The Past and Present of Press Publishers' Rights in the EU

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In the EU, the policy choice was to create a new ancillary right in favor of press publishers, meaning newspapers published in print or online. It was one of the achievements made by the controversial DSM Directive.[1] Two articles were highly disputed: Articles 15 and 17. Both share the same goal: obtaining a better share of the value created on the internet for the authors. Article 17 offers authors strong negotiation leverage by considering that online content sharing service providers communicate content uploaded by users to the public. Article 15 creates an ancillary right in favor of press publishers to facilitate negotiation against internet platforms.

Recital 54 clearly explains the motivation of the EU legislator. First, there is a strong need for "a free and pluralist press," which "provides a fundamental contribution to . . . the proper functioning of a democratic society." Second, the "availability of reliable information" is related to the ability of press publishers to recoup their investments (Recital 55). Third, "publishers of press publications are facing problems in licensing the online use of their publications to the providers of those kinds of services, making it more difficult for them to recoup their investments." The equation thus described seems rather simple. If press publishers are not able to license, they won't be able to recoup their investments, and the public availability of reliable information will be in danger. Having said that, the goal for the EU legislator "is to strengthen [press publishers'] bargaining position[s] by securing their legal certainty,"[2] which implies that the legislation wants to ensure press publishers' ability to license. Providing an ancillary right is clearly seen by the EU legislator as a tool in favor of the protection of investment. That was already the case with the *sui generis* right given to the maker of a database in order to ascertain its investment in the creation of the database.[3]

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1. Council Directive 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, 2019 O.J. (L 130) 92 [hereinafter *Directive 2019/790*].

2. *Commission Staff Working Document Executive Summary of the Impact Assessment on the Modernization of EU Copyright Rules*, SWD (2016) 302 final, at 3.

3. Council Directive 96/9, of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases, ch. 3, 1996 O.J. (L 77) 20 [hereinafter *Directive 96/9*].

Interestingly, these two ancillary rights are pure EU creation without any international background. Both are created at an EU level in order to secure investment and to facilitate licensing. The additional element for the justification of the press publishers' right depends on a close link with democracy.

While it is easy to feel apprehensive about the complexities of such a licensing scheme, the solutions the scheme could bring are even more complex to determine. What is not clear at first is why copyright protection is not be sufficient to solve the problem of licensing. At least in France, press editors are vested with moral and economic rights regarding publication.[4] Moreover, the existence of a contract between the journalist and the press publisher leads to a presumption of assignment of the journalist's rights to the publisher, contrary to the traditional solutions of French law.[5] Furthermore, the Belgian case of *Copipresse*[6] showed that copyright is not an inefficient means of licensing press publishers' content. In that case, Press publishers won against Google because titles and first lines of articles reproduced by Google are protected by copyright law. Nevertheless, Google decided to stop aggregating these press publications in Belgium right after that decision. If this outcome was more a draw than a victory for press publishers, the failure does not come from copyright law. It remains that the Achilles heel of news articles' copyright protection is the originality requirement and the need to prove that the reproduced extracts or titles are original and protected. The strength of the press publishers' right is that the protection is not related to any legal requirement such as originality or investment. Protection is only tied to the legal notion of press publication. The apparent automatic nature of the right makes it easier to prohibit unlicensed online use of press publishers' articles and gives them a strong negotiating leverage. The last question concerns the efficiency of a press publishers' right. Before the creation of an EU ancillary right, European national experiences show that providing press publishers' ancillary rights in addition to copyright protection is not always efficient.[7] German copyright law was amended in 2013 in order to create a new ancillary right in favor of Press Publishers.[8] Nevertheless, it was a failure since Google refused to negotiate with press publishers. Spain has passed

4. Indeed, a newspaper is characterized as a "collective work" for which economic and moral rights shall vest to the "natural or legal person under whose name is has been disclosed." Code de la propriété intellectuelle [C. Prop. Int.] [Intellectual Property Code] arts. L113-2 (Fr.). For the inclusion of moral rights, see Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 22, 2012, Bull. Civ. I no. 70 (Fr.).

5. *See* Code de la propriété intellectuelle [C. Prop. Int.] [Intellectual Property Code] art. L 132-36 (Fr.).

6. Cours d'Appel [Court of Appeals] Brussels, (9th Ch.), May 5, 2011, n° 2011/2999.

7. *See* ELEANORA ROSATI, COPYRIGHT IN THE DIGITAL SINGLE MARKET 254 (Oxford Press, 2021).

8. Laurence Franceschini, Rapport de la Mission de Réflexion sur la Création d'un Droit Voisin Pour les Éditeurs de Presse [Report on the Study of the Creation of an Ancillary Right for Press Publishers]10 (Ministère de la Culture, July 2016), https://www.culture.gouv.fr/Espace-documentation/Rapports/Rapport-de-la-mission-de-reflexion-sur-la-creation-d-un-droit-voisin-pour-les-editeurs-de-presse [https://perma.cc/PQ6G-XT2K] [https://web.archive.org/web/20230309145728/https://www.culture.gouv.fr/Espace-documentation/Rapports/Rapport-de-la-mission-de-reflexion-sur-la-creation-d-un-droit-voisin-pour-les-editeurs-de-presse].

a somewhat similar law. The law went into effect in Spain in January 2015, but Google News Spain was shut down on December 2014.[9]

What is unclear is how a failure at a national level could become a success at an EU Level. Is it enough to grant a new right to press publishers to strengthen their bargaining position? In order to answer that question, the first part of the article will be devoted to the European law of press publishers. The second part will discuss the French experience which shows that the ancillary right is not an effective solution as such.

I. THE EU'S RESPONSE : THE IP TOOL

In order to explain the EU's response, our presentation will delve into the object of protection (Part I.A.), persons concerned by this new right (Part I.B.), and the scope of protection (Part I.C.).

A. WHAT IS PROTECTED?

When it comes to the object of protection, the title of Article 15 is crystal clear, mentioning the "protection of *press publication*" (emphasis added). Paragraph 1 of Article 15 specifies that the right covers press publication. Consequently, the object of protection is this new notion of press publication. Whereas copyright covers original works, this new ancillary right protects press publication which appears as the key goal of this Article 15.

Logically, the notion of press publication is defined in Article 2 of the DSM directive. Pursuant to this article, press publication is considered as "a collection composed mainly of literary works of a journalistic nature, but which can also include other works or other subject matter." The collection "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 is published in any media under the initiative, editorial responsibility and control of a service provider."

Recital 56 gives an interesting illustration of what should be covered by this notion of press publication: "daily newspapers, weekly or monthly magazines of general or special interest, including subscription-based magazines, and news websites."

Based on that definition, various exclusions can be envisioned. The purpose of the press publication has to be journalistic. It is a collection of works of journalistic nature, providing to the general public information related to news. One can easily understand then why "periodicals that are published for scientific or academic purposes, such as scientific journals, are not press publications for the purposes of this Directive" (Article 2 Paragraph 4 *in fine*). A scientific journal lacks this journalistic purpose, excluding its benefitting from the Article 15. Another exclusion is related to editorial responsibility. A blog could be a collection of literary works of a journalistic nature. Nevertheless, if it

9. *Id.* at 11.

lacks any editorial responsibility, such a blog may not be characterized as a press publication (Recital 56). Finally, even if the limitation is not explicit, it seems that press publication should not be extended beyond the written press whether published on paper or online, excluding non-written media such as radio or TV channels.[10] Such a limitation is consistent with the various illustrations of press publication given by Recital 56. All examples are indeed related to the written press. Moreover, the definition is clearly limited to a collection of "literary works," which should be understood as written works. The collection may include other types of works such as photographs or video (Recital 56). The use of the adverb *mainly* may be interpreted as meaning that literary works are the main type of works, even if other types of works can be included, for example, to illustrate a literary work.[11] Ultimately, the need to create a new ancillary right was real for the written press, but not for radio or TV press already protected by previous ancillary rights.[12] This new right seems to be interpreted as covering written press published on paper or online.

The object of protection being explained, the question becomes who is affected by this new right.

B. WHO IS AFFECTED?

Two categories of persons are directly affected, either by benefitting from or being disadvantaged by this new right. Between these two persons, the situation of authors, i.e., those who creates literary works comprising the collection, has to be explained.

Publishers (direct beneficiaries). The direct beneficiary of this new right is the publisher of the press publication. Here again, the key notion is the one of press publication, from which one may infer the definition of publisher. Consequently, the press publication must be published under the initiative, editorial responsibility, and control of a service provider. It could be logically concluded that the press publisher is the one under whose initiative, responsibility, and control the publication is published.[13]

Having explained what a press publication is, one may wonder about the French newspaper *Le Monde* and its website or the U.S. newspaper the *New York Times* and its website. The former will benefit from this new right, but not the latter. Indeed, this new right is limited to "publishers of press publication established in a Member State."[14] The EU directive clearly allows discrimination based on the location of the publication's

10. Tristan Azzi, *"Le droit voisin des éditeurs de publication de presse ou l'avènement d'une propriété intellectuelle catégorielle*, 5 DALLOZ IP/IT 297 (2019).

11. André Lucas, *Droit d'Auteur et Droits Voisins*, REVUE PROPRIETES INTELLECTUELLES n° 72 July 2019, at 64.

12. *See* Council Directive 2001/29, 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, recital 54, 2001 O.J. (L 167) ("In the absence of recognition of publishers of press publications as rightholders, the licensing and enforcement of rights in press publications regarding online uses by information society service providers in the digital environment are often complex and inefficient.").

13. *See* ROSATI, *supra* note 7, at 258.

14. *Directive 2019/790*, *supra* note 1, at art. 15.

establishment. Such discrimination may seem awkward at first. Indeed, intellectual property and, more precisely, copyright law are usually governed by the national treatment principle, prohibiting any discrimination based on nationality.[15] It is clear that the EU legislator may not discriminate based on nationality in order to determine copyright protection, at least where the national treatment rule is applicable. The situation is completely different when it comes to press publishers' rights. This new EU right is not covered by any international convention, excluding it from the national treatment rule. Consequently, if the national treatment rule is not applicable, the EU legislator is free to discriminate. Interestingly, the EU legislator has already limited another ancillary right not covered by any international convention. Under the EU directive on the legal protection of databases, a new *sui generis* right has been created for the making of the database, but only for "database whose makers or right holders are nationals of a Member State or who have their habitual residence in the territory of the Community."[16] The logic of discrimination is the same. The explanation is identical: the lack of international convention. Nevertheless, the connecting factor used in order to discriminate is not exactly the same. With the database directive, a US maker clearly cannot benefit from the *sui generis* right, even if the US maker had some establishment in the EU. Concerning the DSM directive, it is less clear whether one establishment in the EU suffices or if it has to be the main establishment. Following Recital 55, it seems that even if the *New York Times* may have some establishment in the EU, it could not be considered as having "their registered office, central administration or principal place of business within the Union." It seems that by requiring an establishment in the EU, the text indirectly means the main establishment.

Information society service providers. If the publisher may benefit from this new ancillary right, information society service providers will have to pay for their online use of press publications (see Article 15). The definition of information society service providers is also given in Article 2 Paragraph 5. Following this paragraph, "'information society service' means a service within the meaning of point (b) of Article 1(1) of Directive (EU) 2015/1535." The definition is based on a previous directive. Pursuant to that directive, the service has to be provided for remuneration. The E.C.J. considered in the *Airbnb* case that the service could be provided for remuneration, "even though the remuneration received is only collected from the guest and not only from the host."[17] This means that the remuneration does not necessarily need to be paid by the end users.[18] The Advocate General Szpunar clearly established that "the remuneration provided by a service provider in the context of his economic activity is not necessarily paid by the person who benefits from that service."[19] In other words, an aggregation of news free for users but remunerated by advertising should be considered

15. *See* Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979), art. 5, S. Treaty Doc. No. 99-27 (1986).

16. *Directive 96/9*, *supra* note 3, at art. 11.

17. Case C-390/18, Airbnb Ireland, ECLI:EU:C:2019:1112, ¶ 46 (Dec. 19, 2019).

18. *See* ROSATI, *supra* note 7, at 262.

19. Case C-390/18, Airbnb Ireland (Op. of Maciej Szpunar), ECLI:EU:C:2019:336, ¶ 38 (Apr. 30, 2019).

as being provided for remuneration. Ultimately, the service has to be provided at a distance, by electronic means, and at the individual request of a recipient of services.

If the beneficiary has to be established in the EU, there is no symmetry concerning the providers. The policy goal is clear: to protect EU press publishers against service providers targeting an EU public. When it comes to IP or to data protection, the application of EU law is based on the sector of the public that is targeted as an audience. One can quote the seminal *L'Oreal*[20] decision for trademark protection. Such a geographic connecting factor was also applied by the ECJ for the *sui generis* right for databases[21], also limited to EU makers. Discrimination applies to determine who will benefit from the protection, but not in order to identify who will have to respect the protection. The "*effet utile*" of the protection requires that the protection be applied as soon as an EU public is targeted.

Authors (indirect beneficiaries). Finally, it is important to mention the situation of the authors of works included in press publications. To put it simply, the question here is whether the journalist may directly or indirectly benefit from this new right covering a press publication made of articles protected by copyright law.

From a U.S. perspective, it is important to note the hierarchy existing among copyright and ancillary rights. The hierarchy is clearly endorsed by international and European texts. As an example, one could quote the Article 1 Paragraph 2 of the WIPO Performances and Phonograms Treaty, under which "protection granted shall leave intact and shall in no way affect the protection of copyright in literary and artistic works." [22] By the same token, Article 12 of the Directive 2006/115 clearly rules that "protection of copyright-related rights under this Directive shall leave intact and shall in no way affect the protection of copyright." An even stronger hierarchy is created here by Article 15 considering that this new ancillary right "shall leave intact and shall in no way affect any rights provided for in Union law to authors and other right-holders, in respect of the works and other subject matter incorporated in a press publication." This ancillary right is clearly subordinated to copyright and other related rights. Moreover, the press publishers' rights "shall not be invoked against (…) authors and other right-holders," meaning that author's rights should prevail over those of press publishers.[23] From the author's perspective, this new right should usually be advantageous.

But the advantage is limited to authors of works incorporated in press publications. Indeed, the last paragraph of Article 15 clearly provides that "authors of works incorporated in a press publication receive an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers." Authors are clearly the indirect beneficiaries of this new ancillary right. A first question may be asked concerning the meaning of "appropriate." It is certainly important to mention that "appropriate" is often used in this directive to mean

20. Case C-324/09, L'Oréal SA v. eBay Int'l AG, ECLI:EU:C:2011:474 (Jul. 12, 2011).
21. Case C-173/11, Football Dataco v. Sportradar GmbH, ECLI:EU:C:2012:642 (Oct. 18, 2012).
22. WIPO Performances and Phonograms Treaty (WPPT) (Dec. 20 ,1996), 2186 U.N.T.S. 203.
23. *Directive 2019/790, supra* note 1, at art. 15.

something like "proportionate." One may consider that "appropriate" is equivalent to "fair." Indeed, chapter three mentions a fair remuneration imposing an appropriate and proportionate remuneration in Article 18. A second question may be related to the basis of this appropriate remuneration. A first interpretation may limit it to a remuneration strictly based on Article 15. Nevertheless, another interpretation may consider taking into consideration not only revenues streamed from Article 15, but any revenues paid by a provider to a publisher.[24] The second one is clearly in favor of authors, but perhaps not based on the "*effet utile*" of this new ancillary right originally created for press publishers and not for authors.

C. WHAT IS THE PROTECTION'S SCOPE?

In order to determine the scope of protection, one must focus on the rights provided by Article 15 and the exceptions to these rights.

Rights given to the publisher. The scope of this new right is explicitly limited to the online use of press publication. It means that a reproduction on paper of this press publication is not covered by Article 15. However, a digital reproduction for an online use is covered and could be prohibited or monetized by the publishers. It is important to mention that the definition of reproduction in Article 15 is the same as the one defined in the Info. Soc. Directive[25]. Consequently, the reproduction does not need to have a permanent nature. A temporary copy is legally a reproduction under EU law. Under EU copyright law, a reproduction in part has to copy an original part of the work in order for the reproduction to violate the author's copyright. Under Article 15, it is less clear whether such a condition may apply. My understanding is that any reproduction in part of a press publication is legally a reproduction, provided that the very short extract exception does not apply (see Recital 58).

Logically, the second right provided for online use is the making available right defined in Article 3 par 2 of the Info. Soc. Directive. The EU making available right is a faithful implementation of Article 8 of the 1996 WIPO Copyright Treaty[26]. It means that when a provider downloads a part of a press publication on its website, it needs authorization based on the right of reproduction and on the making available right. Finally, the duration of protection is short. Indeed, under Article 15 Paragraph 4, "the right shall expire two years after the press publication is published. Such a short duration is coherent due to the lack of interest of news after a certain period."

Exceptions. Three exceptions to this new ancillary right have been specifically created. Moreover, all copyright exceptions defined in Article 5 of the Info. Soc. Directive are also applicable.

Under Article 15 Paragraph 1, it is explicitly said that private or non-commercial uses of press publications by individual users are not covered by this new right. Such

24. *See* Azzi, *supra* note 10.

25. Directive 2001/29/EC, of the European Parliament and of the Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society.

26. WIPO Copyright Treaty (WCT), Dec. 20, 1996, 2186 U.N.T.S. 121.

an exclusion may appear to be redundant, since the press publishers' rights may be invoked against information society online providers whose services have to be remunerated. The online use of a press publication by a non-commercial blog should normally not be covered by the press publishers right. What is not clear is how to determine when the use becomes commercial. The website of an influencer doing product placement shall not be a non-commercial use anymore.[27] In sum, bloggers are free to use press publications, provided that they generate no remuneration.

Another exception concerns acts of hyperlinking. While it is prohibited to reproduce and make available press publication content by downloading it, it is not prohibited to use a hyperlink in order to make available the content of the press publication. Further questions are related to the limits of this exception. First, the previous version of the directive expressly excluded "acts of hyperlinking which do not constitute communication to the public."[28] Indeed, the exclusion was subordinated to the non-characterization of the act of hyperlinking as an act of communication under the interpretation of the E.C.J. of the Info. Soc. Directive. To make it simple, hyperlinking authorized content is not an act of communication to the public based on the *Svenson*[29] case interpreting the Info. Soc. Directive. Following this drafting, it is no more an act of communication under Article 15 of the DSM directive. On the other side, hyperlinking unauthorized content in full knowledge that such hyperlinking is unauthorized is an act of communication to the public based on the *GS Media* case[30] interpreting the Info. Soc. Directive. Under the former version of the directive, this hyperlinking was characterized as an act of communication to the public. The goal was to keep a perfect analogy with the rule under copyright law. With this exception's new formulation, it seems that an act of hyperlinking might be an act of communication to the public under the Info. Soc. directive but not under Article 15 of the DSM directive.

Finally, the last exception is based on the use of individual words or very short extracts of press publication. Interestingly, the justification for this exception is not freedom of expression, but the fact that such use "may not undermine the investment made by publishers of press publication in the production of content" (Recital 58). Without any doubt, the ECJ will have to determine the exact scope of this exception. A key element might be the protection of investments and how the act affects those investments. Recently, the Court limited the scope of the *sui generis* database right against acts adversely affecting the investments of the maker.[31] The logic might be the same for Article 15 and the interpretation of this exception.

Beyond these specific exceptions to Article 15, copyright exceptions shall apply *mutatis mutandis*. This means that if the reproduction of a journalistic article is authorized pursuant to the quotation exception of the Info. Soc. Directive, then the same exception applies to the right of the press publishers. This new ancillary right will

27. Jean-Michel Bruguière, *Le Droit Voisin des Éditeurs de Presse dans la Directive sur le Droit d'Auteur dans le Marché Numérique*, 371 LEGIPRESSE 267 (2019).

28. *See* ROSATI, *supra* note 7, at 276.

29. Case C-466/12, Svensson v. Retriever Sverige AB, ECLI:EU:C:2014:76 (Feb. 13, 2014).

30. Case C-160/15, GS Media BV v. Sanoma Media Neth. BV, ECLI:EU:C:2016:644 (Sep. 8, 2016).

31. Case C-762/19, CV-Online Latvia SIA v. Melons SIA, ECLI:EU:C:2021:434 (Jun. 3, 2021).

be aligned with copyright so as not to affect the latter. It is clear that if the quotation were authorized under copyright law, but not under Article 15; it would have badly affected the application of copyright law. Consequently, all copyright exceptions are applicable when it comes to press publishers' rights.

The tool being explained, the question becomes whether it will achieve its goal. A good case study is France as it was the first country to implement Article 15 and an interesting litigation against Google has developed there.

II. THE FRENCH EXPERIENCE : THE ANTITRUST TOOL

Since October 2019, France is the first EU country to have implemented and applied Article 15 of the DSM Directive. The situation in France is therefore quite interesting to study. If the goal of Article 15 was to make "the licensing and enforcement of rights in press publications" less complex and more efficient (Recital 54), the first application of the French publishers' right shows that doing so was not so easy or efficient. This paper will first present the Google litigation in France and then attempt to identify from this experience the strengths and failures of the EU's response.

A. THE GOOGLE LITIGATION

After the French implementation of Article 15, Google's reaction was fast and bold.[32] In September 2019, the company declared, "when the French law comes into force, we will no longer display an overview of the content in France for European press publishers unless the publisher has made the arrangements indicate that it is his wish. This will be the case for search results from all Google services."[33] Most of the French publishers accepted Google's condition, giving free licenses on their content to Google.

The first question was whether such a move was acceptable from the IP side. More precisely, did Google respect Article 15 of the DSM directive by negotiating free licenses? It is clear that the directive does not expressly prohibit the waiving of the press publishers' rights. It is interesting to compare that silence with other articles of that same directive. When it comes to contractual protection, in order to correct the imbalance between authors and licensees or assignees, Article 21 clearly considers that

32. Edouard Treppoz, *"Competition Law Strengthening the Failure of the New Publishers' Rights: Is It Fair? The French Competition Authority Orders Google To Negotiate with Publishers and News Agencies"*, MEDIAWRITES (Apr. 23, 2020), https://mediawrites.law/competition-law-strengthening-the-failure-of-the-new-publishers-rights-is-it-fair-the-french-competition-authority-orders-google-to-negotiate-with-publishers-and-news-agencies [https://perma.cc/QQ2R-SHDB] [https://web.archive.org/web/20230126004637/https://mediawrites.law/competition-law-strengthening-the-failure-of-the-new-publishers-rights-is-it-fair-the-french-competition-authority-orders-google-to-negotiate-with-publishers-and-news-agencies].

33. *See* Richard Gingras, *Nouvelles Règles de Droit d'Auteur en France: Notre Mise en Conformité avec la Loi*, BLOG GOOGLE FR. (Sep. 25, 2019), https://blog.google/intl/fr-fr/nouvelles-de-lentreprise/impact-initiatives/comment-nous-respectons-le-droit-dauteur [https://perma.cc/E3PF-MJ3G] [https://web.archive.org/web/20230126005128/https://blog.google/intl/fr-fr/nouvelles-de-lentreprise/impact-initiatives/comment-nous-respectons-le-droit-dauteur].

"any contractual provision that prevents compliance with Articles 19, 20 and 21 shall be enforceable in relation to authors and performers." By the same token, Article 7 of the DSM Directive holds that "Any contractual provision contrary to the exceptions provided for in Articles 3, 5 and 6 shall be unenforceable." It is clear that the EU legislator knows how to strengthen IP protection by the tool of unenforceability when needed. The EU protection may prevail over contractual provisions. It seems quite clear that if nothing is said, such a silence should be interpreted as authorizing the press publisher to waive its right. The conclusion should be the same for accepting free licenses.[34] Paradoxically, if a fair remuneration was the goal of the Directive and the French implementation, nothing was said on the prohibition of a free license, nor on the waivable nature of the new right. Consequently, Google's move from the copyright side was difficult to contest. That's why publishers decided to use another battlefield. The AFP news agency and publishers' unions weaponized the French Competition Authority against Google for an abuse of dominant position.

On April 9, 2020, the French Competition Authority (FCA) rendered its first interim decision clearly in favor of French publishers.[35] Firstly, the FCA held that Google is likely to hold a dominant position (ninety percent) in the French market for general online research services. It would be interesting to understand why the FCA limits the relevant market to online research services. If the market was understood as having access to press information online, Facebook or Twitter would compete in the same market as Google.[36] Secondly, the FCA considers that Google may have abused its dominant position by imposing free licenses which were less favorable to the press publishers than the previous system. For the French Authority, Google is considered "essential and not replaceable for the economic viability of the press publishers,"[37] justifying that a publisher losing Google's traffic would dramatically alter its economic situation. The risk of abuse of its dominant position might then exist. Interestingly, the FCA considered that Google, without formally breaching the French implementation, did circumvent its goal by imposing free licenses.[38] The failure of the French implementation and the EU directive was not to prohibit free license. Antitrust law fills the gap by requiring that Google pay for licenses. This decision could be seen as fair but

34. Bruguière, *supra* note 27, at 267; ROSATI, *supra* note 7, at 287.

35. DECISION 20-MC-01 OF 9 APRIL 2020 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, AUTORITÉ DE LA CONCURRENCE [STANDING COMMITTEE] (Apr. 9, 2020).

36. Jean-Cristophe Roda, *Google Contraint de Négocier avec les Éditeurs de Presse: Quand la Loi sur les Droits Voisins Croise l'Abus de Position Dominante*, 20 GAZETTE DU PALAIS 26 (Jun. 2 2020) (comparing the French position with the Australian Competition Authority's taking into account Facebook); *cf.* DIGITAL PLATFORMS INQUIRY FINAL REPORT, AUSTL. COMPETITION & CONSUMER COMM'N (2019).

37. DECISION 20-MC-01 OF 9 APRIL 2020 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, AUTORITÉ DE LA CONCURRENCE [STANDING COMMITTEE] (Apr. 9, 2020), n° 235.

38. *Id.*

only if the silence of the directive on that given point was not precisely a compromise. If it was, it is not clear if antitrust Law should alter that compromise.

Finally, the FCA held that there has been a serious and immediate damage to the press sector resulting from Google's practice. Strong interim measures were ordered: (1) Google has to negotiate the terms, conditions, and the remuneration in good faith; (2) Google has to communicate information required for a fair evaluation of the remuneration to press publishers; (3) Google has to maintain the display of content in the manner chosen by the publisher. With a little help from the Competition Authority, negotiation might become much more fruitful for the French press publishers and news agencies.

The Paris Court of Appeal confirmed this decision rendered by the Competition Authority in October 2020.[39] To the Court, it was fair to take into account the market for online research services of which Google holds ninety percent. It is worth mentioning that the Court clearly stated that the press publishers' rights does not create a right to be remunerated but does require a fair and balanced negotiation. Google's behavior neutralized the "*effet utile*" of the Press Publishers' rights.

The litigation has nevertheless continued, since some press publishers found that Google did not respect the measures ordered by the FCA and confirmed by the Paris Court of Appeal. They lodged a complaint in August 2020, and in July 2021 the FCA found that Google had failed to comply with some of the injunctions ordered in April 2020.[40] Because of this behavior, the authority issued a fine of 500 Million euros. In particular, the authority recognized that Google did not comply with the order to negotiate in good faith. Google practically refused to clearly identify the press publisher right as the justification of the license, trying to impose a global negotiation not focused on Article 15. Moreover, Google tried to exclude or limit the scope of the right by excluding news agencies when their content was reused by press publishers as well as press publishers lacking Political and General Information (PGI) certification and also by having a restrictive interpretation of revenues derived from Article 15. Interestingly, the authority considers that indirect revenue related to the attractiveness of Google's search service should also be taken into account.

Finally, in June 2022, the litigation ended. Google made commitments that were accepted by the Authority Competition, closing the proceedings on the merits.[41]

What are Google's commitments? First, Google promised not to limit negotiation to publishers having PGI certification and also not to limit Press Agencies' right to content integrated into third party publication. Second, Google undertakes to negotiate in good faith, which means to specifically identify Article 15 in the negotiation, the ancillary right being recognized as the reason for the license and of the remuneration. Third, Google will communicate the relevant information for a transparent evaluation

39. Cour d'Appel [CA] [regional court of appeal] Paris, civ., Oct. 8, 2020, 20/08071.

40. DECISION 21-D-17 OF 12 JULY 2021 ON COMPLIANCE WITH THE INJUNCTIONS ISSUED AGAINST GOOGLE IN DECISION 20-MC-01 OF 9 APRIL 2020, AUTORITÉ DE LA CONCURRENCE [STANDING COMMITTEE] (Jul. 12, 2021).

41. DECISION 22-D-13 OF 21 JUNE 2022 REGARDING PRACTICES IMPLEMENTED IN THE PRESS SECTOR, AUTORITÉ DE LA CONCURRENCE [STANDING COMMITTEE], (Jun. 21, 2022).

of the press publisher's remuneration. The striking point is that this communication is made under the supervision of an independent monitoring trustee. The goal is to combine the legitimate need for Google to protect its trade secrets and the necessity for the publishers to have access directly or indirectly to all information relevant to determine its remuneration. Fourth, Google will make an offer for remuneration and, where an agreement is not made, an arbitral tribunal may determine the remuneration amount. The arbitration may be entirely at the cost of Google. Finally, this entire process will be supervised by an independent monitoring trustee, being notably in charge to overcome any points of disagreement. Interestingly, Google will have to comply with what has been decided by the trustee, but this is not necessarily true of the press publishers.

The key point of these commitments concerns the need for a third and neutral party to ascertain the fairness of the negotiation. As explained, the independent monitoring trustee will play a decisive role. One may also quote the use of the arbitration in order to fix the remuneration. Starting from intellectual property, it seems that the solution for a fair share of revenue is not any more related to intellectual property, or at least not solely related to it.

B. WHAT DOES IT TELL US ABOUT THE EU ANSWER?

The first lesson learned from the French experience is that the EU ancillary right does not solely suffice to strengthen press publishers' power to negotiate in order to obtain fair remuneration. Fairness might eventually be achieved by a complex combination of antitrust law and the intervention of a neutral third party.

Further questions might be raised based on that combination of tools. First, antitrust is efficient only if there is a risk of an abuse of dominant position. The FCA position was that this was the case with Google. Nevertheless, it won't necessarily lead to the same result with other providers less powerful than Google, meaning that antitrust law would not always be the key to achieving fairness. Second, antitrust, as such, is not really convincing. Indeed, if fairness is ultimately obtained in the French Google case, it will be achieved thanks to the intervention of neutral parties. The use of a neutral party seems to be the key to achieve fairness. Finally, the most crucial question concerning that combination of tools is whether the creation of an ancillary right was really needed. If the goal is to obtain fair licensing in favor of press publishers, why would copyright law not be sufficient? Antitrust law needs a right granted to press publishers in order to impose a fair remuneration. The question becomes whether such an outcome may not be obtained based on copyright law. Indeed, the ECJ recognized that eleven words of a newspaper article might be protected by copyright law.[42] Based on that protection, press publishers might have been able to negotiate and—thanks to antitrust law—to reach a fair price. Creating an ancillary right would not necessarily be required.

42. Case C-5/08, Infopaq Int'l A/S, ECJ:EU:C:2009:465 (Jul. 16, 2009).

A second lesson from the French experience is that the IP-only answer was not able to impose fairness. Clearly, the main failure of Article 15 of the DSM directive is related to its waivability. Copyright law is accustomed to correcting the imbalance among contractual parties by imposing unwaivable rights. But when parties do not have the same strength, negotiation would not lead to fairness. A way to correct such an imbalance is to impose unwaivability. Under French copyright law, moral rights are unwaivable.[43] Interestingly, EU copyright uses the same weapon in order to achieve the same outcome. As previously said, the contractual protections given by the same DSM directive are characterized as being unwaivable.[44] Furthermore, from an American perspective, it is informative to delve into the EU resale right directive.[45] Article 1 of that directive defines the resale right as a right "to receive a royalty based on the sale price obtained for any resale of the work, subsequent to the first transfer of the work by the author." Recital three presents a strong analogy with the objective sought by the EU legislator when creating the press publishers' rights. Indeed,

> the resale right is intended to ensure that authors of graphic and plastic works of art share in the economic success of their original works of art. It helps to redress the balance between the economic situation of authors of graphic and plastic works of art and that of other creators who benefit from successive exploitations of their works.

If the goal to correct the unbalanced relationship is identical, the tool is not the same. Resale right is defined at Article 1 Paragraph 1 as "an inalienable right which cannot be waived, even in advance." It seems clear that a first strengthening of the ancillary right would be to make it unwaivable. Nevertheless, it would not have been sufficient since providers may still have the power to impose a free license. As such, the right is not waived, but licensed for free. Wouldn't the ideal tool be to impose an unwaivable right to be paid? The only way out would be for the provider to leave the market. The Spanish and the Belgian experiments show that the exit route was clearly an option for Google. The difference here is that the EU market could not be compared with national markets. Indeed, if leaving a national market might be a strategical option to force other markets not to use the same tool, the strategy is much more dangerous to wield at the EU level.

A last lesson is related to a more comprehensive point of view taken into account by Article 17 of the DSM directive. The goal of Article 17 is still to achieve a better remuneration for authors against internet service sharing platforms. The main

43. *See* Code de la propriété intellectuelle [Intellectual Property Code], art. L121-1 (Fr.) ("It shall be perpetual, inalienable and imprescriptible.").

44. *See Directive 2019/790*, *supra* note 1, at art. 23 ("Member States shall ensure that any contractual provision that prevents compliance with Articles 19, 20 and 21 shall be unenforceable in relation to authors and performers.").

45. Council Directive, of the European Parliament and of the Council of 27 September 2001 on the Resale Right for the Benefit of the Author of an Original Work of Art, 2001/84/EC, 2001 O.J. (L272) 33.

breakthrough of Article 17 is how it addresses that online content sharing services providers communicate content downloaded by users to the public. Consequently, content sharing services must license content uploaded on their platform by users. More precisely, pursuant to Article 17 Paragraph 3, online content sharing service providers have an obligation to make "their best efforts to obtain an authorization." They do not have an obligation to license, but an obligation to make their best effort to negotiate. Concerning Article 17, the best effort obligation is seen as an alleviation from the obligation to have a license. What is interesting is that the negotiation is no longer free, since the online content sharing services platform must behave in order to negotiate licensing. Consequently, an offer which is not fair may not fulfill the best effort requirement. Indeed, imposing systematically to all publishers a free license would be considered a breach the best effort negotiation. The situation is analogous to FRAND licenses.[46] The purpose of this license is to prevent the owner of a patent integrated in a technical standard from abusing his monopoly by charging an excessive license fee. Consequently, the owner of a standard essential patent (SEP) must not only make an offer. He has to make a Fair, Reasonable and Non-Discriminatory license ("FRAND") offer.[47] The characterization of the license as FRAND changes everything. First, what has been negotiated would not be legally binding if it is not FRAND. Second, a judge or eventually an arbitrator may have at the end to determine whether the contract concluded is FRAND. Consequently, the negotiation and the contract are not any more determined by the strongest party, since the legal system requires its FRAND character. Would it be interesting to impose to the provider either an obligation to make its best effort to get a license, or an obligation to obtain not only a license but a FRAND license? Two benefits would result from such an obligation. First, an unfair offer would expose the provider to breach its best effort obligation. Clearly, an exit option without real negotiation would be considered as a breach of its best effort obligation. In order to be efficient, the mechanism needs to fine the provider which breaches its best effort obligation. Second, in the end, a judge will have to decide if the best effort has been respected. This leads to the judicialization of the process of negotiation. Fairness might result from the fear of the judicial intervention. Ultimately, if the best effort obligation were the solution, was it necessary to create a new ancillary right to support such a best effort obligation? Fairness would result from the legal and potentially judicial framing of the negotiation, correcting the imbalance among parties. It might be eventually possible to achieve that result based on the copyright protection owned by the press publishers. Clearly, the ancillary right is a flawed solution, which has been restored by antitrust law. The best restoration would have been to add a best-

46. For a first understanding of FRAND litigation in a European context, see Case C-170/13, Huwai Tech. Co. Ltd v. ZTE Corp., ECJ:EU:C:2015:477, and Optis Cellular Tech., LLC v. Apple Retail U.K. Lim. [2022] EWCA (Civ) 1411.

47. ANNEX 6: ETSI INTELLECTUAL PROPERTY RIGHTS POLICY ¶ 6.1 (Nov. 29-30, 2022) ("When an ESSENTIAL IPR relating to a particular STANDARD or TECHNICAL SPECIFICATION is brought to the attention of ETSI, the Director-General of ETSI shall immediately request the owner to give within three months an irrevocable undertaking in writing that it is prepared to grant irrevocable licenses on fair, reasonable and non-discriminatory ('FRAND') terms and conditions.").

efforts obligation to license. The question remains whether the creation of the ancillary right was such a good option if a best-efforts obligation based on copyright protection would suffice.