A COMPARATIVE ANALYSIS OF THE NEW EU PRESS PUBLISHERS' RIGHT

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Abstract

Platform services in the online space are one of the most innovative and intensive sectors of the global economy, with a significant competitive advantage in technology that gives them deep technological insights into users and user habits. This enables them to deliver targeted advertising to millions of connected end-users. Publishers who make daily news, analysis, interviews, and reports available to their readers in their press releases are at a competitive disadvantage compared to the technology giants mentioned above. The Digital Single Market Directive aims to address this issue by creating a new "press publishing right." This paper analyses the new press publishers' related rights from both a policy and a practical perspective, including a brief comparison of the press publishers' protection and the "hot news" doctrine under the law of some US states.

Keywords: press publishers rights, linking tax, copyright and related rights, European copyright, US copyright law.

ANÁLISIS COMPARADO DEL NUEVO DERECHO DE LOS EDITORES DE PRENSA DE LA UE

Resumen

Los servicios de plataforma en el espacio en línea son uno de los sectores más innovadores e intensivos de la economía mundial, con una importante ventaja competitiva en tecnología que les proporciona profundos conocimientos tecnológicos sobre los usuarios y sus hábitos. Esto les permite ofrecer publicidad dirigida a millones de usuarios finales conectados. Los editores que ponen a disposición de sus lectores noticias, análisis, entrevistas e informes diarios en sus notas de prensa se encuentran en desventaja competitiva frente a los gigantes tecnológicos antes mencionados. La Directiva sobre el Mercado Único Digital pretende resolver este problema con un nuevo «derecho de publicación de prensa». Este documento analiza los nuevos derechos relacionados con los editores de prensa desde una perspectiva tanto política como práctica y también comparan la construcción europea de la protección de los editores de prensa con la doctrina de las «noticias calientes» de la legislación de algunos estados de EE. UU.

Palabras clave: derechos de los editores de prensa, impuesto de enlace, derechos de autor y derechos afines, derechos de autor europeos, legislación estadounidense sobre derechos de autor.

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INTRODUCTION

Search engines, news aggregators, media monitoring services and social media platforms[1] operating in the online space are one of the most innovative and capital-intensive sectors of the global economy. The biggest and best-known are Facebook (Meta) and Google, both based in the United States. In particular, they have a significant competitive advantage in technology that provides them *in-depth technological knowledge* about users and user habits.[2] They can use this information to deliver targeted advertizing to millions of end users connected to the internet. Publishers which make everyday news, analyses, interviews and reports available to their readership in their press publications (both print and online), are at a competitive disadvantage compared to the aforementioned technology giants. Facebook, Google, and the like earn significant revenue by collecting and indexing the paths to press publications and articles available on the Internet, mostly by selling advertizing space.

In 2019, the European Union issued a directive designed to deal with this issue and related problems arising in the online sector.[3] Article 15 of this Directive creates a new "press publisher's right" [hereinafter "PPR"] in news publications. This right, which augments and exists separately from any copyright that may exist in a news story, is a two-year period of exclusivity held by the original publisher. The press publisher has the exclusive rights to reproduce the story online, and to make the story available to others.[4]

This article analyses the new PPR from both a policy and a practical perspective. While the main focus is on the PPR, the discussion also briefly compares the PPR to the "hot news" doctrine under the law of some US states.

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[1] The term platform can refer to several different business models, but they all have in common that they are based on Web 2.0, i.e., the Internet itself is the basis for the existence of the platform. Poell, Nieborg and van Dijck describe the platform as a reprogrammable digital infrastructure that facilitates, and shapes personalized interactions between end-users and service providers. This relationship is characterized by the systematic collection of data, processing it using algorithms and monetizing it. It is extremely cost-effective, but at the same time it has a high social responsibility. Their social and economic position is comparable to that of the railway, telecommunications and electronics monopolies at the turn of the 19th and 20th centuries. See: Poell, Thomas, Nieborg, David and van Dijck, José: "Platformisation. Internet Policy Review", vol. 8. Issue 4. 2019. pp. 3-4. (https://policyreview.info/concepts/platformisation Last visited: 08 June 2022).

[2] Senftleben, Martin, Kerk, Maximilian, Buiten, Miriam and Heine, Klaus: "New Rights or New Business Models? An Inquiry into the Future of Publishing in the Digital Era." IIC-International Review of Intellectual Property and Competition Law, 48, 2017. p. 539. Comp.: Poell, Nieborg and van Dijck, 2019. p. 8.

[3] Directive (EU) 2019/790 of the European Parliament and of the Council, L 130/92.

[4] *Ibid*. Art. 15(1).

I. POWER DIFFERENCES IN THE MARKET FOR ONLINE NEWS

The new neighboring rights protection seeks to put publishers of press publications in a position to effectively assert their interests in a competitive environment in which the players' objectives intersect[5] at several points, and the market in which they compete and operate is both fragmented and disrupted in favor of one of the competitors, due to that competitor's technological advantage.[6]

One of these points is the aforementioned advertizing market, and another is the target audience. Competitors' toolboxes have different characteristics. With the technology mentioned above, service providers can reach end users much faster and more efficiently by deeply analysing the data they provide and optimizing the technology. Their business model, which collects news categorised by topic as a *one-stop shop*,[7] would not work without indexed content.[8] In this way, online intermediary platforms can also control the consumption of content itself, as they determine what the end user sees through the platform's search services.[9]

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[5] In traditional market conditions, press publishers have built a successful business model by serving news readers and advertisers at the same time, by combining them. In the platform economy, the advertizing element of their business model is put at a competitive disadvantage by the fact that the news content they produce is not directly provided to the public by them, but by third party companies that are essentially completely independent of them, without permission. These third parties serve a public whose members belong to the potential clientele of the press publication. Meanwhile, advertisers who were also previously part of the publisher's potential customer base are not advertising in the publication, but on the platform that publicizes the news. Yet the phenomenon is two-sided, because while they do siphon advertising revenue away from publishers, they also make it easier for them to reach audiences that they would otherwise be less likely to reach. The operation of the platform is therefore not clearly negative, but also has a gravitational effect on supply and demand. This is illustrated by the figures presented below. It can be seen that the lack of indexing can also have a negative impact on the traffic of and visits to news portals. Comp: Poell, Nieborg and van Dijck, 2019. p. 7.

[6] Senftleben, Kerk, Buiten and Heine, 2017. p. 540. Comp. Höppner, Thomas: "EU Copyright Reform: The Case for a Publisher's Right." Intellectual Property Quarterly, Issue 1, 2018. p. 4.

[7] Höppner, 2018. p. 5. Comp: Papadopoulou, Maria-Daphne and Moustaka, Evanthia-Maria: "Copyright and the Press Publishers Right on the Internet: Evolution and Perspectives." In. Synodinou, Tatiana-Eleni, Jougleux, Philippe, Markou, Christina and Prastitou, Thalia (ed.): "EU Internet Law in the Digital Era – Regulation and Enforcement." Springer, Nature Switzerland AG 2020. p. 104.

[8] Several cases in Europe relate to the use of press releases by intermediary service providers: Infopaq cases (C-5/08. Infopaq International A/S v Danske Dagblades Forening ECLI:EU:C:2009:465. C-302/10. Infopaq International A/S v Danske Dagblades Forening ECLI:EU:C:2012:16.), Meltwater case (C-360/13. Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd et al. ECLI:EU:C:2014:1195.)

[9] Moscon, Valentina: "Neighbouring rights: in search of a dogmatic foundation. The press publishers' case." In: Pihlajarinne, Taina, Vesala, Juha and Honkkila, Olli (ed.): "Online Distribution of Content in the EU", Edward Elgar Publishing, Cheltenham, UK, Northampton, MA, USA, 2019. pp. 42-43.

The most important tool in the publishers' toolbox is the knowledge that allows them to turn a raw mix of news into meaningful, consumable content for the general public. Publishers organize and oversee this process, while taking responsibility for the content they publish and ensuring that the funding is in place.[10] While publishers know how to produce news for consumption, they do not necessarily have the same expertise concerning how to present it and reach the widest possible audience. This gap has been filled by information society service providers, who are able to deliver content produced by publishers to the public quickly, easily, cost-effectively and in a user-friendly way. Cost-effectiveness is deceptive, however, as they can make a profit from publishing content without having to spend on building and maintaining a network of reporters and publishing infrastructure.[11] In essence, then, the information society service providers engage in a certain level of free riding on the efforts of the publishers.

The technological change has also brought with it a very significant paradigm shift. In the analogue world, where a business model has evolved to meet the news needs of the general public, the market has been driven by the *supply side*. In this, the publisher's business decisions were determined by the fact that the larger the volume of its publications, the cheaper they would be to produce per unit. A beneficial arrangement with the printer was key, which is why it was often the case that the publisher ran its own printing press to keep costs at a more economical level. The same applies to published works of authorship. It is up to the publisher to decide, on the basis of its expertise, which works by which authors to put on the market and in what quantities. Cost-effectiveness was also a consideration here, as the publisher could not afford to keep a mass of unsold published works in stock.[12]

In the digital space, the focus has shifted entirely to the *demand side*,[13] while the cost of production has fallen substantially as printing and warehousing have become less important.[14] A demand side in the online space means a growing mass of users "orbiting" around a platform, committed to it. The goal is now to satisfy them, to increase their number as much as possible, which goes hand in hand with an increase in advertizing revenues and the publisher's digital database (*network effect*).[15] The increased importance of the demand side is illustrated by the fact that 57% of users reach news sites through social media, news aggregators and search

[10] Senftleben, Kerk, Buiten and Heine, 2017. p. 539.
[11] Höppner, 2018. pp. 2-3.
[12] Senftleben, Kerk, Buiten and Heine, 2017. p. 542.
[13] Ibid. p. 540.
[14] Ibid. p. 542.
[15] Ibid. p. 543. Comp: Höppner describes this as the "content-user-advertiser spiral". See: Höppner, 2018. p. 2. Comp: Poell, Nieborg and van Dijck distinguish between *direct and indirect network effects*. The former is when the benefit to the end user of participating in the network is a function of how many other users are connected to the network at the same time and in parallel. The indirect effect arises when users connected at different points in the network can benefit from the cooperation in a way that is directly proportional to the size and other characteristics of the other party. At the same time, it is important to note that platform operators have created highly

engines. 47% only read the headline of the search result without clicking on the link to view the full content. This is backed up by Google data showing that 44% of users who visit Google News only scan the headline.[16]

In other words, the advent of digitalization and the internet has shifted the focus from the supply side to the demand side, with new businesses responding more quickly to the technology available than do the publishers, who are burdened by decades of established business models and practices. Press publishers now recognize that in the online space they too must strive to offer a higher value-added proposition than freely available content online, with the potential for community building,[17] personalization, and user-generated content,[18] where the tools available can be transformed into a database with significant asset value.[19] The aim is now not only to protect the publications and the works of authorship they contain, or the authors who created them, but also to protect the database of news and information created by the publisher with a significant investment and the platform built around it. Protection of that investment and the platform can come not only from copyright and related rights protection,[20] but also from sources such as sui generis database protection, competition law,[21] and trademark law.[22]

The table 1 illustrates the legal protection available to publishers.

There have been attempts in Europe to regulate the relationship between publishers and secondary user intermediaries in the online content consumption market. Prior to 2019, however, those attempts were only at a Member State level. The idea of giving legal protection to publishers who organize news in a structured way has been raised before in international copyright law. However, in the negotiations for the revision of the Berne Convention, which preceded the Rome Convention of

concentrated, centralized markets due to their technical and economic position. Poell, Nieborg and van Dijck, 2019. p. 5-6.

[16] Höppner, 2018. p. 3.

[17] Examples of platform development include Tolino, a joint platform of the three largest German book publishers Thalia, Weltbild and Bertelsmann, and Kluwer Navigator, a service that acts as an access point for legal journals, court decisions and other literature. See: Senftleben, Kerk, Buiten and Heine, 2017. p. 547.

[18] Ibid. p. 544.

[19] Ibid. p. 549.

[20] According to Papadopoulou and Moustaka, the importance of neighboring rights protection lies precisely in its attempt to protect the value chains established for the secondary use of copyright works from unauthorized use by third parties. See: Papadopoulou and Moutaka, 2020. p. 123.

[21] Competition law protects interests that conflict with intellectual property rights. While the former contains the rules of competition between market players, the latter creates a negative legal relationship with an absolute structure over the creation, i.e., a kind of legal monopoly (in the work or invention itself, not necessarily in the market in which that work or invention competes), with limitations and exceptions. At the same time, competition law can also be used to protect the interests of the investor against market behavior that challenges the results of a competitor's investment. See: Moscon, 2018. p. 54.

[22] Senftleben, Kerk, Buiten and Heine, 2017. pp. 549-550.

TABLE 1			
	Author	Publisher	Digital Platform
Possible means of protection	Copyright in articles that constitute literary works and other works of authorship contained therein, such as photographs, maps, etc.	It acquires exclusive rights over the protected works, whether under a publishing contract or an employment contract.	Neighboring rights protecting press publications under the provisions of the CDSM Directive, sui generis protection for database producers, trademark law, competition law.

1961,[23] the idea of including news in the scope of protection was rejected.[24] In fact, the Berne Convention states in Article 2(8) that copyright protection "... shall not apply to news of the day or to miscellaneous facts having the character of mere items of press information." This, of course, gives protection to the authors of the articles as creators of literary works, but excludes mere news from copyright protection in view of the right of access to information. The Berlin review of the Berne Convention also found that the commercial interests of publishers should not be protected by copyright.[25] Accordingly, the publishers of the press publications could not obtain related legal protection. Despite their efforts, it was concluded that news collecting and similar activities do not meet the threshold for recognition as related right holders, which is the standard for a performer or phonogram producer.[26] Recognized related rights holders build their activities and business model on works protected as authors' works, and on exploiting them as fully as possible and disseminating them to the public.[27] Protection of press publications is indeed a borderline area. There is no doubt that publishers invest heavily in producing and publicizing press publications. However, based on the argument that mere news is itself excluded from protection by the Berne Convention, it is difficult to argue that such investment and effort qualifies as a form of authorship. However, the weak point of the argument could be that journalists use the news to create a work of authorship, which becomes part of the press publication, and which could even be protected as a database or collective work.

The relationship between publishers and intermediary service providers seems to reflect a kind of interdependence.[28] Publishers argue that without their

[23] Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.

[24] Moscon, 2018. p. 41.

[25] Ibid. pp. 42-43.

[26] Ibid. p. 45.

[27] Ibid. p. 66.

[28] The position of the authors who actually produce the content is not an irrelevant factor in this seemingly interdependent relationship. Their reception of the new neighboring right has not been without its critics. The European Federation of Journalists has expressed concern that the

content, news aggregator and media monitoring services would not work, while the other side argues that their services actually benefit publishers by drawing more attention to the publishers' content available online.[29] The Spanish and German examples,[30] however, reflect the fact that after the introduction of royalties to publishers, service providers stopped indexing content because they did not want to pay royalties. In Spain, for example, Google discontinued its Google New service in 2015. Overall, the fall in indexing has led to a 6.1% drop in traffic to publishers' websites. The figure was 5.8% for the largest news portals, 7.1% for the average and 13.5% for small publishers. The introduction of the German publisher's neighboring rights legislation has similarly reduced traffic to German news portals. For example, Google did not display search results related to VG Media publications or even hid them completely.[31]

The German and Spanish experiences can be cautionary examples. Search providers that dominate the online intermediary market can easily exclude publications from their search results if they have not reached an agreement with publishers on their use. This may reduce the publishers' market opportunities, even vis-à-vis other competitors who have successfully agreed to use the content.[32] In the absence of effective rights protection, distorted competitive conditions mean that publishers invest less in producing quality content, resulting in either less content available online and/or the imposition of subscription fees for accessing their online platforms.[33]

II. PROTECTION OF PRESS PUBLISHERS UNDER THE EU'S CDSM DIRECTIVE

The secondary, online use of press products is an important and much-debated segment of the CDSM Directive adopted under the EU's Digital Single Market Strategy.[34] The directive aims to protect a free and diverse press, which is essential to ensure quality journalism and citizens' access to information. It contributes to public debate and the proper functioning of a democratic society. However, in the competition for content, advertizing space, and users' attention

content they produce will be harder to disseminate to their target audiences, and that publishers will receive extra resources from the licensing of their property rights without having contributed in any creative way to the content. See: Papadopoulou and Moustaka, 2020. p. 127.

[29] Senftleben, Kerk, Buiten and Heine, 2017. p. 553.

[30] For details of individual national rules, see: Rosati, Eleonora: "Neighbouring Rights for Publishers: Are National and (Possible) EU Initiatives Lawful?" IIC-International Review of Intellectual Property and Competition, 47, 2016, pp. 571-574.

[31] Senftleben, Kerk, Buiten and Heine, 2017. pp. 554-555.

[32] Höppner, 2018. p. 13.

[33] Ibid. p. 17.

[34] Directive 2019/790/EC on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

and data in the online space, publishers face licensing problems that hinder their return on investment. Recognizing publishers as holders of rights to press publications would facilitate enforcement of rights in the digital environment.[35] A key element and rationale for harmonized legal protection for publishers at EU level is the recognition of the organizational and financial efforts made to produce press publications. This legal protection does not affect the use by individual users for private or non-commercial purposes, including online sharing.[36] It must also not cover hyperlinking and mere facts published in press releases.[37] For online uses, it is therefore necessary to establish a system of related rights protection for publishers established in a European Union Member State, such as news providers and news agencies, for the reproduction and communication to the public (making available to the public) of press publications on the internet. The scope of these two property rights corresponds to the scope of the reproduction and communication to the public property rights set out in the InfoSoc Directive,[38] as the exceptions and limitations set out therein apply in full to new related rights, including the exception covering citation for critical or review purposes.[39]

The term "press publication" includes publications containing literary (journalistic) works published in any mass media in the context of an economic activity considered as the provision of a service. These include, in particular, daily newspapers, weekly or monthly magazines of general or special interest (including subscription-based magazines), and news websites. Press publications mainly contain literary works, often accompanied by photographs, videos and other protected works. The provisions of the Directive should not apply to scientific journals or websites and blogs that are not initiated, edited, and controlled by a service provider.[40]

The use of publications may mean the use of entire publications or articles or parts thereof, but not the use of individual words or very brief excerpts from them.[41] The borders to the free use of certain words and very short extracts are not specifically defined in the CDSM Directive, but in recital 58 it is only indicated that such words and short extracts are collected and used by the service in very large quantities, the use of which can only be excluded if it does not affect the rights guaranteed by the Directive. Such a right is undoubtedly the right of access to the information referred to in recital 54.

The protection of publishers must not affect the rights of authors and other rightholders in published works and other protected subject-matter. In contrast,

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[35] CDSM Directive, Recital 54.

[36] CDSM Directive, Recital 55.

[37] According to Papadopoulou and Moutaka, these uses will continue to be governed by EU copyright rules, in cases of free use. See: Papadopoulou and Moutaka, 2020. p. 113.

[38] Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society.

[39] CDSM Directive, Recital 57.

[40] CDSM Directive, Recital 56.

[41] CDSM Directive, Recital 58.

publishers cannot rely on the neighboring rights protection afforded to them by the CDSM Directive, except in contractual agreements between them. Authors of works included in publications are entitled to a share of the revenue that publishers earn from the use agreements they conclude with online content providers [42]

Press publication means, according to Article 2(4), a collection of literary works of a journalistic nature (which may include other works or other protected subject-matter), and which is a single copy of a periodical or regularly updated publication under a single title, such as a newspaper or a general or special interest magazine, intended to inform the public about news or other subjects, or published in any mass media at the initiative, under the responsibility and under the control of the editorial authority of a service provider.

Article 15(1) states, in the context of the protection of press publications for online use, that Member States shall provide publishers of press publications the reproduction and communication to the public rights provided for in the InfoSoc Directive for online use by information society service providers. This provision shall not apply to private or non-commercial use by individual users, or to the acts of hyperlinks and individual words or very short extracts of a press publication. The term of protection of the new neighbouring right shall expire two years after the date of issue, in accordance with Article 15(4). The period shall be calculated from 1 January of the year following the date of issue. The provisions do not apply to publications first published before 6 June 2019.

III. PROTECTION OF NEWS AGENCIES IN THE US UNDER THE "HOT NEWS" DOCTRINE

A. The Birth, Life, and Possible Death of the Hot News Doctrine

As discussed above, the EU created the PPR to respond to a particular power discrepancy arising in the modern world of digital news. However, while the internet may have aggravated the situation, the basic problem of how to protect professional news agencies existed long before the digital age. This section discusses an earlier attempt to deal with this core issue; namely, the "hot news" doctrine that exists under the laws of several US states.

In 1918–over a century before the EU Directive–the US Supreme Court heard an appeal in International News Service v. Associated Press.[43] In this dispute between two rival news agencies, the Associated Press ["AP"] had proof that

[42] CDSM Directive, Recital 59, Article 15(2), (5). This is also in line with Article 1 of the Rome Convention and Article 1(2) of the WPPT, which state that the provisions of neighboring rights do not affect the protection of authors. See: Moscon, 2018. p. 55.

[43] 248 US 215 (1918). *INS* was technically not the first case to recognize a right in the news. In Kiernan v. The Manhattan Quotation Telegraph Co., 50 How. Pr. 194 (NY Sup Ct 1876), a New York court allowed recovery under analogous facts. However, as this was a trial court decision

the International News Service ["INS"] had obtained news stories from AP and distributed that news to INS subscribers, where it was printed in competition with papers obtaining their news from AP.[44] Because INS rewrote the stories using its own words, AP had no claim for copyright infringement.[45] AP nevertheless claimed that INS was liable under the judge-made cause of action for "unfair competition" because it had misappropriated the fruits of AP's newsgathering efforts and used those fruits in direct competition with AP.[46]

The Supreme Court agreed with AP, holding that it was entitled to recover.[47] The majority agreed with AP's basic theory of misappropriation. Allowing INS to free ride by using the news gathered by AP, the majority reasoned, would destroy the incentive for news agencies like AP to invest in news gathering efforts, a result that would harm society. Therefore, the Court held that AP was entitled to a period of exclusivity during which only it could use news it had gathered. INS and other agencies could still compete by reporting on the same events, but had to gather the same news themselves.

Although *INS* is a decision of the US Supreme Court, it is no longer binding precedent on any lower court, state or federal. Twenty years after *INS*, the Supreme Court held in the landmark *Erie* case that the federal courts–including the Supreme Court[48]–have no authority to fashion judge-made rules of substantive law like the tort claim recognized in *INS*.[49] While state courts retain the authority to establish and define judge-made claims, individual states are free to define the contours of the misappropriation claim recognized in *INS*, or indeed reject it altogether.

Nevertheless, even though it is no longer binding precedent, *INS* has had a significant and lasting influence on the states. State courts have almost universally

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(in New York, the "Supreme Court" is actually a court of first instance), the decision was of little precedential value.

[44] Although the case arose well before modern technology, technology played an important role. INS obtained the news from papers printed on the east coast, as well as from public AP bulletin boards. INS then sent the news by telegraph to the west coast. Due to the three-hour time difference, west coast INS papers could print the news at the same time, or even before, papers that obtained the stories directly from AP.

[45] While the United States does not allow for copyright in the news itself–the facts–it does allow copyright in the wording of a news story.

[46] Although AP brought the action originally, the reversal of the parties' names in the case caption reflects the Court's often-confusing practice of naming first the party seeking review.

[47] The Court remanded to the trial court to determine an appropriate scope for injunctive relief.

[48] Unlike the high courts of other nations such as Canada, the US Supreme Court is not truly "supreme." It is merely a supreme *federal* court, and has no authority to tell states what their law is.

[49] Erie R. Co. v. Tompkins, 304 US 64 (1938). Contrary to a common misperception, *Erie* does not reject *all* federal judge-made law. Federal courts may craft rules to govern procedure in the federal courts. In addition, a considerable amount of *substantive* "federal common law" continues to exist in certain special areas. *See* Texas Industries, Inc. v. Radcliff Materials, Inc., 451 US 630 (1981); Cross, John T., "Contributory and Vicarious Liability for Trademark Dilution", 80 Oregon Law Review 625 (2002).

rejected the concept of a *general* tort of misappropriation, under which a party would be liable for using the efforts of another, even when the parties are in competition. However, courts have consistently imposed liability in certain categories of cases, such as those involving trade secrets and the right of publicity. On occasion–far less commonly but most relevant to this discussion–they have recognized a cause of action in cases like *INS* that involve "hot news."[50]

Most of the precedent dealing with the hot news exception comes from the federal Second Circuit, the region that includes New York state.[51] These cases deal with hot news misappropriation claims under New York law.[52] However, this line of authority came to almost a complete end in the Second Circuit Court of Appeals 2011 decision in *Barclays Capital Inc. v. Theflyonthewall.com*.[53] *Barclays* did not hold that there was no misappropriation claim under state law (indeed, under *Erie* the court would have no authority so to hold). Rather, it held that as a state-law claim, the hot news doctrine was preempted by the federal Copyright Act.[54]

The court's opinion in *Barclays* expressly leaves open the possibility that hot news claims might continue to be valid in certain narrow circumstances.[55] And other courts disagree as to whether federal copyright law preempts a real hot news claim.[56] Nevertheless, the case seems to have reduced the use of state-law hot news

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[50] The Associated Press v. All Headline News, 608 F. Supp.2d. 454 (SDNY 2009); Barclays Capital, Inc. v. Theflyonthewall.com, 700 F. Supp.2d 310 (SDNY 2010), *reversed on other grounds* 650 F.3d 876 (2nd Cir. 2011); *see also* National Basketball Assoc. v. Motorola, 105 F.3d 841 (2nd Cir. 1997) (recognizes cause of action but holds plaintiff not entitled to recovery on facts presented).

[51] *Id.*; *see also* Dow Jones & Co., inc. v. Real-Time Analysis & News, Ltd., 2014 WL 4629967 (SDNY).

Given the *Erie* rule discussed above, it may seem puzzling that most of these cases have been heard in federal court. Although federal courts cannot create a federal substantive law of misappropriation, they may hear certain state misappropriation claims under their "diversity" jurisdiction. 28 USC § 1332. The claims at issue in all these cases arose under state law

[52] The material in the text should not be read to suggest that New York is the only state to recognize a hot news claim. The influential decision in Board of Trade of the City of Chicago v. Dow Jones & Co., Inc., 98 Ill.2d 109 (1983) recognizes a hot news claim under Illinois law. *See also* IPOX Schuster, LLC v. Nikko Asset Management Co., Ltd., 304 F. Supp.3d 746 (ND IL 2018) (Illinois law). On the other hands, other states have refused to allow hot news claims; *see, e.g.,* Brainard v. Vassar, 561 F. Supp.2d 922 (MD Tenn. 2008) (no claim under Tennessee law).

[53] 650 F.2d 876 (2nd Cir. 2011) (reversing the district court decision cited *supra*).

[54] Under the Supremacy Clause of Article VI of the United States Constitution, federal law is supreme, and preempts contrary state law. When Congress enacts a federal statute, it has the authority to define the scope of preemption under that statute. The Copyright Act itself defines the scope of preemption in 17 USC § 301.

[55] The influential *Restatement (Third) of Unfair Competition*, a secondary source, while quite skeptical about a hot news doctrine, nevertheless grudgingly acknowledges a limited doctrine may continue to exist.

[56] Chicago Board Options Exchange, Inc. v. International Securities Exchange, Inc., 973 NE2d 390 (Il App. 2012); hiQ Labs, Inc. v. LinkedIn Corp., 2021 WL 1531172 (ND Cal. 2021) (California law; court holds that under California law a hot news claim may exist even if the parties are not in competition).

claims. Since *Barclays*, few hot news claims have been raised in court, either in the Second Circuit or elsewhere.

However, even if the *Barclays* court is correct that the hot news doctrine is invalid due to preemption, the doctrine can inform the analysis in this paper. The hot news doctrine differs in certain ways from the EU's PPR. These differences may help justify the approach taken by the EU, and possibly also suggest ways in which the EU's current doctrine should be modified or adapted.

B. Comparing the EU and US Doctrines

On the surface, the hot news doctrine and the EU PPR seem to be close cousins. The basic purpose of the two rights is certainly the same. Both exist to provide a means for professional news organizations to recoup the costs necessary to engage in news gathering and quality reporting. Both focus on the greatest threat to that incentive; namely, parties who obtain that news from the rightholder and then turn around and distribute it online in a commercial manner.[57] And both accomplish this goal by creating a legally-enforceable right protecting the news reporting efforts. That new right is largely separate from–and in addition to–any copyright that may exist in an individual news story as well as the collective copyright in an edition of the news report. Moreover, the new right remains in force for a term far less than the term of the copyright.

Notwithstanding these core similarities, there are also many differences between the EU PPR and the US hot news doctrine. Some of these differences relate to technical aspects of the right. Others go to the fundamental nature of the right. In many cases, a difference arise only in particular fact situations.

Many of these differences, however, are of more academic than practical importance. For example, while the EU PPR is a form of intellectual property right, the hot news doctrine is often described as a form of tort liability. But that difference in labels of scant importance.[58] The hot news exception does not require a showing of negligence or other tort-based concepts. Just as under the PPR, any intentional act of appropriation is actionable.

Second, and more subtly, the PPR and the hot news doctrine differ in exactly what they protect. The PPR protects *publications*. That is, it only comes into play once the news has been released to the public. The hot news doctrine, by contrast, focuses on the news gathering effort, not the ultimate publication. Put differently, the PPR protects news stories, while the hot new doctrine protects the news itself.

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[57] It is useful to point out that the PPR does not apply to private or non-commercial use of the publication.

[58] Admittedly, treating the hot news claim as a tort may have procedural implications. The statute of limitations on tort claims is usually fairly short, often one year. However, a party who wishes to protect hot news will ordinarily bring its claim even within that shorter limitations period. The difference may also affect damages, as punitive damages may be available for an intentional tort.

This difference in focus has several implications. First, it means that a hot news claim would be available even for unpublished news. Second, while a PPR claim exists only when the defendant borrows significant chunks of the published story, a hot news claim would be possible even when defendant completely rewrites the story (indeed, this was the situation in *INS* itself). And third, in certain cases the difference will affect who can invoke the right. The PPR is available to the *publisher*, while the hot news doctrine is available to news *gatherers*. In a modern world that includes freelance reporters,[59] the party who gathers the news is often different from the person or entity that publishes it.

But while interesting as a conceptual matter, these differences are of little practical importance. In the modern era of internet news, the real economic threat to the professional news organization comes from entities like Facebook, Google, and other news aggregators. These entities basically take the story as originally published, and provide an alternative route for readers to consume it. It is not economically viable for a news aggregator to rewrite the story in its own words. Similarly, news aggregators will rarely have access to unpublished news. Instead, they use that which has been disseminated by other news organizations.[60] Finally, in situations where a press publisher obtains a story from an independent reporter or other third party, the press publisher will typically pay for that story. Therefore, allowing the press publisher rather than the reporter to recover makes sense from an economic perspective. The reporter will already have been compensated. It is the publisher–who compensates the reporter–who is threatened by the news aggregator's copying and redistribution. Therefore, the PPR's grant of a right to the press publisher actually makes good sense as a matter of economics.

On the other hand, there are other differences between the PPR and the hot news doctrine that are more significant. This discussion will focus on three of these differences. In all three cases, the result of the difference is that the PPR is stronger than the hot news doctrine.

Term. The most obvious difference between the PPR and the hot news doctrine is the term of protection. The PPR has a fixed term of two years, measured from the date the press publisher publishes the news story.[61] Hot news protection, by contrast, has no precise term. Rather, courts will grant protection only for a period deemed sufficient for the news agency to recoup its investment in news gathering.

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[59] The news industry in 1918 was a very different creature than it is today. In the early 20th century, news gathering was far more likely to be centralized in an entity like the Associated Press, which hires its own reporters.

[60] Admittedly, in a case like *INS* itself where the defendant has access to the news story before it is published, or to stories that are not published, the hot news doctrine may be more favorable to the professional news organization. Our point is only that the PPR addresses a far more common current-day problem: entities that copy news that is already on the internet,

[61] Art. 15(4). Although not explicitly stated in the text, this reference is almost certainly to the date of first publication. It would be unfair to allow the press publisher to extend the term of protection simply by republishing the news report.

That period will depend on the type of news at issue. In the case of something like a sports score or same-day stock prices, the period might be as short as an hour or two. In the case of an in-depth exposé, the term could be significantly longer, perhaps a month or so. However, regardless of the type of news involved, it is extremely unlikely that a US court would consider news to be "hot" for even six months, much less two years.

Parties bound by the right. Several courts applying the hot news doctrine have indicated that only parties who compete with the news gatherer are liable. This limitation stems from the *INS* decision itself, which is based in the theory of unfair competition.[62] The PPR, by contrast, extends to all public, commercial uses of a press publication.[63] "Commercial" is of course not a synonym for "competition." If a party uses a business asset of another firm in a different market, it may benefit commercially even though it is not in competition. Markets may differ because they are located in a different space, or because the group of buyers is different.[64]

The market for internet news, of course, is not bound by geographical distance to the same degree as the market for physical goods. However, there can still be different geographical markets. Some nations continue to "firewall" the internet, only allowing certain sources to be viewed. Perhaps more significantly, there can also be different subsets of buyers in the market for news. A publication dealing with financial risk in the banking sector might be distributed to one group of buyers. If another party "repurposes" that news to an entirely different audience, it could be dealing in a market that the original publisher currently does not serve. Nevertheless, because that party is benefitting financially from the repurposing, it would have engaged in a commercial use in violation of the PPR.

Interplay with copyright. The PPR carefully distinguishes between the copyright in a news story and the PPR. The latter is clearly a related right, and will often exist in a different party. The PPR Directive also allows the copyright owner considerable control over her work. If the copyright owner grants only a non-exclusive license to the press publisher, the owner remains free to allow other to publish the same story, in which case the later publishers do not violate the PPR.

The hot news doctrine, by contrast, often fails to distinguish the hot news right from the copyright. This failure may be attributable to the era in which *INS* was decided, a period in which news reporting was a far more integrated industry.[65]

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[62] However, not all courts limit the right to competitors. *See* hiQ Labs, Inc. v. LinkedIn Corp., 2021 WL 1531172 (ND Cal.).

[63] Art. 15(1) exempts "private or non-commercial uses," which by negative inference means the right extends to all public, commercial uses.

[64] As a simple example of the latter, the market for printed books would not include buyers who are blind. A party who produces a Braille translation of that book would be dealing in a different sub-market.

[65] As noted above, in the early 20th century an organization like the AP had its own reporters as employees. Because the US is one of the nations that follows a "work made for hire" rule, the AP would own the copyright in stories written by those employers. This meant that the AP owned not only the hot news right, but also the copyright.

But regardless of the reason, the unclear line between copyright and the hot news right has led to various issues, most notably the line of cases discussed above holding that federal copyright law preempts the state-law hot news right.

IV. EVALUATION OF THE PRESS PUBLISHER'S RIGHT IN LIGHT OF THE U.S. EXPERIENCE

A. The Policy Underlying the PPR

The primary aim of the new neighboring right, which protects publishers, is to make it easier to act against mass, unauthorized online use of their publications. According to Höppner, the instruments already available (copyright protection for journalists and other authors and protection for database producers) are not able to provide effective protection for publishers. Copyright cannot be an effective instrument because publishers must first prove that they have the right to exercise copyright, either by granting an exclusive license or by transferring the property rights. Moreover, freelance journalists do not always grant an exclusive license for their work. Enforcement[66] and proving the chain of title is therefore difficult in an environment where many works are used without authorization in a short time. The question of copyright infringement could only be examined on a case-by-case basis.[67] Copyright is therefore in fact an inadequate tool to ensure that third parties do not use publishers' content without permission. Yet there is a need to give some form of recognition and protection to their efforts and to respond to the undeniable fact that certain services benefit financially from free content that they have not helped to produce. In this context, it is essentially irrelevant whether the use is made in a way that infringes copyright, because the main interest to be protected is not the individual authors' copyright in the work, but the protection of the publisher's investment. A further problem is that freelance journalists often do not grant an exclusive license to publishers for their work. In addition to the problems of licensing, the legal policy justification for copyright is different.[68] Copyright recognizes and protects the relationship between the author and his or her work, as well as individual originality, rather than capital investment in the compilation of press releases.[69] The

[66] According to Moscon, an appropriate solution could have been to amend Article 5 of Directive 2004/48/EC (presumption of authorship or entitlement) to extend the presumption to publishers of press publications. See: Moscon, 2018. p. 58. Comp: Papadopoulou and Moustaka, 2020. p. 128.

[67] Höppner, 2018. p. 6.

[68] According to Pihlajarinne and Vesala, the new related right protection depends on the purpose and form of the publication, not on its quality, including its individual, original character. See: Pihlajarinne, Taina and Vesala, Juha: "Propsed right of press publishers: a workable solution?" GRUR International, 3/2018. p. 293.

[69] Höppner, 2018. pp. 6-7.

interests of authors and publishers may not intersect at this point. Authors should be interested in ensuring that their articles reach as wide an audience as possible and are as widely read as possible.[70]

Protection for databases could be an appropriate means of protecting publishers' investments.[71] Article 7 of the Database Directive provides sui generis protection to database producers whose activities in obtaining, verifying, and producing the contents of the database involve significant expenditure. This is similar to the phrase "under the initiative, editorial responsibility and control of a service provider" in Article 2(4)(c) of the CDSM Directive.[72] However, Höppner does not consider the sui generis protection of database producers to be adequate, in view of the wording of Article 7(1) of the Database Directive "extraction and/or re-utilization of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the content of that database". Indeed, news indexing providers, obviously with an eye to the relevant case law, make available on their platforms fragments that are neither whole nor substantial. The three-step test referred to in Article 7(5) cannot be a safe harbor for publishers either, since they have to prove that an insignificant part of the database content is prejudicial to the normal use of the database or unduly prejudices the legitimate interests of producers.[73] It should be noted here, however, that the CDSM Directive itself states that the exercise of the new neighboring right must take into account the system of limitations and exceptions of the InfoSoc Directive, where the three-step test is also part of the regulation. Overall, it seems that copyright protection of the database can be an appropriate tool of ensuring the highest possible protection, in combination with other available means of protection.[74] The rules on limitations and exceptions applicable to the two new property rights refer to the InfoSoc Directive. According to Höppner, citation cannot be invoked in favor of aggregators and media monitoring services, as the display of search results is not for critical or descriptive purposes.[75]

In other words, despite criticisms, the aim of the new legislation is not to duplicate[76] the layer of copyright protection, but to protect the interests of publishers' investors. The fact that this has been done by guaranteeing them reproduction and communication to the public of their press publications should not be misleading. At

[70] Moscon, 2018. p. 58.

[71] Article 1(1) of the 96/9/EC Database Directive defines a database as a collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means.

[72] According to Höppner, this means the legal responsibility of the publisher for the works published, the editorial responsibility for their quality, and the essential organizational and financial efforts. See: Höppner, 2018. p. 12.

[73] Höppner, 2018. pp. 7-8. Comp. Moscon, 2018. p. 49.

[74] Copyright in the articles, trademark in the news portal as a platform of the publisher's portfolio, as well as in the database, the compilation and arrangement of the content as an individual, original intellectual creation.

[75] Höppner, 2018. pp. 12-13. Comp. Pihlajarinne and Vesala, 2018. p. 291.

[76] Papadopoulou and Moutaka, 2020. p. 121.

the same time as granting the two property rights, the legislator also took into account the established practice of the CJEU with regard to linking.[77] The appropriate use of limitations and exceptions also seeks to ensure a proper balance between different interests (freedom of expression, protection of the free press, freedom of access to information, freedom to conduct a business, protection of intellectual property). Senftleben, Kerk, Buiten and Heine point out that one of the future drawbacks of the new neighboring right may be that it will no longer be necessary to conclude contracts of usage of works, which have protected authors' interests until now.[78] This seems to be contradicted by the rule in the Directive that the new right does not affect the rights of authors and other rightholders in works and other subject-matter included in publications. Furthermore, the Directive now requires the authorization of the publisher for only two property rights, reproduction, and communication to the public. Another counter-argument is the almost extreme shortness of the protection period, which is only two years.

B. Some Suggestions for Change

Part III.B of this article points out some differences between the PPR and far older "hot news" claim under the law of some US states. That discussion identified three main differences; namely (a) the term of the right, (b) whether the right is limited to competitive uses of the news, and (c) the interplay between the copyright in the news story itself and the right granted to the publisher or news organization. Although the PPR and hot news rights were created at different times and in different systems, they nevertheless at their cores deal with the same fundamental concern: protecting professional news organizations from predatory behavior by news aggregators and other free riders. As a result, it is possible each law might learn from the other. The following discussion will address each of the three differences discussed above, although not in the same order.[79]

Interplay with copyright. The PPR's explicit distinction between the related right and the copyright is a clear positive, and should not be changed. It preserves the ability of the independent news reporter to market her story as she best sees fit. It also provides an additional means to deal with unscrupulous online news sources. After all, a third party that uses a news story *without* the permission of the copyright

[77] Pihlajarinne and Vesala, 2018. p. 293.

[78] Senftleben, Kerk, Buiten and Heine, 2017. p. 553.

[79] In addition to the changes suggested in this section, the EU might want to consider the limitation of the PPR to press publications "established in a Member State" of the EU. This limitation arguably runs afoul of the National Treatment provision of TRIPS Articles 3 and 4. Although Articles 3 and 4 only apply to intellectual property rights, the PPR is clearly intended to be–and may well be in practice–an intellectual property right withing the meaning of TRIPS. However, this complex issue is beyond the scope of this paper.

owner is potentially liable not only for copyright infringement (by the copyright owner), but also the press publisher.[80]

Indeed, the US law of hot news misappropriation could benefit from similar careful attention to how copyright interacts with the hot news right. Such attention might help save the hot news right from preemption. Under § 301(a) of the US Copyright Act, a state-law right is only preempted if it provides rights "equivalent" to those granted by copyright law.[81] Drawing clearer lines between the copyright in the reporter and the hot news right in the publisher might make it more likely that courts would find the rights not to be equivalent.

Term. The two-year term of the PPR is far longer than the term of protection available under the hot news doctrine. Indeed, viewed from this light the PPR seems somewhat excessive. From an economic perspective, the news industry is notable for its powerful head start/lead time advantages. A party who is the first to report on a story has a tremendous edge over others. On the other hand, this lead time advantage ordinarily dissipates quite quickly, often within a day or so.

The EU should consider whether a two-year term is too long. A "perfect" approach would consider how long the lead time advantage of a particular story lasts. However, as a practical matter it would be impracticable to set up a sliding scale system like that which exists for the hot news doctrine. A court or other tribunal is not well equipped to calculate the lead time advantage of a news story. An alternative would be a fixed term for all stories of a much shorter period, perhaps a week or two. That period would allow the press publisher to reap the benefits of its lead time advantage.

On the other hand, there may be a broader agenda here. Much of the language of the EU Directive, especially in the recitals, suggests that the PPR is about more than merely protecting a press publisher's lead time. Instead, it may be a broader effort to preserve the professional news industry. Granting a two-year exclusive right in a story may do little more than a two-week period in preserving the economic benefits of lead time advantage. However, even if it does not directly benefit the professional news industry, it certainly impairs the ability of news aggregators and similar parties to compete.

Imposing liability on noncompetitors. While the PPR applies only to commercial uses of a press publication, that commercial use need not necessarily be in competition with the press publisher. It is difficult to see how that press publisher suffers any direct economic harm from noncompeting uses. If the press publisher is not serving a particular geographic or specialty market, it suffers no loss of sales if others sell the same news story in that market.

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[80] The exception in Art. 15(2) for non-exclusive licenses applies only in cases where the third party is an "authorized" user. In cases where a third party uses a copyright work without permission, the press publisher could accordingly invoke the PPR even though it has only a non-exclusive license.

[81] Although not explicitly set out in that section, a state-law right can also be preempted if it conflicts with the operation of the copyright system. However, it is difficult to see how a hot news right would conflict.

On the other hand, extending liability to noncompetitors is not necessarily a bad thing. First, very few cases are likely to involve commercial, noncompetitive uses. Given the vast reach of the internet, most professional new organization have a virtually worldwide reach. Second, imposing liability for all public commercial uses saves courts and other tribunals the difficulty of defining the scope of the press publisher's market. As even a brief review of monopoly law makes clear, markets are notoriously difficult to define with any degree of precision. Third, imposing liability on non-competitors does provide an additional benefit to press publishers. The PPR does not prohibit news aggregators from making any use of a news story published by a press publisher. The aggregator can rewrite the story in its own words. However, given the business model of most aggregators, rewriting is rarely likely to be economically viable. In the alternative, the aggregator can summarize the highlights of the story, and then link to the original press publication.[82] An interested reader can then go to the original site and read the story. Not only does this ensure the press publisher is compensated (in the case of pay-per sites), but also has the benefit of ensuring that the press publisher is acknowledged as the source of the story. This in turn may increase the reputation of the press publisher as well as enhance the accuracy of the news [...] which in itself is a laudable goal.

In short, then, the only significant change we would suggest to the PPR relates to term. While a fixed term makes sense as pragmatic matter, a two-year term seems too long. While the EU could also consider modifying the PPR to limit liability to competitors, there are also good reasons to impose liability in all commercial cases involving reproduction or distribution of the original story.

CONCLUSION

Overall, we welcome the creation of a new Neighboring Right for a high level of harmonization and for the Digital Single Market. The press publisher's right is an important tool to ensure that professional news organizations can recoup the costs involved in accurate reporting. And dealing with the issue at the EU level makes perfect sense. If the European legislator had not responded to the challenges faced by publishers, it would have been up to the Member States to do so, which would have led to further fragmentation of the already fragmented internal market.[83] It would also run counter to both the provisions of the InfoSoc Directive and the relevant CJEU case law. The former precisely delineates the limits of the rights of

[82] As noted above, the PPR does not apply to linking.
[83] Comp. Pihlajarinne and Vesala, 2018. p. 295.

reproduction and communication to the public and the beneficiaries. The latter confirms[84] or clarifies this line in several cases.[85]

Of course, like all legislative efforts, the press publisher's right is imperfect and involves some tradeoffs. However, the only significant change we would recommend is a reduction in the term of the right from the current two years to a period of a few weeks or a month. That reduced term would be more than sufficient to allow the press publisher to leverage its lead time to recoup its costs, while not unduly impairing the ability of news aggregators and others to "re-report" the news. For good or bad, some people prefer to receive their news from these sources.

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[84] As regards communication to the public: C-466/12. Nils Svensson, Sten Sjögren, Madelaine Sahlman, Pia Gadd v. Retriever Sverige AB. ECLI:EU:C:2014:76.; C-348/13. BestWater International GmbH v. Michael Mebes, Stefan Potsch. EU:C:2014:2315.; C-160/15. GS Media BV v. Sanoma Media Netherlands BV, Playboy Enterprises International Inc and Britt Geertruida Dekker. ECLI:EU:C:2016:644. Concerning the rights of the related rights holders and the limits of these rights: C-279/13. C More Entertainment AB v. Linus Sandberg. EU:C:2015:199. For fair compensation to be paid to copyright holders for private copying, see: C-572/13. Hewlett-Packard Belgium SPRL v. Reprobel SCRL. EU:C:2015:389.

[85] For the limitations of certain rights, see: Rosati, 2016. p. 575-578. On national options for related rights holders: Ibid. pp. 578-583.