le Centre national du cinéma et de l'image animée, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038791094, accessed: 20.07.2023.

from continuing, the second aim is to prevent an act infringing the right from being committed again.[1299]

According to art. 79 (1) of Polish Copyright Act[1300], a rightholder whose economic rights have been infringed may request that the person who infringed these rights ceases the infringement. This claim, like in the French law, seeks to restore the lawful state of affairs and to prevent specific infringements in the future. In the claim requesting an injunction against infringement, the right holder must indicate the specific acts that the infringer is to cease. The infringed work or subject matter must be clearly identified[1301]. In case of the unauthorised use of press publication, press publishers can request for the cease of infringement indicating the press publication(s) concerned and the conduct the claimant is seeking to prohibit. As to the latter, it would be the use (reproduction or/and making available) of press publication by the ISSP in unauthorised manner.

- claim to obtain a compensation for damage

According to the French doctrine, the civil action brought to obtain the compensation for the loss dues to the infringement of the exclusive rights does not require the proof of fault.[1302] The claimant is required to provide a proof of the loss suffered, for which he is seeking compensation. To illustrate, press publishers have to demonstrated the loss suffered from the unauthorised use of their press publications which they seek compensation for. Compensation for the damage suffered by the victim of the infringement is mainly awarded in the form of **the damages and interests[1303].** They should be fixed, according to art. L331-1-3 of the French Intellectual Property Code according to the following criteria:

[1299] A. Lucas, A. Lucas-Schloetter, C. Bernault, Traité … p.986.

[1300] English version: Act of 4 February 1994 on Copyright and Related Rights (Consolidated text), Ministry of Culture and National Heritage, http://www.copyright.gov.pl/modules/download_gallery/dlc.php?file=23&id=1578048906, accessed: 19.07.2023. Polish version of art. 79 (1) of Polish Copyright Act: Uprawniony, którego autorskie prawa majątkowe zostały naruszone, może żądać od osoby, która naruszyła te prawa: 1) zaniechania naruszania; 2) usunięcia skutków naruszenia; 3) naprawienia wyrządzonej szkody: a) na zasadach ogólnych albo poprzez zapłatę sumy pieniężnej wwysokości odpowiadającej dwukrotności, a w przypadku gdy naruszenie jest zawinione – trzykrotności stosownego wynagrodzenia, które w chwili jego dochodzenia byłoby należne tytułem udzielenia przez uprawnionego zgody na korzystanie z utworu; 4) wydania uzyskanych korzyści, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU19940240083/U/D19940083Lj.pdf, accessed: 19.07.2023.

[1301] W. Machała(ed.), Komentarz do art.79 Ustawy o prawie autorskim i prawach pokrewnych, in: R.M. Sarbiński, W. Machała (ed.), Prawo autorskie i prawa pokrewne. Komentarz, Wolters Kluwer Polska, 2019, point 32, LEX.

[1302] M. Vivant, J.-M.Bruguière, Droit …,p.1054.

[1303] The court may, as an alternative and at the request of the injured party, award a lump sum by way of damages.

-the negative economic consequences of the infringement, including loss of profit and loss suffered by the injured party;
-the moral prejudice caused to the injured party and profits made by the infringer, including the savings on intellectual, material and promotional investments that the infringer has made as a result of the infringement.[1304]

According to art. 79 (1) of Polish Copyright Act, a rightholder whose economic rights have been infringed may request that the person who infringed these rights redress any damage caused: a) pursuant to generally applicable provisions of law, or b) paying an amount corresponding to double or, where the infringement is intentional, triple the amount of the relevant remuneration that would at the time it is claimed have been due to the rightholder for authorising the use of the work[1305].

The provision refers to the concept of property damage. The latter encompasses two types of damages which are:
- the losses resulting from the damage that have actually occurred in the property of the right holder (*damnum emergens*),
-the future benefits that the entitled party could reasonably expect (*lucrum cessans*).[1306]

The right holder can either claim damages under the general rules, based on the Civil Code, or use a simplified procedure based on awarding double damages[1307]. These two ways are mutually exclusive and it is up to the right holder to choose the method of claiming damages. As regards the compensation for damages in accordance with the general principles from the Civil Code, the claimant must prove the unlawfulness of the conduct of the infringer who, for example, has unauthorisedly reproduced or made

[1304] English version by the author. French version of art. L331-1-3 of French Intellectual Property Code: Pour fixer les dommages et intérêts, la juridiction prend en considération distinctement :
1° Les conséquences économiques négatives de l'atteinte aux droits, dont le manque à gagner et la perte subis par la partie lésée ;
2° Le préjudice moral causé à cette dernière ;
3° Et les bénéfices réalisés par l'auteur de l'atteinte aux droits, y compris les économies d'investissements intellectuels, matériels et promotionnels que celui-ci a retirées de l'atteinte aux droits.
Toutefois, la juridiction peut, à titre d'alternative et sur demande de la partie lésée, allouer à titre de dommages et intérêts une somme forfaitaire. Cette somme est supérieure au montant des redevances ou droits qui auraient été dus si l'auteur de l'atteinte avait demandé l'autorisation d'utiliser le droit auquel il a porté atteinte. Cette somme n'est pas exclusive de l'indemnisation du préjudice moral causé à la partie lésée, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000028716676, accessed: 20.07.2023.
[1305] Constitutional Court considered this provision, in the part in which it allows for the claiming of payment in the amount of three times the contractual remuneration, to be unconstitutional. See: Judgment of the Constitutional Tribunal of 23.06.2015, SK 32/14, LEX no. 1747331.
[1306] A. Niewęgłowski, Komentarz do art. 79 Ustawy o prawie autorskim i prawach pokrewnych in. A. Niewęgłowski (ed.), Prawo autorskie. Komentarz, Wolters Kluwer Polska, 2021, LEX, point.22. See: A. Matlak, T. Targosz, E. Traple, Komentarz do art. 79 …, point.90, LEX.
[1307] See: P. Podrecki, Środki ochrony praw własności intelektualnej, LexisNexis, 2010, point.2.7.6., LEX.

available to the public the press publication. The infringer must be at fault and there must be a causal link between the harmful event and the damage itself to the rightholder[1308].

While putting these considerations in the context of the unauthorised use of press publication, in determining the damage, it is necessary to take into account what amount the press publisher would have received if the agreement between ISSP and press publisher would have been concluded and what is the "value" of the rights which have been infringed. The concept of damage also extends to the lost profits. To illustrate, since the publication has already been used (in an unauthorised manner) and disseminated to a significant part of the public, this has not only failed to benefit the publisher but has also contributed to the loss of the value of the press publication itself.

In seeking the payment of damages in the amount of twice the royalty due, the claimant is required to prove the unlawfulness of the infringer's action and, more specifically, to prove that the infringer is using the work without having an effective title to do so.

- claim as regards the confiscation of the revenue generated

According to art. L.331-1-4 of the French Intellectual Property Code the court may also order the confiscation of all or part of the revenue generated by the infringement, which will be remitted to the injured party or his successors in title[1309]. To illustrate, the benefits generated by the ISSPs while using the press publication in unauthorised way (including for example the advertising benefits) could be considered by the court as due to press publishers in view of the infringement found.

According to art. 79 (1) of the Polish Copyright Act, a rightholder whose economic rights have been infringed may request that the person who infringed these rights issue the generated benefits. It is not about any profit but the benefits obtained in connection with the infringement and it is not conditional on the perpetrator being at fault. This demand fulfils a compensatory, repressive and preventive function.[1310] In particular, the obligation to hand over the benefits obtained as a result of the infringement of the

[1308] A. Matlak, T. Targosz, E. Traple, Komentarz do art. 79 …, point 91, LEX.
[1309] English version by the author. French version of art. L.331-1-4 paragraph 4: La juridiction peut également ordonner la confiscation de tout ou partie des recettes procurées par la contrefaçon, l'atteinte à un droit voisin du droit d'auteur ou aux droits du producteur de bases de données, qui seront remises à la partie lésée ou à ses ayants droit. https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006279275, accessed : 25.08.2023.
[1310] W. Machała Komentarz do art.79 …, point 99, LEX.

economic rights is a manifestation of the general principle that the infringement of someone's rights, including the right on intangible property, should not be profitable.[1311]

- claim to remedy the effects of the infringement

According to art. L331-1-4 of the French Intellectual Property Code in the event of a civil judgment for infringement, the court may order, at the request of the injured party, that the objects produced or manufactured which contribute to the infringement of these rights, the media used to collect the data illegally extracted from the database and the materials or instruments that were mainly used to produce or manufacture them be recalled from commercial channels, permanently removed from these channels, destroyed or confiscated for the benefit of the injured party. The court may also order any appropriate measure to publicise the judgment, in particular its posting or publication in full or in extracts in newspapers or on online public communication services that it designates, in accordance with the terms that it specifies.[1312]

Claim for the remedy of an infringement of the exclusive rights provided for in art. 79 of the Polish Copyright Act belongs to the group of claims for restitution, i.e. claims aimed at the restoration of the state of affairs prior to the infringement of a given right. It is up to the Court to decide what actions will have to be taken to remedy the effects of the infringement committed. These may include, for example: destroying or releasing to the claimant the unlawfully produced copies of the work, destroying advertising and promotional materials, making a statement of a specified content and form, notifying specified persons. Allowing the claim, the court may order the defendant to perform jointly several acts, which it deems necessary to remove the effects of the infringement. According to art. 79 (2) of Polish Copyright Act, the rightholder may request the publication of a press statement having the appropriate content and form or the public announcement of the whole or part of a ruling issued by the court in the case concerned,

[1311] W. Machała Komentarz do art.79 …, point 32, LEX.

[1312] English version by the author. French version of art. L331-1-4 of French Intellectual Property Code paragraphs 1 and 2: En cas de condamnation civile pour contrefaçon, atteinte à un droit voisin du droit d'auteur ou aux droits du producteur de bases de données, la juridiction peut ordonner, à la demande de la partie lésée, que les objets réalisés ou fabriqués portant atteinte à ces droits, les supports utilisés pour recueillir les données extraites illégalement de la base de données et les matériaux ou instruments ayant principalement servi à leur réalisation ou fabrication soient rappelés des circuits commerciaux, écartés définitivement de ces circuits, détruits ou confisqués au profit de la partie lésée.
La juridiction peut aussi ordonner toute mesure appropriée de publicité du jugement, notamment son affichage ou sa publication intégrale ou par extraits dans les journaux ou sur les services de communication au public en ligne qu'elle désigne, selon les modalités qu'elle précise., https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000006279275, accessed : 25.08.2023.

in the manner and to the extent prescribed by the court. ISSP infringing the related right of press publishers could be ordered for example to make a statement of a specified content and form or to notify its users.

To conclude:

In case of the infringement of the related right of press publishers consisting for example of the unauthorised use of press publication online by ISSP, press publisher, according to French and Polish law, can request for:

- the cease of the use of press publication
- the remedy the effects of the infringement in the form of a statement of a specified content and form, notifications to ISSP's users.
- the redress of any damage caused in the for of amount the press publisher would have received if the agreement between information society service provider and press publisher would have been concluded and lost profits due to the fact that the press publication has been already disseminated to a significant part of the public, which has not only failed to benefit the publisher but has also contributed to the loss of value of the press publication itself.
- the issue of benefits obtained from the unauthorised use of press publication.

7. Collective management of the publishers' rights

Article L218-3 of the French Intellectual Property Code[1313]	**The Draft of the act amending the Polish Copyright Act**
Article L218-3 The rights of press publishers and press agencies resulting from Article L. 218-2 can be assigned or licensed. Such right holders can entrust the management of their rights to one or more collective management bodies governed by Title II of Book III of this Part.	-

7.1.Definition and role of collective management organisations

[1313] English version by the author. French version of art. L218-3 of the French Intellectual Property Code:
Les droits des éditeurs de presse et des agences de presse résultant de l'article L. 218-2 peuvent être cédés ou faire l'objet d'une licence. Ces titulaires de droits peuvent confier la gestion de leurs droits à un ou plusieurs organismes de gestion collective régis par le titre II du livre III de la présente partie, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038826732, accessed : 18.07.2023.

According to art. L.218-3 of the Intellectual Property Code the management of the rights can be entrusted to one or more collective management bodies. Therefore, press publishers can negotiate with ISSPs by themselves or entrust the management of their rights to one or more collective management bodies. The intermediation of the collective management body is however not mandatory.

The Polish legislator in the assumptions of the implementation of the CDSM Directive published in 2022[1314] like in the assumptions from 2024 specified that the exercise of the new related rights will not be subject to the obligatory intermediation of a collective management organisation. However, a representative collective management organisation according to the provisions of the Act on collective management will be able to grant the so-called licence with extended effect.[1315]

According to art.3 (2) of the Polish Act on collective management of copyright and related rights[1316], a collective management organisation is a society associating the rightholders or entities representing the rightholders, the primary statutory objective of which is the collective management of copyright or related rights for the benefit of the rightholders within the scope of the authorisation granted to it by the Minister competent for Culture and National Heritage Protection.[1317]

The role of collective management organisation, according to art. 3 of the Act on collective management, consists in the exercise of copyright or related rights for the collective benefit of rightholders. Such organisation carries out the acts such as: taking

[1314] Kancelaria Prezesa Rady Ministrów, Projekt ustawy o zmianie ustawy o prawie autorskim i prawach pokrewnych oraz niektórych innych ustaw,2022, https://www.gov.pl/web/premier/projekt-ustawy-o-zmianie-ustawy-o-prawie-autorskim-i-prawach-pokrewnych-oraz-niektorych-innych-ustaw2, accessed:05.02.2024.

[1315] Kancelaria Prezesa Rady Ministrów, Projekt ustawy o zmianie ustawy o prawie autorskim i prawach pokrewnych oraz niektórych innych ustaw,2024, https://www.gov.pl/web/premier/projekt-ustawy-o-zmianie-ustawy-o-prawie-autorskim-i-prawach-pokrewnych-oraz-niektorych-innych-ustaw3, accessed:05.02.2024.

[1316] Ustawa z dnia 15 czerwca 2018 r. o zbiorowym zarządzaniu prawami autorskimi i prawami pokrewnymi, Dz.U. 2018 poz. 1293, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20180001293/T/D20181293L.pdf, accessed: 19.07.2023, hereinafter Act on collective management.

[1317] English version by the author. Polish version of art. 3(2) of the Act on collective management: organizacja zbiorowego zarządzania prawami autorskimi lub prawami pokrewnymi, należy przez to rozumieć stowarzyszenie zrzeszające uprawnionych lub podmioty reprezentujące uprawnionych, którego podstawowym celem statutowym jest zbiorowe zarządzanie prawami autorskimi lub prawami pokrewnymi na rzecz uprawnionych w zakresie zezwolenia udzielonego mu przez ministra właściwego do spraw kultury i ochrony dziedzictwa narodowego, zwanego dalej „ministrem”; https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20180001293/T/D20181293L.pdf, accessed: 19.07.2023. See also: M. Czajkowska- Dąbrowska, A. Pązik. K. Wojciechowski, Komentarz do art. 3, Komentarz do ustawy o zbiorowym zarządzaniu prawami autorskimi i prawami pokrewnymi in: R. Markiewicz (ed.), Ustawy autorskie. Komentarze. Wolters Kluwer Polska, 2021, LEX.

over the rights in collective management, concluding contracts for the use of works or subject matters or collecting remuneration for such use, collecting, distributing and paying the revenue from rights, monitoring the use of works or subject matters of related rights by users, asserting the protection of copyright or related rights and exercising other rights and obligations of the organisations for collective management of copyright or related rights arising from the Polish Copyright Act.[1318]

According to art. L321-1 of the French Intellectual Property Code, collective management organisations are the legal entities constituted in any legal form whose main purpose is to manage copyright or related rights on behalf of several holders of these rights, for their collective benefit, either by virtue of legal provisions or in performance of a contract[1319]. The role of such organisation is to authorise the use of work or other subject matter in place of the rightholders, to collect their remuneration and to redistribute it to them, after the deduction of management fees[1320] or to make the claims in case of the infringement of the rights.

Collective management organisations intermediate, for instance, the collection of levies, which are either levied as a tax paid on copying equipment or are paid in a predetermined amount to the collecting organisations by the users (e.g. companies, libraries or universities). These dues are then divided proportionally in relation to the frequency of use of the work among the rightholders.

[1318] English version by the author. Polish version of art. 3(2) of the Act on collective management of copyright and related rights: Ilekroć w niniejszej ustawie mowa jest o: 1) zbiorowym zarządzaniu prawami autorskimi lub prawami pokrewnymi – należy przez to rozumieć działalność polegającą na wykonywaniu praw autorskich lub praw pokrewnych dla zbiorowej korzyści uprawnionych przez dokonywanie takich czynności, jak: a) obejmowanie praw w zbiorowy zarząd, b) zawieranie umów o korzystanie z utworów lub przedmiotów praw pokrewnych lub pobór wynagrodzenia za takie korzystanie, c) pobór, podział i wypłata przychodów z praw, d) monitorowanie korzystania z utworów lub przedmiotów praw pokrewnych przez użytkowników, e) dochodzenie ochrony praw autorskich lub praw pokrewnych, wykonywanie innych uprawnień i obowiązków organizacji zbiorowego zarządzania prawami autorskimi lub prawami pokrewnymi wynikających z niniejszej ustawy oraz ustawy z dnia 4 lutego 1994 r. o prawie autorskim i prawach pokrewnych (Dz. U. z 2018 r. poz. 1191 i 1293),https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20180001293/T/D20181293L.pdf, accessed: 19.07.2023.

[1319] English translation by the author. French version of art. L321-1 (I) of French Intellectual Property Code: I.-Les organismes de gestion collective sont des personnes morales constituées sous toute forme juridique dont l'objet principal consiste à gérer le droit d'auteur ou les droits voisins de celui-ci pour le compte de plusieurs titulaires de ces droits, tels que définis aux livres Ier et II du présent code, à leur profit collectif, soit en vertu de dispositions légales, soit en exécution d'un contrat, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000033687876, accessed : 25.08.2023.

[1320]C. Bernault, J-P. Clavier, Fiche 18. La gestion collective du droit d'auteur, Fiches de Droit de la propriété intellectuelle, 2016, pp.104-109, https://www.cairn.info/fiches-de-droit-de-la-propriete-intellectuelle--9782340014107-page-104.htm, accessed : 25.08.2023. See also : M. Vivant, J.-M. Bruguière, Droit d'auteur et droits voisins, Dalloz, 2019,p.886.

7.2.Nature of intermediation of collective management organisations

The intermediation of collective management organisations can be mandatory or not. In case of mandatory intermediation, the possibility of obtaining permission to use the work or other subject matter directly from the rightholder and vice versa, the possibility for rightholders to license their creations individually is totally or partially excluded. The introduction of mandatory intermediation is justified by the practicalities of trading in intangible rights. Individual holders of exclusive rights in some cases are unable to exercise them effectively, e.g. to collect remuneration for the use of works or subject matters, due to the huge number of users[1321].

In French law, according to art. L.217-2 of the French Intellectual Property Law the right to authorise the simultaneous, unabridged and unchanged cable retransmission on national territory of a performer's performance, a phonogram or a videogram broadcast from a Member State of the European Union other than France may only be exercised by a collective management organisation.[1322] On the basis of the analysis of this example, the conclusion can be drawn that the mandatory intermediation of collective management organisations is introduced in those cases where broadcasting, public communication and reproduction of works is carried out on a large scale and whose recipients are a large public. This can be seen as the reason why the mandatory intermediation has not been introduced in France in relation to the publishers' rights since although press publications are used on a large scale, those against whom the regulation is directed are easily identifiable.

Moreover, it should be specified that according to the European Commission, "Member States are not allowed to implement art. 15 of the CDSM Directive through a mechanism of mandatory collective management. Imposing mandatory collective management would deprive publishers of this exclusive right by precluding publishers' choice to authorise or prohibit the use of their publication."[1323]

[1321] See: M. Ficsor, Collective rights management from the viewpoint of international treaties, with special attention to the EU 'Acquis', in: D. Gervais, Collective Management of Copyright and Related Rights, Wolters Kluwer, 2016, p.47.
[1322] See art. L.217-2 of the French Intellectual Property Law
[1323] Answer given by Mr Breton on behalf of the European Commission, Parliamentary question – E-004603//2020(ASW), European Parliament, 2020, https://www.europarl.europa.eu/doceo/document/E-9-2020-004603-ASW_EN.html, accessed: 22.11.2022; see also: U. Furgał, The EU Press Publishers' Right: Where Do Member States Stand?, Journal of Intellectual Property Law & Practice, vol. 16, no. 8, 2021,p. 890.

It should be noted that, the collective management organisations are often criticised for the complexity of their functioning and the lack of transparency of the rules under which the collection and the distribution of funds take place.[1324] The intermediation of the organisation entails costs, which to a certain extent could deplete the profit of press publishers. Moreover, negotiations conducted on behalf of multiple publishers are necessarily more standardised and schematic[1325], which may not respond to the specific needs of certain press publishers[1326]. On the other hand, it should be noted that mandatory intermediation would unify and strengthen the negotiation position of press publishers against powerful ISSPs. The disadvantages of negotiating independently are a weaker negotiating position and greater dependence on ISSPs given their market position.[1327]

In my opinion, the introduction of mandatory intermediation could constitute a remedy to the imposition of negotiating conditions by ISSPs by reinforcing the bargaining power of press publishers. However, due to the important differences between interests of press publishers demonstrated in chapter I of the thesis [1328] and various ways of achieving it, I find the optional intermediation as more suitable path through which the publishers' rights can be exercised. It should be recalled that the mandatory

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[1324] See for example: S. Depreeuw, Mandatory collective management of copyright: when the road to deadlock is paved with good intentions, Kluwer Copyright Blog, 2022, https://copyrightblog.kluweriplaw.com/2022/02/09/mandatory-collective-management-of-copyright-when-the-road-to-deadlock-is-paved-with-good-intentions/, accessed: 02.10.2023. See also: J. Band, B. Butler, Some cautionary tales about collective licensing, Michigan State International Law Review, vol.21,no.3, 2013, https://files.osf.io/v1/resources/h5cg6/providers/osfstorage/57890a3b6c613b01f3347c19?action=download&direct&version=1, accessed: 02.10.2023.

[1325] S. von Lewinski during a discussion at the Max Planck Institute for Innovation and Competition, 17.10.2023.

[1326] French collective management organisation (OGC) called "Société des droits voisins de la presse" (DVP) dedicated to defending the related rights of press publishers and press agencies has been created in 2021. It has been considered that the creation of such a body will have pro-competitive effects for press organs by strengthening their bargaining power vis-à-vis players in a dominant position, particularly digital platforms and limiting the distortion between press publishers by not favouring the big publishers and allowing the smaller ones to be defended. Due to the rather late creation of the body, at the time of writing of this chapter (17.10.2023) only one agreement has been reached by the DVP. Around ten negotiations are currently underway, at various stages of progress. See: Ch. Laubier, La Société des droits voisins de la presse (DVP) peine à négocier avec les plateformes numériques,Édition multimeid@, 2023, https://www.editionmultimedia.fr/2023/08/18/la-societe-des-droits-voisins-de-la-presse-dvp-peine-a-negocier-avec-les-plateformes-numeriques/, accessed : 27.09.2023 ; Médias et droits voisins: Google conclut un nouvel accord en France,zonebourse, 2023, https://www.zonebourse.com/cours/action/ALPHABET-INC-24203373/actualite/Medias-et-droits-voisins-Google-conclut-un-nouvel-accord-en-France-45082027/, accessed : 17.10.2023 ;
see : V. Duby – Muller, L. Garcia, Assemblée Nationale, Rapport d'information …, pp.50-51, https://www.assemblee-nationale.fr/dyn/15/rapports/dv/l15b4902_rapport-information.pdf, accessed : 18.07.2023.

[1327] See: D. Gervais, Collective Management of copyright and related rights, Wolters Kluwer, 2016, pp.3-31.

[1328] See chapter I, point 5.3.

intermediation of collective management bodies had been introduced in Spanish regulation on press publishers[1329] before the adoption of the CDSM Directive. The lack of mandatory intermediation introduced in EU law may be considered as an attempt to regulate the issue differently, hoping that the result will be more effective.

Practice showed that large and well-known press publishers like for example Le Monde preferred to negotiate individually with ISSPs and had the bargain power to negotiate and achieve the tailored agreements.[1330] Another tendency could be identified, that small press publishers, in order to gain in force, turned to the collective management organisations to exercise their rights.[1331] In the interest of another group of press publishers was not to exercise the exclusive rights at all.[1332]Therefore, taking into account such a complex landscape of different press publishers with different interests, the introduction of a mandatory intermediary would not be a suitable solution.

In Poland, the exercise of the new related rights will not be subject to the mandatory intermediation of a collective management organisation but a representative collective management organisation, according to the provisions of the Act on collective management, will be able to grant the so-called licence with extended effect.[1333]

A representative collective management organisation is the one that has an exclusive authorisation to collectively manage the rights of a specific category of rightholders to a given type of works or subject matter in a specific field of exploitation according to art. 10(1) of the Act on collective management.

As explained by O. Bulayenko *et al*., extended effect of the collective licence "allows a representative collective management organisation, subject to statutory conditions and safeguards, to conclude licences covering the rights not only of rightholders who have given this collective management organisation an explicit authorisation to represent them, but also rightholders who have not given the organisation any authorisation to exercices

[1329] See chapter III, point 3.3.
[1330] See: Media Specs, « Apig » : l'Alliance de la presse française contre les GAFA, https://www.mediaspecs.fr/apig-lalliance-de-la-presse-francaise-contre-les-gafa/, accessed: 18.07.2023.
[1331] A.de Rochegonde, Le long chemin des droits voisins, Stratégies. Les medias des nouveaux modelès, 2022,https://www.strategies.fr/actualites/medias/LQ594241C/le-long-chemin-des-droits-voisins.html,accessed : 17.10.2023.
[1332] See chapter I, point 5.3.
[1333] Kancelaria Prezesa Rady Ministrów, Projekt ustawy o zmianie ustawy o prawie autorskim i prawach pokrewnych oraz niektórych innych ustaw, https://www.gov.pl/web/premier/projekt-ustawy-o-zmianie-ustawy-o-prawie-autorskim-i-prawach-pokrewnych-oraz-niektorych-innych-ustaw3, accessed:05.02.2024.

their rights."[1334] It means that a representative collective management organisation will be allowed to counclude the licences also on behalf of press publishers who did not give the collective management organisation an explicit authorisation to exercise their rights.

The Polish legislator did not explain its choice of introducing this licensing structure in relation to the publishers' rights. M. Czajkowska – Dąbrowska points out that it is adopted in cases when it would not be possible for the collective management organisations to obtain the appropriate authorisation from all rightholders or in order to facilitate the situation of the users of works and to ensure that the recipients of culture are able to access protected cultural goods.[1335] It could be presumed that the objective of the Polish legislator in case of press publishers was to facilitate the exercise of their exclusive rights.

To conclude:

- The introduction of mandatory intermediation could constitute a remedy to the imposition of negotiating conditions by ISSPs by reinforcing the bargaining power of press publishers. However, due to the important differences between interests of press publishers, I find the optional intermediation as more suitable path through which the publishers' rights can be exercised. Poland proposes to introduce the licence with extended effect what can constitute a golden mean between the optional and mandatory intermediation[1336].

8. Competition law – an alternative tool to ensure the effectiveness of the publishers' rights in France

[1334] O. Bulayenko *et al.*, Study on emerging issues on collective licensing practices in the digital environment, Final Report, 2018, p.130, https://www.ivir.nl/publicaties/download/Study_on_collective_practices_in_the_digital_environment.pdf, accessed: 05.02.2024.

[1335] M. Czajkowska - Dąbrowska, Rozszerzony zarząd zbiorowy, Paper presented during the conference „Wyzwania dyrektywy o prawie autorskim i prawach pokrewnych na jednolitym rynku cyfrowym (2019/790") organised by Intellectual Property Chair, Faculty of Law and Administration UJ, Kraków, 24-25.10 2019. See: L. Guibault, Extended Collective Licensing for the Use of Out-of-Commerce Works in Europe: A Matter of Legitimacy Vis-à-Vis Rights Holders, IIC- International Review of Intellectual Property and Competition Law, vo.49, 2018, https://link.springer.com/article/10.1007/s40319-018-0748-5, accessed: 06.02.2024.

[1336] According to L. Guibault: "to make mass digitisation economically viable in practice, a solution must be found in order to cover as many rights owners as possible, including non-members. In principle, this can be achieved in one of three ways: (1) mandatory statutory licensensing, (2) voluntary opt-in agreements, and (3) Extended Collective Licensing (ECL) schemes. ECL is less intrusive than the first option while at the same time still providing large scale coverage that opt-ins cannot achieve" in: L. Guibault, Extended Collective Licensing for the Use of Out-of-Commerce Works in Europe: A Matter of Legitimacy Vis-à-Vis Rights Holders, IIC- International Review of Intellectual Property and Competition Law, vo.49, 2018, p.918, https://link.springer.com/article/10.1007/s40319-018-0748-5, accessed: 06.02.2024.

The question arises whether the rapid implementation of the art. 15 of the CDSM Directive in France, the first in the European Union, guaranteed its effectiveness. I understand effectiveness in the legal context, as the regulation's quality of being respected and of being capable to produce an intended or desired result[1337]. This section provides a case study of the legal situation of press publishers in France after the adoption of the related rights, who strived to ensure the effectiveness of their protection through the competition law.

Its objective is to identify the deficiencies, inaccuracies, grey areas in the text of the French implementation revealed in practice, that could potentially impact the effectiveness and that have meant that, despite the protection being granted, press publishers in France have not been able to make use of it, which calls into question the purposefulness of the regulation. The identification of these problems is intended to serve, in the final stage of the analysis provided in Chapter 6, to develop how the (Polish) implementation should look like on the basis of lessons learned. It will be important also at the stage of the application of the law before the courts. I focused on the study of the case of French press publishers against Google. The rationale for this choice is the scale of this dispute, the momentousness of the decision of the French Competition Authority and its importance for the effectiveness of the publishers' rights.[1338]

Press publishers, while seeking the protection in France, faced the imposition of the unfair conditions due to the "quasi-monopolistic" position of Google on the search engine market[1339]in case when they asked for the remuneration for the authorisation of the use of their press publications on the basis of the implemented publishers' rights. Under the threat of delisting or downgrading the display of their press publications, which would impact and compromise the continuity of their business, press publishers claimed to be forced to grant Google free authorisation to reuse their press publications.[1340] As it has been observed earlier in this chapter, it is permissible to consent to the use of press publication for free in the framework of exercising the publishers' rights, but such authorisation must come from the press publishers' willingness and not be imposed on them. The practices of

[1337]See: Effectiveness, Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/effectiveness, accessed: 06.10.2023.
[1338] A dispute between Google and press publishers on the adequate remuneration for press publishers took place also in Germany but the German Competition Authority refrained from examining this in detail and has not intervened. See: Bundeskartellamnt, Improvements for publishers using Google News Showcase,2022, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2022/21_12_2022_Google_News_Showcase.html?nn=3591568 , accessed: 08.11.2023.
[1339] Decision 20-MC-01 of 9 April 2020 of French Autorité de la concurrence, p.43.
[1340] Decision 20-MC-01 of 9 April 2020 of French Autorité de la concurrence, p.43.

Google, constituting, in a sense, a circumvention of the publishers' rights, undermined its purpose since despite the protection granted, press publishers were obliged to authorise the free use of their press publications to protect their interests.

In this regard, Syndicat des Éditeurs de la Presse Magazine, the Alliance de la Presse d'Information Générale and others representing the interests of important number of newspaper and magazine publishers in France, and Agence France-Presse referred to the French Competition Authority[1341] the practices employed by Google in the press sector, complaining that the application of the publishers' rights by the tech giant constitutes an abuse of dominant position in violation of articles L. 420-2 of the French Commercial Code (Code de commerce)[1342] and 102 of the TFEU[1343], as well as an abuse of a situation

[1341] If the misconduct relates to an anti-competitive practice, in particular an abuse of a dominant position, in France, Authorité de la concurrence, an independent administrative authority ensuring that competition operates freely has jurisdiction. Where appropriate, it issues sanctions and injunctions. See art. L461-1(I) of French Commercial Code, https://www.legifrance.gouv.fr/codes/section_lc/LEGITEXT000005634379/LEGISCTA000006133188/, accessed : 24.07.2023.

[1342] According to art. 102 of TFEU any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;(b) limiting production, markets or technical development to the prejudice of consumers;(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

According to art. L420-2 of French Commercial Code, the abuse by an undertaking or a group of undertakings of a dominant position within the internal market or a substantial part thereof is prohibited. Such abuse may in particular consist of: refusal to sell, tying or discriminatory conditions of sale, the termination of established commercial relations for the sole reason that the partner refuses to submit to unjustified commercial conditions. It is also prohibited for an undertaking or group of undertakings to abuse a customer or supplier's state of economic dependence if this abuse is likely to affect the operation or structure of competition. Such abuse may in particular consist of refusal to sell, tied sales, discriminatory practices as referred to in articles L. 442-1 to L. 442-3 or range agreements.

English version by the author. French version of art. L420-2 of French Commercial Code: Est prohibée, dans les conditions prévues à l'article L. 420-1, l'exploitation abusive par une entreprise ou un groupe d'entreprises d'une position dominante sur le marché intérieur ou une partie substantielle de celui-ci. Ces abus peuvent notamment consister en refus de vente, en ventes liées ou en conditions de vente discriminatoires ainsi que dans la rupture de relations commerciales établies, au seul motif que le partenaire refuse de se soumettre à des conditions commerciales injustifiées.
Est en outre prohibée, dès lors qu'elle est susceptible d'affecter le fonctionnement ou la structure de la concurrence, l'exploitation abusive par une entreprise ou un groupe d'entreprises de l'état de dépendance économique dans lequel se trouve à son égard une entreprise cliente ou fournisseur. Ces abus peuvent notamment consister en refus de vente, en ventes liées, en pratiques discriminatoires visées aux articles L. 442-1 à L. 442-3 ou en accords de gamme.
https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038725501/2023-07-24, accessed: 24.07.2023.)

[1343] One of the conditions for the application of Article 102 TFEU is that the anti-competitive practice has an effect on trade between Member States (cross-border aspect). Where there is such an effect, the EU

of economic dependency. The complainants requested the interim measures to be ordered to force Google to enter into negotiations with them in good faith.

The question may arise why French press publishers decided to choose the path of competition law instead of claiming the infringement of the related rights. The practices of Google were, in some cases, on the borderline between infringement and non-infringement[1344] for example when it came to classifying all headlines as short excerpts exempted from protection, calculating the higher remuneration for those publishers who disseminate information on political and general issues or displaying in worse ranking position the press publications from press publishers who did not decide to waive their rights. In other words, the practices of Google were certainly detrimental to the interests of press publishers, but did not necessarily constitute in every case a *per se* infringement of the publishers' rights. Therefore, press publishers decided to search for another mechanism to ensure the effectiveness of the related rights in France and used the tools from competition law.

As to the relationship between the claims for infringement of the copyright and related rights' regime and claims as regards the abuse of dominant position and unfair competition practices, they have very different natures, causes and purposes. The former seeks to remedy the infringement of an intellectual property right, while the latter seeks to eliminate misconduct or behavior that is contrary to honest commercial practice. Infringement and unfair competition practices according to the French case law can be claimed jointly if the infringing act and the unfair competition act are separable and one is not accessory to the other.[1345]

competition law applies, where there is not, the national competition rules apply. Thus, it may be that a practice partly has a cross-border impact and partly a purely national impact, with the result that the authorities can apply both legal bases. The due attention should be paid to not to punish twice for the same breach according to the *ne bis in idem* principle.

[1344]For example, in some case the negotiations under the related rights of press publishers were possible but only in case when press publishers joined the Showcase services. In theory therefore, press publishers could enforce their rights but in practice, the additional conditions were imposed on them to do so. See also: P. Mouron, L'Autorité de la concurrence au secours du droit voisin des éditeurs et agences de presse. Revue européenne des médias et du numérique, no. 54, 2020, pp.10-14, https://amu.hal.science/hal-02885794/document, accessed : 05.08.2023 ; O. Wang, Droit voisin des éditeurs de presse et concurrence : quelles perspectives après l'affaire *Google* ?, Dalloz, 2022, https://www.dalloz-actualite.fr/node/droit-voisin-des-editeurs-de-presse-et-concurrence-quelles-perspectives-apres-l-affaire-google, accessed : 05.08.2023.

[1345] See: Cour de cassation, civile, Chambre commerciale, 19 janvier 2010, 08-15.338 08-16.459 08-16.469, Inédit, rectifié par un arrêt du 4 mai 2010, https://www.legifrance.gouv.fr/juri/id/JURITEXT000021734255/, accessed : 24.07.2023.

- Decision of 9 April 2020 of French Competition Authority on requests for interim measures by press publishers

In response to the press publishers' complaint, the French Competition Authority issued a decision in April 2020 in which it considered that "Google has not entered into any negotiations with publishers and news agencies with a view to defining the conditions for displaying and paying for their content that is protected under the press publishers' related rights."[1346] What it has done, is to unilaterally impose the choice between either the use of protected content at zero cost or the display of headlines and hyperlinks implying the significant losses of the traffic and revenues to press publishers. Due to the high dependency of press publishers' revenues on the visibility on the Google services, they had no choice but to comply with the display policy imposed by Google.

Google's practices were considered as thwarting the intended effects of the press publishers' rights. It has been observed that Google's application of the publishers' rights created a worse situation of press publishers from the economic and legal perspective than before the adoption of the said rights.[1347] The Autorité found that Google's application of the publishers' rights **was likely to constitute an abuse of the dominant position**. In reaction, it ordered the tech giant with interim measures which remained in force until the Autorité published its decision on the merits.[1348]

- Decision of 12 July 2021 of French Competition Authority on compliance with the injunctions issued against Google in Decision of 9 April 2020

In the decision issued by the Autorité on 12 July 2021 Google has been considered to have failed to comply with:

- the order to negotiate in good faith[1349];

[1346] Decision 20-MC-01 of 9 April 2020 of French Autorité de la concurrence, p.46.
[1347] Decision 20-MC-01 of 9 April 2020 of French Autorité de la concurrence, p.56.
[1348] Google has been ordered: to negotiate in good faith within 3 months of the request to open negotiations with any news publishers and news agencies or collective management organisations and to achieve the result of the negotiations in the form of setting the remuneration due to the latter; to provide news publishers and news agencies with the information required for the transparent assessment of the remuneration; to continue to display textual extracts and enriched extracts from news publishers and news agencies during the negotiation period; to respect the principle of neutrality in the way in which news publishers' and news agencies' protected content is indexed, classified and presented on Google's services during negotiations on related rights and in negotiations on related rights in respect of any other economic relationship Google may have with news publishers and news agencies; and to provide the Authority with monthly reports on the manner in which it is complying with the decision.
[1349] Despite the repeated request of French press publishers, Google did not aim to negotiate and pay press publishers and news agencies under the related right of press publishers. By way of linking the negotiations of the remuneration resulting from the publishers' right to the negotiation of the remuneration from the

- the obligation to communicate to publishers and news agencies the information necessary for a transparent evaluation of the remuneration due[1350];
- the obligation of neutrality in negotiations on related rights in respect of any other economic relationships Google may have with news publishers and news agencies[1351];
- the order to ensure that the existence and outcome of the negotiations provided for in the Injunctions does not affect the indexing, classification or presentation of the protected content reused by Google within its services[1352].

The Autorité imposed a penalty of 500 million euros. It ordered Google to "make an offer of remuneration that meets the requirements of the press publishers' related right and the Decision for the current use of protected content on Google's services to those complainants who make a formal request to re-open negotiations".[1353] Google paid the fine and proposed the commitments to:

- negotiate in good faith with press publishers and news agencies that so request, the remuneration for any reproduction of protected content on its services according to transparent, objective and non-discriminatory criteria;
- to communicate the information necessary for a transparent evaluation of the proposed remuneration, and to make a proposal for remuneration within three months of the start of negotiations;

services like Showcase it made the former not transparent and dependent on joining other services of Google.

[1350] Autorité noted that this communication was partial, late, fragmented and not sufficient because not allowing "the complainants to make the link between Google's use of protected content, the revenue it derives from it and its financial proposal(s)." See: Decision of 12 July 2021 of French Autorité de la concurrence, p.105.

[1351] Autorité found that the tech giant did not allowed press publishers and news agencies to negotiate a separate remuneration for the current uses of protected content within the framework of the related right of press publishers which constitutes a violation of the discussed Injunction see: Decision of 12 July 2021 of French Autorité de la concurrence, p.93.

[1352] Google violated the obligation to ensure that the existence and outcome of the negotiations provided for in the Injunctions do not affect the indexing, classification or presentation of the protected content reused by Google within its services by linking the negotiations on the remuneration resulting from publishers' right to the negotiations on the remuneration resulting from the services such as Showcase since the absence on latter meant a worse visibility for the press publisher. See: Decision of 12 July 2021 of French Autorité de la concurrence, p.115.

[1353] This is the heaviest fine imposed by the Autorité de la concurrence for non-compliance with its injunctions, and the second highest imposed on an individual company in France. See: T. Gaudiaut, Les GAFA dans le viseur de l'Autorité de la concurrence, 2021,Statista, https://fr.statista.com/infographie/25325/plus-grosses-amendes-antitrust-infligees-a-une-entreprise-en-france/, accessed : 24.07.2023.

- to take the necessary steps to ensure that the negotiations do not affect the indexation, ranking or presentation of protected content and to ensure that the negotiations do not affect any other economic relationship that may exist between Google and the news publishers and news agencies.[1354]

These commitments were accepted by the Competition Authority which on 21 June 2022 closed the proceedings on the merits.[1355]

While analysing the case discussed, I identified several problems revealed by practice and related to the wording of the French implementation of art. 15 of the CDSM Directive and the mechanism introduced therein which are likely to undermine the effectiveness of the publishers' rights.

Firstly, in view of specific relationship between ISSPs and press publishers, French legislator could have introduced the mechanisms protecting press publishers from exploiting their dependence on ISSPs such as for example the assistance of an independent body in case of refusal to negotiate. The need of such solution has been confirmed in practice when publishers asked the Competition Authority in France to mediate. On the other hand, it needs to be acknowledged that the objective of the related rights' regime, chosen by the EU legislator to regulate the press publishers' case, is not to prevent the abuse of dominant position nor the use of economic dependency.

Secondly, according to the French transposition of art. 15 of the CDSM, press publishers are entitled to request from ISSPs the information necessary to calculate the remuneration[1356]. French legislator used its margin of appreciation while transposing art. 15 to safeguard the transparence of the calculation of the remuneration. However, this safeguard is not complete since no mechanism in case of non - compliance is provided. In consequence, the transparency of calculation of the remuneration can be undermined. For example, Google, as results from the case study, provided fragmented and not sufficient information to make a link between the use of press publications and the revenues derived. It affected the result of calculation and potentially could undermine the effectiveness of the publishers' rights. I see in this solution some shortcomings, even though its purpose in itself is perfectly legitimate.

[1354] Autorité de la concurrence,2021, https://www.autoritedelaconcurrence.fr/fr/communiques-de-presse/dans-le-cadre-de-linstruction-au-fond-du-dossier-sur-les-droits-voisins, accessed : 24.07.2023.
[1355] Autorité de la concurrence, Related rights: The Autorité accepts Google's commitments, 2022, https://www.autoritedelaconcurrence.fr/en/press-release/related-rights-autorite-accepts-googles-commitments, accessed: 24.07.2023.
[1356] See point 5.1. of this chapter.

Thirdly, French legislator did not use its margin of discretion while transposing art. 15 of the CDSM Directive to safeguard the situation of press publishers negotiating remuneration under the new law. The legislator could have done so by introducing, for example, an obligation not to stop the display of publications from publishers negotiating remuneration. In this way, press publishers would not have experienced a decline in the display of their publications and a decline in their revues coming from, and consequently would not have been deterred from asserting their rights.

Lastly, in my opinion, the wording of the exclusion of very short extracts of press publication from the publishers' protection in the CDSM Directive and French law[1357], leaves considerable interpretative doubts as to how it is to be understood. It opens the way to practices adopted by ISSPs to understand all headlines as very short extracts, excluded from the protection[1358] what calls into question the effectiveness of the rights of press publishers. Even though French legislator introduced some specifications as to the understanding of the concept, they are not precise enough to dispel the interpretative doubts. It means that to assess whether the infringement of the related rights occurs, the case-by case's analysis should be conducted. The legislator (both EU and French) could have specified that short extracts are not necessarily synonymous with headlines but in case of such approach an objection of excessive descriptiveness could be raised.

In conclusion, press publishers were given the protection but its formulation, the demonstrated inaccuracies and deficiencies, allowed ISSPs to circumvent it, to exploit its shortcomings to impose on press publishers the conditions for the use of their press publications. This ease of circumvention of the legal solutions adopted through the implementation of art.15 of the CDSM Directive was largely due to **the market position of ISSPs and the dependence of publishers' interests on them.**

Some remuneration agreements between press publishers and Google have been concluded following the decision of the French Competition Authority. Google signed an agreement with French Press Agency on 11 November 2021. The remuneration agreed takes the form of an annual lump sum which takes into account the related rights in France and in all Member States of the European Union, regardless of the progress made in

[1357] See chapter V point 2.4.

[1358] According to French Competition Authority: Google "systematically and indiscriminately"[1358] considered the headlines of press publications as meeting the criteria from provision from Article L. 211-3, paragraph 2 on Intellectual Property Code despite the fact that such practices could constitute an infringement of the said provision. See: Decision 20-MC-01 of 9 April 2020 of French Autorité de la concurrence, p.58.

transposing the CDSM Directive in those Member States. It has been explained that the international presence of Agency justifies the fairly high amount, which cannot therefore be compared to the contracts signed by press publishers with only national presence.[1359]

On 16 April 2022 Magazine Publishers' Union (in French: SEPM) which represents eighty publishers and more than 400 titles, has approved the specific framework agreement for the remuneration under the related rights of press publishers proposed by Google. The total value of the agreement is around €20 million a year. The framework agreement between Google and the SEPM governs the way in which individual publishers will negotiate their remuneration with Google. The calculation method is based on several criteria, such as the audience for the site and the use made of its content by platform.[1360] As to the independent press publishers, Le Monde is supposed to obtain 1,3 million dollars and 2 million euros per year for the involvement in commercial services.[1361]

However, the details of the agreements especially as regards the amount of the remuneration in most of the cases are not publicly available. Several of these agreements were subject to confidentiality clauses between the contracting parties. This is the case of the agreement between Alliance of the general information press (in French: APIG) and Google concluded in March 2022, the details of which are confidential.[1362] The general problem that could be identified is the lack of transparency as regards the negotiated remunerations and their conditions. This hinders research into the effectiveness of the publishers' rights. It is difficult to compare the amounts obtained by press publishers in reality. Not only very often do they not come from official sources, but also, they are communicated in an inconsistent and selective manner or they are not communicated at all.

[1359] V. Duby – Muller, L. Garcia, Assemblée Nationale, Rapport …, p.65, https://www.assemblee-nationale.fr/dyn/15/rapports/dv/l15b4902_rapport-information.pdf, accessed : 18.07.2023.

[1360] C. Cohen, La presse magazine trouve un accord avec Google, Le Figaro, no. 24152, 2022, Europresse, https://nouveau-europresse-com.budistant.univ-nantes.fr/Search/ResultMobile/11, accessed : 24.07.2023.

[1361] V. Duby – Muller, L. Garcia, Assemblée Nationale, Rapport …, p.65, https://www.assemblee-nationale.fr/dyn/15/rapports/dv/l15b4902_rapport-information.pdf, accessed : 18.07.2023 ; Challenges.fr,Google s'engage à verser 76 millions de dollars à un groupe d'éditeurs de presse français, 2021, https://www.challenges.fr/media/google-s-engage-a-verser-76-millions-de-dollars-a-un-groupe-d-editeurs-de-presse-francais_750841, accessed :24.07.2023.

[1362] C. Cohen, Droits voisins : Google signe avec la presse d'information, Le Figaro, no. 24114, 2022, Europresse, https://nouveau-europresse-com.budistant.univ-nantes.fr/Search/ResultMobile/13, accessed : 24.07.2023.

To conclude:

- The lack of mechanisms protecting press publishers from exploiting their dependence on ISSPs, not sufficient safeguard of the transparency of the calculation of the remuneration due to press publishers, or not precise enough the scope of the definition of press publication are the shortcomings of the French implementation likely to undermine the effectiveness of the publishers' rights.

- The circumvention of the publishers' protection in many cases did not constitute its infringement of the publishers' rights. It was rooted in the important market position of ISSPs and the economic dependency of press publishers on them. It justifies the choice of the competition law mechanism of French publishers to seek the protection.

- The lack of transparency as regards the agreements and their conditions hinders the research into the effectiveness of the related rights. It should be therefore stated that, although the intervention of the Competition Authority in France contributed to the launch of negotiations (in good faith) between the parties and in consequence, the agreements have been reached, the lack of available data on their details or the selectivity of the data makes it difficult or even impossible to assess the effectiveness of the protection introduced.

9. Implementation of art. 15 of the CDSM Directive in other Member States

The shortcomings and deficiencies of the French implementation of art. 15 of the CDSM Directive likely to undermine the effectiveness of the regulation, served as a lesson for Member States implementing the provision afterwards. The latter introduced some special control and replacement mechanisms to anticipate and prevent the practices of ISSPs leading to the circumvention of the publishers' rights. These solutions are in some cases based on the regulation on the use of press publications by online platforms adopted in common law. The following analysis will discuss the mechanisms introduced in Belgium, Spain and Italy. It will be focused on the solutions which aim at addressing some of the legal issues of the French implementation identified and discussed in the precedent point. The objective is to determine how the margin of discretion during the implementation of the art. 15 of the CDSM Directive has been used by Member States implementing the CDSM Directive after France and to identify the legal solutions that could be implemented by Polish legislator to ensure the effectiveness of the regulation

and to determine what should be taken into account at the stage of the application of the law.

- Lack of mechanisms protecting press publishers from exploiting their dependence on ISSPs in the French implementation

In Italy, the important role has been entrusted to the Italian Communication Authority which determines the criteria for the calculation of the remuneration (fair compensation[1363]) due to press publishers and its amount in case when the parties do not reach an agreement. According to art. 43 bis (10) of Legge sul diritto d'autore within sixty days of the request, the Authority, on the basis of the criteria established to determine the fair compensation, decides which of the economic proposals formulated by the parties complies with the criteria or, if none, it indicates ex officio the amount of the fair compensation.[1364]

The involvement of the public body and in fact, the obligation to bargain may contribute to the increase of the efficiency of the publishers' protection. This assisted negotiation mechanism, resembling the contractual arbitrage has been also introduced in Belgium. According to art. XI.216/2 §2 of the Code of Economic Law (Code de droit

[1363] In the framework of the Italian implementation the obligation to pay the fair compensation has been introduced which can be understood as a right to remuneration granted to press publishers. However, press publishers, in the CDSM Directive were granted the exclusive rights and not the right to remuneration which may lead to the conclusion that the Italian implementation goes beyond the margin of appreciation granted to Member States in the implementation of the publishers' right. See the request for a preliminary ruling of Il Tribunale Amministrativo Regionale per il Lazio, Sezione Quarta, N. 18790/2023 REG.PROV.COLL.
N. 07093/2023 REG.RIC., 12.12.2023, point 21, https://drive.google.com/file/d/1VbN_nAwpL2q7zZTFGLRyJ2f28JEBVltv/view, accessed: 31.01.2024; see also: U. Furgał, The Emperor Has No Clothes: How the Press Publishers' Right Implementation Exposes Its Shortcomings, GRUR International, Vol. 72, no. 7, 2023, pp 650–664; C. Sganga, Why the implementation of the Italian press publishers' right might not be compatible with EU Law, Kluwer Copyright Blog, 2022, https://copyrightblog.kluweriplaw.com/2022/05/30/why-the-implementation-of-the-italian-press-publishers-right-might-not-be-compatible-with-eu-law/,accessed: 06.02.2024.
See: chapter V, points 4.3., 5.4.5.

[1364] English version by the author. Italian version of art. 43 bis (10) of Legge sul diritto d'autore: Fermo restando il diritto di adire l'autorità giudiziaria ordinaria di cui al comma 11, se entro trenta giorni dalla richiesta di avvio del negoziato di una delle parti interessate non è raggiunto un accordo sull'ammontare del compenso, ciascuna delle parti può rivolgersi all'Autorità per le garanzie nelle comunicazioni per la determinazione dell'equo compenso, esplicitando nella richiesta la propria proposta economica. Entro sessanta giorni dalla richiesta della parte interessata, anche quando una parte, pur regolarmente convocata non si è presentata, l'Autorità indica, sulla base dei criteri stabiliti dal regolamento di cui al comma 8, quale delle proposte economiche formulate è conforme ai suddetti criteri oppure, qualora non reputi conforme nessuna delle proposte, indica d'ufficio l'ammontare dell'equo compenso, https://www.altalex.com/documents/codici-altalex/2014/06/26/legge-sul-diritto-d-autore#titolo1, aceessed: 15.11.2022.

économique) press publishers and ISSPs must negotiate in good faith with regard to the uses of press publication and the remuneration due in this respect. In absence of the agreement, the more diligent party can have recourse to the dispute resolution procedure before the Belgian Institute for Postal Services and Telecommunications, during which the remuneration for the exploitations of press publication can be decided and a binding administrative decision can be taken[1365].

In Belgian case, similarly to the Italian implementation, the parties are obliged to negotiate what raises the questions about potential restrictions on the parties' contractual freedom and the negotiating autonomy. This issue has been put forward by Google and Meta which at the end of January 2023, brought actions before the Belgian Constitutional Court for annulment of the Belgian law of 19 June 2022, which transposed the CDSM Directive. The platforms claimed that the contested law creates an excessive burden for ISSPs in breach of the general principle of freedom of trade and industry, and in particular, freedom of contract because it imposes the conditions under which the agreements with press publishers have to be concluded.[1366]

In my opinion, this issue should be seen in a broader perspective. The factors such as relatively weak bargaining position of press publishers due to important market position of some ISSPs such, Google, Twitter(X) or Facebook (Meta) and the press publishers' economic dependence[1367] on them justifies the adoption of mechanisms facilitating of and assisting in negotiations as regards the exercise of the publishers' protection. The freedom of contract is not of absolute nature and the threat of the abuse of the dominant position by ISSPs can be an important justification for the adoption of such mechanisms but the question arises whether it does not go beyond the scope of margin of discretion of

[1365] English version by the author. French version of art. XI.216/2 §2 of the Code of Economic Law: L'éditeur de presse et le prestataire de services de la société de l'information doivent négocier de bonne foi en ce qui concerne les exploitations visées au paragraphe 1er et la rémunération due à cet égard, pour autant que et dans la mesure où l'éditeur de presse est disposé à autoriser les exploitations précitées. En l'absence d'accord, la partie la plus diligente peut faire appel à la procédure de règlement des litiges devant l'Institut belge des services postaux et des télécommunications, visée à l'article 4 de la loi du 17 janvier 2003 concernant les recours et le traitement des litiges à l'occasion de la loi du 17 janvier 2003 relative au statut du régulateur des secteurs des postes et télécommunications belges, au cours de laquelle la rémunération pour les exploitations visées au paragraphe 1er peut être décidée et où une décision administrative contraignante telle que visée à l'article 4 précité peut être prise, https://www.ejustice.just.fgov.be/eli/loi/2013/02/28/2013A11134/justel, accessed : 24.07.2023.

[1366] Droits voisins / Belgique : Meta et Google conteste la loi belge qui selon eux porte atteinte à leur liberté de commerce et d'industrie; le législateur belge a "placé toute une industrie dans une insécurité juridique majeure", La Correspondance de la Presse, 2023, Europresse. As of the date of writing this point of dissertation (06.10.2023), no decision has been issued on this matter. The case with application number 7925 is considered as pending according to the information displayed on the website of Belgian Constitutional Court. See: https://www.const-court.be/fr/judgments/pending-cases, accessed: 06.10.2023.

[1367] See chapter I, sections 4 and 5.

Member States in implementing the provision from art. 15 of the CDSM Directive and whether it does not interfere with contractual freedom overly.[1368]

There are some similarities between the introduction of the recourse to the intermediation institution in the legislations discussed and the solutions provided in the Australian News Media Bargaining Code.[1369] The latter adopted in February 2021 is a mandatory code of conduct "to address bargaining power imbalances between digital platform services and Australian news businesses".[1370] Its objective is to incentivise news media businesses[1371] and digital platforms to reach agreements for remuneration for news content displayed on digital platform services.[1372] In case when parties cannot reach an agreement, the Code sets out a process for an arbitral panel to determine the remuneration due to press publishers as regards the use of their press publications. The bargaining parties must participate in the arbitration in good faith.[1373] A failure to do so is subject to a maximum civil penalty. The explicit obligation to bargain in good faith has been introduced in the Belgian implementation but the legislator did not specify what consequences would be in case of failure to do so. In the Spanish implementation, there is an obligation to carry out the negotiation of authorisations of the use of press publication in accordance with the principles of good contractual faith, due diligence, transparency and respect for the rules of free competition, excluding the abuse of a dominant position in the negotiation[1374].

According to the Australian Code, each of the bargaining parties must submit to the panel a final offer on the remuneration amount. The panel must accept one of the final

[1368] See chapter V, point 5.4.5.
[1369] Hereinafter: the Code. In June 2023 Canadian Online News Acts has been adopted the solution of which mirrors those provided in Australian Code. See: K. Walker, An update on Canada's Bill C-18 and our Search and News products, Google Canada Blog, 2023, https://blog.google/intl/en-ca/company-news/outreach-initiatives/an-update-on-canadas-bill-c-18-and-our-search-and-news-products/ accessed: 26.07.2023.
[1370] The Parliament of the Commonwealth of Australia, Treasury Law Amendment (News Media and digital platforms mandatory bargaining code) Bill 2021, Revised Explanatory Memorandum, p.9, https://www.accc.gov.au/system/files/Revised%20explanatory%20memorandum.pdf, accessed: 25.07.2023.
[1371] The terminology used in this point is the terminology from the News Media and digital platforms mandatory bargaining code.
[1372] Revised Explanatory Memorandum, p.7.
[1373] Section 52ZS of Treasury Law Amendment (News Media and digital platforms mandatory bargaining code) Bill 2021, https://www.accc.gov.au/system/files/Final%20legislation%20as%20passed%20by%20both%20houses.pdf, accessed:25.07.2023.
[1374] Art. 129 bis (3) of Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia, https://www.boe.es/buscar/act.php?id=BOE-A-1996-8930, accessed: 11.07.2023.

offers, unless it considers that none of them is in the public interest.[1375] According to the Australian Code, the bargaining parties must comply with the arbitral panel's determination[1376]. A failure to comply is subject to a civil penalty[1377]. This mechanism is mirrored for example by Italian implementation of art. 15 of the CDSM Directive. However, in Italy, there is no explicit specification as to the consequences of failure to comply with the determination of remuneration done by Italian Communication Authority.

As regards, the effectiveness of the solutions introduced in Australia, despite the negative reactions towards the Australian Code of digital platforms and the threats of Google to pull out of providing search services in Australia, and of Meta to shut down the newsfeeds [1378], the Code has resulted in over AU$200 million payments from these platforms to news publishers and was considered as an effective tool facilitating the bargaining between news organisations and digital platforms.[1379] It should be however noted that copyright and competition law regimes are materially different. Moreover, the solutions adopted in Australia are part of common law which differs from the continental system. Therefore, the legal solution inspired by common law should be adopted to the continental law with caution.

- Failure to safeguard the situation of press publishers negotiating remuneration under the related rights

To anticipate the practices such as those of Google in France which offered the inferior display conditions to those publishers who entered into negotiations on remuneration for the authorisation of the use of press publications, the Italian legislator decided to introduce the obligation that during the negotiation, ISSPs shall not limit the

[1375] Section 52ZX(7) of Treasury …, https://www.accc.gov.au/system/files/Final%20legislation%20as%20passed%20by%20both%20houses.pdf, accessed:25.07.2023.
[1376] Section 52ZZE of Treasury …, https://www.accc.gov.au/system/files/Final%20legislation%20as%20passed%20by%20both%20houses.pdf, accessed:25.07.2023.
[1377] Sections 76(1)(a)(iaa), (1A)(b) and (4A)(h) of Treasury …, https://www.accc.gov.au/system/files/Final%20legislation%20as%20passed%20by%20both%20houses.pdf, accessed:25.07.2023.
[1378] A. Schiffrin, Platforms push back against laws like Australia's Media Bargaining Code, CEPR,2022, https://cepr.org/platforms-push-back-against-laws-australias-media-bargaining-code,accessed: 26.07.2023.
[1379] R. Sims, Instruments and objectives; explaining the News Media Bargaining Code, Judith Neilson Institute for Journalism and Ideas,p.3, https://jninstitute.org/wp-content/uploads/2022/05/Rod-Sims_News-Bargaining-Code_2022.pdf , accessed: 26.07.2023.

visibility of press publications of such publishers in search results. The unjustified restriction as regards the display in the course of negotiations may be assessed for the purpose of verifying compliance with the obligation to negotiate in good faith.[1380]

The Italian solution, although not introducing any financial sanction in case of non-compliance, constitutes an important step towards safeguarding the effectiveness of the regulation in this respect. However, the issue of practical nature should be raised. How a press publisher should prove that the visibility of his press publications has been reduced when the data on the display of content is held by ISSPs? One of the solutions that I see would be to extend the information claim as regards the transparency of the calculation of remuneration to the provision of such data. According to media reports, a number of press publishers has already concluded agreements with Google in Italy and it took place in a "peaceful atmosphere"[1381] without drastic changes in terms of Google's display policy and without legal skirmishes. In Spain, within the implementation of the art. 15 of the CDSM Directive, the obligation to respect the editorial independence of publishers of press publications has been introduced.[1382]

- Insufficient safeguard of transparency of the calculation of publishers' remuneration

The Italian implementation, like the French, one includes the obligation to provide the data necessary to determine the publishers' remuneration resulting from the use of press publications by the ISSPs. However, the Italian legislator goes a step further by introducing that in the event of the failure to communicate such data within thirty days of the request, the Authority shall impose an administrative sanction on the defaulting party of up to one per cent of the turnover achieved in the last financial year closed prior to

[1380] English version by the author. Italian version of art. 43 bis (9) of Legge sul diritto d'autore: (…) Nel corso della negoziazione i prestatori di servizi delle società dell'informazione non limitano la visibilità dei contenuti degli editori nei risultati di ricerca. L'ingiustificata limitazione di tali contenuti nella fase delle trattative può essere valutata ai fini della verifica del rispetto dell'obbligo di buona fede di cui all'articolo 1337 del codice civile, https://www.altalex.com/documents/codici-altalex/2014/06/26/legge-sul-diritto-d-autore#titolo1, aceessed: 15.11.2022.

[1381] Google agrees to pay Italian publishers for news, 2021, The Economic Times, accessed: 12.08.2023 https://economictimes.indiatimes.com/tech/technology/google-agrees-to-pay-italian-publishers-for-news/articleshow/81683034.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst

[1382] 129 bis (3) of Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia, https://www.boe.es/buscar/act.php?id=BOE-A-1996-8930, accessed: 11.07.2023.

notification of the dispute.[1383] Given the reluctance of some ISSPs in France to provide data and the manner in which it has been done, as demonstrated in previous points of this chapter, the introduction of a sanction in case of failure to provide the requested data is a step that can importantly improve the provision of data necessary to establish the remuneration and contribute to safeguarding the effectiveness of the publishers' rights.

The Belgian legislator was more accurate by specifying in art. XI.216/2 §3 of the Code of Economic Law that ISSPs shall provide, at the written request of the press publisher, **up-to-date, relevant and complete** information on the exploitation of the press publications so that press publisher can assess the value of the rights. In particular, ISSP shall provide **information on the number of consultations of the press publications and on the revenues that ISSP derives from the exploitation of press publications.[1384]** The information shall be provided within one month of the day following the notification of the press publisher's written request and shall under no circumstances be used for any purpose other than the assessment of the rights. The information provided will be treated as strictly confidential.

The Belgian legislator, contrary to the Italian one, did not provide for a sanction in the event of non-compliance with the obligation. Such provision is intended to address the shortcomings that appeared after the implementation of the related rights in France. Data provided by Google there, has been considered as inaccurate, selective which did not make it possible to calculate or understand how the remuneration offered to publishers

[1383] English version by the author. Italian version of art. 43 bis (12) of Legge sul diritto d'autore: (…) In caso di mancata comunicazione di tali dati entro trenta giorni dalla richiesta ai sensi del primo periodo, l'Autorità applica una sanzione amministrativa pecuniaria a carico del soggetto inadempiente fino all'uno per cento del fatturato realizzato nell'ultimo esercizio chiuso anteriormente alla notifica della contestazione. Per le sanzioni amministrative di cui al quarto periodo è escluso il beneficio del pagamento in misura ridotta previsto dall'articolo 16 della legge 24 novembre 1981, n. 689, https://www.altalex.com/documents/codici-altalex/2014/06/26/legge-sul-diritto-d-autore#titolo1, aceessed: 15.11.2022.

[1384] English version by the author. French version of art. XI.216/2 §3 of the Code of Economic Law: Le prestataire de services de la société de l'information fournit, à la demande écrite de l'éditeur de presse, des informations actualisées, pertinentes et complètes sur l'exploitation des publications de presse afin que l'éditeur de presse puisse évaluer la valeur du droit visé au paragraphe 1er. En particulier, le prestataire de services de la société de l'information fournit des informations sur le nombre de consultations des publications de presse et sur les revenus que le prestataire de services de la société de l'information tire de l'exploitation des publications de presse.
Les informations sont fournies dans un délai d'un mois à compter du jour suivant la notification de la demande écrite de l'éditeur de presse.
Les informations fournies ne seront en aucun cas utilisées à d'autres fins que l'évaluation du droit visé au paragraphe 1er et l'attribution d'une part appropriée de cette rémunération visée au paragraphe 6. Les informations fournies sont traitées de manière strictement confidentielle.
https://www.ejustice.just.fgov.be/eli/loi/2013/02/28/2013A11134/justel, accessed : 24.07.2023.

was calculated.[1385]In Belgian implementation it is clearly indicated what kind of data is expected and in what way it should be transmitted, namely information has to be up-to-date, relevant and complete. The ideal solution therefore, seems to be a combination of both, so as to clearly define what data is expected and implement a financial sanction in the event of non-compliance.

To conclude:

- In Italy or in Belgium, an important role has been entrusted to the independent bodies. They are responsible for the determination of the criteria for the calculation of the remuneration and of the amount of the remuneration (fair compensation) in case when the parties do not reach an agreement. The involvement of the public body and in fact, the obligation to bargain can contribute to the increase of the efficiency of the press publishers' rights. The factors such as relatively weak bargaining position of press publishers due to important market position of some ISSPs such as Google, Twitter or Facebook and the press publishers' economic dependence on them justifies the adoption of mechanisms facilitating of and assisting in negotiations as regards the exercise of the publishers' protection. It may however constitute a risk to the contractual freedom and go beyond the scope of margin of discretion of Member States in implementing the CDSM Directive.

- The Italian legislator decided to introduce the obligation that during the negotiation, ISSPs shall not limit the visibility of publishers' content in search results. I see the necessity to extend the information claim as regards the data necessary to calculate the remuneration to the data as regards the visibility of press publications. The latter will enable press publishers to assess whether their visibility has been reduced or not.

- The Belgian legislator, as regards the obligation to provide the data necessary to calculate the remuneration due to press publishers, specified that the information on the exploitation of the press publications has to be up-to-date, relevant and complete. In Italy, there is an obligation that in the event of failure to communicate such data, an independent body shall impose an administrative pecuniary sanction. In my opinion, the combination of both would ensure the effectiveness of press publishers' protection.

10. Conclusion

Press publishers are granted the exclusive rights of *erga omnes* nature, the scope of which is limited in practice and allows claims to be directed against a specific group,

[1385] Decision of 12 July 2021 of French Autorité de la concurrence, p.105.

namely ISSPs using a press publication in the specific, online environment. This restriction is beneficial for the free flow of information, since the publishers' rights do not apply to users who are not ISSPs.

ISSPs are any natural or legal persons providing an information society service for remuneration, understood broadly also as the incomes generated by advertisements or personal data, at a distance, by electronic means and at the individual request of a recipient of services.

The reproduction and making available rights granted to press publishers are understood by the CJEU in a broad way and the assessment whether they apply are based of several complex criteria. This can have a discouraging effect on the ISSPs in the context of dissemination of information and knowledge since the criteria discussed make it difficult to objectively determine the scope of the rights. In consequence, in many cases the assessment whether a given act would constitute an infringement of the exclusive rights or not is not evident.

Freedom to use a press publication is enjoyed by those who are individual users who use press publication for their private or non-commercial needs and are not ISSPs. The exclusion of private or non-commercial uses should be understood as an alternative exclusion. It results from the systemic and purposive analysis of the exclusion that individual users should be understood broadly as also including legal persons, for example non-profit organisations.

The mandatory intermediation of the collective management organisations has not been foreseen and such a solution corresponds to the significant differences in the interests of press publishers. It would be important from the perspective of research into the effectiveness of the publishers' rights to study and compare the results of the agreements concluded between press publishers and ISSPs to assess how they translate into achievement of the intended objectives of the regulation. However, this requires access to information on the agreements reached between actors.

The analysis of the case of French publishers who had to ensure the effectiveness of the granted protection through the competition law tools revealed that the press publishers' rights (both at the EU and French level) lacked the mechanisms protecting press publishers from exploiting their dependence on ISSPs and from the negative effects of imbalances between these two actors as regards the market power. Lack of measures in these two areas allowed the regulation to be circumvented and undermined its purposefulness.

Safeguards aiming at anticipating the practices leading to the circumvention of publishers' protection have been introduced in subsequent implementations of the related rights in e.g. Spain, Italy or Belgium. Amongst them, the adoption of the arbitration mechanism in case when parties cannot reach an agreement, the involvement of independent body to determine the amount of remuneration, the obligation to negotiate in good faith should be indicated.

It is worth to note a certain tendency that the implementation of the publishers' rights, in order to secure its effectiveness, in some Member States was enriched by the adoption of the mechanisms aiming at safeguard the negotiations process between press publishers and ISSPs. This is justified by the specific relationship between these two actors, inequalities in bargain power and a strong market position that allows platforms to impose conditions on the use of press publications. The analysis of the French case conducted in this chapter showed that grant of the exclusive rights only, without these safeguards, may not be enough to ensure the achievement of the objectives pursued with the adoption of the publishers' rights, including safeguarding media pluralism and guaranteeing the free flow of information. This is, however, preliminary conclusion, which need to be confirmed by research into other practical cases from other Member States, which are not addressed in this thesis, if only because the negotiations between press publishers and ISSPs as regards the enforcement of the publishers' rights are only at an early stage in many EU countries.

Chapter V: Press publishers' rights in the context of access to information and media pluralism – conclusions and recommendations

1. Introduction

The last chapter provides the assessment of the related rights of press publishers from the different perspectives. They are discussed firstly, from the perspective of the legal framework for access to information and press publishing activity under copyright and related rights' regime and risks to media pluralism, secondly, from the perspective of market realities. Then, the analysis is focused on the assessment whether the publishers' rights constitute an interference with fundamental rights and if so, whether this interference is justified. The objective is to identify, through the prism of these different perspectives, the threats resulting from the press publishers' rights to media pluralism and free flow of information at the EU level and in the discussed national laws.

The determination of how far Member States can go in implementing art 15 of the CDSM Directive, to what extent they are free to choose the means to achieve the objectives of the new law will be instrumental to carry out the final stage of the analysis.

The latter will consist in formulating how the implementation of the publishers' rights should look like in order to ensure the effectiveness of the regulation, especially in the context of preserving media pluralism and the free flow of information. This can serve as a guide for the amendment of the laws implementing art. 15 of the CDSM Directive in Member States. This research, aiming at identifying the elements conductive to the achievement of the balance between the protection of the publishers' interests and of the free flow of information and media pluralism will be of great importance at the stage of the application of the law for example before the courts. Moreover, the proposed mechanisms will be the source of inspiration for the future regulations concerning the relationship between various media and its impact on the freedom of expression and information flow.

2. Legal framework for access to information and press publishing activity after the adoption of the publishers' rights in the EU and national laws

The adoption of the related rights of press publishers brings some changes to the legal framework of access to information within copyright and the related right's regime. After establishing the framework of copyright and related rights before the adoption of the CDSM Directive in chapters II and III of the dissertation, it is now worth focusing on analysing what has changed with the adoption of the new rights. The objective of this section is also to demonstrate what has changed as regards the scope of protection under copyright and related rights' regime in the context of press publishing activity, who is protected, to what extent and what's new is protected since the adoption of the publishers' rights.

The assessment will be conducted in the close connection with the analysis carried out in the previous chapters by relying on a comparative method to assess the changes as regards the subject matters of protection, holders of protection, its scope.

One of the objectives of the press publishers' rights was to foster the availability of reliable information and to strengthen freedom of expression and media pluralism. However, through the analysis conducted in the dissertation, I identified some dangers for the free flow of information and media pluralism deriving from the scope and wording of the provision from art. 15 of the CDSM Directive and its national implementations. As to the latter, I focused on the analysis of French, Italian, Spanish and Belgium implementations and the Polish proposal.

This section aims at discussing the identified risks and dangers, to explain the reasons why they pose a threat from the perspective of freedom of expression and to propose legal remedies to limit this counter-productive effect of the regulation. The analysis will be based on the assessment of the criteria of media pluralism established in chapter I, namely plurality and diversity of media supply, use and distribution, in relation to 1) ownership and control, 2) media types and genres, 3) political viewpoints, 4) cultural expressions and 5) local and regional interests and on determined in chapter I framework for access to information, rooted in the existence of pluralistic media, and understood as a possibility to receive information which is accessible and visible to the audience.

2.1.Subject matter of protection

2.1.1. Definition of press publication and scope of public domain

For Ch. Geiger, O. Bulayenko and G. Frosio "lifting materials out of the public domain has unwanted consequences, impinging greatly on freedom of expression and

democratisation, while favouring centralisation of information."[1386] This argument should not be neglected, public domain constitutes a basis for access to information enabling the development and dissemination of knowledge through the reuse of its elements.[1387]

The adoption of the protection of a new subject matter can limit the scope of public domain. This is because the elements which are protected since then normally have not been protected so far. The adoption of the related rights of press publishers adds a further layer of protection. The elements protected by copyright such as photographs, videos, literary expressions put together constitute a press publication within the meaning of art. 2(4) of the CDSM Directive which is protected by the related rights of press publishers[1388].

The same subject matter can be therefore protected on two different legal basis and two (different) right holders will independently have control over its use. To illustrate, the same photographs will be protected by copyright but also by related rights' regime if included in press publication.

However, following the interpretation of the definition of press publication provided in chapter III of this dissertation, the press publishers' protection does not extend to the unprotected elements. They can be used by a journalist to write another press item or by mere users of Internet to create. The possibility of the reuse of elements of public domain is not restricted by the scope of the definition of the press publication adopted in art. 2 (4) of the CDSM Directive and in conclusion, the scope of public domain is not limited due to the introduction of the protection of a new subject matter thanks to its specific structure based on the already protected elements. For example, the press publishers' protection does not apply to news of the day, pictures made by AI which despite the fact of their potential inclusion in a press publication can be used freely.

It is, in my opinion, an important safeguard for access to information. The EU legislator based the new subject matter on the subject matters already protected[1389] under copyright and related rights' regime. Access to protected elements remains restricted

[1386] Ch. Geiger, G. Frosio, O.Bulayenko, Opinion …, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2921334, accessed: 27.10.2022, p. 17.
[1387] See chapter II, section 2.
[1388] The protection does not extend to the mere facts according to recital 57 of the CDSM Directive. It should be seen as a reference to the idea/expression dichotomy according to which ideas, procedures, methods of operation or mathematical concepts as such are not be protected. What is protected by copyright is the expression of the idea or a fact but not the idea or fact as such.
[1389] See the following consideration as regards whether all the subject matters included in press publication should be protected or not.

from the perspective of the free flow of information but the scope of this restriction is not extended due to the adoption of the new subject matter of protection within related rights' regime.

The purpose of the adoption of the press publishers' rights was to reward the publishers' efforts and investments made in publishing a press publication. A purposive interpretation of the new protection would therefore argue in favour of the understanding of the exclusive rights as also covering the use of unprotected elements of press publications in order to effectively safeguard the press publishers' interests. It should be noted, however, that following the efficiency of the publishers' protection in this regard would significantly limit the scope of public domain by making the exclusive rights extend to the use of its elements. Accordingly, and taking into account the result of the linguistic interpretation, I conclude that the protection of press publishers applies only to the protected elements of press publication.

The scope of the definition of press publication is criticised as being too broad for example due to the fact that it extends to the press publications which has the purpose of providing the general public with information related not only to news but also to other topics[1390]. According to M.M. Eechoud "the addition of 'other topics' extends it to virtually every domain of commercial, government and citizen publishing."[1391] The objective of the adoption of the publishers' rights was to reward the investements of press publishers which could lead to the strengthening of the press market and, consequently, ensuring access to information and media pluralism. If the press publishers' rights apply only to press publications providing information related to news, there would be a differentiation of the scope of protection of press publishers, favouring a particular group of publishers publishing on a particular topic. It would result in a further widening of disparities in the press sector and would not be conducive to achieving the mentionned objectives. Moreover, it should be kept in mind that what is protected under the publishers'rights is not the information itself but a collection consisting of protected elements which provide information. The purposive analysis of the provision leads to the

[1390] See: S. Karapapa, The press publishers' right in the European Union: an overreaching proposal and the future of news online. In: Bonadio, E. and Lucchi, N. (eds.) Non- Conventional Copyright: Do New and Non-traditional Works Deserve Protection? Edward Elgar,2018, pp. 316-339; Ch. Geiger, G. Frosio, O.Bulayenko, Opinion …, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2921334, accessed: 27.10.2022.

[1391] M.M. van Eechoud, A publisher's …, https://www.openforumeurope.org/wp-content/uploads/2017/01/OFE-Academic-Paper-Implications-of-publishers-right_FINAL.pdf, accessed: 27.10.2022,p.34.

conclusion that the broadly defined subject matter of press publishers' protection as regards the topic of press publication is conducive to achieving the objectives of the regulation and does not impact negatively the free flow of information.

I see another safeguard for free flow of information in the specification that the very short extracts of press publication or individual words are excluded from the protection according to art. 15 (1) of the CDSM Directive. Although new subject matter of protection has been created by the legislator, a certain minimum for the protection to arise has been recognised. It means that everything which does not meet this minimum criterion is not subject to protection and therefore, the access to it is not controlled by the right holder. It is beneficial to the free flow of information. A separate issue that will be discussed later based on the analysis of national implementations within this chapter is how big is this area excluded from protection and how it should be determined.

2.1.2. Press publication as a (collective) work

As results from the analysis conducted in chapter II on the understanding of the concept of work in the French and Polish law, the latter constitutes an expression of mind, intellectual creation reflecting the personality of author deciding on the shape of the work by selecting and arranging its elements what makes it original. Press publication constitutes a collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matters. Since this is a collection of works and other subject matters, it should be examined what is the relationship between press publication and collective work and whether a press publication could be considered as a collective work. I propose to divide the analysis into two stages and firstly focus on the subject matter of protection and secondly, on the nature of the involvement of publishers in the creation of both, press publication and collective work. The remarks relating to the collective work are based on the analysis of collective work under French and Polish law conducted in chapter II of the dissertation.

Press publication understood as a collection includes at least two works and other subject matters. According to the interpretation of press publication provided in section 4 of chapter III, press publication can contain also non-protected elements but the publishers' protection will not extend to them. Collective work, similary, should include at least two works and it may include also non-protected elements. As regards press publication, it includes the works of specific, journalistic nature and it has the purpose of

providing the general public with information related to news or other topics. Neither French nor Polish legislator has specified such requirements for collective work, but there is nothing to prevent a specific collective work from meeting them.

Press publication is a collection constituting an individual item within periodical or regularly updated publication under a single title. Collective work, as a result of the publisher's commitment to combine all the elements of the collection can also be defined as an item, a work within copyright meaning. The specifity of press publication is the requirement of being published within a periodical or regulary updated publication.

For the protection of collective work to arise, the latter has to be of creative nature. The selection, combination and arrangement of its elements has to lead to the creative effects, contrary to press publication which for the protection under related rights' regime to arise is not assessed on this basis. This is an important difference as regards the compared subject matters. Although a press publication can be of creative nature, the latter is neither required nor assessed in order to extend the protection to press publication under new law.

According to the French law, the protection under the publishers' rights intends to reward the engagement of press publishers, consisting in initiative, editorial responsibility and control. According to the Polish proposal of the implementation of the CDSM Directive, his role consists in exercising actual and legal control over the selection of the content which is disseminated[1392].

Editorial responsibility, according to the analysis conducted in section 5 of the chapter III of this dissertation should be understood as the exercise of effective control meaning the possibility of taking the final decisions both over the selection of materials included in a press publication and over their organisation which follows the professional ethics and which does not necessarily imply any legal liability under national law for the content provided. Initiative should be understood as the act of initiating the publishing process, control as conducting supervision over the process of publishing.

The emphasis in both national legislations and the Directive is on exercising control over the publication process what could lead to the conclusion that it is less likely though of course not impossible that the publisher will be involved in such a process in a creative way since for example the selection of its elements will be often up to editor- in- chief or journalist.[1393]

[1392] See chapter III, section 5.
[1393] See chapter I, point 4.1.

In my view, and based on the analysis conducted in sections 4 and 5 of chapter III on the scope of the engagement of press publisher, he is responsible for the control over the selection and arrangement of the elements of press publication rather that for the selection and arrangement of its elements as such. I understand this responsibility for example as consisting in accepting materials submitted for publication. Moreover, the financing aspect of the process of creation, production and distribution of press publication should not be neglected.

As regards the collective work, it has been observed in the analysis provided in chapter II that the publishers' involvement to create a collective work consists of initiating, organising and providing technical and financial background, bearing the risks and responsibilities of the final form of the work, indicating the conceptual framework, selecting and arranging its elements. Especially the latter demonstrates the involvement of creative nature.

For the protection under related rights' regime to arise it is irrelevant whether the involvement of press publisher is of creative nature or not. Exercising control may, but does not have to be creative. For copyright protection to arise, press publisher has to be involved in creative way. It cannot be excluded therefore that the involvement of press publisher in the creation of press publication will be creative and he will be granted also the copyright protection on this basis.

It means that depending on whether the criteria of protection of collective work will be met, press publication can be considered as a collective work and in such a situation there will be a multiplication of the layers of protection. Press publisher will have the exclusive rights to press publication and the exclusive rights to collective work.

From practical perspective, problematic in the case of collective work was the necessity for the publisher to prove the legal titles to all its elements before the court to seek protection[1394]. In case of press publication, the protection under related rights arises to a collection of works and other subject matter and it is not necessary to prove the legal title to the elements of a press publication, only that the work in question is included in a press publication which will make it easier for publishers to pursue their claims. Press publishers become entitled to the works and other subject matter as the elements of press publication, the author remains entitled "narrowly", to the respective element of the press publication used independently of press publication. In case of a collective work, the

[1394] M.van Eechoud, A publisher's intellectual property right. …, p.27.

protection arises to the "surplus" being the result of the combination, creative selection and arrangement of elements which leads to the production of a creative outcome.

The adoption of the related rights of press publishers complements the protection of press publishers in this area, where press publication does not meet the criteria of collective work, it is of complementing character also as regards the legislations where the collective work is not recognised.

This is a specificity of the related rights of press publishers the subject matter of which may be the same as the subject matter of copyright protection. It is not the case of phonograms or broadcasts. Phonogram, defined as any exclusively aural fixation of sounds of a performance or other sounds in art. 3 (b) of the Rome Convention is a subject matter of related rights protection, being different compared to the subject matter of copyright protection which is the sound of performance or other sound. Broadcast, understood according to art. 3(f) of the Rome Convention as transmission by wireless means for the public reception of sounds or of images and sounds is a different subject matter compared to sounds or images and sounds which it transmits and which are protected by copyright. Press publication protected by related rights' regime can constitute also a subject matter protected by copyright.

Therefore, a clear distinction should be made between a press publication protected under copyright for its originality and under related rights to reward the press publisher's involvement in its dissemination. It should be moreover highlighted that for protection resulting from the press publishers' rights to arise, the press publication does not have to be a work. Its originality is not assessed for the protection resulting from the related rights to arise.

To conclude:

- The construction of the publishers' rights which apply to the use of press publication based on the protected elements provides a safeguard against the restriction of the free flow of information which could have taken place by extending protection to the elements from public domain. Another safeguard constitutes the setting of a minimum threshold from which the protection applies, i.e. excluding from the protection of individual words and very short extracts of press publication.

- Contrary to some subject matters of related rights such as phonogram or broadcasting, the specificity of the related rights of press publishers is that the

subject matter of protection can be the same as the subject matter of copyright protection.

- Press publication protected under the related rights' regime can be considered as a collective work as regulated for example in French or Polish law if the criteria of protection of collective work will be met. In such a situation there will be a multiplication of layers of protection. Press publisher will have the exclusive rights to press publication and the exclusive rights to collective work. Following the adoption of the related rights of press publishers, the latter are considered as the original rightholders what means that they will be able to get injunctive relief or institute infringement proceeding before the court easier since the demonstration of the transfer of rights from the authors of the respective works included in a press publication or the grant of an exclusive license will not be necessary. The adoption of the publishers' rights is of complementing character as regards the legislations where the collective work is not recognised.

2.2.Holder of protection

Since the adoption of the CDSM Directive, the protection resulting from the reproduction and making available rights extends to publishers of press publications. They become next to the authors, performers, phonogram producers, producers of the first fixation of films, and broadcasting organisations, another category of right holders who are empowered to decide on access of the public to information included in works and other subject matters. It leads to a multiplication of entities to whom the protection resulting from copyright and related rights extends. From the press sector perspective, the press publishers are explicitly[1395] recognised as holders of exclusive rights. From the perspective of access to information, the extension of the list of rightholders deciding on the use of works or other subject matters can be considered as an interference with the users' interests.

As it has been observed above, the subject matter of protection under publishers' rights is based on the subject matters already protected. However, the grant of exclusive rights to a new category of entities, results in the emergence of a new category of actors who control access to the information contained in these subject matters. Therefore, despite the fact that press publication has a "secondary" character, being based on already

[1395] Before the adoption of the related right of press publishers, they were holders of exclusive rights as a result of the transfer of assignment of the rights from other rightholders.

existing subject matters, a new group of actors controlling access to these subject matters is added which contributes to limiting the scope of access to information included therein.

Protection applies to all publishers of press publication established in a Member State. It should be specified that the protection extends only to publishers publishing press publication and not another subject matters. Moreover, neither in CDSM Directive nor in French implementation and Polish proposal, a distinction is made depending on the market importance or seize of press publishers. In consequence, anyone who meets the criteria of a press publisher and publishes a press publication is subject to the protection resulting from the related rights.

It should be however noted that the press publisher's control over the use of press publications applies only in case of the use of press publication by information society service providers. The *erga omnes* character[1396] of the related rights is limited in practice to the online environment and to the specific entities, ISSPs, against whom it applies, what makes the range of entities against whom the right is directed **limited**. Individual users of Internet, for their own, non-commercial needs, without carrying out the activities that could be classified as the activity carried out by the ISSPs, can use press publications without any restriction. Therefore, it should be discussed what is the relationship between the extension of the category of holders of exclusive rights to press publishers and the scope of access to information and whether such an extension can negatively impact the exercise of the right to receive information discussed in details in chapter I of the thesis.

Since the right applies against ISSPs, users **are not directly affected by the regulation.** However, users are the main audience of the ISSPs, the objective of which is provide information to the public. Indirectly, therefore, **the introduction of a new category of entities controlling access to information contained in a press publication can have a negative impact on individual users and framework of their access to information.** The examples of situation when users can be indirectly affected by the adoption of the rights discussed are numerous. It will be the case when a press publisher does not agree to the use of a given press publication in the framework of the exercise of his rights. Another example will be when ISSP chooses not to make available of a press publication due to the high remuneration to be paid to press publisher. The *erga omnes* nature limited in practice to ISSPs restricts the negative impact on the flow of information

[1396] See chapter IV, section 2.

of such extension, but not entirely, since the entities targeted by the rights have a significant role in disseminating information[1397].

To conclude:

- The extension of protection resulting from the reproduction and making available rights to publishers of press publications means the introduction of another category of rightholders who are empowered to decide on access of the public to information included in works and other subject matters, elements of press publication.

- The press publisher's control over the use of press publications applies only in case of such use by ISSPs. The practical *non-erga omnes* character of the discussed related rights makes the range of entities against whom they are directed limited, the users are not directly affected by the regulation. However, the indirect negative impact on the access to information of the public has to be established due to the important role of ISSPs in dissemination of information.

2.3.Exclusive rights

The objective of the exclusive rights is to incentivise the production and dissemination of intellectual works. For some scholars, exclusive rights should be perceived as complementary to unfair competition law, which is "by nature devoted to regulating competitor relations."[1398]

The threat to the effectiveness of the publishers' rights arises on the ground of competition law and concerns the anti-competitive practices by ISSPs. Related rights are not adequate to cope with such practices. What is protected by the related rights' regime is the investment, its purpose is to reward the rightholder for the particular achievement. The objective of the competition law also relates to the investment, but does not protect it explicitly. It regulates the behaviors of competitors taking over the investements.[1399] Granting exclusive rights to press publishers means protecting the investments made by them. It does not however mean protecting them against unfair market practices. The choice of legal regime, because of the latter, may hinder the achievement of the intended objectives of the publishers' rights.

[1397] See chapter I, point 5.4.
[1398] V. Moscon, Use and abuse of neighbouring rights and the growing need for a sound understanding: the case of online news protection in Europe in : S.Frankel, The object and purpose of intellectual property, Edward Elgar Publishing, 2019, p.309.
[1399] See: V. Moscon, Use and abuse …, p.324.

As regards the framework of access to information, the grant of exclusive rights to a new group of actors means that this new group of actors, through the exclusive rights, has a power to control the access to information included in press publications. It is not just the granting of these rights to new group that poses a risk, but the threat from the perspective of framework to access the information consists also in how broadly we understand them.

It is important to note the correlation between the broader understanding of the exclusive rights which implies the narrower scope of the possibilities to use the work without infringing the rights discussed. In other words, the more broadly we understand the exclusive rights in the context of the use of a press publication, the fewer are cases of the use of press publications that will not be covered by the exclusive rights. Moreover, the greater is likelihood of the interference with the normal use, simple enjoyment of the work which in principle is not covered by the scope of the exclusive rights.

Due to the broad understanding of reproduction right and doubtful legal qualification[1400] of several acts, important for media organisations such as scanning, storing and indexing of press publications, there is a possibility that ISSPs will refrain from conducting them in order to avoid the negative legal consequences. For that reason, the final results of such activities will not reach the readers at all or will reach them to a limited extent. The free flow of information can be impeded. I agree with C. Sganga who points out that the purpose of ensuring an adequate reward to right holders, anchored in the property logic, predominates over any other arguments that "could support a more careful balance between exclusivity, access and new creations"[1401]. This observation leads to the conclusion that the broad understanding, although being in the interest of the beneficiaries of the reproduction right may constitute a danger to the interest of the recipients of the works[1402].

To illustrate, the evolving interpretation of the deliberate intervention in the context of the communication to the publica right, to enable the access to the work could be indicated. Within the subsequent judgements of the CJEU, the deliberate intervention of user which is necessary to conclude an act of communication evolved into the mere facilitation of access which since then is considered as enough for the act of the

[1400] For example, the doubts as to whether the requirements from art. 5(1) of the InfoSoc Directive are met or not.

[1401] C. Sganga, Propertizing …, p.126.

[1402] P. Jougleux, Access to works protected by copyright law, in: T.E.Synodinou, Pluralism or universalism in international copyright law, Wolters Kluwer, Information Law Series, 2019, pp.643-650.

communication to the public to occur. In other words, the engagement of the user providing public with the access to the work has not to necessarily be of substantial nature in order to meet the criteria of the act of communication to the public from art. 3 of the InfoSoc Directive. Already the provision of a product giving access to the work can be considered as an act of communication to the public. The press publishers' rights apply only against the ISSPs, so the outlined doubts and interpretive concerns will impact only their situation. It could be considered as important safeguard of users' situation as regards the possibility of use of press publications in view of the discussed extension of the exclusive rights.

Granting of exclusive rights to further actors is in each case an extension of the catalogue of entities controlling the access to information[1403]. The adoption of the publishers' rights from the perspective of access to information is a step that should be viewed negatively as contributing to the disruption of the flow of information unless sufficiently balanced with the exceptions and limitations. However, it must be acknowledged that the limitation of the scope of application of the publishers' rights only against a specific group of actors mitigates this negative impact.

To conclude:

- Granting exclusive rights to press publishers means protecting the investments made by them. It does not however mean protecting them against unfair market practices of online platforms on which press publishers are dependent. There is a danger that the grant of the exclusive rights only, not accompanied by the adoption of the mechanism aimed at preventing the abuse of dominant position, the imposition of negotiating conditions or the exploitation of market dependencies will not be sufficient to secure the effectiveness of the publishers' protection.

- Grant of exclusive right to press publishers should be considered as a grant of power to control the access to information included in press publications. Since the exclusive rights of reproduction and making available to the public are understood broadly, the narrower becomes the scope of possibilities to use of press publication without infringing these rights. The negative impact on the free

[1403] According to A. Strowel and F. Tulkens, the nature of the exclusive right known as copyright has evolved towards a right to control access as we move into the digital age. See: A. Strowel, F. Tulkens, Freedom …,p.303,https://dial.uclouvain.be/pr/boreal/object/boreal%3A137558/datastream/PDF_01/view,accessed: 10.08.2022; See: J. Ginsburg, From Having …, https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=2212&context=faculty_scholarship accessed: 10.08.2022.

flow of information in this case is however limited due to the fact that the publishers' rights apply only against the ISSPs and not individual users.

2.4. Exclusions from the scope of protection

The protection granted to press publishers does not apply to the acts of hyperlinking neither to the acts of the use of individual words and very short extracts of press publications. These are the safeguards for free flow of information, **balancing the restrictive effect of the mere adoption of exclusive rights**. However, whether the balancing effect will take place and to which extent, depends on the understanding of these exclusions.

Narrow understanding of hyperlinks and very short extracts of press publication means that less information will reach the public. In case of hyperlinks, if the interpretation of the latter privileges only the URL address, audience will not see the short excerpts from press publications that are often displayed in the link. Given how many people use online platforms as a source of information[1404] and for how many people reading the short phrase is a sufficient source of information, the fact that they will receive the limited amount of information compared to what they received before the adoption of the related rights, can limit the plurality of media supply and hamper the free flow of information.[1405]

The restrictive understanding of very short extracts of press publication excluded from protection resulting from the publishers' rights has been pushed by many academics and by national legislators implementing the DSM Directive with the purpose of more effective protection of press publishers[1406]. Their objective is to understand very short extracts in a limited sense to minimise the use of press publications not falling within the scope of the exclusive rights. In practice, it means that less information will reach the public.

Moreover, since the criteria on how to understand very short extracts and how short they should be to be qualified as falling within the scope of the exclusion remain subjective and difficult to measure despite some national efforts to define the term with

[1404] See chapter I, point 5.4.
[1405] See chapter I point 5.3.
[1406] See chapter III point.4.1.

more precision[1407], to avoid the infringement of the rights or to avoid asking for the authorisation for the use of press publication incuring supplementary costs, ISSPs can opt for shortening information displayed to public. In consequence, what will reach the audience will be significantly shorter than what would have reached it if the short extracts had not been understood in a restrictive manner.

Since we understand freedom to receive and impart information as the element of right to freedom of expression, called "passive freedom of information"[1408], the passive behavior of user to receive publicly accessible information from different sources, not only from public authorities but also from for example digital platforms is protected by fundamental rights. The narrow understanding of the exclusion of acts of hyperlinking or short extracts of press publication from the scope of protection will not fulfil its balancing objective and is likely to constitute an obstacle to free flow of information.

It is specified in art. 15 of the CDSM Directive that the protection of press publishers shall not apply to private or non-commercial uses of press publications by individual users. It applies to the online uses of press publication by ISSPs. The question may be therefore asked into which category falls the use of press publication by non-profit organisations. In this regard two scenarios are worth considering. The first is based on the narrow understanding of individual users. It is reflected for example by the proposal of the Polish implementation of the CDSM Directive. According to the latter, the protection shall not apply to the personal use, not related to the conducted business activity[1409]. As it has been already observed in chapter IV, it is difficult to attribute personal use to any organisation, which in consequence means that the activity of non - profit organisations is explicitly excluded from the exclusion. Since such activity is excluded from the exclusion for example in the Polish proposal and at the same time the related rights of press publishers do not apply to it, it is difficult to determine unequivocally what is the legal qualification of the activities of such organisations within the publishers'rights.

This can have a negative impact on the free flow of information. To explain why, it should be noted that the scope and subject matter of the activity of non-profit organisations varies, but they very often contribute to the dissemination of

[1407] See: chapter III point 4.1.
[1408] Ch. Grabenwarter, Article 10: Freedom of expression. …, p.256.
[1409] See chapter IV, point 3.1.

information.[1410] The lack of certainty as to how to legally qualify the use of press publications means that such organisations will be less likely to use press publications to republish them and elaborate on them[1411]. The scale of the threat depends on how important an actor such non- profit organisations is in terms of disseminating information and how large audience does it reach. The same applies to the use of press publications by libraries.

The second scenario is based on the broad understanding of individual users which encompasses also for example non-profit organisation using the press publication within the framework of the exclusion from the publishers' protection. The broad understanding explicitly including such organisations in the category of individual users will be conductive to free flow of information. The new rights will either not change or positively influence the access to information and the adoption of this interpretation I advise.

To conclude:

- The exclusions of the use of the very short extracts of press publication and the acts of hyperlinking from the scope of the publishers' protection are the safeguards for free flow of information, balancing the restrictive effect on the flow of information resulting from the mere adoption of the exclusive rights. However, the restrictive understanding of these exclusions will not contribute to the fulfillment of this balancing objective and can constitute an obstacle to the free flow of information by limiting the information that reaches the audience.

- The difficulty to legally qualify the use of press publications by for example non-profit organisations due to the vague wording of the exclusion from the CDSM Directive and national implementations can impact the activity of such organisations contributing to the dissemination of information. It can result in their reluctance to use press publications and in consequence, in disrupting the free flow of information.

2.5.Conditions for calculation of remuneration

[1410] See for example the scope of the activity of the Polish foundation Panoptykon, https://panoptykon.org, accessed:11.10.2023.

[1411] In this analysis I left aside the examination of what kind of exceptions and limitations could apply in case of the use of press publications by non-profit organisations.

The conditions of the calculation of the remuneration resulting from the authorisation of the use of press publications by ISSPs were regulated within the implementation of the CDSM Directive by some Member States.

According to the second paragraph of art. L218-4 of the French Intellectual Property Code, the fixing of the amount of the remuneration shall take into account, amongst others, **the contribution of press publications to political and general information** and the extent to which press publications are used by online public communication services.[1412] The recognition of the contribution of press publication to political and general information as the factor impacting the amount of the remuneration due to press publishers is likely to result in higher remuneration obtained by press publishers publishing on such topics. In consequence, press publishers publishing on topics not related to political and general information are likely to receive less remuneration. These publishers are often small and niche publishers, so less remuneration can significantly affect their business.

During the legislative process in France, it has been explained that the rationale behind the explicit mention of political and general information was to underline the important role of such type of press to invest in and defend the democracy[1413] and that the intention of the legislator was not to exclude the press publications relating to other topics.[1414] The important place of newspapers on political and general information in French constitutional system has been already demonstrated in point 4.2.3 of chapter I and point 5.1. of chapter IV. However, such a distinction can be of detrimental consequences on media pluralism.

It can be used by ISSPs as an argument to provide lower remuneration for press publishers publishing on different topics than political and general information, such as health or interior design, or whose press publications relate to very narrow specialisations or niche domain, such as canoeing or playing chess.

[1412] English version by the author. French version of art. L218-4 of French Intellectual Property Code: La fixation du montant de cette rémunération prend en compte des éléments tels que les investissements humains, matériels et financiers réalisés par les éditeurs et les agences de presse, la contribution des publications de presse à l'information politique et générale et l'importance de l'utilisation des publications de presse par les services de communication au public en ligne, https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000038826736, accessed : 11.08.2023.

[1413] Ministère de la Culture, Secrétariat général, Droit voisin au profit des agences de presse et des éditeurs de presse. Recueil…, p.160.

[1414] Ministère de la Culture, Secrétariat général, Droit voisin au profit des agences de presse et des éditeurs de presse. Recueil …, p.196.

In this context the definition of media pluralism should be recalled, according to which media pluralism is understood as plurality and "diversity of media supply, use and distribution, in relation to 1) ownership and control, 2) media types and genres, 3) political viewpoints, 4) cultural expressions and 5) local and regional interests."[1415] The concept of media pluralism is therefore based, amongst others, on the existence of media of varying size and different types to respond to many and divers needs of audience. The consequence of the French regulation can be the differentiation of press publishers depending on the topics of press publication they publish. The legislator gave ISSPs a tool to treat press publishers differently. It puts those publishers who publish on topic others than political and general information at a disadvantage. This may discourage them from continuing their activities or, in the worst-case scenario, worsen their financial situation and lead them going out of business. As a result, the number of publishers publishing on these other topics will decrease, as will the diversity and plurality of media supply.

To illustrate, such a distinction introduced by French legislator has become a field for discriminatory treatment of French press publishers by Google who excluded the principle of remuneration for press publishers and news agencies who did not have a "political and general information" qualification. Google explained that: it "does not deny that the related right covers non-IPG[1416] press publications, (but) it does not require Google (or any other party) to purchase any content. (However,) as regards non-IPG content, Google considers that it has no commercial interest in taking out paying licences for this type of content in view of the many equivalent alternatives widely available on the Internet".[1417]

The Autorité of Concurrence which settled the dispute between French press publishers and Google pointed to the fact that according to art. L.218-4 of the French Intellectual Property Code the contribution of press publications to political and general information is one of condition for benefiting from the related rights but its fulfillment is not mandatory. The list of factors provided in the said provision is not exhaustive and therefore, "the contribution to the IPG cannot be the sole criterion for remuneration. The

[1415] P. Valcke *et al*., Independent Study …, p.5.
[1416] Political and general information, from French: Information Politique et Générale.
[1417] Decision of 12 July 2021 of French Autorité de la concurrence, p.50.

provision from art. L.218-4 opens the possibility to individual handling of remuneration, and not general and undifferentiated as Google does"[1418].

This practical example shows that setting remuneration criteria in the discussed way has translated, in practice, into worse treatment of some press publishers. As it has been demonstrated so far, it was not the intention of the EU legislator to differentiate press publishers on the basis of, for example, the topic of press publications.

In Italy, the Italian Communication Authority has been entrusted with an important role in determining the criteria to calculate the remuneration. While doing so, according to art. 43 bis (8) of the Legge sul diritto d'autore, it should consider the length of **the period of press publisher's activity, the market relevance**, the number of journalists employed, as well as the number of online consultations of the press publication, costs of technological and infrastructure investments and the economic benefits derived by both parties in terms of visibility and advertising revenues.[1419]

The way of calculating the remuneration depending on the length of period of press publisher's activity or his market relevance favours the activity of experienced and large press publishers but disadvantages beginners, small and niche press publishers who, although producing valuable content, will receive lower remuneration. Such wording of conditions of remuneration exacerbates the disparities in the press sector. In consequence, due to the different treatment and worse remuneration for the use of press publications, the press publishers concerned may reduce their activities or close them down due to the difficult financial situation and worse market position compared to large and experienced press publishers. To safeguard media pluralism, the visibility and the real accessibility of information coming from **different** media organisations is necessary.[1420]

The differences in remunerations based on the legal solutions introduced in France and in Italy can contribute to the imbalances in press sector and can accentuate the

[1418] Decision of 12 July 2021 of French Autorité de la concurrence, p.94.

[1419] English version by the author. Italian version of art. 43 bis (8) of the Legge sul diritto d'autore: Per l'utilizzo online delle pubblicazioni di carattere giornalistico i prestatori di servizi della società dell'informazione riconoscono ai soggetti di cui al comma 1 un equo compenso. Entro sessanta giorni dalla data di entrata in vigore della presente disposizione, l'Autorità per le garanzie nelle comunicazioni adotta un regolamento per l'individuazione dei criteri di riferimento per la determinazione dell'equo compenso di cui al primo periodo, tenendo conto, tra l'altro del numero di consultazioni online dell'articolo, degli anni di attività e della rilevanza sul mercato degli editori di cui al comma 3 e del numero di giornalisti impiegati, nonché dei costi sostenuti per investimenti tecnologici e infrastrutturali da entrambe le parti, e dei benefici economici derivanti, ad entrambe le parti, dalla pubblicazione quanto a visibilità e ricavi pubblicitari, https://www.altalex.com/documents/codici-altalex/2014/06/26/legge-sul-diritto-d-autore#titolo1,aceessed: 15.11.2022.

[1420] See the introduction to chapter 1.

inequalities within it even further. Media pluralism means a guarantee **to access and consume** a wide range of viewpoints across a variety of platforms and media owners.[1421] Favoring of content from certain press publishers leading in consequence to over-representation of some media outlets and under - representation of others and to reinforcement of the winners take it all dynamic means that the scope of information to which the readers will have actually access and will be able to consume will be reduced. It does not strive to optimisation of number of press publishers, being beneficiary to the safeguard for media pluralism[1422] and represents, in my opinion, an important threat to media pluralism.

To conclude:

- The national legislators implementing art. 15 of the CDSM Directive which decide to specify the way of calculation of the remuneration should avoid introducing factors such as popularity of press publisher, the length of its activity or the topic of its publications since these may have a negative impact on the safeguard for media pluralism.

2.6.Dependence of press publishers on online platforms

The adoption of the publishers's rights in France was associated with the debate on the sources of funding for press sector. It was pointed out that the state aid as a proportion of press sales raised from 12.9% to 23.3% between 2008 and 2021 and constituted a significant burden on public finance sector.[1423] A kind of financial relief was seen in the adoption of the publishers' rights and the redirection of a part of this financial burden of supporting press sector to private entities. However, this involves a certain threat to media pluralism, namely the risk of strengthening the publishers' dependence on private actors.

According to the definition of media pluralism discussed in the first chapter, this is the plurality and diversity of media supply, use and distribution, in relation to among others ownership and **control of media**[1424]. One of the consequences of the introduction of the related rights can be the intensification of the control over the process of

[1421]See: Ofcom, Measuring media …, https://www.ofcom.org.uk/__data/assets/pdf_file/0031/57694/measuring-media-plurality.pdf, accessed: 01.04.2023, p.8.
[1422] See chapter I, point 4.3.
[1423]V. Duby – Muller, L. Garcia, Assemblée Nationale, Rapport …, p.27, https://www.assemblee-nationale.fr/dyn/15/rapports/dv/l15b4902_rapport-information.pdf, accessed : 18.07.2023.
[1424] See introduction to the first chapter.

dissemination and creation of press publications by ISSPs. Control, in this context, is understood broadly as real control over the informative content that reaches the audience.

This control is based on the use of existing dependencies between press publishers and ISSPs. The remuneration resulting from the related rights of press publishers and agreed by the parties, called "private subvention"[1425], is considered by some academics as likely to create distortions of competition and inequalities[1426] between press publishers. For other scholars this is a tool of performing the control by online platforms over the production and dissemination of press publications and a bargaining chip for ISSPs to offer less remuneration in exchange for a better display position for press publishers.[1427]

To illustrate, in France, Google limited the visibility of press publications of those publishers who wanted to enforce their rights. [1428] It had a proven negative effect on the traffic redirected to their websites and resulted in their financial loses.[1429] Those who wanted to be better displayed which is important for their survival on the market have decided to forego the remuneration. Those, who wanted to enforce their rights, lost in visibility.

It should be recalled that visibility online and the real accessibility of information coming from media organisations[1430] is one of the factors gaining in relevance as regards the safeguard for media pluralism. The control of ISSPs over press publishers may be exercised by making visibility conditional on non-payment of remuneration to publishers, or by reducing its amount, or by making it conditional on the content and subject matter of press publications, thereby limiting the independence of press publishers and impacting the safeguard for media pluralism.

To conclude:

- The remuneration due to press publishers under the publishers' rights can be considered as a private subvention strengthening the dependence of press

[1425] V. Duby – Muller, L. Garcia, Assemblée Nationale, Rapport …, pp.50-51, https://www.assemblee-nationale.fr/dyn/15/rapports/dv/l15b4902_rapport-information.pdf, accessed : 18.07.2023.

[1426] Pierre Bentata in: V. Duby – Muller, L. Garcia, Assemblée Nationale, Rapport …, p.27, https://www.assemblee-nationale.fr/dyn/15/rapports/dv/l15b4902_rapport-information.pdf, accessed : 18.07.2023.

[1427] T. Höppner, Post on Linkedin, 2022, https://www.linkedin.com/posts/thomas-höppner-7ba59a70_related-rights-the-autorité-accepts-googles-activity-6944995588136435712-zfaV, accessed: 10.08.2023.

[1428] See chapter V, points 3.2.3 (c), 3.3.

[1429] V. Duby – Muller, L. Garcia, Assemblée Nationale, Rapport …., p.31, https://www.assemblee-nationale.fr/dyn/15/rapports/dv/l15b4902_rapport-information.pdf, accessed : 18.07.2023.

[1430] See introduction to the first chapter of the dissertation.

publishers on ISSPs. The legal safeguards should be introduced to anticipate the abuse of such dependence affecting the free flow of information and media pluralism.

3. Press market realities

The objective of this section is to assess the publishers' rights in the context of press market realities. The analysis focuses on the consequences of the adoption of the rights from the economic perspective, on the relationship between press publishers and ISSPs and between different press publishers since the adoption of the protection. For the purpose of this dissertation I define press market realities as the interdependencies of many actors shaping the press sector, influencing the business models chosen and ways of production and dissemination of information[1431].

3.1. Publishers' rights – an answer to market failure?

It is widely held that the press industry is facing a stage of market failure[1432]. The latter, understood as failure of a market to deliver an optimal result relates to the situation when "less welfare is created than could be created given the available resources. The social task then becomes to correct the failure"[1433]. R.M. Hilty and V. Moscon explain that market failure occurs when the advantage of goods or services is taken by third parties and it prevents the investor in those good or services from gaining a profit.[1434] The EU legislator considered press publishers as the victims of such practices conducted by

[1431] Definition formulated on the basis of criteria established in: European Commission, Market Definition in the Media Sector - Economic Issues, Report by Europe Economics for the European Commission, DG Competition, 2002, https://ec.europa.eu/competition/sectors/media/documents/european_economics.pdf, accessed: 09.10.2023.

[1432] See: V. Pickard, America's battle for media democracy. The triumph of corporate libertarianism and the future of media reform, Cambridge University Press, 2015; P. Napoli, Social Media and the Public Interest: Media Regulation in the Disinformation Age, New York Chichester, West Sussex: Columbia University Press, 2019; P. Walters, A public good: Can government *really* save the press?, Sage Journals, vol.23, no.8, 2020, https://journals.sagepub.com/doi/full/10.1177/1464884920982404, accessed: 09.10.2023.

[1433] E. Baekkeskov, Market Failure, Britannica, https://www.britannica.com/money/topic/market-failure, accessed: 09.10.2023.

[1434] R. M.Hilty, V. Moscon, Position Statement of the Max Planck Institute for Innovation and Competition on the Proposed Modernisation of European Copyright Rules PART E Protection of Press Publications Concerning Digital Uses, 2017,p.4, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&cad=rja&uact=8&ved=2ahUKEwiGj86niOmBAxWC_7sIHczVB5YQFnoECA4QAQ&url=https%3A%2F%2Fwww.ip.mpg.de%2Ffileadmin%2Fipmpg%2Fcontent%2Fstellungnahmen%2FMPI_Position_Statement_PART_E_Publishers_2017_02_21_RMH_VM-def-1.pdf&usg=AOvVaw2DOH2DEhq5PYHNJf0Vc833&opi=89978449, accessed: 09.10.2023.

news aggregators and decided to adopt the publishers' rights to address the market failure and to provide press publishers with "an efficient tool against aggregators" and an instrument to fight "mass exploitation of press publications in the digital economy"[1435]. It has been acknowledged that copyright protection of publishers based on assignment or transfer of the authors' rights was not sufficient and therefore, the explicit recognition of press publishers as rightholders would strengthen their position and incentivise them to make further investments[1436].

The conditions as regards the criteria of calculation of the remuneration and its amount due to press publishers on the basis of the exercise of their exclusive rights are often confidential[1437]. It makes it impossible to evaluate and compare the remuneration received by different press publishers and therefore, to assess whether the objectives of the publishers' rights are likely to be met. For this reason, it is impossible to conclude whether the adoption of the related right efficiently addressed the market failure or not.

EU legislator while proposing a solution to address the market failure, focused on legally framing the use of press publication by online platforms and on strengthening the legal situation of press publishers in face of competition from online platforms as regards the dissemination of information. Other factors contributing to the difficulties of press sector which were identified in the first chapter of the dissertation, such as technological issues in implementing the subscriptions' model, problems in adapting the business model and addressing the readers' reluctance to pay for subscriptions were not addressed with the publishers' rights. The latter is supposed to bring additional revenues which would translate into improvement of the welfare of press sector. In the perspective of its overall problems, however, this may be considered as a piecemeal solution.

The publishers' rights are directed against ISSPs and introduce burdens for them in relation to the use of press publications. The effect can be to discourage platforms from investing in the area of reuse of press publications[1438] and to develop a business model based on their own production of information content which will certainly take place with

[1435] European Parliament, The proposed Directive on Copyright in the Digital Single Market (Articles 11, 14 and 16) Strengthening the Press Through Copyright, 2017, https://www.europarl.europa.eu/thinktank/en/document/IPOL_BRI(2017)596835, accessed: 09.10.2023.
[1436] See:T. Hoppner, EU Copyright …, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3081733, accessed:09.10.2023.
[1437] See: chapter IV, section 8.
[1438]J. Moeller, N. Helberger, Beyond …, pp.24-25, https://www.ivir.nl/publicaties/download/Beyond_the_filter_bubble__concepts_myths_evidence_and_issues_for_future_debates.pdf, accessed: 06.02.2023.

the increased use of AI[1439]. A legislative step which does not encompass the interdependencies between press publishers and ISSPs demonstrated in the first chapter, and important role of online platforms in disseminating information can prove counter-productive. [1440]

3.2. Publishers' rights and the vertical complementarity between ISSPs and press publishers

Google, while reacting to the adoption of the publishers' rights in France, presented press publishers with a choice between displaying their content for free or limiting their display policy to hyperlinks and headlines only, in case when press publishers would like to enforce their rights.[1441] Moreover, according to this new policy, press publishers could choose the length of the excerpts that would be displayed and the majority of them, did not wish to impose a limit on the length of the excerpts.[1442] From a practical point of view, it means that the majority of press publishers decided not to enforce their right and to allow Google to use the entire articles for fear of not being displayed or being displayed only to a limited extent.

Such decisions can be explained by the relationship of vertical complementarity between ISSPs and press publishers.[1443] Displaying text with an accompanying image improves publishers' visibility in digital environment, resulting in higher click-through rate and consequently, in greater profits. *A contrario*, displaying for example only hyperlinks or, even worse, depriving publishers of a presence on the news aggregator and other services of ISSPs significantly worsens the flow of traffic to publishers' websites and thus, their revenues.[1444]

According to data provided during the procedure before the French Competition Authority, press publishers who decided not to allow Google for the reuse and display of press publications without remuneration, experienced sharp falls in audience numbers. "Suppressing the display of protected content from the website of the newspaper *La Voix du Nord* within Google's services between 24 and 27 October 2019 led to a fall in traffic

[1439] See chapter I, point 4.2.
[1440] See: H. Coster, As Google pushes deeper into AI, publishers see fresh challenges, Reuters, 2023, https://www.reuters.com/technology/google-pushes-deeper-into-ai-publishers-see-fresh-challenges-2023-10-19/, accessed:23.10.2023.
[1441] See chapter IV section 8.
[1442] Decision 20-MC-01 of 9 April 2020 of French Autorité de la concurrence, p.55.
[1443] See chapter I, point 5.3.
[1444] Decision 20-MC-01 of 9 April 2020 of French Autorité de la concurrence, pp.30-32.

redirected from Google of around 33% (…). According to the tests carried out by the Figaro Group, a link listed without a photo or description on Google experiences a downturn in its click performance of about 50%. Since traffic from Google Search accounts for around 50% of the traffic of figaro.fr, according to the publisher, the impact on Internet audiences could therefore potentially amount to a drop of 25%."[1445] Reduction in traffic is likely to lead to significant loses in revenues of press publishers, which could amount to the loss of between 30% and 50% of the annual revenues.[1446]

From the economic perspective, the situation of press publishers after the adoption of the publishers's rights in France became worse. This is because firstly, the important number of press publishers agreed to the use of their press publications by Google for free. Secondly, those press publishers who decided to exercise their rights faced important losses in traffic and in revenues. Such consequences of the French case confirm the established in chapter I interdependencies between the interests of press publishers and news aggregators and the strong dependence of the interests of the former on those of the latter.[1447]

Although several[1448] French press publishers, as the result of the Authority's intervention and the penalty imposed on Google, managed to reach the agreements with Google News[1449], the interdependencies discussed still can influence the shaping of the relationship between these two actors. I identified several threats in this regard. Firstly, due to the dependence of press publishers on ISSPs, there may be a tendency to offer press publishers lower remuneration in exchange for a better display position. Secondly, this dependency can lead even further and result in influencing the type and subject matter of the content to be favored by news aggregators[1450]. These potentials threats should be considered for example at the stage of the implementation of the CDSM Directive in Member States and of its application.

[1445] Decision 20-MC-01 of 9 April 2020 of French Autorité de la concurrence, p.32.
[1446] Decision 20-MC-01 of 9 April 2020 of French Autorité de la concurrence, p.33.
[1447] See chapter I, point 5.3.
[1448] As the data on signed agreements is unstructured, fragmented and varies according to the source of information, it is difficult to determine with precision what percentage of press publishers in France has not yet signed the agreements with Google News, and what are the terms of the agreements concluded so far between press publishers and Google.
[1449] S. Missoffe, Google a signé plus de 150 contrats portant sur les droits voisins, tandis que l'Autorité de la Concurrence accepte ses engagements, Google Blog France, 2022, https://blog.google/intl/fr-fr/nouvelles-de-lentreprise/chez-google/google-a-signe-plus-de-150-contrats-portant-sur-les-droits-voisins-tandis-que-lautorite-de-la-concurrence-accepte-ses-engagements/, accessed : 08.08.2023.
[1450] See chapter I point 5.4.

To calculate the remuneration for the use of press publications, the information provided by press publishers but also by ISSPs is needed. As to the data provided by the latter, it includes the information on their profits from the display of press publications or their parts, the number of impressions or the number of clicks, etc. Since these data are held by ISSPs, press publishers are dependent on them to be able to calculate their remuneration, and depending on how many clicks, visits and impressions these data show, so high will be its final amount.

The risk of discretion and fragmented reporting of data which impacts the interests of press publishers should be pointed out. Some Member States introduced the legal safeguards obliging ISSPs to disclose the data necessary to determine the remuneration upon the request[1451].

However, due to the rapid development of new technologies and emerging new ways of using press publications, press publishers claim that the share of data does not reflect the actual state of affairs. According to Irene Lanzaco, director general of Spanish news industry trade body, la Asociación de Medios de Información (AMI), representing for example El Pais and El Mundo, "There is a lot of information on Google's side and very little, if any, information on the side of the publishers. This means that Google is able to capture and monetise valuable audience data coming out from news and only the tech giant really knows how much news is worth to them."[1452] This example shows that the aspects of data value capture should be taken into account while legislating on the functioning of online platforms.

3.3.Publishers' rights and two speed press industry

The adoption and the exercise of the publishers' rights in France confirmed and sharpened the differences in the interests between press publishers. For some of them, exercising the publishers' rights was less beneficial than maintaining the existing relationship with the ISSPs.[1453] This was of particular importance for small publishers

[1451] See: Art. 43 bis (12) of Legge sul diritto d'autore https://www.altalex.com/documents/codici-altalex/2014/06/26/legge-sul-diritto-d-autore#titolo1,aceessed: 12.08.2023.

[1452] Statement of Irene Lanzaco for Press Gazette. Future of Media see in: A. Majid, Publishers square up for new battle with Google in Spain, Presse Gazette. Future of Media, 2023, https://pressgazette.co.uk/platforms/google-news-spain-facebook-challenge/, accessed : 12.08.2023.

[1453] See: A. Mendoza- Caminade, Le droit voisin des éditeurs de presse et des agences de presse à l'épreuve de la puissance des plateformes en ligne : la longue marche vers l'effectivité du droit, Revue Lamy de la concurrence, no. 106, 2021.

with less negotiating power or for those, publishing on topics unrelated to politics and general information due to the impact of these factors on remuneration. Moreover, large press publishers enjoyed a more privileged negotiating position with Google[1454] which further contributed to the fragmentation of the press market. In the report concerning the application of the related rights of press publishers in France, it has been observed that the lack of cooperation between press publishers has led to the conclusion of individual and bilateral agreements which, while they benefit the largest players in the sector, make remuneration effective only for a minority of press publishers[1455]. It can be understood as the reinforcement of the winners take it all dynamic.[1456] Another example of the threat of market fragmentation are the factors on basis of which the remuneration due to press publishers should be established in Italy. It favours large publishers employing a large number of journalists and making significant investments which has a negative impact on small and niche publishers and contributes to maintaining the divide between large publishers who are successful and small publishers who are constantly struggling to stay in the market.[1457]

3.4.Publishers' righst and the share of remuneration with authors

The EU legislator provided an obligation to share the remuneration obtained by press publishers from the exercise of the related rights with the authors of works incorporated in press publications in art. 15 (5) of the CDSM Directive. It means that the revenues of press publishers from the use of press publications by ISSPs will be reduced by that part which will go to the authors. The legislative approach within the implementation of the provision differs among Member States. Spain decided not to introduce any specification as regards the amount of the share due to the authors. In France, according to art. L218-5 of the French Intellectual Property Code, professional journalists and other authors of works presented in press publications are entitled to an appropriate and equitable share of the press publishers' remuneration. Germany introduced a more specific provision and decided that the share should be at least one third of the press publishers'

[1454] See the detailed analysis of the agreements reached by Google and press publishers in France in: Ch. Papaevangelou, N. Smyrnaios, Regulating dependency: The political stakes of online platforms' deals with French publishers, Anàlisi: Quaderns de Comunicació i Cultura, no. 68, pp. 117-134, https://shs.hal.science/halshs-03747847/document, accessed: 08.08.2023.
[1455] V. Duby – Muller, L. Garcia, Assemblée Nationale, Rapport …, pp.28-29, https://www.assemblee-nationale.fr/dyn/15/rapports/dv/l15b4902_rapport-information.pdf, accessed : 18.07.2023
[1456] See chapter I point 4.3.
[1457] See chapter I point 4.2.1.

remuneration.[1458] In Italy the it should be between 2% and 5% of press publishers' remuneration and according to Polish proposal it should be 50%[1459]. The greater the share is for the benefit of the authors, the less from the use of press publication will go to the press publishers which is against their interests. However, the conclusion cannot be drawn that such a solution is contrary to the objectives of the regulation. In fact, a certain part of the publishers' remuneration will go to the authors of the elements of press publication, which contributes to the protection of the press sector as such.

To conclude:

- The publishers' rights have been adopted to address the market failure in the press sector. Due to the confidentiality of the agreements concluded between press publishers and ISSPs, it is impossible to conclude whether the adoption of the related rights efficiently address the market failure or not. EU legislator while proposing a solution to address the market failure, focused on strengthening the legal position of press publishers with regard to the use of their press publications by ISSPs. From the broader perspective of issues challenging the welfare of press industry like technological difficulties in implementing subscriptions, problems in adapting the business model and addressing the readers' reluctance to pay for subscriptions, this legislative step constitutes a piecemeal solution which can be insufficient to effectively address the market failure. Moreover, there is a danger that the publishers's rights will contribute to the fragmentation of the press market and reinforcement of the winners take it all dynamic therein.

4. Obligation to respect freedom of expression and information in light of the adoption of the press publishers' rights

4.1. The press publishers' rights as a limitation of the exercise of the right to freedom of expression and information

As results from the analysis conducted in the first chapter, fundamental rights interact with each other, at the same time they can be complementary and conflicting what may be paradoxical.[1460]

[1458] See: §87k of Urheberrechtsgesetz – UrhG, https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html, accessed: 13.07.2023.
[1459] See: chapter III, section 7.
[1460] See chapter I point 2.3.

The publishers' rights were adopted with the objective of preserving access to information, its free flow and of safeguarding media pluralism. On the other hand, it should be pointed out that the extension of the exclusive rights to a new category of actors may constitute a limitation of the scope of the access to information. There are new rightholders granted the power to authorise or prohibit the access to information included in press publications. The latter could be seen as an interference with freedom of expression.

4.2. Justifications for the limitation of the exercise of the right to freedom of expression and information

The interference[1461] with fundamental rights, in order to be considered as justified[1462] has to follow the specific criteria which are: prescription by law, legitimate aim and proportionality. The aim of this point is to assess whether the the publishers' rights constitutes a justified interference with freedom of expression and information.

4.2.1. Prescription by law

The related rights of press publishers were adopted by the EU legislator in art. 15 of the CDSM Directive. As it was observed in point 2.5.1. of the first chapter, the law should be formulated with sufficient precision. Although numerous interpretative doubts have been pointed out in the analysis conducted in chapters III and IV as regards the scope of the protection resulting from the rights and understanding of term such as press publication, publisher of press publication or information society service provider, it should be acknowledged that these doubts can be clarified within the case law and practice and do not constitute the key doubts about the essence of the law.

The EU legislator based its competence on art. 114 of TFEU striving to the harmonisation of the legal framework which contributes to the proper functioning of the internal market. It indirectly touches upon the media pluralism' issues since its safeguard constitutes one of the intended effects of the enacted regulation but does not go beyond its field of competence to legislate in the field of media pluralism.[1463]

[1461] See: chapter I points 2.4 and 2.5.
[1462] See: chapter I point 2.5.
[1463] See chapter I, point 3.2.

4.2.2. Legitimate aim

The interference with fundamental rights has to correspond with the objectives of general interest. The aim of the adoption the related right of press publishers was to:

- strengthen the bargain position of press publishers;
- contribute to the increase of the revenues of press publishers, to enable the recoupment of their investments as well as to ensure the sustainability of press publishing industry;
- foster the availability of reliable information and strengthen freedom of expression and media pluralism.

The EU legislator highlighted that press publishers suffered from the decline in print newspaper revenues or competition with online platforms as to the revenues from advertisement and faced important difficulties as regards the digital transition. However, the question arises as to whether any group of actors facing difficulties due to competition from digital platforms or other entities or due to the impact of technological transformation should gain the legal protection. The answer will be no, unless there is a compelling justification for introduction of such a protection. For press publishers, a compelling justification will be their role in disseminating information, providing access to reliable information important for the functioning of democratic society.

The prosperity of press sector constitutes a safeguard for media pluralism and free flow of information. For this reason, protection of press publishers constitutes a legitimate aim justifying the interference with freedom of expression. The paradox of complementarity and of conflict of the rights discussed should be noted here, since the adoption of the publishers' rights constitutes an interference with freedom of expression but at the same time intends to achieve the objectives in this area.

4.2.3. Proportionality

a. Effectiveness

As regards the criterion of effectiveness, it should be examined whether the adoption of the publishers' rights would be suitable for achieving the pursued objective.

Before the adoption of the CDSM Directive press publishers claimed that due to the fact that they were not recognised as rightholders under the EU law, their bargaing

position in relation to the online platforms was weak.[1464] In consequence, the extension of the exclusive rights to press publishers could bring some remedy to the identified issues. The EU legislator considered that a clear identification of press publishers as rightholders will help them to reach the agreements with ISSPs. Reaching agreements should result in revenues for press publishers for the use of their press publications, which in turn would translate into better functioning of the press sector, which would benefit the free flow of information and media pluralism.

The adoption of the publishers' rights should contribute to the increase of the revenues of press publishers and enable the recoupment of their investments. Nevertheless, it should be noted that in the Impact Assessment, the European Commission did not provide any detailed data backed up with specific calculations as regards the impact of the adoption of the rights on the increase of the press publishers' revenues.[1465] It can be assumed that the granting of related rights will lead to the revenues on the part of publishers, but it is difficult to determine the scale of these revenues according to the data provided. For these reasons, the conclusion should be drawn that the adoption of the publishers' rights can be considered as suitable for achieving the pursued objective. Its effectiveness can be ensured by an appropriate selection of the legal safeguards at national level within the implementation of art. 15 of the CDSM Directive[1466] and at the stage of the application of the law.

b. Necessity

The EU legislator while adopting a new law has to verify whether there is no measure that could be less intrusive in achieving of a legitimate goal and that causes less prejudice to the right the interference with takes place. The EU legislator considered that the adoption of the publishers' rights will answer the pressing social need justifying the interference with fundamental rights.[1467]

In the Impact Assessment three alternative solutions to resolve press publishers' issue were presented.[1468] Option 1 consisted in encouraging stakeholders' dialogue and cooperation to find solutions concerning the dissemination of press publications. Option

[1464] See: Impact Assessment, …, pp.157-158.
[1465] See: chapter III point 3.1.
[1466] See: chapter V, section 5.
[1467] See: chapter I, point 2.5.3.
[1468] See Impact Assessment…, pp.161-164.

2 related to the introduction in EU law of a related rights covering digital uses of press publications and option 3 consisted in adding to the option 2 the possibility for Member States to provide press publishers with possibility to claim compensation for such uses under an exception.

It was observed that the third option, the introduction in the EU law of the related rights covering digital uses of press publication with the possibility for Member States to provide that press publishers may claim compensation for such uses under an exception, "is the most proportionate as it allows addressing in a targeted way and in their own merits the specific problems faced by different categories of publishers, without going beyond what is needed to achieve this objective."[1469] This option was expected to increase the level of protection of press publications and to foster the quality of journalistic content.[1470]

However, the details on how the legislator came to these conclusions, what method and what tools used to establish it are not provided. S. Karapapa pointed out that that even though "the Commission offers statistical evidence on the extent of the so-called newspaper crisis, the claims on the casual relationship between the introduction of a press publishers intellectual property right and the increase in the revenues of the press leading to media diversity are neither supported nor substantiated with data."[1471]

It should be noted that no other way of regulating the issue beyond the related rights' regime has been considered[1472]. The decision of the EU legislator could be explained by the fact that the rationale behind the adoption of the rights discussed was to reward the investments made and making available of works included in press publication to wider public as well as to protect press publishers against the threat of piracy coming from ISSPs. For these reasons the choice of the legal regime seems to be justified.

[1469] Impact Assessment…, p.173.

[1470] Impact Assessment…, p.170. See also Explanatory Memorandum in: Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - COM(2016)593, 2016, https://digital-strategy.ec.europa.eu/en/library/proposal-directive-european-parliament-and-council-copyright-digital-single-market, accessed: 28.10.2022, p.9.

[1471] S. Karapapa, The press publication right in the European union :An overreaching proposal and the future of news online, in: E. Bonadio and N. Lucchi (eds.), Non-Conventional Copyright: Do New and Non-Traditional Works Deserve Protection?, Edward Elgar, 2018, available at: https://centaur.reading.ac.uk/75767/1/Karapapa%252C%20S%20-%20Press%20Publications%20right%20in%20the%20EU%20-%20FINAL%20Karapapa%20Feb%202018.pdf, accessed:28.10.2022, p.7.

[1472] For example, the EU legislator did not envisage the introduction of taxation model, see: P. Keller, The press publishers right will fail - to support the media we should tax information aggregators instead. Shared Digital Europe, 2020, https://shared-digital.eu/as-predicted-the-new-press-publishers-right-is-a-failure-lets-make-information-aggregators-pay-news-media-producers-for-real/, accessed: 04.11.2023.

c. Proportionality (in narrow sense)

According to the recital 84 of the CDSM Directive, "this Directive respects the fundamental rights and follows the principles recognised in particular by the Charter". As to the related rights of press publishers, according to the Explanatory memorandum "the proposal is proportionate as it only covers press publications and digital uses."[1473] However, I identified an important missing point in the assessment of the rights. While weighing different interests at stake, the EU legislator did not take into account the positive effect of practices of news aggregators on press publishers this is all the more important as regards the small and local publishers for whom the existence on news aggregators is of vital importance.[1474] The legislator did not analyse how this relationship will be affected by the introduction of the new rights. Although this identified deficiency does not allow the conclusion that the regulation fails the proportionality test, it is in my opinon legitimate to conclude that it may affect, in the later stages, the effectiveness of the granted protection.

It should be noted that the extension of the exclusive rights has been balanced with the exceptions and limitations. The publishers' rights apply against a specific category of entities, ISSPs, which means that users are not affected by this regulation in a direct way. The scope of the application of the publishers' rights is limited, it does not apply to the act of hyperlinking. The definition of the subject matter of protection has also a limited scope, the publishers' protection extends only to the works and other protected subject matters and not to the public domain elements.

All these elements should be considered as the safeguards for free flow of information aiming at balancing the extension of the protection resulting from the extension of the exclusive rights to new actors. The core of the right to receive information, as it has been established in the analysis conducted in the first chapter, is the right of the public to be adequately informed, in particular on matters of public interest which means that public has the right to access information which is available and this access cannot be limited in

[1473] It is not further specified what should be covered in addition to press publications and digital uses to make the proposal disproportionate. See: European Commission, Explanatory Memorandum in: Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - COM(2016)593, 2016, https://digital-strategy.ec.europa.eu/en/library/proposal-directive-european-parliament-and-council-copyright-digital-single-market, accessed: 28.10.2022.

[1474] See: S. Athey, M. Mobius, J. Pal, The Impact …, https://www.nber.org/system/files/working_papers/w28746/w28746.pdf, accessed: 03.02.2023.

unjustified manner. Despite the introduction of the publishers' rights, public can still be adequately informed, it has the access to the information publicly available. Media, playing an important role in disseminating information should be pluralistic to allow all ideas and information to be expressed freely. Due to the new layer of protection, the scope of this access may be limited if for example ISSPs choose not to display press publications from press publishers, or if press publishers do not consent to the use of their press publications, or if, as a result of the restrictive understanding of the exemptions from protection such as very short extracts of press publications, information displayed on news aggregators will be significantly reduced. This does not however mean that the public will lose access to information at all or to significant extent, it means that potentially they may have to seek its other sources. The core of the right to receive information being part of freedom of expression is therefore preserved what in my opinion means that the principle of proportionality is followed and the interference with freedom of expression is justified.

To conclude:

- The adoption of the publishers' rights constitutes a justified interference with freedom of expression. This thesis is reflected in practice, action for annulment of the act has not be brought on the basis of art. 263 of the TFEU and the time for bringing it has already passed according to art.263 (6) of the TFEU.

- Although the adoption of the publishers' rights does not affect the core of the freedom of expression, the assessment of the publishers' rights conducted by the EU legislator before its adoption, is marked by some deficiencies. I identified:
    - The lack of examination of the impact of the said right on the ISSPs and their activity, conducive to the dissemination of information and to the increase of diversity of information in online environment.

    - The lack of examination of the adoption of the safeguards against the imposition of negotiating conditions by ISSPs and use of market asymmetries even though such practices could have been expected given the Google's reaction to the introduction of the press publishers' rights in Spain in 2014.

- The insufficient assessment of the related rights before their adoption, although will not affect the validity of the publishers' rights, can render the regulation incomplete, lacking important mechanisms and ineffective. An important role in remedying some of these shortcomings belongs to the Member States in the exercise of their margin of discretion in implementing the Directive.

4.3. Scope of margin of discretion of Member States in the implementation of the publishers' rights

The objective of this point is to determine the scope of the margin of discretion of Member States while implementing art. 15 of the CDSM Directive. It will enable to establish what kind of legal interventions within the implementation of the provision can be taken to address the insufficiencies identified in the assessment of the rights conducted at the EU level before their adoption.

Directives, as legal instrument of the EU, are synonym of certain flexibility within the EU law. The acts are binding as to their end to be achieved but leave some choice to Member States as regards the method and form of their achievement.[1475] The scope of this freedom will consist in choosing among options provided in the Directive, providing further specification of EU legal norms or adopting more stringent standards.[1476] The CJEU provides some guidance as to how it should be done. In its judgement concerning the action for the annulment of art. 17 of the CDSM Directive brought by Poland it stated that "Member States must, when transposing Article 17 of Directive 2019/790 into their national law, take care to act on the basis of an interpretation of that provision which allows a fair balance to be struck between the various fundamental rights protected by the Charter. Further, when implementing the measures transposing that same provision, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with that provision but also make sure that they do not act on the basis of an interpretation of the provision which would be in conflict with those fundamental rights or with the other general principles of EU law, such as the principle of proportionality."[1477]

When adapting this reasoning to the implementation of art.15 of the CDSM Directive, it should be noted that Member States should adopt such interpretation of the implemented provisions which allows to strike a faire balance between various fundamental rights. Moreover, the transposition entails further obligations. Once the provision is implemented, the national law has to be interpreted in consistent manner with

[1475] P. Craig, G.de Burca, EU Law, Text, cases and Materials, Oxford University Press, 2008, pp.106-107.
[1476] See: R. Zbíral, S. Princen, H. Smekal, Mapping the Legal Scope for Flexible Implementation in EU Directives, RSC 2022/46 Robert Schuman Centre for Advanced Studies Integrating Diversity in the European Union (InDivEU),2022, p.8.
[1477] CJEU, Republic of Poland v European Parliament, Council of the European Union, case C-401/19, 26 April 2022, para.99. See also: CJEU, Promusicae v. Telefónica de España SAU, case C-275/06, 29 January 2008, para.68.

that provision and the latter should be understood in the way as to not conflict with fundamental rights and general principles of EU law.

The publishers' rights are the example of maximum harmonisation, the protection granted to press publishers at the national level as result of the Directive's implementation cannot be more or less intense. It means that press publishers have to be provided with the exclusive rights to authorise and to prohibit the acts of reproduction and making available of press publications in every Member States according to art. 15 (1) of the CDSM Directive and these rights according to art. 15 (2) 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.

Nevertheless, Member States are free to specify the circumstances in which the authorisation of the use of press publication takes place. They should implement the solutions leading to the increase of the revenues of press publishers and to the recoupment of the investment made by them since these are the objectives of the new law. Acknowledging the identified threat of the imposition of negotiating conditions by ISSPs based on 2014 Spanish case, the national legislators should introduce the necessary safeguards. The objective of Member States should be to ensure the effectiveness of the publishers' rights.

It has been established in the precedent point that at the EU level the impact of the publishers' rights on the increase of the revenues of press publishers and the recoupment of the investment made by them has been not sufficiently examined. National legislators cannot adopt a different legal regime to regulate the publishers' issue or intensify the scope of their protection. However, they can adopt more stringent standards, more specific solutions to facilitate the process of obtaining the remuneration for the authorisation of the use of press publications, to maximise the publishers' chances to recoup their investments.

Since the objective of the adoption of the publishers' rights was also to foster the availability of reliable information and to strengthen freedom of expression and media pluralism, to achieve this objective, Member States could consider the adoption of the reporting obligations for the agreements reached with press publishers or the obligation on ISSPs to conduct the audits in order to control the compliance with the adopted provisions. The latter can be justified by the public interest in the protection of free flow of information and the safeguard for media pluralism. Member States should pay close attention to the wording of the definition of the subject matter of protection and the

exclusions from its scope such as individual words and very short extracts of press publication as well as the exclusion from the scope of the protection of acts such as private or non-commercial uses of press publication by individual uses or acts of hyperlinking to eliminate or avoid the potential risks to access to information and media pluralism and to achieve the objective of the regulation in the most effective way.

To conclude:

- Margin of discretion of Member States in case of the implementation of the publishers' rights is limited due to maximum harmonisation. The transposition of art. 15 of the CDSM Directive should provide the legal safeguards aiming at introducing more specific and stringent standards where it is necessary in order to meet the set objectives without, however, going beyond the discretion granted to Member States for the implementation of the provision.

5. A balanced model of the implementation of art. 15 of the CDSM Directive

This section aims at proposing how the implementation of art.15 of the CDSM Directive should look like in order to balance the conflicting interests. The focus is directed towards the Polish implementation since at the time of completion of the research: 07.02.2024, Poland has not implemented the CDSM Directive yet and is the only one Member State which has not done so. Polish case serves as an example on how the implementation of the publishers' rights should be structured. Moreover, the proposed understanding based on balancing the strive towards the effective protection of press publishers on the one hand and safeguarding the free flow of information and media pluralism on the other will be important at the stage of application of the law. The mechanisms discussed will be a source of inspiration for the future regulations concerning the relationship between various media and its impact on the freedom of expression and information flow.

My objective is not to propose how the issue of press publishers could have been regulated better at the EU level, I accept the regulation from art. 15 of the CDSM Directive as it is, with its strengths and weaknesses, and, based on the determined in precedent sections margin of discretion of Member States, I propose how it can best be implemented, with special attention to protection of media pluralism and access to information. I am not proposing the exact wording of the provisions implementing art. 15

of the CDSM Directive, but I am suggesting what mechanisms should be included, how to construct definitions, what to avoid.

Criteria guiding my proposal are to ensure the effectiveness of the publishers' rights and to protect media pluralism and access to information. These elements, sometimes contradictory, as revealed the analysis conducted in this dissertation, will require the development of the compromises. I will draw on the analysis of the French implementation and the Polish project carried out in chapters III and IV. I will take into account the practical problems that have arisen with the exercise of the publishers' rights in France. I will draw inspiration from the solutions adopted in the legislations of Member States in the framework of the implementation of the publishers' rights and in common law, discussed in chapter IV and finally, I will consider the economic aspects of related rights and propose the mechanisms aiming at avoiding the threats to media pluralism and access to information identified in the last chapter.

5.1.Press publication

I propose to understand a press publication as a collection composed mainly of literary works of journalistic nature, which can also include other works or other subject matters. The use of term 'mainly' implies that at least two works of journalistic nature have to be included in a press publication. The latter should be understood from the perspective of its purpose being the disclosure to the public of information, opinions or ideas. It does not imply the involvement of professional journalists in the creation of such works.

If the literary works are included, and potentially other works or (protected) subject matters, then in my opinion, the fact that the press publication in question would contain also unprotected elements should not prevent it from being granted protection under the exclusive rights of press publishers. However, if a non - protected element is included in a press publication and is then used by ISSPs to the extent indicated in the CDSM Directive, there will not be an encroachment on the publishers' exclusive rights. This is beneficial to the free flow of information and prevents the publishers' protection from being extended to the elements of the public domain.

The regularity of update of press publication should be understood broadly as encompassing also the update of press walls of news websites or websites published by press publisher taking place several times per day or per week. The broad scope of the

definition which applies to the press publications providing the general public with information related not only to news but also to other topics is justified by the purpose of the new law. Periodicals that are published for scientific or academic purposes, such as scientific journals, are not covered by this definition.

Press publication should be published under the initative, editorial responsibility and control of a service provider. Editorial responsibility should be understood as the exercise of the effective control both over the selection of materials included in a press publication and over their organisation which does not necessarily imply any legal liability under national law for the content provided. All the mentioned conditions must be met cumulatively.

5.1.1. The use of individual words and very short extracts of press publication

While wording the exclusion of individual words or very short extracts of press publication, I suggest to specify that the publishers' rights do not apply to the use of individual words and very short extracts of press publication which do not dispense the reader from reading it.

To ensure the effectiveness of granted protection and the achievability of the objectives of the regulation, I see a need to safeguard the proposed criterium with a supplementary test. It is important to specify how this deterrent effect of very short extracts on the reader's willingness to read the whole press publication should be measured. The focus should be on the economic impact of the use of such extracts on the situation of press publishers. It could be assessed according to criteria formulated in chapter III point 4.1. of this dissertation, namely on the criterion of whether the reader would identify the selected passage as an excerpt from a specific publication if he knew it, what kind of information is included in the very short extract, what is the relevance of the short extract for the reader and finally, what are the economic consequences of the use of the extracts of press publication also in the context of the publishers' benefits from the visibility on online platforms. These criteria will be useful at the stage of judicial assessment of whether an act constituted an infringement of the press publishers' rights or met the requirements for exclusion from the scope of protection.

I identified one significant drawback of the proposed solution. The assessment of the indicated criteria will take place on the case by case basis and neither predictability nor certainty are guaranteed. Moreover, it involves significant litigation costs. For some press

publishers, especially small and local, who are in a worse financial position than the technology giants, these costs may become a disincentive to assert their rights. The lack of a specific threshold also negatively affects the situation of ISSPs, which operate in highly automated way. The complex and evaluative criteria of what exactly do the very short extracts of press publication mean are difficult to translate into algorithms. The remedy would be the adoption of a quantitative threshold. It would limit flexibility, but would provide more certainty and commonality in the understanding of this exclusion. Perhaps a clue as to what limit should be set would be to take inspiration from X (Twitter) policy and set a character limit. The current character limit set by the platform for users from Europe is 280. Although 280 characters would be too much as regards the exclusion discussed, I consider that 80 characters, could be a compromise between the protection of the publishers whose interest is to let ISSPs use the shortest possible extracts out of the scope of the publishers' rights and the interest of platforms to make these extracts as long as possible. It should not be forgotten that in between all this there is also the user and therefore, due attention to the guarantees of the free flow of information should be paid.

To illustrate, the headline from today's Gazeta Wyborcza (30 January 2024) "Afera Lotos-Orlen. Koniec blokady śledztwa, Pomaska ujawnia dokument z prokuratury"[1478] has 82 characters. This headline conveys key information as to the content of the article, the user will be able to identify this article by the headline, which at the same time does not (in my opinion) exempt the reader from reading the entirety of this part of press publication. In consequence, the assessment whether this headline should be considered as a very short extract of the press publication excluded from the protection is complex. The use of quantitative criterion would facilitate the assessment, on the basis of the example given, we can conclude that the proposed threshold will not restrict the free flow of information, if the headline were shortened by two characters it would be considered as a short extract excluded from the publishers' protection.

I acknowledge that the adoption of quantitative threshold is regarded with reluctance as a constraint on flexibility[1479]. This is not a miracle solution but its advantage is certainty.

[1478] W. Czuchnowski, Afera Lotos-Orlen. Koniec blokady śledztwa, Pomaska ujawnia dokument z prokuratury, 2024, https://wyborcza.pl/7,75398,30646898,afera-lotos-orlen-prokuratura-wszczela-sledztwo.html#S.MT-K.C-B.1-L.1.duzy, accessed: 30.01.2024.

[1479] See: U. Furgał, The Emperor Has No Clothes: How the Press Publishers' Right Implementation Exposes Its Shortcomings, GRUR International, Vol. 72, no. 7, 2023, pp 650–664.

5.2.Press publisher and press agency

In national implementation of art. 15 of the CDSM Directive it should be specified that press publisher should be established in a Member State.

Depending on whether in national press law the definition of press publisher and press agency is already included or not, the reference can be made to the existing provisions. However, in such a case due attention should be paid to the definitional scopes of regulations. If there is no existing definition of press publisher and press agency for example in press law, as it is in Poland, the adoption of a specific definition within the implementation of art. 15 of the CDSM Directive is not necessary, if the mentioned above criteria will be included for example in the definition of a press publication.

5.3.Appropriate share of revenues for authors of works incorporated in a press publication

I propose to understand the appropriateness of the share, based on what has been discussed in chapter III section 7, as proportionality with regards to the scope of the use of the authors' contributions in the framework of the use of press publication. The practice of ISSPs consists in using press publications rather in their parts. Therefore, some elements of press publication will be used by ISSPs and other not at all. The scope of such a use may vary, press publication can be used to greater or lesser extent meaning that its elements can be used only marginally or in their entirety. Moreover, depending on many factors such as popularity of press publication, its topic, quality, recognisibility of press publisher, some contributions to the press publication will be used with more frequency within the framework of the use of press publication, by many ISSPs, than others. For these reasons, the amount of the share should be fixed as proportionate in relation firstly, to the volume of the authors' contribution used by ISSPs within the use of press publication and secondly, to the frequency of its use. The greater the contribution used and the more often, the greater the share of authors should be.

In this case, great care should be taken in formulating hard thresholds which limit significantly the flexibility. I would advise rather to set the share in form of a percentage range. The amount of the share to be paid to authors by press publishers should not be foreseen as significantly high so as not to limit the aim of the regulation which is to give publishers an incentive to invest in publishing of press publications. Following this logic, 50% of the share proposed by Polish legislator represents a significant and, in my opinion,

overly significant burden for press publishers, which may distort the intent of the publishers' rights.

I would like to highlight the importance of linguistic coherence throughout the implementation of art.15 of the CDSM Directive. In the implementation of this provision it should be specified that the share is due to the authors of the works included in press publication and not to the authors of press publication like it has been provided in Polish proposal since the latter may be conductive to the interpretative doubts.[1480]

5.4.Exclusions from the scope of protection

5.4.1. Acts of hyperlinking

The protection of press publishers does not apply to the acts of hyperlinking. The links within the exclusion provided in art. 15 of the CDSM Directive could be understood **narrowly** as containing only the URL address. Hyperlinks which includes additional text, images or graphics would be therefore considered as being beyond the scope of exclusion.[1481] However, it is worth pointing out that the Court highlighted the particular importance of linking in the context of freedom of expression and of information from art.11 of the Charter[1482]. It underlined the role of hyperlinks which contribute to the exchange of opinions and information in the Internet and are of great importance from the perspective of digital environment marked by the availability and exchange of immense amounts of information.[1483] Therefore, the conclusion is that the narrow interpretation of the hyperlinks will contribute to the effectiveness of the publishers' protection but may be of detrimental effect on the free flow of information. The compromise would be to specify within the implementing provision, that the hyperlink can include individual words and very short extracts of press publication which do not dispense the reader from reading it. The criteria of the assessment of the latter would be the same as in case of the exclusion of the individual words and very short extracts proposed in point 6.1.1. of this chapter.

5.4.2. Private or non - commercial uses of press publication by individual users

[1480] See chapter III section 7.
[1481] See: R. Markiewicz, Prawo autorskie …, p.176.
[1482] See: CJEU, Svensson, para. 18.
[1483] CJEU, GS Media, para. 45.

Since press publishers are granted the exclusive rights of *erga omnes nature* which are limited in practice and allow claims to be directed against a specific group of entities, ISSPs, using a press publication in a specific, online environment, the obvious conclusion is that the rights do not apply in case of private or non- commercial uses of press publication by individual users. Therefore, it is not necessary to implement the exclusion that protection does not apply to private or non-commercial uses of press publication by individual users. If legislator decides to do so, with regards to the safeguard for free flow of information, the English or French linguistic version of the art. 15 of the CDSM Directive should be considered as a source of transposition, where the private and non-commercial uses of press publication are considered alternatively what is favorable for the free flow of information.[1484]

To dispel the doubts whether the publishers' protection applies also to non-profit organisations or other non-individual actors not being ISSPs, I propose to specify within the implementation of the provision that the press publishers' protection does not apply to private or non-commercial uses of press publication by individual users or other entities which are not ISSPs. Such specification will not hamper the effectiveness of the protection and will bring the clarity as regards the use of press publications by, for example, not-for-profit organisations, which will benefit for the free flow of information.

5.5.Criteria of calculation of the remuneration

It remains with the margin of appreciation of Member States to provide further specification of the EU legal norms or adopt more stringent standards. Therefore, it is legitimate, but not indispensable, for Member States to regulate how the remuneration for the use of press publications by ISSPs should be calculated.

I would advise to introduce the basic criteria for the calculation of such remuneration with regard to the effectiveness of the publishers' protection. Minimum criteria, which can be clarified or supplemented by parties during the negotiations, will allow smaller publishers in particular, or those who choose to negotiate without the intermediation of collecting societies, to avoid or minimalise the risk of the imposition of remuneration calculation conditions by ISSPs. It may be also an important factor facilitating the negotiations. The crux, however, lies in how these criteria will be formulated so as not to give ISSPs room for discriminatory treatment. I propose to focus especially on the use of

[1484] See chapter V, point 2.4. See also: chapter III point 4.1, chapter IV point 3.1.

press publication while determining them. Since the use of press publications generates profits for the ISSPs, it is justified to share those profits with press publishers in the framework of the exercise of their exclusive rights. Calculation of this remuneration should be based on the criteria such as the number of services of ISSP on which the press publications are displayed, the number of times these publications have been displayed and searched for on such services. The indirect revenues of ISSP from the use of press publications should be also taken into account as it has been done for example in French transposition[1485].

For the sake of balance, the extent to which the use of press publication by ISSPs contributes to the profits on the part of press publishers, in form of clicks and visits to their websites, should also be considered. Every activity aiming at disseminating information is important from the perspective of public debate and access to information as it was observed in chapter I.[1486] Therefore, the criteria discussed should not discourage platforms from continuing their activity of disseminating information.

The effectiveness of the protection resulting from the publishers' rights, notably as regards the free flow of information and media pluralism can be threatened by the introduction of criteria focused on press publisher. These include the criterion of the subject matter of press publications he publishes, popularity, size or length of service of press publisher.[1487] It could lead to the unexpected by the EU legislator differentiation of press publishers, to the support of the winners take it all dynamic reinforcing the overrepresentation of some press publishers and underrepresentation of others, unfavorable from the media pluralism perspective. The objectives of the law could not be achieved. If national legislator would like to base its criteria on the press publisher's activity, I would rather advise to envisage, for example, additional support for small press publishers due to their more difficult market situation.[1488]

5.6.Information claim

In Poland, the collective management bodies have the claim to request the information and documents necessary to determine the amount of the fees and remunerations they are claiming within the exercise of the exclusive rights on behalf of the rightsholders and in

[1485] See: chapter IV, point 5.1.
[1486] See: chapter I, point 2.1.2.
[1487] See chapter V point 2.5.
[1488] See: chapter I points 4.2. and 4.3.

case of non - compliance with such a claim, the exploitation agreement as regards the use of works or other subject matters can be terminated according to art. 48 and 49 of the Act on collective management[1489]. In case when the collective management organisation will intermediate as regards the negotiations on the exercise of the exclusive rights, these provisions will apply. A general information claim should be however introduced within the transposition of art. 15 of the CDSM Directive, which will allow press publishers negotiating on their own to request information. The question arises to what extent the legislator should be precise in formulating the scope of this claim. In my opinion, it would be advisable to provide press publishers with a claim to request the data necessary to determine the remuneration and to determine the scope of the exploitation of press publications. The latter would be important to determine the scope of the use of press publications for the purposes such as AI training or to determine whether the visibility of a publisher's press publications may or may not have been restricted.

The time limit for the submission of the requested information should be specified as well as the consequences in the event of the failure to communicate such data within the indicated period of time. As to the latter, the consequence in form of financial penalty would be suitable to effectively encourage ISSPs to provide the requested data. The introduction of such a sanction in case of failure to provide data in this context is justified from the perspective of reinforcing the bargain position of press publishers.

The characteristic of the data required, such as up-to-date, relevant and complete could be specified but in my opinion, it is not necessary since, the data requested, necessary to calculate the remuneration or determine the scope of the exploitation of a press publication should be such for the claim to be met. In other words, from the scope of the claim to provide the data, it follows that the data should be such to enable the calculation of remuneration or determination of the scope of the use of press publication.

5.7.Mediation mechanism

In view of the threat of the abuse of dominant position and the exploitation of the economic dependence, it is justified to put in place the mechanisms aimed at redressing inequalities of power between the negotiating parties as regard the exercise of the publishers' rights. Therefore, I propose to foresee the involvement of an independent

[1489] See articles 48 and 49 of Act on collective management, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20180001293/T/D20181293L.pdf, accessed: 18.10.2023.

body who will be responsible for the assistance in case of the difficulties in reaching an agreement. Recourse to such an institution should be voluntary and with the consent of both parties. The objective of the procedure will be to provide an opportunity for mediation in the event of a negotiation deadlock over the use of press publications by ISSPs. In Poland, competence of this mediating institution could have the Copyright Committee.[1490] National legislator while adopting this mechanism should take into account the specificity of the functioning of press sector, of the relationship between press publishers and ISSPs and determine what is the risk of exploiting the economic dependence of press publishers in a given Member State in order to adjust the intensity of the solutions introduced.

Some Member States have gone a step further by entrusting an independent body with the role of determining the remuneration and obliging the parties to negotiate[1491]. Considering the significant imbalances as regards the negotiating power between press publishers and ISSPs and the dependence of press publishers on the latter, these solutions will certainly aim at improving the effectiveness of the publishers' protection since they are targeted to address the demonstrated weaknesses of the publishers' rights. I would advise to introduce the mechanisms similar to the ones adopted in Belgium or Italy but I have the doubts as to whether this is not a measure that goes beyond the margin of discretion in implementation of the CDSM Directive granted to Member States.

Press publishers have been granted the exclusive rights to authorise or prohibit the use of their press publications online by ISSPs which does not imply that the ISSPs are obliged to enter negotiations. U. Furgał explains that "digital intermediaries are obliged not to behave in a way covered by the publishers' monopoly unless they acquire publishers' consent. That does not mean, however, that they must seek publishers' consent whenever a publisher requests them to do so."[1492] The choice of the related rights' regime may indicate that the EU legislator did not want to create an obligation to negotiate on the part of ISSPs, or did not expect that it would be so difficult for publishers to enforce this new law and therefore limited itself to the related rights' regime.

The obligation to negotiate resulting from the adoption of such mechanisms could give a raise to the argument of the limitation of the freedom to contract. Although, the

[1490] Komisja Prawa Autorskiego, http://www.prawoautorskie.gov.pl/pages/strona-glowna/zbiorowe-zarzadzanie/komisja-prawa-autorskiego.php, accessed: 26.01.2024.
[1491] See: chapter IV, section 9.
[1492] U. Furgał, The Emperor …, p. 659.

latter is not of absolute nature, and its limitation could be justified on the grounds of protecting freedom of expression, the concerns whether the interference with contractual freedom is not too far reaching could be raised.

Tribunale Amministrativo Regionale per il Lazio (Sezione Quarta) in December 2023 requested for a preliminary ruling, asking the CJEU whether the provision from art. 15 of the CDSM Directive should be interpreted as precluding the introduction of the following provisions in the framework of its implementation:

a) introduction of the obligation of remuneration (fair compensation);
b) provision of the obligation to enter into negotiations with publishers, provision of information necessary for the purposes of determination of fair compensation and not to restrict the visibility of the publisher's content in search results pending the finalisation of the negotiation;
c) grant to an independent body a supervisory and sanctioning power, the power to identify the reference criteria for determining fair compensation, the power to determine, in the event of failure to reach agreement between the parties, the exact amount of fair compensation[1493].

The CJEU response to these questions will be invaluable in determining whether the introduction of such mechanisms, which undoubtedly could lead to safeguarding the effectiveness of the publishers' protection, remains within or exceeds the margin of discretion of the Member States while implementing the CDSM Directive.

5.8.Safeguard for visibility

Inspired by the Italian implementation[1494], I propose to introduce the obligation that during the negotiation, ISSPs shall not limit the visibility of press publications of negotiating publishers on their services. The unjustified restriction as regards the display in the course of the negotiations shall be understood as a breach of the duty to negotiate in accordance with the principle of good faith.

The adoption of such a measure constitutes a safeguard for the free flow of information. It limits the risk that less information than usual will reach the public due to

[1493] Il Tribunale Amministrativo Regionale per il Lazio, Sezione Quarta, N. 18790/2023 REG.PROV.COLL.
N. 07093/2023 REG.RIC., 12.12.2023, point 21,
https://drive.google.com/file/d/1VbN_nAwpL2q7zZTFGLRyJ2f28JEBVltv/view, accessed: 31.01.2024.
[1494] See chapter IV, section 9.

the ongoing negotiations and the use of economic dependence of press publishers by ISSPs to make them accept unfavorable or less favorable solutions. Moreover, it protects press publishers against the imposition of negotiating conditions and such a protection is desirable from the perspective of ensuring the effectiveness of the publishers' rights.

5.9.Safeguard for transparency

The confidentiality of the agreements reached by press publishers and ISSPs renders the scrutiny of the effectiveness of the press publishers' rights very difficult or even impossible. Moreover, the lack of transparency as regards the amount of the remuneration received by press publishers means that the calculation of the share for authors can be discretionary. For these reasons, I consider that the disclosure of the details of the agreements concluded within the framework of the exercise of the publishers' rights should be allowed either at the request of the collective management organisation or at the request of the researcher through, in Poland for example, Copyright Committee.[1495]

The obligation to disclose the information included in such agreements has to have however a limited scope. Otherwise, the interference with freedom of contract would be too important. Therefore, I propose to limit the scope of entitled entities to collective management organisations in case of determination of the authors' share and to researchers. In this second case they should be vetted by an independent body and should be required to use these data solely for research purposes and to consider them as strictly confidential.

6. Conclusion

The conducted analysis showed that the extension of the protection under copyright and related rights' regime to a new subject matter - press publication - does not constitute a threat to access to information due to the safeguards for free flow of information included in provisions from art. 2(4) of the CDSM and art. 15 (2) of the CDSM Directive.

However, the explicit recognition of press publishers as holders of exclusive rights within the adoption of the publishers' rights means that a new group of actors controlling access to the protected subject matter is added which contributes to the limitation of the scope of access to information included therein. Since the rights applies against ISSPs,

[1495] Komisja Prawa Autorskiego, http://www.prawoautorskie.gov.pl/pages/strona-glowna/zbiorowe-zarzadzanie/komisja-prawa-autorskiego.php, accessed: 26.01.2024.

the users are not directly affected by the new law. Nevertheless, while taking into consideration the role of ISSPs in disseminating information, the indirect negative impact of such legislative approach on the framework of access to information should be ascertained.

The assessment of the publishers' rights in the context of media pluralism and access to information revealed that the exclusions from the scope of protection, conceived to balance the restrictive effect of the adoption of the publishers' protection on the free flow of information, understood in a restrictive manner, will not contribute to the fulfillment of this balancing objective and can constitute an obstacle to the free flow of information by limiting the information that reaches the audience. Discriminatory conditions of remuneration introduced in some Member States can lead to overrepresentation of some media outlets and underrepresentation of others and to the reinforcement of the winners take it all dynamic unfavorable from the perspective of the protection of media pluralism.

The results of the conducted analysis are important also from the perspective of the stage of application of the publishers' rights. The due attention should be paid to the understanding of the definition of press publication, to the scope of exclusions from the protection, to the criteria of calculation of remuneration and the transparency obligations.

To avoid or mitigate the negative effects of the identified shortcomings on the free flow of information and media pluralism, Member States should with great care use their margin of discretion while implementing the CDSM Directive. The solutions introduced in this regard should address the interdependencies between press publishers and online platforms and target the imbalances between these two actors. Due to maximum harmonisation, the scope of this margin of discretion is not significant, but Member States should, within this margin of discretion, endeavour to implement such mechanisms as will ensure the best possible efficiency of the publishers' rights.

Press publication can be considered as a collective work as regulated for example in French or Polish law. In such a case a multiplication of the layers of protection can be found. It should be however noted, that under the publishers' related rights it is not necessary to prove the legal titles to the individual elements of a press publication what makes it easier for press publishers, considered as original rightholders, to institute infringement proceeding before the court. The adoption of the publishers' rights is of complementing nature as regards the legislations where the collective work is not recognised. In consequence, the related rights would increase legal certainty and would simplify the process of asserting the publishers' rights and defending their interests.

The analysis of the market realities leads to the conclusion that it cannot be clearly stated whether the introduction of the publishers' rights can translate into addressing the market failure or not. This difficulty is due, *inter alia*, to the fact that the agreements concluded between press publishers and ISSPs are mostly confidential which makes it impossible to determine how much remuneration translates into improvement of press publishers' situation. The conducted research showed that the adoption of the publishers' rights can result in strengthening the press publishers' dependence on ISSPs and highlighting the differences between press publishers.

The related rights of press publishers constitute a justified interference with freedom of expression. The conducted analysis showed that the core of the right to receive information understood as the right of the public to be adequately informed, in particular on matters of public interest, is not affected.

Final conclusion

The objective of my research was to propose how the implementation of art. 15 of the CDSM Directive ought to be, to ensure the effectiveness of the publishers' rights, especially as regards the free flow of information and safeguard for media pluralism. I focused on the assessment of the publishers' rights, to provide a set of indications as to which mechanisms and instruments should be used by the national legislator in order to best implement art.15 within its margin of discretion and in view of this specific context. To this end, I analysed the provisions from articles 2(4) and 15 of the CDSM Directive, their French implementation and the Polish proposal for the implementation.

The EU legislator decided to pursue the objectives from the field of freedom of expression with the use of tools from the area dedicated to the protection of literary and artistic creations and their dissemination.

The grant of the exclusive rights to press publishers was expected to result in an improvement in their financial situation and, consequently, in strengthening of the press sector, which would imply better access to information and protection of media pluralism. Intuitively therefore, an objective from outside of the scope of the related rights' regime could be achieved by its means. However, the mere extension of the exclusive rights to a new category of actors is a step towards restricting the access to information since the monopoly over the use of press publications has been created. A paradox can be observed that the new press publishers' protection, rather than contributing to protecting access to information, limits it. To balance such an effect, numerous safeguards have been introduced.

My research showed that the related rights of press publishers, in contrast to other related rights, are distinguished by a higher level of specificity. They are directed against a specific group of actors, namely against ISSPs, and not against every user of press publication. They apply to the use of press publications in the online environment. The subject matter of protection must meet the criterion of a collection consisting of protected elements, so the protection does not cover the unprotected elements from the public domain. The term of protection is significantly shorter compared to that resulting from other related rights. All these specificities can be seen as safeguards for the flow of information in the context of the extension of the exclusive rights to press publishers.

Moreover, the acts of hyperlinking or the use of individual words or very short extracts of press publication are excluded from the scope of protection arising from the publishers' rights what contributes to limiting its scope. In this context however, another paradox could be identified, since a broad understanding of these exclusions will enhance the free flow of information, while a narrow understanding will contribute to more effective protection of press publishers. This is all about weighing the interests at stake and making the choices whether to tip the scales towards enhanced protection for press publishers or a guarantee of the flow of information.

By discussing the functioning of press publishers and of ISSPs supplying the services such as news aggregation, the high interdependence of these actors and the market imbalances between them were identified. The mere granting of the exclusive rights without the implementation of mechanisms to secure the negotiating position of press publishers, as evidenced by the analysis of the case of the French publishers, may not contribute to the increase of the effectiveness of their protection. The research conducted showed that any legal changes, including those in the copyright and related rights' regime as regards the online information communication environment, should take into account the dependencies and market power imbalances between the actors concerned by the legislation. These factors are decisive in terms of its effectiveness, and failure to take them properly into account can lead to the effects of counter- productive nature.

The press publishers' rights were adopted to address the market failure. Since the most of the agreements reached by press publishers and ISSPs are confidential, it is impossible to know whether revenues from the use of press publications are such as to actually translate into a better situation for press publishers and, consequently, in strengthening of the press sector, ensuring access to reliable information and protecting media pluralism. In consequence, the conclusion to be drawn from the analysis conducted in this dissertation is that it can be difficult to achieve the objectives of freedom of expression through the regulation based on the related rights' regime. This is due to the very characteristics and purpose of the protection resulting from the choice of the legal regime, the realities of the market and the dependencies between actors. To say that it can be difficult does not mean that it is impossible, and the important role of weighing up conflicting interests lies with the Member States. The scope of their margin of discretion is however limited since the publishers' rights are an example of maximum

harmonisation. Therefore, the protection granted to press publishers at the national level as result of the Directive's implementation cannot be more or less intense. Nevertheless, Member States are free to specify the circumstances in which the authorisation of the use of press publication takes place. They should put in place the solutions targeting the identified dependencies and market power imbalances to do the most to limit the number of factors potentially affecting the effectiveness of the publishers' rights.

On the basis of the lessons learned from French case, some Member States introduced the additional safeguards against the limitation of the visibility of press publishers on the ISSPs' services or the mechanism of arbitration and assistance within the process of negotiation between press publishers and ISSPs. Particular care should be taken not to alter the nature of the protection granted to publishers, as the EU legislator has not chosen to introduce a separate right to remuneration for them or to impose an obligation to negotiate and contract. The balance between seeking effective protection for press publishers and respecting freedom of contract should be preserved.

My research led to the formulation of how the implementation of art. 15 of the CDSM Directive ought to be. I proposed the adoption of the remuneration criteria based on the use of press publication and not centered on press publishers. This will avoid reinforcing the winner-take-all trend and further fragmentation of the press market. I consider the grant of information claim to press publishers but also to collective management organisations and researchers as necessary from the perspective of higher transparency which can translate into greater efficiency of the regulation and into more research opportunities to study this issue. Acknowledging the increasing importance of the visibility factor as one of the guarantees of media pluralism, I see a need for the safeguards for press publishers' visibility on the ISSPs' services, especially during the negotiation period.

The Polish legislator is the last one who has not implemented the CDSM Directive. Although the failure to fulfill the obligations under EU law deserves criticism, in a sense, the Polish legislator enjoys a very privileged position. It can draw lessons from the legislative successes and failures in other Member States in this area to formulate its implementation, avoiding numerous threats to the free flow of information and media pluralism.

I believe that Poland and other Member States wishing to amend the already implemented publishers' rights will find the set of guidelines and warnings formulated in

this research useful. I hope that they will choose the right words that will actually translate into action. Effective action, beneficial for media pluralism and free flow of information.

Table of legislation

(The table includes also non-binding legal instruments.)

International Treaties and Conventions

Berne Convention: Berne Convention for the Protection of Literary and Artistic Works, of 9 September 1886 (completed at Paris on 4 May 1896, revised at Berlin on 13 November 1908, completed at Berne on 20 March 1914, revised at Rome on 2 June 1928, at Brussels on 26 June 1948, at Stockholm on 14 July 1967, at Paris on 24 July 1971, and amended on 28 September 1979)

Rome Convention: International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, done at Rome on October 26, 1961

TRIPS: Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994,

WCT: WIPO Copyright Treaty, adopted in Geneva on 20 December 1996

WPPT: WIPO Performances and Phonograms Treaty, adopted in Geneva on December 20, 1996

WIPO Marrakesh Treaty: Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (adopted by the Diplomatic Conference to Conclude a Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities in Marrakesh, on 27 June 2013)

Council of Europe

ECHR: European Convention on Human Rights, signed in Rome on 4 November 1950

Council of Europe, Pluralisme des médias et enjeux de la concurrence, IRIS spécial, Une publication de l'Observatoire européen de l'audiovisuel, 2020.

Committee of Ministers, Recommendation CM/Rec (2018)1 of the Committee of Ministers to member States on media pluralism and transparency of media ownership, Adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers' Deputies.

Committee of Ministers, Recommendation CM/Rec(2011)7 of the Committee of Ministers to member states on a new notion of media, adopted by the Committee of Ministers on 21 September 2011 at the 1121st meeting of the Ministers' Deputies.

Committee of Ministers, Recommendation CM/Rec (2007)15 of the Committee of Ministers to member states on measures concerning media coverage of election campaigns, Adopted by the Committee of Ministers on 7 November 2007 at the 1010th meeting of the Ministers' Deputies.

Committee of Ministers, the Declaration of Freedom of Expression and Information Adopted by the Committee of Ministers on 29 April 1982 at its 70th Session.

European Union:

Treaties and Charter

Charter: Charter of Fundamental Rights of the European Union, OJ C 364/1, 18.12.2000

TEU: Treaty on European Union (Consolidated Version), Treaty of Maastricht, 7 February 1992, OJ EC C 325/5; 24 December 2002

TFEU: Consolidated Version of the Treaty on the Functioning of the European Union, Sep. 5, 2008, OJ C 326, 26.10.201

Regulations

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