The EU's Press Publisher's Right is too broad. What can be done about it?

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Abstract

Commercial institutional news publishers have for many years in many countries sought copyright protection for news. To some extent they've been successful. Article 15 of the EU's Copyright in the Digital Single Market Directive, the Press Publisher's Right, is a recent example. But there are policy considerations that militate against such moves, notably the doctrine that copyright doesn't protect facts. The Press Publishers' Right contains provisions to try and deal with policy concerns such as these. However, they are insufficient. One reason, discussed here, is that the drafting of the subject matter provisions in article 15 are too broad.

This article suggests one way of mitigating this would be to interpret the subject matter provisions of art 2(4) and 15 restrictively. This might be done in two ways. First, such an interpretation may by required when considering recital 54, which expresses the rationales for the provision. Recital 54 explains that the desired aims of this part of the Directive are 'quality journalism and citizens' access to information', and 'public debate and the proper functioning of a democratic society'. A free and pluralist press is 'essential' and a 'fundamental contribution' to these desired ends. But, as the ends are prior to the means, the Press Publishers' Right should be interpreted in such a way that the desired ends are achieved, rather than in a way that protects the means by which such ends are achieved. Such an interpretation may also be possible and required by virtue of the freedom of speech and information guarantees provided by article 11 of the Charter of Fundamental Rights of the European Union and article 10 of the European Convention on Human Rights.

Introduction[1]

Commercial news publishers have for many years and in many countries wanted to maximise their sources of revenue. One way they have attempted to do this is by seeking protection of the information, including the news,[2] that they gather and publish.[3] They have done so particularly when the collection, evaluation and production of this information has been difficult or expensive, and when a competitor's reuse of it deprives, or risks depriving them of revenue. They have sought protection for the news *they* gather and publish, even though commercial news publishers have always, to some extent, derived revenue from reusing the news *others* have gathered and published, without paying for it themselves.[4]

Economics and history

Some of the reasons publishers do this relate to the nature of news, from an economic point of view. There are at least four characteristics of news that are, arguably, relevant. The first is that news is nonrivalrous, which means that one person's consumption of a news story does not mean there is less of it for someone else to consume. In this, news is unlike – say – a piece of food, which if eaten by one person, cannot also be eaten by another. News is also nonexcludable, which means that it is difficult to prevent news being passed from one customer who pays to find out about it, to another who has not. To some extent the passing on of news can be restricted by mechanisms like paywalls, but these cannot completely prevent one person telling another person what they've read, seen or heard.

Third, gathering and producing news involves high fixed costs, but further dissemination incurs low marginal costs. Collecting, assessing and producing news content is expensive, but once news has been gathered, assessed and produced, further republication costs very little. And in an online world, these marginal costs fall to practically nothing. That means for a Google or a Facebook, any revenue they generate from disseminating news produced by others will be highly profitable.

And, finally, news is a public good, in the sense that people are seldom willing to pay the full amount that it costs for it to be generated. Moreover, it is also a public good in the sense that the wide dissemination of news can provide a benefit to society at large, for example by informing the electorate with accurate information. It is beneficial to a person to live in a society where the electorate is well-informed by reading accurate news, whether or not that person actually buys and reads the news themselves.[5] The value of this benefit can be greater than the profit to be made from producing such information.

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[1] This work is an expansion of the author's Kluwer Copyright Blog. Richard Danbury, 'The DSM Copyright Directive: Article 15: Why and Why Not? – Part II', Kluwer Copyright Blog, April 28 2021, <http://copyrightblog.kluweriplaw.com/2021/04/29/the-dsm-copyright-directive-article-15-what-part-ii/>, accessed 24/8/21. The author gratefully thanks Dr Christina Angelopoulos and Professor Alison Young for comments and contributions to this draft. Errors remain his own.

[2] There have always been difficulties defining this term with sufficient precision for lawyers. See, for example, Will Slauter, 'Who Owns the News', Stanford University Press, 2019, 11. I attempt to address these later when considering the article 10 jurisprudence of the European Court of Human Rights (see text to n 47).

[3] It's important to recognise that this is not the only way that news publishers generate revenue. They also generate revenue from selling to advertisers, access to their readers' attention.

[4] See, for example, Will Slauter, 'Who Owns the News', Stanford University Press, 2019 chapter 3.

[5] See, for example, Joseph Raz, 'The Morality of Freedom', Oxford University Press, 1988, 253.

Together these qualities have driven those who want to make money out of the gathering, assessing and production of news to seek different ways of maximising the revenue they can derive from their activity. This is because, they have argued, given the economic nature of news, if left merely to the market, they would not be able to turn sufficient profit from their enterprise to make it worth their while. Nor, without legal interventions, would society obtain the benefit of a well-informed electorate.[6]

The force of these economic arguments won't be evaluated here, but they do provide a basis for understanding why commercial news publishers have sought to protect their financial returns through the law. Historically, one type of legal protection they have sought has been to invoke what we now know as intellectual property laws. Indeed, not only did news publishers use a precursor of IP law to protect news-related activity *before* the doctrine of copyright was established in 1710 by the Statute of Anne,[7] they also lobbied that news should be *included* in that Statute.[8] Throughout the three hundred years or so that followed, protection has repeatedly been sought, notably when there has been technological change, such as (for example) the building of electric telegraph lines,[9] and the introduction of radio.[10] Indeed, commercial news publishers lobbied, unsuccessfully, the League of Nations to 'recognise the principle of a property right in news'.[11]

This history is frequently overlooked. As Will Slauter has observed: 'the consequences of treating news as a kind of property have been discussed numerous times in the past. But such debates tend to fizzle out and be forgotten the next time the issue comes up'.[12] With the development of the internet, these arguments have become live again. Many commercial news publishers have once again sought protection in law in many countries in the world.[13] In the late 2010s, European publishers lobbied the EU for such protection. They were successful. In 2019 the EU passed article 15 of the Copyright in the Digital Single Market Directive,[14] frequently known as the 'Press Publishers' Right' (the 'Right'). This article argues that this is not a good piece of law.

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[6] Such legal interventions have occurred since the early days of news. See, for example, the postal privileges afforded to newspapers in early America: Will Slauter, 'Who Owns the News', Stanford University Press, 2019, 92 -94.

[7] Will Slauter, 'Who Owns the News', Stanford University Press, 2019, 35; Jayne E E Boys, 'London's News Press and the Thirty Years War', The Boydell Press, 2011, 73-89.

[8] Will Slauter, 'Who Owns the News', Stanford University Press, 2019, 49.

[9] Lionel Bently, 'The Electric Telegraph and the Struggle over Copyright in News in Australia, Great Britain and India', in 'B Sherman and L Wiseman (eds), 'Copyright and the Challenge of the New;, Alphen an den Rijn: Kluwer 2012, 43-76'; Lionel Bently, 'Copyright and the Victorian Internet: Telegraphic Property Law in Colonial Australia', *Loyola of Los Angeles Law Review*, 38 (2004), 71-176.

[10] Jonathan Silberstein-Loeb, 'The International Distribution of News', Cambridge University Press, 2014, 156.

[11] Jonathan Silberstein-Loeb, 'The International Distribution of News', Cambridge University Press, 2014, 209.

[12] Will Slauter, 'Who Owns the News', Stanford University Press, 2019, 4.

[13] See, for example, Richard Danbury, 'Appraising Potential Legal Responses to Threats to News in the Digital Era, Working paper number 1 'A comparative Analysis of Recent National Copyright Interventions', 2014, https://www.cipil.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cipil.law.cam.ac.uk/documents/copyright_and_news/first_report_complete.pdf, accessed 24/8/21.

[14] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

Policy, and the free speech-copyright balance.

The reason is prefigured in these historical debates. There are, and always have been, cogent arguments of principle against providing commercial news publishers with the protection of copyright, or – as is the case with the Right – a right ancillary to copyright. The one to be highlighted here centres around the fact that copyright and rights related to it can be seen as one side of a balance, on the other side of which are interests such as the need for free competition and free flowing information. I'll return to what this means in legal terms at the end of this article.[15] But in general terms, the point here is that on the one hand society may benefit from granting a limited monopoly to an agent to perform an activity because, were it not for the grant of the monopoly, the activity would not be performed (or not to a sufficient degree or standard). On the other hand, harm can arise to society from granting such monopolies.

This notion of a balance is somewhat abstract. To see what it means in relation to news and copyright, one can consider how it has played out in the law. Copyright protection is nowadays frequently afforded to news-related material. Over time, commercial news producers have sought and been granted in some countries protection for: headlines,[16] very short summaries of news (frequently known in copyright law as snippets and by journalists as intro paragraphs),[17] photographs of newsworthy events,[18] transcribed speeches,[19] financial news including particularly price information,[20] and stock recommendations.[21]

However, commercial news publishers have also frequently sought to protect something else: the facts about events that are written into these stories. To explain this, consider the distinction between events that happen, the fact that a particular event has happened, and the reports of the facts that an event has happened. A monarch dies somewhere, and this is reported by a news organisation. Publishers have sought to protect not only a particular piece of reporting of the fact that there has been an event, but *any* reporting of the fact that there has been an event: any reporting of the fact, for example, that the monarch has died. This has generally been resisted. A doctrine has evolved that copyright law protects expressions, rather than facts.[22] One reason relates to the balance mentioned earlier. The harm that would arise to society from granting a monopoly to a commercial agent over *any* report of a particular fact that an event has happened, outweighs the benefit that society would gain from commercial news publishers having a such a monopoly.

This article argues that Article 15, the Right, is a bad piece of law because it upsets this balance. The Right, in other words, creates a net detriment to society in terms of the free

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[15] Text to n 50

[16] *NLA v Meltwater* [2011] EWCA Civ 890 [21 -22], but also see *Fairfax Media Publications Pty Limited v. Reed International Books Australia Pty Limited* [2010] FCA 984.

[17] *Infopaq International A/S v Danske Dagblades Forening* Case C-5/08, [2009].

[18] Section 30(2) Copyright Designs and Patents Act 1988.

[19] *Walter v Lane*, [1900] AC 539.

[20] *Clayton v* Stone 5 F Cass 999 (CCSDNY 1829); Exchange *Telegraph Company Ltd v Gregory & Co* [1895] 1 QB 147; Will Slauter, 'Who Owns the News', Stanford University Press, 2019 Chapter 4.

[21] *Barclays Capital, Inc. v. Theflyonthewall.com* - 700 F. Supp. 2d 310 (SDNY 2010)

[22] For a historical account of the development of this doctrine, including the drafting of the 1885 Berne Convention, see Heidi Tworek 'Protecting News Before the Internet', in Richard John and Jonathan Silberstein-Loeb, 'Making News', OUP, 2015, chapter 8.

flow of information.

True, the Right contains provisions to try and deal with these policy concerns. They were not present in earlier drafts.[23] But these drafts were amended, and the Right on the statute book contains provisions designed to strike a balance between the competing interests of free-flowing information in a society and the imperative of commercial news organisations to protect their revenue. The passed text now includes the following specific exclusions from the ambit of article 15:

- As to content, individual words or very short excerpts, or snippets;
- As to acts, hyperlinking and acts other than reproduction and making available;
- As to effect, the possibility of invoking the right against other rightsholders – such as journalist authors;
- As to use, liability for private or non-commercial uses of press publications;
- As to duration, a period of 2 years is set out in the Directive, while 20 years had at one point been proposed.

Moreover, the notion of this balance is built into the Directive. Recital 54 explains that the desired aims of the Right are 'quality journalism and citizens' access to information', and 'public debate and the proper functioning of a democratic society'. And, while a free and pluralist press is 'essential' and a 'fundamental contribution' to these desired ends, it is not the end itself. This is appropriate, because the press, as has been recognised elsewhere, is an instrumental good in a society, not a good in itself.[24] The press – and journalism more broadly - is valuable because, and insofar as, it promotes democracy.

But significant problems remain, many of which have been set out elsewhere.[25] One that has had less attention will be discussed here.[26] It concerns to the subject matter article 15 protects. The Right specifies that the protected material is a 'collection' of a particular type, as defined by the directive. This notion of a 'collection' will be discussed below, and it will be argued that it is too broad. Indeed, it rivals in scope the EU's *sui generis* database right, which has been described as 'potentially awesome in its breadth',[27] and 'one of the least balanced and most potentially anti-competitive intellectual property rights ever created'.[28] Indeed, the work protected by the Right is in some ways actually *broader* than the *sui generis* right.

[23] See, for example, for criticisms of earlier drafts: https://ipkitten.blogspot.com/2018/05/sleepwalking-towards-perpetual-news.html> accessed 24/8/21.
[24] Judith Lichtenberg, 'Foundations and Limits of Freedom of the Press', in Judith Lichtenberg (ed), 'Democracy and the Mass Media', Cambridge University Press, 1990.
[25]See for example: https://www.ivir.nl/academics-against-press-publishers-right/previous-academic-publications-on-the-proposed-press-publishers-rights/ , accessed 24/8/21.
[26] A valuable contribution is Elzbieta Czarny- Drozdzejko, 'The subject-matter of press publishers' related rights under Directive 2019/790 on copyright and related rights in the Digital Single Market', International Review of Intellectual Property and Competition Law IIC 2020, 51(5), 624-641.
[27] Lionel Bently, Brad Sherman, Dev Gangjee, Philip Johnson, 'Intellectual Property Law', Oxford University Press, 2018, 366.
[28] J Reichmann and P Samuelson, 'Intellectual Property Rights in Data?' (1997) 50 *Vand L Rev* 51, 81.

This is because the *sui generis* database right at least requires substantial investment to have been made in obtaining, verifying, or presenting the contents of a database for protection to arise. No such requirement exists for the Right. As Lionel Bently has noted,[29] this is somewhat surprising, particularly seeing as the rationale for the right as set out in the recitals is the fact that large Internet companies are free riding on news publishers' investments.[30] Nor is there any originality threshold to overcome, for the Right to afford protection to particular content.

As a result, the EU now has two expansive rights ancillary to copyright that can apply to collections of news and which co-exist. Both can operate to control and monetise the flow of data and information. Both lie on top of and are supplementary to copyright itself and other related rights. Indeed, further layers of protection may exist, as long as the content meets the various criteria required for protection under these rights – where it is sufficiently original under the *Infopaq* standard[31] to be protected by copyright, for example.[32] Together, this bundle of expanding IP rights amount to a too much of an impediment to the free flow of information in democracies, and – the flip side of this - too expansive a protection for commercial news publishers.

The work protected by the Press Publishers' Right

A collection

The starting point for determining what material the Press Publishers' Right protects can be found in article 2(4). This specifies that what is protected is a 'press publication'. But a press publication is not a news report as such. It is a collection of different material, with *collection* being the key concept. It is this collection to which protection under Article 15 adheres. Other provisions of the Directive both expand and restrict the scope of definition. When taken together, the restrictive provisions are outweighed by the expansive ones.

Mainly of literary works of a journalistic nature

Article 2(4) indicates that the collection should be 'composed mainly of literary works of a journalistic nature'. To some extent, this is a restriction of the subject matter that the Right protects, as it doesn't protect just any collection, but one modified by this clause. However, there are at least two points to draw out which show that this restriction is not that effective.

The first is that the material that's collected should be mainly *literary* works. Hence, protection might be expected to be afforded only to text-based works: a substantial restriction, and one consonant with the description of this ancillary right as a *Press* Publishers' right. However, article 2(4) should be read with recital 56. This makes clear that the right may also include other types of copyright protected work, such as audio or audio-visual news. No doubt this makes sense from the point of view of commercial news publishers, as many years ago they moved beyond publishing text-based news in newspapers, to publishing news in a variety of media. But, while it makes sense from the

[29] https://ipkitten.blogspot.com/2018/05/sleepwalking-towards-perpetual-news.html accessed 24/8/21.
[30] Recitals 54, 55, 58.
[31] *Infopaq International A/S v Danske Dagblades Forening* Case C-5/08, (2009).
[32] Discussed at https://ipkitten.blogspot.com/2019/04/dsm-directive-series-2-is-press.html accessed 24/8/21.

point of view of their commercial interests, given the balance mentioned earlier, it's not clear that this makes it appropriate to expand the provision's information monopoly beyond text to sound and video.[33]

The second is the fact that the literary works need to be 'mainly of a journalistic nature' to receive protection. This might seem to be a two-fold restriction. First, the work should be *mainly* of a journalistic nature, and secondly the work should be mainly of a *journalistic* nature.

In relation to the former, the use of the term 'mainly' clearly indicates that there are component parts of a 'collection' that will be protected, and which are not journalistic in nature. Whilst 'mainly' suggests that they predominate, the term explicitly allows that there will be material that falls into the Right that has nothing to do with journalism, and not much directly to do with the flow of information necessary in a healthy society envisaged by recital 54. This is an unwarranted expansion of the scope of the Right.

The reason that such work is permitted protection is likely to be a result of the fact that traditional newspapers have been bundles of content. Readers have been attracted by some content, and then stumble across other content.[34] There has been, in other words, a cross-subsidy of attention at the heart of a newspaper, and this traditional bundle of content is something the Right is designed to protect. But, while basing the scope of the right on the traditional concept of a newspaper is in the publishers' interests, it's less clearly in the public's interest. The internet has enabled the disaggregation of news, and any attempt to virtually re-bundle it through the use of a new copyright is likely to be futile.

In relation to the latter, Elizbieta Czarny-Drozdzejko has persuasively argued that the interpretation of 'journalistic' is likely to be affected by CJEU's broad interpretation of the term in allied areas of information law, particularly that of data protection.[35] Two cases show how broadly the term is interpreted. In the first, the *Satamedia* case,[36] the court interpreted the term 'journalistic activities' as being activities where the 'object is the disclosure to the public of information, opinions or ideas, irrespective of the medium which is used to transmit them'.[37] Further, in *Sergejs Buivids v Datu valsts inspekcija*, [38] the court clarified that the communicator of a piece of data that is journalistic doesn't have to be a professional journalist.[39] If the definition of the term 'journalistic' in the Right follows that adopted by the CJEU in data protection law, then this will not be much of a limitation on the ambit of art 15.

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[33] See also the words in art 2(4)(c) 'any media', discussed below.

[34] For a historical account see Will Slauter, 'Who Owns the News', Stanford University Press, 2019, 105, 132; and a contemporary account George Brock 'Out of Print', 2013 , Kogan Page, 79-80.

[35]Elzbieta Czarny- Drozdzejko, 'The subject-matter of press publishers' related rights under Directive 2019/790 on copyright and related rights in the Digital Single Market', International Review of Intellectual Property and Competition Law IIC 2020, 51(5), 624-641.

[36] *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy, Satamedia Oy,* C-73/07 (2008).

[37] [61]. The Court, in other words, adopted a functional interpretation of 'journalism', rather than an institutional one. I will return to this later see text to n 43.

[38] *Sergejs Buivids v Datu valsts inspekcija,* Case C-345/17 (2019).

[39] [55].

The analysis above shows that a 'collection' is both a very broad, and an ill-delineated definition of the content that's protected under the new right. The remaining parts of Article 2 (4) seem intended to mitigate this deficiency, as they attempt to confine this rather wide definition. But, despite being read as a conjunctive list, this they do not do.

An individual title within a periodical

Art 2(4)(a) provides that the collection that is protected under Article 15 must constitute an 'individual item' within a periodical, or regularly updated publication under a single title. It gives the example of what such a title would be, by referencing newspapers and special interest magazines as a model. Yet the drafting here is a little odd, and its effect may not be to confine, but to actually expand the scope of Article 15.

This is because the article says that the collection itself must comprise an individual item *within* a periodical. It will be remembered that it is not the periodical itself that is protected, but a collection within it. Periodical published news has traditionally consisted of, and does so to this day, a bundle of different collections of content. A publication comprises both a mosaic and a Russian doll of collections. Given the fact that the boundaries of what is a protected collection are not clearly defined by Article 2, it seems inevitable that one journalistic work will fall into a variety of different collections, even within one publication. And, of course, as a collection doesn't have to comprise only journalistic works, the number of possible collections multiplies.

That means that any potential infringing act related to a single piece of content may be grounds for a variety of different breach actions at the same time. This is because the content may be the member of a variety of nested and overlapping collections within one publication. There may, therefore, be multiple legal suits that arise for one restricted act, where that act involves a work (journalistic or other) that is present in multiple collections in one publication. What's more, if a piece of content is in a collection in a variety of publications, which happens – for example – when an article is syndicated, the possible breach actions further multiply.

Has the purpose of providing the public with information

Art 2(4)(b) seems to attempt to confine the protected content to a collection that has a specific purpose. It says that the collection 'has the purpose of providing the general public with information related to news or other topics'. This purpose is to provide the general public with information related to news. Were the clause to end there, it would confine the content a little, but it is important to pay attention to the fact that it doesn't. The article does not say that it is confined to providing the public with news, but uses a wider term – 'related to news'. Content beyond news is clearly caught.

But even this mild limitation of the right is expanded further, when the phrase that ends art 2(4)(b) is taken into account. The provision ends with the words 'or other topics'. That would seem to mean that a collection of works not related to news (but meeting the other requirements of Art 2(4)) could be protected, as well as news content, and content related to news content. In other words, as long as a collection has a purpose of providing the general public with information, it doesn't seem important what that information concerns. The collection falls into the ambit of the Right. Indeed, it's difficult to conceive of

information that doesn't fall under the descriptions of 'news, related to news, or other topics.' A collection of weather reports, or knitting patterns, or recipes, or a catalogue of Lego minifigures, if falling in other respects under Art 2(4), would be caught by the press publishers' right. Again, the rationale for this wording is likely to have been the traditional nature of a printed newspaper as a bundle of content, but in an online world, this seems too expansive a protection to be borne by society.

Moreover, it's unclear from the text who the agent is that has to have the purpose in question. The strict wording of the Directive is deficient, as it suggests that the collection itself has to have this purpose. But purposes are qualities that sentient agents have, and a collection isn't a sentient agent. The purpose presumably must, by reading Art 2(4)(c), be that of the publisher. This is a drafting flaw. And it's not clear whether the purpose has be the subjective purpose of the publisher of the collection, or whether the purpose should be a determined objectively by a court. But, given that – as has been described – the purpose is so broad, this deficiency and ambiguity may not amount to much in practice.

Is published in any media under editorial control

Art 2(4)(c) may be slightly more successful, viewed from the perspective of a need to restrict the ambit of the notion of 'a collection'. The collection in question cannot be just any collection to be protected by the Right. Art (2)(4)(c) specifies that the collection be 'published in any media under the initiative, editorial responsibility and control of a service provider.' That said, it's not clear whether this is a conjunctive list or a disjunctive one, namely whether all these three qualities are required, or only at least one, for a collection to be protected. One can imagine, for example, a journalistic entrepreneur commissioning a work of journalism, but not having editorial responsibility for its production, nor control over a final work. Would this be sufficient for a collection to be classified as protected under the Right?

If the list is disjunctive, then again the ambit of protection of the Right is wide.

Even if it is conjunctive, a broadening of the scope of the Right is provided by this definition, which makes clear that it doesn't matter in which media the publication in question happens, as article 2(4)(c) expressly says that publication can be 'in any media'. Once more, the Right doesn't only benefit traditional newspapers, and – where the other relevant requirements are met – legacy radio and television news publishers may be provided with rights under Article 15.

Institutional journalism, not functional journalism

Article 2(4)(c) should be read in conjunction with recital 55, which is indeed effective at limiting the Right. But it limits it in a way that is controversial. Recital 55 explains that the 'concept of publisher of press publications should be understood as covering service providers, such as news publishers or news agencies' when they publish news, as defined in the Directive. Blogs are expressly excluded by recital 56, because they are not the editorial responsibility of a news publisher.

The controversy is that, as some have observed, this does raise the prospect of protecting established players and dissuading new entrants, thereby encouraging concentration in the

market and a lack of source diversity, also known as media pluralism.[40] This is because some blogs evolve into to news publishers. One eminent example in recent times is the investigative journalism site Bellingcat, which started as a blog run by a young unemployed man, Elliot Higgins, in the front room of his house in Leicester.[41] Bellingcat is now an investigative journalism platform with a global reputation.[42]

More generally, this is an area where the Right is at odds with much other international and regional media law. Many other areas of such media law tend to focus on a functional definition of journalism, rather than an institutional one.[43] The difference is between protecting information that is journalistic in its nature, rather than information that is produced by journalistic institutions. To take as one example, the international law of journalistic source protection. This, for the most part, protects journalism conceived functionally, rather than journalism conceived of as a type of expression produced by particular institutions.[44]

This, given the need stated in recital 54 to encourage a free flow of information necessary in a healthy democracy, is an area where it would be more appropriate, given the balance between the commercial interests that the Right protects and society's interest in free-flowing information, for the Right to be more expansive, rather than less expansive. This is because it would facilitate new entrants to institutional journalism, who can challenge the dominance of established commercial news organisations. Indeed, it may be that this effect of article 15 in dissuading new players is inconsistent with another landmark piece of EU law, the Audiovisual Media Services Directive ('AVMSD').[45] One of the stated goals of the AVMSD is to safeguard media pluralism. It is less than ideal, to say the least, if one effect of the CDSM Directive is at odds with this.

Individual words and short extracts

Beyond Article 2, there is one further provision that determines what content the right covers. This is contained in Article 15(1). This provides that the rights afforded by Article 15 do not apply to the use of individual words, or very short extracts of a press publication. Recital 58 explains that this is on the grounds that such use 'may not undermine the investments made by publishers of press publications'. This is a little odd for, as has been mentioned, there's no requirement under Article 15 that a news publisher's collection have required expenditure to produce to gain protection. Moreover, as has also been mentioned, short extracts may be subject to protection under copyright law itself, where they are sufficiently original under the *Infopaq* criteria.[46]

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[40] https://www.ivir.nl/academics-against-press-publishers-right/ accessed 24/8/21.
[41] https://www.bellingcat.com/ accessed 24/8/21.
[42] https://www.cjr.org/business_of_news/bellingcat_brown_moses.php accessed 24/8/21.
[43] Jake Rowbottom, 'Media Law', Hart, 2018, 27, n 107.
[44] Richard Danbury, 'Is there a Global Norm for the Protection of Journalists' Sources?' in Lee Bollinger and Agnes Callamard 'Regardless of Frontiers, Columbia University Press, 2021, 128-130.
[45] Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities.
[46] *Infopaq International A/S v Danske Dagblades Forening* Case C-5/08, (2009)

Conclusion

The scope of a 'collection' as defined by the Right is expansive. This is one reason why the Right is not a good law. The breadth of what falls into the concept of a collection is such that the Right – particularly when considered against the backdrop of other relevant IP rights that may affect the flow of news – alters the balance between private commercial interests in news and the public interest in free flowing information. What is to be done?

One solution may be found when the article comes to be interpreted in court. The notion of a 'collection' should be interpreted restrictively. Where possible, it should be taken as referring to core public interest news rather than – for example – entertainment news. There are difficulties in such a claim, it is admitted. One is that the concept of a core of public interest news is notoriously difficult to identify. But it is possible to do so for the purpose of applying legal rules. Evidence of this – and indeed a guide – can be found in the approach of the European Court of Human Rights. This court has built an extensive jurisprudence that distinguishes between different types of speech, when assessing what type of protection such speech merits under article 10 of the European Court of Human Rights.[47]

The grounds for such an approach can be found in recital 54 of the Directive, mentioned above. This specifies as the core purpose of the Directive as the need 'to ensure quality journalism and citizens' access to information'. As the author argued in a recent opinion in this journal, this recital (and recital 55) can be read as demonstrating that the Right is intended to encourage the dissemination of a particular type of content – namely information of value in a democracy. The breadth of the subject matter that is actually covered by the Right goes far beyond this. A court, and ultimately the CJEU, should take a purposive interpretation of the wording of this part of the Directive,[48] and by referring to these recitals should restrict the ambit of the Right.

Another means by which the same result could be achieved lies in European human rights law. Much has been written about how copyright (and other intellectual property rights) relates to and engages with other spheres of law, such as this.[49] The CJEU (and, indeed other apex courts such as the US Supreme Court) have struggled in the past with determining how these fields of law interact, and in particular, how copyright interacts with free speech guarantees. In Europe, such guarantees are found in article 11 of the Charter of Fundamental Rights of the European Union and article 10 of the European Convention on Human Rights. The CJEU has resolved the apparent conflict between these spheres of law by determining that free speech guarantees are sufficiently taken into account by the internal features of copyright law, such as duration limits, limitations of scope, and defences and

[47] See, for example, European Court of Human Rights, 'Guide on Article 10 of the European Convention on Human Rights, Council of Europe 2020, [566] https://www.echr.coe.int/documents/guide_art_10_eng.pdf accessed 24/8/21.

[48] See, for example, *R v Secretary of State for Trade and Industry, Ex p BECTU* C-173/99, (2001).

[49] Christophe Geiger, 'Research Handbook on Human Rights and Intellectual Property, Edward Elgar, 2016; Richard Danbury, 'Appraising Potential Legal Responses to Threats to News in the Digital Era, Working paper number 3 'Copyright, Freedom of Speech and the News', 2014, https://www.cipil.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.cipil.law.cam.ac.uk/documents/copyright_and_news/paper_22_august_2016_.pdf accessed 24/8/21.

exceptions.[50] That means that no external review of the Right from the point of view of free speech law would be likely to succeed. But, equally, the Courts jurisprudence indicates that national courts must interpret the Right in way that fully adheres to fundamental rights. Indeed, recital 84 of the Directive says as much in terms. Restricting the scope of the Right as described above would be such an interpretation.

Moreover, there is a further argument for such an approach that arises from considering free speech law. This is the view that EU copyright and related law sufficiently embodies free speech guarantees as the law is *now*. But when copyright and related law changes, the situation changes, and it may no longer do so. In other words, where there are significant changes to the balance between copyright and free speech, a review of the relevant parts of copyright and related law is necessary.[51] This review should evaluate whether and to what extent the changed corpus of copyright continues to pay sufficient regard to free speech law.

The Right is a relevant change in copyright and related law. It is therefore appropriate to reassess where and how the balance is struck between free speech and copyright and related law. The criticisms made here about the scope of the Right, when combined with similar criticisms that have been made elsewhere about other aspects of the Right, suggest that things have become unbalanced. It would be entirely appropriate, therefore, as a means of internally balancing this new right related to copyright with considerations about the free flowing of information in a democracy, if the scope of the Right is restricted when it comes under judicial scrutiny.

[50] *Funke Medien NRW GmbH v Bundesrepublik Deutschland* Case C-469/17 (2019)
[51] Neil Netanel, 'First Amendment Constraints on Copyright after Golan V Holder', (2013) 60 UCLA Law Review 1082, 1107.