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# Appraising potential legal responses to threats to news in the digital era

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*A comparative analysis of recent national copyright interventions*

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## Abstract

It is well known that the news industry has faced significant challenges over the past two decades. Argument rages as to the cause of these difficulties, and indeed these are likely to differ in different countries, but a significant common element can be identified in the rise of digital technologies in general, and the internet in particular. This has resulted in, amongst other things, increased competition for attention, the decline in subscription revenues due to free distribution of news, and the decline in the revenue newspapers have traditionally drawn from printed display and classified advertisements.

Copyright concerns, therefore, are not necessarily central to the financial problems facing these institutions, but they have been proposed as part of a solution. That, at least, has been the view of news producers – those institutions who seek to make revenue from news – in many countries. To that end, there have been recent copyright and copyright-related interventions, both in legislation and litigation, proposed or adopted, in (amongst other countries) the UK, Germany, Spain, Italy, Denmark, Belgium, France, Finland, Australia, and the USA. Indeed some of these have prompted a series of cases to be referred to the CJEU.

Some comparative study of these interventions has already been undertaken, but more is likely to be worthwhile. This is partly because of a lack of such an approach in the literature considering the ‘newspaper crisis’<sup>1</sup> in particular and in news production in general, and also because of the apparent lack of international comparison that has been undertaken in the formation of these interventions. Moreover, such study is likely to be valuable given the common challenges that copyright raises to those who seek to derive revenue from the production of news.

Hence as a preparatory work to a wider study that appraises legal responses to threats to news in the digital environment, the current study compares some contemporary, contrasting copyright-related legal responses to the financial threats to the production of news. The difficulties that copyright poses to those who seek to derive revenue from news will be summarised, and then copyright responses to these difficulties from three different countries will be described, and compared. Each has approached the question in a different way: in Denmark, the current position was arrived at by litigation, in Germany by legislation, and in Belgium by litigation and negotiation.

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<sup>1</sup> Siles I and Boczkowski PJ, ‘Making Sense of the Newspaper Crisis: A Critical Assessment of Existing Research and an Agenda for Future Work’ (2012) 14 *New Media Society* 1375

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## Introduction

Copyright law poses a variety of different problems for those who seek to derive revenue from news. These can be classified according to the elements of copyright as identified by Bently and Sherman, and thereby separated into those that pertain to the following: the subject matter of copyright, criteria for protection, authorship and first ownership, nature of the rights controlled by copyright, infringement, defences, moral rights, exploitation and use of copyright, limits on exploitation, and related other rights.<sup>2</sup> Clearly this taxonomy is largely based upon the structure of UK law, and details vary in other jurisdictions, but similar general contours can be discerned in other jurisdictions, albeit with pronounced national differences.<sup>3</sup>

News publishers and their representatives in an array of countries have proposed or implemented laws or seen copyright litigation that engages with these problems. A selection of interventions from 10 countries was studied for this paper.<sup>4</sup> Doctrinal analysis was supplemented by semi-structured interviews with practitioners concerned with the litigation and/or academic copyright lawyers in some of the countries concerned.<sup>5</sup> A summary of the results of this study is set out in appendix 1. Some interesting patterns emerge.

One general pattern is that attention has not been distributed equally across all areas of copyright that pose problems for news producers, but rather that there has been a focus of attention in a couple of areas. This finding complements other similar studies, such as that by Xalabarder<sup>6</sup> and Picard.<sup>7</sup> Also interesting has been the fact that interviews with participants tend to suggest that many of these interventions arose without informed reference to what was happening in other countries, which indicates that international comparisons like the present are worthwhile.

The problem that attracted the most frequent attention was the question of which actions are restricted by copyright. This was prompted largely by European litigation about how to conceive hyperlinks in copyright terms, and about the ambit of the Information Society Directive's ("InfoSoc") provisions<sup>8</sup> that exempt certain

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<sup>2</sup> This structure is taken from L Bently and B Sherman, *Intellectual property law* (3rd edn Oxford University Press, Oxford ; New York 2009).

<sup>3</sup> There are notable differences, and indeed the three country comparison undertaken below demonstrates this.

<sup>4</sup> The EU cases provided a difficulty in classification in this national-based scheme, as they are appellate cases from national jurisdictions. This was resolved by the EU case law that affected Denmark and the UK being considered as an extension of the national legislation that prompted it, while the *Svensson* judgment was classed as "EU", given the fact that the Swedish litigation from which it arose was not studied.

<sup>5</sup> The identities of these have been withheld for this draft to maintain confidentiality.

<sup>6</sup> R Xalabarder, 'Google News and Copyright' in A Lopez-Tarruella (ed) *Google and the Law* (T.M.C. Asser Press, The Hague 2012)

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<sup>8</sup> In particular article 5 (1), Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and

automatic transitory copying from being considered to breach the reproduction right. These issues are relevant to whether news aggregators<sup>9</sup> and media monitoring organisations should be considered to be undertaking restricted actions when they use the news found on publishers' websites.<sup>10</sup>

Second most frequently addressed were questions of the subject matter of copyright and originality as a criteria for protection. Consideration was given here to the extent to which headlines and short snippets of text should be considered works meriting copyright protection, not least because concerns arise about the extent to which such excerpts can be considered sufficiently original to merit protection under copyright law. The defences or exceptions to copyright attracted a similar amount of attention. Fourth came the area of related rights to copyright, important given the German legislation which has created a news publishers' ancillary right.<sup>11</sup> There has been a recent Spanish law of a similar effect, but which is characterised as an amendment to the quotation exception.<sup>12</sup>

The fifth area that attracted attention related to the limitations on exploitation of copyright, and in particular questions arose about the extent to which it could legitimately be argued that when material is placed on the web, it is done so with an implicit consent that can be copied.<sup>13</sup> Questions of infringement,<sup>14</sup> and the areas of authorship, first ownership and moral rights attracted the least attention. This is despite the problems that ownership of copyright present to news producers in many jurisdictions – which will be discussed below.

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related rights in the information society. These have been characterized in English litigation as amounting to a copyright exception: *Newspaper Licensing Authority v Meltwater Holding BV* [2010] EWHC 3099 (Ch) [106] for example. But Xalabarder holds that art 5 (1) should be better considered a limitation on what acts are considered to be a reproduction.

<sup>9</sup> The different types of aggregators are described and categorized in K Isbell, 'The Rise of the News Aggregator: Legal Implications and Best Practices' (Citizen Media Law Project, Berkham Centre for Internet and Society, Harvard University, 2010)

<sup>10</sup> Discussed below, for example, when considering Denmark

<sup>11</sup> Discussed below

<sup>12</sup> Discussed, for example, in G Minero, 'News reporting and copyright implications. New Article 32 of the Spanish Copyright Act: quotation, press clipping and aggregation of online contents' (Copyright and News Reporting, Barcelona, 14 November 2014 2014) and R Xalabarder, 'The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government; Its compliance with International and EU law' (infojustice.org 2014) <<http://infojustice.org/archives/33346>> accessed 10 October 2014. A similar Italian proposal never made it off the drawing board.

<sup>13</sup> This was an issue, for example, in the Belgian *Copiepresse* litigation, discussed below.

<sup>14</sup> Save that questions relating to the extent to which headlines and short snippets of text should be considered copyright works are closely connected to questions of infringement.

It shouldn't be concluded from the discovery of this hierarchy in these materials that there is a similar pattern to be found in copyright interventions in news more generally, because the sample is neither comprehensive nor representative. Cases and laws will have been missed. But this research does reveal a broad-brush portrait of the lay of the land, indicating where interventions have concentrated and what has been tried, and what might be possible. It is also a helpful indication of where future interventions might be focussed.

Against this background, it was considered useful to take a more detailed analysis and comparison of what has been happening in specific contrasting countries, to explore what has been tried, what has worked, and why. The remainder of this paper will therefore describe and compare in general terms the interventions that have taken place in Denmark, Germany and Belgium. The prime focus will be on recent significant interventions that have taken place in these countries, which will be described with relevant doctrinal context as identified by the interviewees and from the literature.

The three countries have been selected as they contrast well with each other. In Denmark news producers have used copyright litigation to regulate the news of news they publish, and today appear content with what it has achieved. By contrast in Germany, recourse to the courts was not felt by publishers to be a successful way of protecting their digital assets and revenue, and this has led to legislation that is intended to benefit news producers. Belgium presents a contrast to both, as news producers here obtained beneficial results from the courts, but felt dissatisfied with the fruits of this success. They did not seek legislation, but rather they sought to negotiate a solution with Google.

Another reason for selecting these countries is that are sufficiently similar in some respects to make comparison worthwhile. For one thing, each country is a relatively similar developed economy, but with a news industry that has been in comparable financial difficulty.<sup>15</sup> Moreover, the doctrinal context of each country is similar, as all are members of the EU, so all have copyright laws that have been subject to harmonisation both by European legislation the decisions of the CJEU. This makes the legal differences that remain, from the point of view of news producers seeking to generate revenue from news product, all the more interesting.

After the copyright interventions in these countries have been compared, some concluding general thoughts will be offered about the prospects for news producers who seek to use copyright law. It will be suggested that the material studied indicates that as a means of ensuring revenue from news product, copyright is not always effective nor practicable, that it is difficult given the changing nature of digital technology, and that focus needs to be paid to the ultimate rationale for intervening, which is the protection of the supply of news, not the protection of news institutions.

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<sup>15</sup> S Wunsch-Vincent, 'Online News: Recent Developments, New Business Models and Future Prospects' in DAL Levy and R Nielsen (eds), *The Changing Business of Journalism and its Implication for Democracy* (2010)

## Denmark

Denmark is a useful place to start the survey of copyright interventions, as Danish publishers have, over a number of years, used copyright and related law to inhibit the development of many digital threats to their ability to derive revenue from the production of news. It is one of the few European countries in which Google News has no site, and the commercial media monitoring organisation Meltwater does not operate here.<sup>16</sup> The publishers have achieved this through litigation and negotiation, having succeeded in court as long ago as 2003.<sup>17</sup> Further, Denmark is a good place to start a comparative survey of copyright interventions as Danish litigation, in the form of *Infopaq*'s double reference to the CJEU,<sup>18</sup> has had a dramatic affect across Europe on the prospects of copyright as a means for publishers to protect or generate revenue from their production of news.

The driving force of the publishers' litigation has been their association, the Danish Newspaper Publishers' Association (DDF).<sup>19</sup> Interviews reveal that it has a mandate to police what it sees as potential violation of its members' rights,<sup>20</sup> and the political and cultural will to do so.<sup>21</sup> It certainly has a track record of taking action. As early as the late 1990s, when aggregators and other businesses started to emerge using the news published by the DDF's members, interviews reveal that the DDF made contact asserting that any re-use of such material required the permission of the publishers.<sup>22</sup>

The DDF has indicated that their motivation was not so much concerns about, as is the case in other countries, the decline of the advertisement-funded business model of newspapers, so much as ethical and moral arguments about re-use of what they consider to be their intellectual property which has cost money to generate.<sup>23</sup> The perceived need was not to lose control of digital rights.<sup>24</sup> Nevertheless, arguments about loss of potential advertising revenue have also been a significant feature in the cases brought by the organisation.<sup>25</sup>

Denmark's emphasis on the protection of their news product online as opposed to the need to garner advertising revenue may, in part, be explained by the nature of the Danish newspaper market. So, for example, in 2008, a date that was in the middle of the litigation that will be described, just over 60% of Danish newspaper revenue came

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<sup>16</sup> Interview

<sup>17</sup> Interviews

<sup>18</sup> *Infopaq v Danske Dagblades Forening* C-5/08, [2009] EUECJ C-5/08 (16 July 2009), *Infopaq v Danske Dagblades Forening* C-302/10, [2012] EUECJ C-302/10

<sup>19</sup> The organization is now Danske Media, following its incorporation of radio journalism.

<sup>20</sup> Interview

<sup>21</sup> Interview

<sup>22</sup> Interview

<sup>23</sup> Interview. A short account of justifications of this type for copyright can be found at L Bently and B Sherman, *Intellectual Property Law* (OUP, Oxford 2014) 5

<sup>24</sup> Interview.

<sup>25</sup> *Danske Dagblades Forening v Newsbooster* SHD February 19, 2003, Case V 110/02 CHECK CITATION, evidence of Lasse Olander, cited in the *Newsbooster* judgment.

from sales, as opposed to advertising. This compares with the position in Germany, where sales contributed around 10% less to total revenue, and the US, where sales amounted to under 15% of revenue.<sup>26</sup> Clearly the protection of news content as a commodity to package and sell, rather than the protection of the ability to sell advertising to companies on the basis that people read news material, is of disproportionate importance in Denmark. This supposition is bolstered by news consumption figures, as far more people read newspapers online or downloaded them in 2008 (52%) than a comparable group in Belgium or Germany (21% for both.)<sup>27</sup>

### Early litigation

The early action that is considered by the DDF to be significant was the *Newsbooster* judgment.<sup>28</sup> Newsbooster provided an online and email service. A client would indicate the sort of news in which they were interested, and Newsbooster provided the client with a list of links to newspapers' sites reporting that story, either on visiting the website, or by email. The links were accompanied by a copy of the headline, and a couple of sentences summarising the story. The links provided were deep links, in that they led the client past the newspaper website's front page to the story in question. DDF became aware of Newsbooster's activities in November 2001. Pre-action negotiations resulted in Newsbooster ceasing to display headlines and extracts of articles, but DDF were not satisfied, and filed an application for an injunction with a lower court, the Copenhagen City Court bailiff department, in April 2002. An interim injunction was granted in July 2002.<sup>29</sup>

The approach of Danish law to copyright relating to news is similar to that in the UK. Literature and artistic works, for example, are protected, when they are original. Further, news is not protected as such, but the expression of it is, and the law does not consider rewriting news to be a breach of copyright.<sup>30</sup> These problems were avoided by the DDF as the action was decided largely on the Danish implementation of the *sui generis* database right,<sup>31</sup> a finding bolstered by a finding that the use of deep links by Newsbooster was problematic, and that Newsbooster breached the Danish Marketing

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<sup>26</sup> Rasmus and Levy p 12.

<sup>27</sup> Rasmus and Levy p 27

<sup>28</sup> *Danske Dagblades Forening v Newsbooster*. This is not a view which those on the other side of the litigation share: interview

<sup>29</sup> Facts from interviews

<sup>30</sup> *DDF v Jørn Jacobsen Management ("Online Avis")* U.1987.882H 5 October 1987. There are some exceptions, such as s 72 of the Copyright Act which protects foreign press releases, but these appear opaque in that it is unclear whether the news is protected, or the formulation of it. They do not appear to have founded an action. interview. They are similar to the 19<sup>th</sup> century Telegraph Laws: L 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* (Wolters Kluwer, Alphen aan den Rijn, The Netherlands 2012).

<sup>31</sup> Interview. Section 71 of the Danish Copyright Act. This provision was amended most recently by section 1(xiii) of Act No. 407 of 26 June 1998. The main purpose of the amendment was to implement the so-called Database Directive, Directive 96/9/EC of 11 March 1996 on the legal protection of databases. The extent to which this decision remains viable in the light of subsequent EU law will be discussed below.



Practices Act (although there was not extensive explanation of the reasoning on that point).<sup>32</sup>

In granting an interim injunction, the judge found that the collections of headlines and articles that constitute the publishers' websites qualified for protection under section 71 of the Danish Copyright Act, which had been amended to implement the Database Directive,<sup>33</sup> as 'catalogues, tables, databases and the like'. The court then found that Newsbooster's use of headlines and deep links to articles in these websites infringed the publishers' exclusive rights. Relevant was the fact that Newsbooster engaged in repeated and systematic reproduction and making available of the publishers' headlines and articles, for commercial intent. Further, the use of deep links circumvented the publishers' front pages, and thereby deprived them of revenue from advertising. The court also cited as relevant the fact that Newsbooster was a commercial company, whose commercial activities depended on the use of such links that pointed to the publishers' material, and that Newsbooster thereby competed with the publishers' business.

The case was set to be reviewed by a higher court, but before a fuller hearing Newsbooster stopped trading, and so was not present to argue the case fully at this hearing. Nevertheless, the lower court's decision was considered sufficiently weighty to establish a precedent in this area.<sup>34</sup> Hence in 2006, when Google decided to launch Google news in Scandinavia, the DDF approached the company and indicated that such a move would be unlawful. Google's response, according to the publishers, was to suggest that it was possible for publishers to opt out of the service, but the publishers responded that as copyright is not an opt-out doctrine, this would not resolve the issue.<sup>35</sup> To date, as mentioned, Google has not launched Google news in Denmark, whereas the service is available in other Nordic countries, such as Sweden and Norway. Nor does it appear that Meltwater, a major commercial service that draws on published news and a significant figure in litigation in this area in other countries,<sup>36</sup> is active in Denmark.<sup>37</sup>

For reasons that will be discussed in a moment, the *Newsbooster* is unlikely to remain a compelling precedent. However, at the time, it was seen as such. And there were other actions where the DFF sought to protect what they considered to be their digital rights. One prominent instance related to the Aidonline company. The attraction of this service to clients was that it contributed money to charity. It did this by diverting

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<sup>32</sup> Section 1 of the Marketing Practices Act.

<sup>33</sup> Database Directive, Directive 96/9/EC of 11 March 1996 on the legal protection of databases

<sup>34</sup> Interview

<sup>35</sup> Interview. Google's account is subtly different, in that they assert that the Danish press association collectively said they didn't want the service, and so Google did not implement it: interview

<sup>36</sup> In the USA, *Associated Press v Meltwater* 931 F.Supp.2d 537, S.D.N.Y. Mar. 21, 2013 (US District Court for Southern District of New York). In the UK, *Public Relations Consultants Association v Newspaper Licensing Agency (Meltwater)* [2013] UKSC 18

<sup>37</sup> Interview

banner advertising revenue from websites that the clients visited, and paying 20% of such revenue to charitable causes. The diversion of banner advertisements and hence funds was achieved by Aidoline's clients downloading software that altered the banners that were displayed on the clients' browsers. This was clearly an assault on the publishers' business model, as they did not gain the revenue from the ad banners that otherwise would have appeared in the browsers of those who viewed their website. The DFF sought an interim injunction to prevent this, and the case settled.

### Infopaq litigation

It was against this doctrinal context and approach of the DDF that the *Infopaq* litigation arose. Infopaq was a media monitoring organisation, providing a service to customers whereby particular a customer could ask for material covered in newspapers to be identified to them and summarised. Infopaq used digital technology to facilitate a full search of Danish newspapers for the content in question. They performed this task by manually feeding the newspapers into a scanner, converting the digital files to text files, and then searching the text files for particular words and phrases. This search indicated the place in the newspaper in which the content that the client was interested, and an employee of Infopaq could then read the newspaper article in question, summarise it, and send this information to the client.

Infopaq started in 2005, and the digital element of their operation seems designed to speed up and facilitate their ability to retrieve information, rather than to automate it. No copied newspaper articles were distributed to customers, only précises, as the digital technology employed was in essence an indexing process. The copies it generated remained in-house. Nevertheless, the DDF was of the view that such copying violated their members' rights, as it occurred without permission. Infopaq disagreed, but moved the digital indexing process out of the jurisdiction to Sweden.<sup>38</sup> They then filed a suit seeking a declaration that their activity was legal. The case made its way up to the Danish Supreme Court, and from there was ultimately referred to the CJEU.

Infopaq's case was argued in the alternative, based on alternative facts, given that they had a variety of ways they could go about their business. Two alternative processes are particularly relevant. The first process involved their producing a physical printout of copied information, but the second did not. Hence, when the case made its way to the CJEU, there were two sets of questions to answer, one involving the issue of infringement predicated on the existence of a physical copy of a work, the other did not.<sup>39</sup> Where there was printed text, the defence was that the copying was de minimis, or the copied text was not sufficiently original to have copyright protection. Where there were only electronic copies, the defence was the temporary copying exemption in article 5 (1) of the InfoSoc Directive.<sup>40</sup> However, the CJEU in the first hearing omitted to provide answers that governed both alternatives, and the case had to be brought back for a second hearing.

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<sup>38</sup> Interview

<sup>39</sup> Interview

<sup>40</sup> Interview

On the first reference,<sup>41</sup> the CJEU, as is well known, interpreted the law<sup>42</sup> in a way that is beneficial to publishers who seek to rely on copyright as a means of restricting use of the news that they produce. Two findings in particular are relevant, as the court specifically addressed some of the difficulties described in the introduction with which publishers are presented by copyright. The first is an issue of the subject matter and criteria for protection, the second relates to the nature of rights protected by copyright.

The question about the subject matter and criteria for protection was the issue of whether headlines and short snippets could be protected. (Indeed, this difficulty may have been why the Newsbooster decision was pleaded on the *sui generis* database right rather than copyright itself.) In respect of this, the court found that 11 consecutive words (the amount taken by Infopaq) could be material protected by copyright under certain circumstances, and so the taking of 11 words could found a claim. The test of what is protected revolves around whether the extract contains an element of the source work that expresses ‘the author’s own intellectual creation’.<sup>43</sup> Conceivably, 11 words could contain such an element, particularly if they were the kernel – or lede or standfirst – that were designed by employing creative choices by the writer to contain the core of a news story. But equally, it is possible to conceive of headlines possessing such quality, despite the court’s observation that ‘words... considered in isolation, are not as such an intellectual creation of the author’.<sup>44</sup> A headline, a word or words to be taken in context, manifesting originality as conceived by the CJEU, may well manifest the author’s own intellectual creation. The first *Infopaq* judgment, therefore, has made copyright claims a more attractive avenue for news producers seeking to protect or generate revenue from the news they produce.

The second notable aspect of this *Infopaq* judgment relates to the temporary copying exemption set out in article 5 (1) of InfoSoc Directive.<sup>45</sup> The Court described the cumulative conditions required for the article to apply. An act is not to be considered a reproduction if: it is temporary, transient or incidental, an integral and essential part of a technological process, where the sole purpose of that process is to enable a transmission in a network between third parties by an intermediary of a lawful use of a work or protected subject-matter, and the act has no independent economic significance.<sup>46</sup> The court also explained that copies generated must be stored or deleted automatically as a consequence of a user’s decision to initiate or terminate a technological process, as opposed to being dependent on some further human intervention, and that the duration of the copy should be limited to what is necessary for the completion of the relevant technological process.

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<sup>41</sup> *Infopaq v Danske Dagblades Forening*

<sup>42</sup> As Bently and Sherman describe, the Court was interpreting the Berne Convention and community *acquis* in relation to infringement, but the case has been applied more widely, Bently and Sherman, *Intellectual Property Law* 98

<sup>43</sup> *Infopaq v Danske Dagblades Forening* [48]

<sup>44</sup> *Ibid.* [45]

<sup>45</sup> Info Soc Directive 2001/29/EC

<sup>46</sup> *Ibid.* [54]

The court applied this to the facts, considering the evidence presented to it.<sup>47</sup> The court distinguished between printed reproduction and digital reproduction.<sup>48</sup> The court held that it was feasible that art 5 (1) might apply to aspects of digital reproduction,<sup>49</sup> the printing out of the text on paper made it clear that reproduction wasn't transient within the meaning of art 5 (1).<sup>50</sup>

The case was remitted to the Danish courts for further consideration, but the CJEU had not dealt with the second limb of Infopaq's argument, which turned on the question of whether article 5 (1) applied when they did not print out copies of the text taken from publishers' websites. The case was further remitted to the CJEU in 2009. Again the Court's judgment is important for news publishers across Europe,<sup>51</sup> but in this case, the judgment is less beneficial to their interests. Three aspects stand out. First is the requirement that to achieve the protection of article 5 (1), the use to which a transmission of a reproduced work is put has to be lawful. This might be expected to exclude transmissions that are made without authorisation of copyright holders, but the court (relying on other case law)<sup>52</sup> decided otherwise, and decided that unlawful means unlawful, ignoring the question of whether the transmission is authorised or not. In other words, the transmission has to be unlawful for reasons other than such a use not being permitted by those who possess copyright in the content.<sup>53</sup>

The second issue relates to another aspect of article 5 (1). This is the requirement, for the article to apply, that the act of reproduction has to have no independent economic significance. Again, it could be concluded that the use by an aggregator or media monitoring organisation of the news content on publishers' sites has such a significance, as it is reproduced to generate a financial return independent of the return accruing to the publisher from producing the work. Nevertheless, the Court found otherwise, again relying on earlier case law.<sup>54</sup> The independent economic significance at question has to be distinct from that economic advantage derived from the transmission at issue, which may well have its own economic advantage. It has, in other words, to be 'an additional economic advantage going beyond that derived from the use of the protected work.'<sup>55</sup>

Third, the court dealt with the question of whether the making of copies is a necessary part of a technological process. Significantly, the court found that article 5(1) 'does

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<sup>47</sup> Ibid [66]

<sup>48</sup> Ibid. [65 – 67]

<sup>49</sup> Ibid. [65]

<sup>50</sup> Info Soc Directive 2001/29/EC [67 – 70]

<sup>51</sup> *Infopaq v Danske Dagblades Forening*

<sup>52</sup> *Football Association Premier League Ltd and ors v QC Leisure and ors and Karen Murphy v Media Protection Services Ltd*, Joined cases C - 403/08 and C-429/08 [2011] ECR I-9083 (ECJ, Grand Chamber)

<sup>53</sup> *Football Association Premier League Ltd v QC Leisure, Murphy v Media Protection Services Ltd* Case C-403/08 and C-429/08 [2012] All ER (EC) 629 [42 – 46]

<sup>54</sup> *Football Association Premier League Ltd and ors v QC Leisure and ors and Karen Murphy v Media Protection Services Ltd*,

<sup>55</sup> *Infopaq v Danske Dagblades Forening* [47 – 54]

not preclude the technological process from involving human intervention and, in particular, from being activated or completed manually'.<sup>56</sup>

The case was again remitted to the Danish courts, and in March 2013 the Supreme Court found that the copies produced by Infopaq did not have the benefit of article 5 (1). The Court found that the news excerpts taken were subject to copyright – or, to be more precise, that some excerpts might meet the originality requirement –<sup>57</sup> and that Infopaq's actions did not have the benefit of article 5 (1). This was because the copies Infopaq created at an early stage in the process, by scanning newspapers and creating a searchable text database, were not temporary, transient and automatic copies compliant with article 5 (1).

### Evaluation

It appears that the Danish publishers' association have prevented their news product from being used without permission, and without paying a licence fee. A key feature of this has been the litigation on which the DFF embarked, litigation that resulted in the *Newsbooster* and then the *Infopaq* judgments. Moreover, aspects of the *Infopaq* judgments tend to make further action easier because of the finding of the CJEU that copyright protection can be afforded to short snippets of text if they are considered original. Indeed, Infopaq has since stopped trading in Denmark. However, on consideration, the prospects may not be so rosy, from the publishers' point of view. This is for a number of reasons, some of which relate to judgments of the CJEU subsequent to the *Newsbooster* decision, and to the *Infopaq* litigation itself.

Turning first to the *Newsbooster* precedent, there is significant doubt as to whether it remains good law in respect of the copyright and database elements of the judgment. (The Danish Marketing Act rationale may well remain robust.)<sup>58</sup> The first concern relates to the Danish court's finding on the law relating to hyperlinks, and in particular the finding that hyperlinking systematically reproduces and makes available the publishers' material to the public. It is not now possible to draw quite as clear-cut a conclusion. This is because of the CJEU's decision in *Svensson v Retriever Sverige AB*<sup>59</sup> that creating a link may not necessarily *prima facie* infringe the right to make available. A key issue is whether the link makes material available to a new public, and it is not clear that *Newsbooster*, in providing a link, would bring this about. Further, the court found that, in any event, the commercial motive in creating a link is irrelevant.<sup>60</sup> These conclusions appear at odds with the approach of the Danish court.

A second concern relates to the *sui generis* database right, a central aspect of the *Newsbooster* decision. It is not now clear that such a claim is a viable cause of action for publishers, given the judgment of the CJEU in, amongst other cases, *British*

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<sup>56</sup> *ibid.* [32], quotation from *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others* Case C-360/13

<sup>57</sup> *Infopaq International A/S v Danske Dagblades Forening* Case 97/2007, 15 March 2013

<sup>58</sup> Interview

<sup>59</sup> *Svensson v Retriever Sverige AB* C-466/12, [2014] Bus LR 259, [2014] ECDR 9

<sup>60</sup> The decision has been criticised – see, for example, Bently and Sherman, *Intellectual Property Law* 169

*Horseracing Board v William Hill*.<sup>61</sup> One issue that case raises is the question of ‘repeated dipping’. This is the issue of whether repeated small scale taking from a larger database comprises an infringement. The CJEU found in *William Hill* that repeated dipping constitutes an infringement only where there is ‘possibility that, through the cumulative effects of its acts [the taker] might reconstitute and make available the whole or a substantial part of the contents of the [source material]’.<sup>62</sup> Given that it is unlikely that the repeated taking by Newsbooster reconstitutes the whole or a substantial part of the source newspaper or news website, is it is unlikely that Newsbooster’s actions would today be considered an infringing act.<sup>63</sup>

In relation to the *Infopaq* judgments, difficulties also remain. This is despite the benefits afforded to news publishers by the decision in *Infopaq I*, and arise because the court in *Infopaq II* interpreted article 5 (1) in ways that loosens the protection afforded to publishers’ news. There are three elements to this. First, the CJEU confirmed that an individual may be present in the copying process without necessarily making article 5 (1) inapplicable. The process, in other words, doesn’t have to be entirely automated – a result that has been described as surprising<sup>64</sup> – and one that means an organisation that reproduces news does not necessarily lose protection under article 5 (1) merely because a person is involved in the copying process. Second, as described, the protection of art 5 (1) is not necessarily invalidated by the fact that those who copy the news are doing so to make money. Again, this provides some succour to commercial aggregators and media monitoring organisations whose purpose in reproducing news is to generate income for themselves, for they will not necessarily, because of this reason alone, now lose the benefit of article 5 (1) protection. They might use art 5 (1) when delivering their material to customers to be viewed on websites, rather than in email form. The third weakness from the publishers’ point of view arises because the CJEU found that protection is not lost by virtue of the fact that the rights holder does not permit the reproduction at issue. Save for this ruling, it might have been expected that such a lack of permission was what the drafters of article 5 (1) meant by the term ‘unlawful’. However, this ruling means that an organisation that reproduces material published by a publishers without their permission does not, by this reason alone, lose the benefit of article 5 (1)’s protection.

Together, these findings raise the possibility of organisations being able to reproduce news content and commercialise it, while remaining protected by article 5 (1). Moreover, the CJEU’s recent decision in the Meltwater litigation further nudges the

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<sup>61</sup> *British Horseracing Board v William Hill* Case C-203/02 [2004] ECR I-10415 (ECJ) . A view supported by an interviewee.

<sup>62</sup> *Ibid.* [91]. However, against this should be set the argument in *Innoweb v Wegener* Case C-202/12, that a database right is breached when it, amongst other things, presents the same functionality as a source site.

<sup>63</sup> Another problem is based on the CJEU’s line of jurisprudence, described in Bently and Sherman, *Intellectual Property Law* 355, that concludes that the *sui generis* right only protects material for which relevant effort has been expended in the activity of collection and arrangement of a database, rather than the activity of creation of the information contained within the database.

<sup>64</sup> Interview

door open.<sup>65</sup> This judgment indicates that that viewing a file on a browser, a process that leaves a cached copy on a local disk, is an act that is protected by art 5 (1). Together these have been described as facilitating new challenges to publishers.<sup>66</sup> For, if a media monitoring organisation or aggregator, or similar, did not print out copied material, but merely held it in electronic form, a form that was automatically deleted in short order after use, and distributed it to its customers to be viewed on a browser, it might well achieve protection under article 5 (1).<sup>67</sup> If that were so, its actions would not taken to constitute reproduction, and on this ground at least a copyright action to restrain it would be weak.

In summary, the litigation embarked on by DFF has historically reaped rewards from the point of view of news producers. However, it is not clear how strong this protection remains. Moreover, unanswerable questions must remain about the efficacy of the action by other standards. Might the Danish publishers have been doing themselves damage by restricting the ability of news aggregators to link to their material? They may have protected re-use of their digital product, but in doing so they might have foregone the ability of an aggregator to drive audience to their sites, and thereby deprived themselves of potential revenue. This argument is unanswerable because it is a counterfactual, but – as will be seen – it was of key significance in the case of Belgium, and will be discussed later. It is also a central plank in the argument mounted by organisations, like Google, that reproduce and link to news content, as to why their activities benefit news publishers.

## Germany

German news publishers, like those in Denmark, have attempted over a long period of time to protect the reproduction of news online, using copyright related laws. However, in contrast to the Danes, the Germans had less success in litigation, and so between 2009 and 2013 took to the legislature to attempt to protect their revenue. In 2013, the Leistungsschutzrecht für Presseverleger, a right ancillary to copyright, was passed which protects the economic rights of publishers of news. This legislation seems to have had influence beyond German borders, as a similar approach is currently mooted in Spain.

Unlike Denmark, the driving force in the interventions studied at least, seems to have been individual publishers, not a publishers' organisation. Interviews reveal that a stated motivation for such action was the fact that news material had been disseminated in the early days of the internet, a decade or so ago, for free.<sup>68</sup> Evidently the free dissemination of material that might otherwise draw a subscription or sale and advertising revenue proves problematic for those who would seek to draw revenue from the production of news. Interestingly, however, empirical research has

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<sup>65</sup> *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others*

<sup>66</sup> This was suggested by an interviewee.

<sup>67</sup> Problems still remain for aggregators. One is the Berne 3 step test, incorporated in article 5 (5) of the InfoSoc Directive, which may prevent a commercial aggregator from availing themselves of the benefits of this provision.

<sup>68</sup> Interview



shown that the revenue-related problems associated with the development of the internet, albeit evident, were felt less acutely over the past decade by German newspapers than those in other countries.<sup>69</sup> So, for example, fewer people read newspapers online in Germany than in other comparable European countries,<sup>70</sup> and print circulation has held up reasonably well,<sup>71</sup> as did (in some cases) profits, with Axel Springer AG reporting a return on investment of a record 18% in the first quarter of 2010.<sup>72</sup> Nevertheless, longer-term trends paint a less optimistic picture, showing the increases in online readership and declining circulation that replicate patterns evident elsewhere.<sup>73</sup> The central question remains unclear, though, of whether these will lead to a diminution of profit.

### Early litigation

Whatever the comparative picture that has unfolded since, publishers at the beginning of the millennium took to the courts to attempt to protect the digital expression of their news product. This was not met with the beneficial result for news publishers that the Danes achieved. Two cases can be described that illustrate that this was so. The first was an early case that reached the German Federal Supreme Court in 2003.<sup>74</sup> This was an action against a media monitoring organisation by a newspaper publisher that published, amongst other titles, *Handelsblatt*. The aggregator, 'Paperboy', offered a similar service to the one that *Newsbooster* offered to Danish consumers. The company ran a search engine that trawled through public online newspapers, hence sites not protected by passwords, for particular words or phrases. The results offered to a client were deep links that bypassed the front pages of the newspaper websites, and included a headline and a short excerpt from the publication. Additionally, a client could request they be sent an email containing the links, which was described as by Paperboy as 'your personal newspaper'.

The publisher claimant sued for an injunction on the grounds of breach of copyright and unfair competition, and after various appeals the case arrived at the Federal Supreme Court. The court dismissed the claim, in ways that are strikingly different to the Danish approach, and consideration of these highlights some of the continuing problems for news producers relying on copyright. In terms of the *sui generis* database right, the crux of the Danish *Newsbooster* action, the German court found against the publisher claimant not on the availability of the right itself, as the court *assumed* that newspaper websites were databases within the relevant statutory

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<sup>69</sup> F Esser and M Brüggemann, 'The Strategic Crisis of German Newspapers' in DAL Levy and R Nielsen (eds), *The Changing Business of Journalism and its Implications for Democracy* (2010)

<sup>70</sup> 21 % of individuals aged 16-74 in 2008, which places Germany as the 22<sup>nd</sup> of 29 countries sampled in DAL Levy, R Nielsen and Reuters Institute for the Study of Journalism., *The changing business of journalism and its implications for democracy* (Reuters Institute for the Study of Journalism, Oxford 2010). Denmark has 52%, and is placed 8<sup>th</sup>.

<sup>71</sup> It declined from 78% daily reach in 1999 to 71% in 2009: Esser and Brüggemann 43.

<sup>72</sup> Ibid. 43

<sup>73</sup> Wunsch-Vincent

<sup>74</sup> "*Paperboy*" Judgment of 17 July 2003 (BGH I ZR 259/00), BGH [2001] GRUR 958 (German Federal Supreme Court)



definition.<sup>75</sup> Rather, the issue was that of infringement. First, the Federal Supreme Court found that the aggregator's hyperlinks could not be considered as reproducing nor making available, preferring to consider the link as a means of directing a user to a work that had already been published. It is the user who performs the relevant act to be considered for copyright purposes. But second, the repeated and systematic extracting of short parts of the source text did not contravene the normal use of a database.<sup>76</sup>

In relation to the copyright claim, the decision of the German court also turned on the question of infringement, and again found against the publisher claimants on two grounds. First, hyperlinks, conceived as a tool to direct a user to the site where material could be found – a pointer - did not breach the right to reproduce afforded by the copyright act, nor did they breach the (at that stage novel) right of making available to the public.<sup>77</sup> But further, each snippet that was taken by the aggregator was not sufficient to benefit from copyright protection, as it was too insubstantial to benefit from the protection afforded to literary works.<sup>78</sup>

Again, as was the case in relation to the early Danish cases, doubts have been cast on this judgment by subsequent CJEU case law, and these will be discussed later. Nevertheless, whatever the strengths and weaknesses of the case as considered now, at the time the *Paperboy* judgment was perceived as creating problems for publishers seeking to enforce copyright. In the opinion of those advising some newspapers, these difficulties were enhanced by other cases.<sup>79</sup> One that they emphasise concerned the *Frankfurter Allgemeine Zeitung* and an Austrian aggregator.<sup>80</sup> The problems that arose in this case included the familiar issue that short excerpts of text do not merit copyright protection due to insufficient originality,<sup>81</sup> but also some that relate to the ownership of copyright. This difficulty crystallised in this action because the *Frankfurter Allgemeine Zeitung* needed, in seeking to use copyright to restrain the activities of an aggregator, to prove it had locus to sue, derived from the journalist author in respect of the articles being copied.

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<sup>75</sup> Section 87b(1), Urheberrechtsgesetz (UrhG - Copyright Act)

<sup>76</sup> Useful analyses of the decision are found in, for example, S Klein, 'Search Engines and Copyright: an analysis of the Belgian Copiepresse decision in consideration of British and German Copyright Law' (2008) 39(4) *International Review of Intellectual Property and Competition Law* 451 and J Stemplewitz, 'Report - Bundesgerichtshof-Zivilsachen (Federal Court of Justice-Private Law)' in Miller and Zumbansen (eds), *Annual of German and European Law 2004* (2003), R Podszun, 'Searching the Future of Newspapers: with a little help from Google and IP law?' (2013) 44(3) *International Review of Intellectual Property and Competition Law* 259

<sup>77</sup> Section 15(2) UrhG

<sup>78</sup> Stemplewitz

<sup>79</sup> Interview

<sup>80</sup> A summary of the case derives from an interviewee. A report of the original has not been located.

<sup>81</sup> This point can be found set out in other cases too, for example (albeit only at the Higher Regional Court level): *Urheberrechtsschutz für sog. Gebrauchstexte*, *Oberlandesgerichts Düsseldorf vom 25. Juni 2002– 20 U 144/01*

In the absence of a presumption that an employer owns the rights in the work produced by someone they hire, a notion foreign to German law, this presents significant difficulty for a large publisher.<sup>82</sup> For the *Frankfurter Allgemeine Zeitung* and other German publishers it was difficult as author contributors frequently sold their stories to different publishers, affording only non-exclusive rights to one publisher. This is possible, interviews reveal, because of the structure of the German newspaper market, where there are a variety of geographically based titles that do not directly compete, and it is a state of affairs no doubt contributed to by Germany's federal structure. That of itself is a problem for publishers, but this becomes amplified when a publisher seeks to use copyright as a way of restricting a large number of articles aggregated over time. It is, in the minds of some publishers at least, relatively easy for an aggregator defendant, or another persistent user of news product, to defend a copyright action by putting the publisher to proof on their possessing sufficient rights to sue using copyright.

It is against this doctrinal background that some publishers say they proposed a right, ancillary to copyright, to protect publishers' economic investment in the production of news.<sup>83</sup> The economic background was, as is well known, the economic turbulence of the end of the last decade. The legislation proposed was justified *inter alia* on the grounds that it helped publishers without Government needing to provide them with money, an unwelcome development in that it is argued to be antipathetic the hands-off relationship the German state is supposed to have with the commercial press.<sup>84</sup> It was also justified by analogy with other commercial enterprises that assist in the publication and distribution of copyright content, and who benefit from ancillary rights to protect their economic investments.

The proposal was deeply controversial, and some argued on the basis of leaked information that it was originally conceived as much more extensive than has been enacted. Kreutzer argues that originally the proposals sought to create a new exclusive right in snippets, even single words, which would amount to 'an approach to monopolise the German language itself'. This was altered to a proposed right to prevent the unauthorized extraction of published snippets. He also identified the proposed legislation as creating an obligation on "'commercial users' (ie readers) to license the access to and use of the websites that are (voluntarily) provided free of charge by the publishers. Such a 'reception right' would affect every company, freelancer and public authority.'<sup>85</sup> That proposal was also not present in the final law that passed into force in 2013.

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<sup>82</sup> Interview.

<sup>83</sup> Schutzlos ausgeliefert im Internet, Prof Dr Hegemann, Frankfurter Allgemeine, 2 April 2009, <http://www.faz.net/aktuell/technik-motor/computer-internet/kopierte-inhalte-schutzlos-ausgeliefert-im-internet-1785694.html>, accessed 2 November 2014

<sup>84</sup> Interview

<sup>85</sup> T Kreutzer, 'German Copyright Policy 2011: Introduction of a New Neighbouring Right for Press Publishers?' (2011) 27 Computer Law & Security Review 214

### News publishers' ancillary right

The law is now contained in section 87 f of the German Copyright Act. It provides that:<sup>86</sup>

(1) The producer of news materials (news publisher) shall have the exclusive right to make said materials publicly available, in whole or in part, for commercial purposes, with exception of single words or very small text snippets. If the news publication has been produced in a company, the owner of that company shall be considered the producer of the publication.

(2) A news publication shall be defined as an editorially determined compendium of journalistic articles within the scope of a collection periodically published under a particular title that, considering the overall situation, must be deemed predominantly typical of a publishing house, and that is not issued primarily in service of self-promotion. Specifically, journalistic articles shall be defined as such articles and images as are intended to convey information, to assist in the shaping of opinions, or to entertain the recipients thereof.

[...] 87g Transferability, life and limits of rights

[...] (4) The provision of public access to news publications or parts thereof shall be permissible to the extent that this access is not provided by commercial operators of search engines or commercial providers of services that aggregate this content in a respective fashion. For the remainder, the provisions of Part 1 Section 6 shall apply accordingly.

A full review of the legislation will not be undertaken here,<sup>87</sup> but a couple of features will be noted that arise from interviews. The first is that those who support the right observe that there is no need for copyright in the underlying material, and hence the law is not overbroad. News, therefore, matter that is not subject to the protection of copyright,<sup>88</sup> is not controlled. And it clearly is an advantage from the point of view of the argument that the information of the day should not be subject to copyright, but it also means that the publishers' right has a broader scope than it would otherwise

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<sup>86</sup> Translation from I Barabash, 'Ancillary Copyright for Publishers: the End of Search Engines and News Aggregators in Germany?' (2013) 35 European Intellectual Property Review 243

<sup>87</sup> The provision has been extensively studied elsewhere. For example, J Wahlers, 'Germany's ancillary copyright legislation - questions remain' (Wilde Beuger Solmecke Rechtsanwälte 2014) <<http://www.wbs-law.de/eng/copyright-eng/germanys-ancillary-copyright-legislation-questions-remain-41756/>> accessed 25 July 2014, Barabash, , G Westkamp, 'The new German Publisher's Right - a violation of European Law? A Comment' (2013) 3 Queen Mary Journal of Intellectual Property

<sup>88</sup> Art 7 of the 1885 Berned Convention; art 9 of the 1908 Berlin revision; art 9(2) of the 1928 Rome revision and art 2(8) of the 1979 Paris revision all, to a greater or lesser extent, provided news with a lesser protection in copyright to other content. Indeed, the 1908 and 1928 and 1979 revisions exclude news from the ambit of the protection afforded by the Convention in express terms. Discussed in Xalabarder, 'Google News and Copyright'. The 1908 revision is noted and discussed in the dissenting judgment of Brandeis J in *International News Service v Associated Press* 248 US 215 (1918) .

have. Arguments that the right is justified on natural rights and reward theories of copyright have been advanced,<sup>89</sup> that emphasise the expenditure that publishers have been put to, to garner, organise, write, publish and distribute news. And further arguments based on creativity have been put forward, emphasising the creativity of publishers in developing the reputation of news outlets, and in selecting journalists and news and writing news to achieve such a reputation.<sup>90</sup>

Those who criticise the right point out a number of features. One prominent set of criticisms concentrate on the uncertainty that the provision creates, and one prominent example of such a criticism focuses on the drafting of the provision. It has been tactfully described as ‘open textured’,<sup>91</sup> and less tactfully as ‘a bit of a mess’.<sup>92</sup> This is particularly true of the exception in sub-clause (1), ‘with exception of single words or very small text snippets’, as it is not clear now big or small such snippets have to be to be excluded from protection. This provision was apparently added very late in the legislative process, as a concession to those who were concerned about the provision’s wide scope, and in particular to prevent search engines falling into its purview.<sup>93</sup> However, its ambiguity will require litigation to resolve, particularly as the distinction between search engines – who are presumably exempt – and news aggregators - who are not – is not that easy to draw. Other criticisms doubt the appropriateness of the provision in the first place, considering it to be a fetter on innovation, unjustified in economic terms, and an attempt to protect a redundant business model.

The ambiguities in the law have already prompted litigation, and an unexpected result. A collecting society, VG Media, has been established for the collection of proceeds from the right, and the litigation revolves around the tariff set for the right.<sup>94</sup> The level of the tariff has been challenged in a tribunal, and any decision is expected to be appealed, where the ambiguities of the act will be addressed. News reports indicate that at the moment the litigation appears to be going Google’s way.<sup>95</sup>

The unexpected result of the legislation is that Google has asked publishers who want to have their product appear indexed in the Google News aggregator to waive the right, and indeed many have done so.<sup>96</sup> The rationale for doing so appears to be that if

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<sup>89</sup> These arguments can be found summarised in L Bently and B Sherman, *Intellectual Property Law* (OUP, Oxford 2014), 37. They were advanced in interview.

<sup>90</sup> Interview.

<sup>91</sup> Interview

<sup>92</sup> Interview

<sup>93</sup> Interviews

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<sup>95</sup> M Sheahan, 'Google wins victory in row with German publishers' *Reuters* (22 August 2014) <<http://www.reuters.com/article/2014/08/22/us-google-germany-antitrust-idUSKBN0GM1HR20140822>> accessed 2 November 2014

<sup>96</sup> C Crum, 'Google Gets Around Having to Pay German Publishers by Making Google News Opt-In' (WebProNews 2014) <<http://www.webpronews.com/google-gets-around-having-to-pay-german-publishers-by-making-google-news-opt-in-2013-06>> accessed 25 July 2014

they are omitted from Google News, then publishers will lose traffic to their sites and thereby lose revenue.<sup>97</sup> (This issue was noted earlier when discussing the Danish experience, and will be revisited when Belgium is considered.) This matter went further in October 2014, when Google requested that publishers waive the right if they wanted to be indexed on Google search: again, publishers consented, albeit complaining that they were doing so under duress.<sup>98</sup>

## Evaluation

It is again useful, from the perspective of considering the difficulties facing news publishers seeking to use copyright and related rights to derive revenue from the news they produce, to evaluate some of the German jurisprudence in the light of subsequent case law of the CJEU. So in relation to that portion of its judgment that depended on its finding about the nature of hyperlinks in copyright law, the *Svensson* decision has, as described above, cast doubt on some of the reasoning employed by the Federal Supreme Court. In particular, doubt is cast on the route used by the German court to conclude there was no infringement of the making available right. It is no longer appropriate, without more, to hold that hyperlinking is merely location pointing, and on these grounds conclude that hyperlinking does not count as making content available, thereby performing a restricted activity. *Svensson* indicates that a link may be appropriately described as communicating, but it is not making the work available if material has already been placed on the internet, unless the link makes material available to a new public.<sup>99</sup> It may well be though, that while the route used by the German court is now inappropriate, its conclusion remains viable.

Nor do the early German court judgments fare better in relation to the conclusion about the applicability of copyright to short snippets of text. As described above, the CJEU in *Infopaq I* has determined that these can be subject matter protected by copyright when they comprise the requisite quality of originality found in the source material, a view that has been followed by a subsequent judgment of the Federal Court in Frankfurt.<sup>100</sup> However, the German case law fares better in respect of its conclusions on the issue of repeat dipping and the breach of the *sui generis* database. The CEJU's approach is similar to that of the German court, as it holds that repeated taking of insubstantial material will not of itself breach a database right.<sup>101</sup>

On balance, then, given the decision on the possibility that small text excerpts can be sufficiently original to on occasion mean that a particular work is covered by copyright, it has become easier for German publishers to use copyright law to seek to restrict re-use of news online. However, the problems associated with authorship and first ownership continue, as the European decisions mentioned have not altered the view that publishers have to establish they have title to various rights to enforce them

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<sup>97</sup> Interviews.

<sup>98</sup> <http://www.dw.de/german-publishers-vs-google/a-18030444>, accessed 2 November 2014

<sup>99</sup> *Svensson v Retriever Sverige AB*, Bently and Sherman, *Intellectual Property Law* 162 - 169

<sup>100</sup> Zulässige Sekundärnutzung urheberrechtlich geschützter Textvorlagen in eigengestalteten Kurzfassungen, Dezember 2010 – I ZR 12/08 – Perlentaucher – OLG Frankfurt am Main

<sup>101</sup>

in court. This, as has been described, is an issue, given the large variety of complex rights that publishers might seek to enforce in a court action against, for example, an aggregator. Further, as in Denmark, the developments described above resultant from *Infopaq II* also potentially create problems from the point of view of publishers.

But perhaps the most notable result of the German ancillary right is the limited benefit it has, so far at least, provided for publishers, given the ease with which Google has evaded its strictures. They have achieved this by virtue of their size and bargaining power, being such a dominant force online. This clearly raises issues of competition law, as has been asserted by the collecting society that represents publishers,<sup>102</sup> but the extent to which this will resolve the weaknesses of the ancillary right remains to be seen. One unforeseen result of the legislation has been that it appears others have learnt from it. A Spanish provision recently passed, not an ancillary right but a development of the quotation exception, which as drafted is expressed as being un-waivable. This, too, has become deeply controversial, and Xalabarder for one has argued that the proposed Spanish provision is contrary to international and European law.<sup>103</sup> It has resulted in the closing down by Google of Google News in Spain.

## Belgium

The third country to be studied is Belgium. Although a small market, it is worth studying as it has seen extensive years of news-related copyright litigation, brought by news producers against Google, which has ended in a surprising result. Despite winning a series of cases resoundingly, news publishers have not sought not to enforce the judgment they achieved, but have rather negotiated a solution with Google. This raises interesting questions about the relationship of copyright, news production and revenue.

Belgium's online news market is relatively poorly developed, in comparison with the other the European countries studied by Levy and Neilsen. These authors record that relatively few Belgians, 21% of those aged 16 to 74, downloaded or read newspapers online in 2008. This was equivalent to Germany but a much lower figure than Denmark. Nevertheless, the age profile of those who did replicated in general terms the patterns apparent in other countries, with fewest readers in the 65-74 group, and most in the 25-34 age bracket, which likely indicates that this will rise in the future in line with other countries. It will be interesting to see if the end of the copyright related litigation against news publishers increases this rate of change.

### Copiepresse litigation

There were three guiding forces of the Belgian litigation: Copiepresse, a collecting society and managing agent for Belgian French and German language daily press

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<sup>102</sup> VG Media, 'Press release: VG Media sues for payment against Google' (VG Media, Berlin 2014)

<sup>103</sup> R Xalabarder, 'The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government; Its compliance with International and EU law' (infojustice.org 2014) <<http://infojustice.org/archives/33346>> accessed 10 October 2014



publishers, the SAJ representing journalists, and Auscopie representing authors of school, scientific and university publications.<sup>104</sup> They took action against Google in response to what they saw as Google News and Google Search's taking of the material of their members.<sup>105</sup> A default ruling of 5<sup>th</sup> September 2006 ordered Google to withdraw from all its sites all articles, photographs and graphic representations from the French and German language editions of the Belgian daily press that were represented by Copiepresse, within 10 days from the notification of the ruling, under penalty of a fine of Euro 1,000,000 per day of delay and to publish the judgment on its website.<sup>106</sup> A re-hearing before the Court of First Instance in Brussels led to a ruling in February 2007, which was also a conclusive victory for Copiepresse, although the daily fine in default of compliance was reduced to Euro 25,000 per day.<sup>107</sup>

The court in this judgment dealt with a number of copyright and related arguments. One was decided in favour of Google, when the court found no breach of the *sui generis* database right on the basis of ownership of the right in question. The court came to this conclusion on the grounds that actions for the breach of such a right were open only to those who held such a right, or produced the database in question. Copiepresse, the court found, met neither of these conditions, and so that aspect of the case was declared inadmissible.

However, other matters went Copiepresse's way, in a resounding fashion. On the issue of subject matter, the court found contrary to Google's arguments that snippets and headlines might indeed constitute copyrighted material. The key question was whether the borrowed material constituted part of what which was considered original – marked by the personality or stamp of the author - in the source work. The court observed that it couldn't be excluded that such content might be the matter that Google took, and hence Copiepresse had a viable claim.

Copiepresse scored a similar victory on the issue of reproduction. Here the court's argument turned on a particular conception of a hyperlink. The court noted that Google cached copies of the websites crawled by its robots, and observed that it was this to which the hyperlinks led that were present on Google's search page. Crucially, the court indicated that such links did not lead to material held on a source page. This meant that, in the court's opinion, a viewer of a cache sourced material from Google's copy of a page, stored in Google's memory, and not from the material's original location. Moreover, the court noted that even when material was taken down from an original location, it could still be viewed on Google's cache. Hence the court found that Google was responsible for a material reproduction of a work, and a

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<sup>104</sup> It will be useful, for shortness, save where the context requires otherwise, to refer to all as 'Copiepresse'.

<sup>105</sup> Others became third parties to the dispute at some stages. These included Pressbanking, a company that emailed press articles to subscribers on request.

<sup>106</sup> Translation from

[https://www.copiepresse.be/images/file/Google/Jugement\\_Google\\_130207\\_EN.pdf](https://www.copiepresse.be/images/file/Google/Jugement_Google_130207_EN.pdf), accessed 24 October 2014

<sup>107</sup> *Google v Copiepresse* 13 February 2007; No 06/10/928/C of the general roll (Court of First Instance, Brussels)

communication of this to the public. The court also briefly considered ‘the European directive on electronic trade’.<sup>108</sup> It found this irrelevant as ‘it is the behaviour of Google itself that it is incriminated’, and in any event Google’s caching was not temporary storage required for indexation, but copying required to make material available to the public.<sup>109</sup>

Copiepresse also scored victories relating to copyright exceptions and moral rights. In the former, the court found that Google could not claim the benefit of the relevant copyright exceptions, whether citation or reporting news. In regard to the latter, although the court found Google didn’t breach the moral right of disclosure, given that journalists had already disclosed their material onto the web, it did breach the moral right of integrity as Google modified the work and of paternity, as the author’s name isn’t stated on Google news. Moreover, Google didn’t have success arguing that publishers had consented to re-use of their material by placing it online without tagging it as non-copyable, for example by using the robots.txt protocol. The court stated the principle that copyright is ‘not a right of opposition but a right for prior authorisation’, and this not having been forthcoming, such an argument was bound to fail.<sup>110</sup>

In 2011, the case reached the 9<sup>th</sup> chamber of the Brussels court of appeal. The higher court revisited many of the arguments canvassed in the lower court, and affirmed most of them. After disposing of preliminary arguments about matters such as applicable law, the court turned its attention to copyright. It was not disputed on appeal that articles from daily newspapers enjoyed the protection of copyright vested upon literary or artistic works, so attention turned to the question of reproduction and communication to the public. No doubt this approach was because of the precedent of *Infopaq I*.

In relation to the issue of reproduction, the court agreed with the lower court that ‘Google’s registration on its own servers of a page published by a publisher constitutes a physical act of reproduction’, and permitting users to access Google’s cached copy amounted to a communication to the public.<sup>111</sup> The existence of Google’s cached copy was therefore central to the court’s decision. The court considered that the presence of such a copy on Google’s site strengthened this argument, as such would still exist should a publisher remove an original.

Google attempted to argue that such a copy should not be considered a reproduction, by virtue of article 5 (1) of the InfoSoc directive, as interpreted by the CJEU in *Infopaq I*. The court did not agree, for a number of reasons. First, the court indicated

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<sup>108</sup> Presumably the E-Commerce Directive, Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

<sup>109</sup> [8]

<sup>110</sup> p 25

<sup>111</sup> [22]. Translation from

[https://www.copiepresse.be/images/file/Google/Copiepresse\\_%20ruling\\_appeal\\_Google\\_%205\\_May\\_2011.pdf](https://www.copiepresse.be/images/file/Google/Copiepresse_%20ruling_appeal_Google_%205_May_2011.pdf) accessed 27 October 2014



that provision by Google of a cache copy went beyond the ‘mere provision of installations aimed at or facilitating communication’, the provision of which, by virtue of preamble 27 of the InfoSoc Directive, was the activity at which the directive was aimed.<sup>112</sup> After all, a cache exists after an original is inaccessible, and so providing such a facility is providing an additional service.<sup>113</sup> Next, Google failed to establish that making the cache available to the public was ‘necessary from a technical point of view to ensure the efficient transmission of a work’, and hence failed to establish that caching is ‘an intrinsic and essential part of a technological process enabling efficient transmission in a network’. Finally, the cached copy, the court found, is not transient, as it can remain as long as a publisher maintains their article on a website, which may be for years. Moreover, a cached copy is available from Google, even if the publisher requires payment to view the original.<sup>114</sup>

In this argument, the appellate court also laid emphasis on the difference between Google News and Google search. The company, in the case of Google News, replicated the essential information that the publisher and journalist wanted to convey, hence it was unviable to argue, as Google had attempted to do, that all the site did was provide a signpost that points to relevant articles. In other words, Google News both reproduced and made material available to the public, and hence breached these regulated activities.

The court also found against Google on the availability of copyright exceptions to cover Google News’ activity, and on the question of moral rights also agreed with the decision of the lower court. A similar conclusion was forthcoming on Google’s argument that there was implicit permission to copy, with the court re-stating that such a theory was ‘incompatible with the requirement of explicit permission which is inherent to copyright’.<sup>115</sup> Nor was there any succour for Google in the domestic provisions that transposed the E-Commerce directive,<sup>116</sup> partly as Google’s active rather than passive nature made them inapplicable, but also again because of the longevity of Google’s cached copy of protected work made it inappropriate to consider the generation of such a copy as ‘an activity which is linked to the transmission of contents across networks’.<sup>117</sup>

## Evaluation

The case was submitted to the Supreme Court, but was never heard. There are some questions about whether, had the case been heard, the decision would have been upheld, as a result of subsequent developments in European law, described above, in particular, the evolved jurisprudence about the nature of the InfoSoc Directive’s

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<sup>112</sup> [23]

<sup>113</sup> [25]

<sup>114</sup> [26]

<sup>115</sup> [50]

<sup>116</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce)

<sup>117</sup> [54]

temporary copying exemption that explains how the article is to be interpreted. One aspect of the Belgian reasoning that looks particularly vulnerable is the idea that Google have failed to establish that caching is necessary from a technical point of view in the transmission of content in a network. The CJEU held, at least in relation to browser caches, that strict necessity is not required for art 5 (1) to apply, but rather the test is closer to there being a great utility for caching.<sup>118</sup> It may be that, as was argued to be the case in Denmark and Germany, Belgian publishers may lose a measure of control over their material if an aggregator creates automatic temporary copies of the sort that are covered by the Directive.

Be that as it may, the action was compromised before trial, after the parties negotiated. The deal was announced in December 2012,<sup>119</sup> and some aspects were publicised. Perhaps most significantly, part of the agreement was that the publishers could voluntarily re-enter Google News, whilst still retaining the ability to remove their material. This re-entering was significant, and somewhat ironic, as the publishers had embarked on litigation in the first place to restrict Google News' use of their material, the material they were now asking Google to use.

In return, Google agreed to pay the legal fees of the action, and some reports suggest that they also paid a '\$6m copyright fee',<sup>120</sup> an allegation Google denied.<sup>121</sup> More substantively, the parties agreed to 'work with the publishers on mutually beneficial business partnerships and innovation'. The aspiration was to (quoting from Copiepresse's statement): 'optimize monetization both on the advertising market and on the readers' market' by the construction of new business models. Both sides of the litigation would promote each other's services, with the news producers carrying Google advertising and Google optimising AdWords campaigns to attract readers to newspapers' websites.

Some have argued that the publishers were forced to compromise because they ran short of money and energy in the face of the Google behemoth,<sup>122</sup> but it is not clear that this was the sole reason for their supplication. This is because the negotiation took place against the backdrop of what could happen if Google withdrew its facility to index the publishers' websites on its search engine. For, during this litigation,

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<sup>118</sup> *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd and Others* [47].

<sup>119</sup> Copiepresse, 'Belgian French-language news publishers, authors societies and Google reach partnership agreement.' (2012) <[https://www.copiepresse.be/images/file/Google/2012\\_12\\_12\\_Copiepresse\\_press\\_release\\_EN.pdf](https://www.copiepresse.be/images/file/Google/2012_12_12_Copiepresse_press_release_EN.pdf)> accessed 14 July 2014,

<sup>120</sup> X Ternisien, 'En conflit avec la presse belge, Google accepte de l'indemniser' *Le Monde* (<[http://www.lemonde.fr/economie/article/2012/12/13/google-indemnise-la-presse-belge-pour-violation-du-droit-d-auteur\\_1805881\\_3234.html](http://www.lemonde.fr/economie/article/2012/12/13/google-indemnise-la-presse-belge-pour-violation-du-droit-d-auteur_1805881_3234.html)> accessed 3 November 2014

<sup>121</sup> Google Europe Blog, 'Partnering with Belgian news publishers' (Google 2012) <<http://www.googlepolicyeurope.blogspot.co.uk/2012/12/partnering-with-belgian-news-publishers.html>> accessed 3 November 2014

<sup>122</sup> Interview

Google at some stages<sup>123</sup> removed the news publishers' product from Google search and Google News, an action that Google indicated was necessary to comply with court orders,<sup>124</sup> but which others have suggested was Google strong-arming its opponents.<sup>125</sup> Whether this was the case or not, contemporary reports indicated the consequences of being barred from Google's platform. Exclusion from Google search resulted in a severe decline in internet traffic on the publishers' websites, from 15% to 26%.<sup>126</sup>

This experience is likely to have given the publishers an impetus, from the point of view of the desire to increase traffic to their websites, to gain re-admission to Google's sites, and hence to negotiate. Evidently, as was noted in relation to the German example, this does raise competition law questions about the power that Google have, derived from their dominance of the EU search market, but it is beyond the scope of this paper to consider these in more detail. But the point to emphasise is how the Belgian case, as did the Danish and German cases, illustrates the complexity of the links between the generation of revenue, the protection of digital rights, and the maximisation of traffic to websites.

## Conclusions

A number of conclusions can be drawn from this comparison. Three negative ones will be drawn out here, not because they are the only conclusions that can be drawn, nor that the only conclusions are negative, but because they describe some boundaries that need to be observed when considering the place of copyright as a way of securing revenue from news. The first is that recourse to copyright by news producers may not be effective nor always practicable; the second is that using copyright law to protect news product may entail significant effort given the mutable, disruptive and promethean nature of digital technology, and the third is that it is important to recognise that the activity for which protection of copyright ought to be sought is the production of news, not the protection of the current institutional news producers.

## Similarities and differences

The first point arises from comparing some similarities and differences between the three cases. To stress some differences first, in Denmark news producers appear to have achieved what they sought to achieve, and used copyright law in the courts to protect their news product from digital re-use. Moreover, they appear content with this state of affairs, and there has been no attempt to use legislation to advance their interests. This can be contrasted, for different reasons, with the situations in Germany

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<sup>123</sup> S Miller, 'Google's lost appeal in Belgium' (2011)

<<http://www.inaglobal.fr/en/press/article/googles-lost-appeal-belgium>> accessed 3 November 2014, Hopkinson

<sup>124</sup> R Whetstone, 'About the Google News case in Belgium' (Google Europe Blog 2006) <<http://googleblog.blogspot.co.uk/2006/09/about-google-news-case-in-belgium.html>> accessed 3 November 2014

<sup>125</sup> Interviews

<sup>126</sup> N Stevens, 'Bilan: Lavenir.net, la plus grosse victime de Google' *RTL.be* (18 July 2011) <<http://www.rtl.be/pourlui/article/Bilan-Lavenir-net-la-plus-grosse-victime-de-Google-103179.htm>> accessed 3 November 2014

and Belgium. In Germany news producers were less satisfied with their experience of using copyright law in the courts. This is because of a series of court decisions that made the use of copyright to protect the news generated by them more difficult. That result obviously prompted the desire to use legislation to alter copyright law to achieve what was not possible in the courts. Belgium provides a counterpoint for both. There, over a number of years, news producers have used copyright law in the courts to prevent re-use of news material. However, the news producers have not relied on the court orders that resulted from this litigation, but rather they have sought to negotiate a solution with Google, their prime adversary.

One conclusion that can be drawn from this is the observation that there may be a tension between the objectives of protecting the published news from un-permitted digital reproduction and the like, and the maximisation of revenue from deploying news product. The two objectives are evidently linked, as one can seek to maximise the revenue that can be gained from news product by using copyright related law. However, they are not necessarily equivalent, and as the Belgian case (and perhaps that in Denmark too) shows. Belgian news producers may have protected re-use of the material they published, but have not maximised the possible returns from this product. This is a reason they have sought negotiation with Google, putting aside their ability to restrict re-use of their product, to attempt to increase the revenue that can be derived from it.

This leads to a contentious area. It leads to the suggestion that it might be beneficial for publishers to neglect digital rights, as this may increase traffic to their site, and this increased traffic can increase revenue. This is contentious, not least because the putative link between increased traffic and increased revenue is unclear, and indeed, the empirical evidence that such a link exists is equivocal.<sup>127</sup> But one need not go too far into this territory to assert that policing copyright and garnering revenue may sometimes be different aspirations, nor to say that copyright may not always be an efficacious way of increasing revenue.

Turning now to the similarities in the cases that can be identified, one prominent example is the fact that in Denmark and Belgium, news broadcasters were not involved in the legal action that was taken, and that also appears to have been the case in Germany. Moreover, the actions in each country were taken, and the concerns about unauthorised re-use of what publishers considered to be their news material were asserted, by commercial news providers. This leads to a weakness in the negotiating positions of commercial news providers, as it becomes impossible for them to withdraw their material completely from the market. They might wish to do this to choke off Google's supply of news. In Germany, for example, publishers could

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<sup>127</sup> Some of the evidence is reviewed in R Denicola, 'News on the Internet' (2012) 23 Fordham Intellectual Property, Media and Entertainment Law Journal 68 83 – 84, Xalabarder, 'The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government; Its compliance with International and EU law' (accessed 17, E Rosati, 'Fordham Focus 9: News Aggregators and Fair Use' (IPKat 2013) <<http://ipkitten.blogspot.co.uk/2013/04/fordham-focus-9-news-aggregators-and.html>> accessed 3 November 2014. Unsurprisingly, it is also referred to in Google's press release on its Belgian settlement: Google Europe Blog, (accessed

not have threatened to withhold their news without risk of ceding their audience to the broadcast news providers, as if they withdrew their product consumers would look elsewhere. Broadcasters now commonly disseminate text and still images via their online activities. Moreover, alternative supplies of news exist not only because of publicly funded news providers, but also because of foreign news providers disseminating news in accessible languages. This negotiating weakness of commercial news providers results from news being, generally speaking, fungible – easily substitutable from other sources at no, or practically no cost. This may mean that copyright may not always be a practicable means of raising revenue.

### Copyright and digital technology

A second set of observations that arises from the consideration of the three case histories relates to the potential efficacy of the solutions arrived at. Each legal intervention, whether litigation based or legislative, is aimed at the problems that digital technology currently poses to the protection of news by the use of copyright. The publishers' ancillary right provides a means of securing revenue from Google and aggregators, as does – ultimately at least – the Danish and Belgian litigation. But one significant facet about the changes in digital technology is that they are continuing and evolving. The current legal copyright-based responses to these technological developments are by definition reactive, and deal with past developments. Future developments may, and indeed are likely to, create new currently unforeseen problems for copyright law. The problem, therefore, is that these solutions may be currently reasonably efficacious, but doubt must exist about how efficacious they will be in the future.

Two examples can be taken to illustrate this point. The first relates to the protection of snippet rights, or headlines, as manifest by the German publishers' ancillary right, or the developments in *Infopaq II* that indicates that headlines and short excerpts of text may be sufficiently original to merit protection under copyright law. These provisions, because of the nature of copyright law, protect the expression of the news, not the news itself. Hence, they do not generally protect against the re-writing of news. Yet the developments of robots - programmes that re-write news – has already taken place, and indeed AP have brought them into action to re-write some basic news stories.<sup>128</sup> When these robots can re-write the snippets and headlines and other news product, their material will not be expressed in the words of the source material. It will not, therefore, be restricted by snippet rights or the publishers' ancillary right. The words will have changed, and as copyright protects expression not idea, copyright will afford no remedy to news producers.

True, there are remedies to this that have been tried to protect against the re-writing of news, but not in the mainstream of copyright law.<sup>129</sup> These remedies are somewhat

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<sup>128</sup> A Beaujon, 'AP's robot-written stories have arrived' (2014)

<<http://www.poynter.org/latest-news/mediawire/259602/aps-robot-written-stories-have-arrived/>> accessed 21 July 2014

<sup>129</sup> There is an interesting line of possible exceptions to this rule in English law, relating to market sensitive financial information *Exchange Telegraph Company Ltd v Gregory & Co* [1895] 1 QB 147 and compilations *Elanco v Mandops* [1980] RPC 213 (Court of Appeal), discussed in W Cornish, D Llewelyn and TF Aplin,

marginal because of the decades-old idea<sup>130</sup> that it is wrong to protect news information, rather than its expression. They have appeared historically, and continue to exist in some contemporary codes. Their historical existence has been described by Bently, in his account of copyright related laws that sought to protect telegraphed news in Australia,<sup>131</sup> and he describes how proposals for similar laws were mounted in England in the late 19<sup>th</sup> century.<sup>132</sup> The modern codes that contain similar provisions include, for example, Finnish and Italian copyright laws.<sup>133</sup> They also exist beyond copyright law, most evidently in America, in the 'hot news' misappropriation tort.<sup>134</sup> This tort, if it is to be considered as such (and there is argument about this characterisation)<sup>135</sup> seeks to protect news information from being purloined. But these laws are problematic, not least from the point of view of constitutional guarantees of freedom of speech, and competition law. Yet without them, developments in digital technology may well quickly circumvent the line in the sand drawn by current copyright laws. It may, therefore, be worth investigating them in more detail.

The second example of technology potentially circumventing the protection afforded by current copyright law to news producers' product is evident in Denmark today. Denmark, of course, is the country where news producers are reportedly most content with the state of play, and the results achieved in the courts. And yet, the *Infopaq* litigation has opened up the door, as discussed above, to the possibility that an aggregator organising itself in a different way, might be able to avail themselves of the article 5 (1) temporary copying exemption of the InfoSoc Directive, at least in dissemination.

The metaphor of a hydra is not misplaced here: copyright law cuts off one off head, and two digital heads grow in its place. This is clearly not of itself necessarily a reason that news producers should refrain from pursuing copyright based remedies against those who use new digital technology and ways of organising themselves to take news product. But it should be taken as an indication that the current legal position is very unlikely to protect news product from future digital developments. The position is not one of Canute in his chair, allegedly commanding the sea to retire, a futile effort in the face of an implacable force. But the image of the hydra suggests that the effort involved in continuing to litigate or legislate to protect news product in the face of changes in digital technology should not be underestimated. Indeed Heracles succeeded in killing the hydra: but the level of effort involved in such a task was considerable.

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*Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (8th edn Sweet & Maxwell, London 2013) 555.

<sup>130</sup> Discussed earlier x –ref (currently n 89)

<sup>131</sup> L Bently, 'Copyright and the Victorian Internet: Telegraphic Property Laws in Colonial Australia' (2004) 38 *Loyola of Los Angeles Law Review* 71

<sup>132</sup> Bently, 'The Electric Telegraph, and the Struggle over Copyright in News in Australia, Great Britain and India'

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<sup>134</sup> *International News Service v Associated Press*

<sup>135</sup> *Barclays Capital Inc v Theflyonthewall.com Inc* 650 F.3d 876, 2011 Copr.L.Dec. P 20,117, 99 U.S.P.Q.2d 1247, 39 Media L. Rep. 2009, 77 A.L.R.6th 793

The upshot of this is that it may be better, from the point of view of flexibility and the need to adapt to future unforeseen changes, for publishers to adopt a negotiated solution with those who seek to use their news online. Clearly this cannot be the only tool in publishers' armoury, and negotiation from a position of legal strength is likely to result in better conclusions from a news publishers' point of view. And it is also true that litigation may well be preferable to legislation in that litigated solutions are more able to adapt to quickly changing facts than legislation, which, once drafted, is difficult to alter.<sup>136</sup> But it does highlight the fact that legal interventions are likely to be insufficient in a time of such dramatic change, and they should be complemented by negotiation in an attempt to secure a good result.

### Copyright and news institutions

The third set of observations that can be drawn from comparing the three countries relate to what it is that the copyright interventions that have been tried have sought to protect. In each case, news publishers brought the litigation in question, and yet, there are clearly different elements involved in the news process. Questions should at least be asked about whether the concentration on the interests of publishers is appropriate. It may well be that *at the moment* these institutions are the best way of garnering, selecting, writing, publishing and distributing news, but that is not to say they always will be.

In this vein, authors such as Hargreaves,<sup>137</sup> Picard,<sup>138</sup> Xalabarder,<sup>139</sup> Brock<sup>140</sup> (and others in interview)<sup>141</sup> have suggested that the best thing to do might be to let market forces restructure this business. A central idea here is one of creative destruction.<sup>142</sup> The internet can be seen as one in a long history of disruptive technologies that have forced those who seek to make money out of news to change the ways they act. So, to start early on, it is not unreasonable to presume that the business of oral news dissemination gave way to new models when writing was developed,<sup>143</sup> but one can

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<sup>136</sup> There remain downsides to litigation too: not least the cost, and the uncertainty that can chill beneficial developments.

<sup>137</sup> I Hargreaves, *Journalism: A Very Short Introduction* (Oxford University Press, 2014) chapter 8.

<sup>138</sup> RG Picard, "'Not with my News": Contemporary Struggles to Protect the Economic Value of News' in W Slauter (ed) *Making News* (Forthcoming, Forthcoming 2014)

<sup>139</sup> Xalabarder, 'The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government; Its compliance with International and EU law' (accessed 19

<sup>140</sup> G Brock, *Out of Print* (Kogan Page, London 2014)

<sup>141</sup> Interviews

<sup>142</sup> P Schlesinger and G Doyle, 'From organizational crisis to multi-platform salvation? Creative destruction and the recomposition of news media' *Journalism: Theory, Practice and Criticism*

<sup>143</sup> It is worth emphasizing the pre-print tradition of news, as many historical accounts of journalism omit the importance of the oral tradition of news: B Kovach and T Rosenstiel, *The Elements of Journalism* (Three Rivers Press, New York 2007), for example, moves from the middle ages to 1735 in a page. Admittedly, there is little direct evidence of the tentative assertion in the text, but it is not an unreasonable



be more certain that handwritten news dissemination gave way to print, news-writers had to change the way they made money. Pettegree describes the flourishing news industry based on manuscript *avvisi* in the years before the introduction of printing to Europe<sup>144</sup> and the ability of these manuscript news-writers to turn a profit was undermined by the development of printing.<sup>145</sup> In more recent times, the development of the telegraph,<sup>146</sup> then radio<sup>147</sup> and then television<sup>148</sup> all broke the mould of various news industries, and forced those who make money from news to re-think how they could continue to do so. Technology, it is argued, has repeatedly changed the ways in which news is collected, written and distributed. This has frequently led to periods of creative destruction in the structures of news organisations, and in particular in the ways in which money is made from news.

The Internet may be the latest example of this, and its development will lead to the replacement of old organisations by new ones, and old ways of working will fall away

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assumption. Pettegree, for example, describes the importance of the oral dissemination of news in early modern Europe, particularly England. A Pettegree, *The invention of news : how the world came to know about itself* (Yale University Press, New Haven ; London, England 2014) 120-137, and those who made money from this activity would have had to change their practices when print arose. In other societies too, there would have been structures for the gathering and dissemination of news that are likely to have been tied into an economic framework. These structures would have been challenged by the introduction of print. Hints of this can be gained, as an example, from the clear accounts of how news was disseminated by the Incas. B Cobo, *History of the Inca Empire* (6th edn University of Texas Press, Austin 1653) ch 32, G de la Vega, *Royal Commentaries of the Incas* (University of Texas Press, Austin 1609) ch 7 and 14, H Poma, *Letter to a King* (E P Dutton, New York 1567-1615) 95-101. The Incas had no writing or paper, but relied on memory and recorded some information on knotted string. This technology and these structures did not survive the Spanish conquest, which introduced to the Andes (as well as horses and gunpowder), paper and writing.

<sup>144</sup> Pettegree

<sup>145</sup> Interestingly, and this is a point to which I'll return, the writers of *avvisi* had a viable business model until as far as the eighteenth century. This appears to have been founded on the nature of their content, being more trustworthy, and hence distinguishable to a consumer from news material carried in print: *ibid.* "Well-sourced, dispassionate and reassuringly expensive, the manuscript newsletters were a distinctive and now almost wholly forgotten part of the news world." 116

<sup>146</sup> In Australia, India and Great Britain: Bently, 'The Electric Telegraph, and the Struggle over Copyright in News in Australia, Great Britain and India', Bently, 'Copyright and the Victorian Internet: Telegraphic Property Laws in Colonial Australia'.

<sup>147</sup> In the USA, Picard 272-73. In the UK, Silberstein-Loeb, *The International Distribution of News: The Associated Press, Press Association, and Reuters, 1848-1947* (Cambridge University Press, Cambridge 2014) chapter 5.

<sup>148</sup> Picard



and be replaced with the new.<sup>149</sup> If this is the case, it is distinctly plausible to argue that the traditional structures of the news businesses should be left to wither and die, and be replaced by organically developed internet-based activities that perform similar functions,<sup>150</sup> such as citizen journalism, blogging and the like. If that is the case, then no intervention, whether or not legal and of a copyright nature, is appropriate.

While these are cogent arguments, they are not unanswerable.<sup>151</sup> Two points can usefully be made. First, because while we may be living through a period of destructive change, it is not clear that encouraging or assisting the destruction is necessarily a good thing: not all destruction is creative, and it is difficult to see clearly in advance whether the destruction in question will be followed by creation. So it is unclear at the moment whether any destruction of news institutions will be replaced by a new set of comparable structures. In short, it is a gamble to assume that they will.

The second point, which is really a development of the first, is that it is not clear even if we are living through a period of creative destruction, whether the new structures that will be created are of greater value than those that they replace. Even a scholar such as Benkler,<sup>152</sup> a trenchant advocate of the new structures that are arising, notes that the position is not quite clear whether the new is better than the old.<sup>153</sup> Furthermore, there are many who argue that the old structures appear to provide qualities that are not replicated by the new. Sunstein, for example, argues that the demise of what are in effect news editors (he uses term general interest intermediaries)<sup>154</sup> may lead the creation of personal echo-chambers, and distort people's views of the world and place within it.<sup>155</sup> Again, there is an element of risk in assuming that the new will be as good or better than the old.<sup>156</sup>

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<sup>149</sup> J Clark and T Van Slyke, 'How Journalists Must Operate in a New Networked Media Environment' in R McChesney and V Pickard (eds), *Will the Last Reporter Please Turn out the Lights* (The New Press, New York London 2011), Hargreaves 113 to 115

<sup>150</sup> For a small selection of those who put forward such a view, see the references cited at FN 33 in N Gamse, 'Legal Remedies for Saving Public Interest Journalism in America' (2011) 105 *Northwestern University Law Review* 329. More nuanced and developed arguments are set out in Y Benkler, 'Giving the Networked Public Sphere Time to Develop' in R McChesney and V Pickard (eds), *Will the Last Reporter Please Turn out the Lights* (The New Press, New York London 2011), and can be derived from the work of B Dutton, 'The Fifth Estate' (Oxford Internet Institute 2007) <<http://www.oii.ox.ac.uk/research/projects/?id=57>> accessed 22 September 2014.

<sup>151</sup> Interview

<sup>152</sup> A useful summary is provided at Hargreaves 135

<sup>153</sup> Benkler

<sup>154</sup> CR Sunstein, *Republic.com 2.0* (Princeton University Press, Princeton ; Oxford 2007) ch 2

<sup>155</sup> *Ibid.* ch 4

<sup>156</sup> Arguably, Schelsinger's research confirms the view that some of the changes are not altogether to the good. He notes that the ability of journalists and editors in the

These assertions about creative destruction are thus not evidently true, may not be completely true, or indeed may not be true at all. But even if one rejects them, they do still present a forceful reminder that the institutions that we currently have for news production are not immutable, nor are the current structures of the news business necessary. This leads to the observation that one should have an open mind about the possibility of change. This leads to further reflection about what it is that is worth protecting, and this is not likely to be the business models of news publishers in and of themselves. It is worth recalling that in an earlier age, the established news producers in print sought to restrict the ability of a novel distribution technology – radio – to generate and disseminate its own news, in order to protect their business model.<sup>157</sup> Rather, it is more likely that protection should be sought for the production of news, not the means by which it is currently produced. This insight should be born in mind when further evaluating the propriety of legal interventions that may assist the production of news in a digital environment.

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*Telegraph* appears to be altering the editorial approach of the paper, tipping the delicate balance of news judgment away from a bias to what a journalist considers should be reported, and more towards matter in which an audience appears interested: Schlesinger and Doyle, . The difference between the business and ideal of journalism is compared by Hargreaves to ‘the classic separation of ‘church’ and ‘state’’. Hargreaves 68.

<sup>157</sup> Silberstein-Loeb, Chapter 5. Silberstein-Loeb describes, for example, the anguish felt by Reuters about the newly formed BBC’s ability to disseminate news widely, and therefore undermine dramatically the ability of Reuters to make money from its wholesale dissemination of news to news retailers. See, for example, 184 and 185 and the threat posed to Reuters’ World News Report by the Empire Wireless Service Broadcast. He also describes how the Post Office modified broadcasting licences to prevent re-broadcasting of certain news to preserve the ability of news agencies to make money: 156. Silberstein-Loeb, observes that governmental control of broadcasting arose from a mindset embodied in structures set up in the Telegraph Act 1868. For a different view, based on a comparative study of Italy, France and Britain, that asserts that the rationale was more influenced by the desire to exert governmental control over the airwaves, see RC Smith, *Broadcasting Law and Fundamental Rights* (Clarendon Press, Oxford 1997) chapters 1 and 2, whose perspective is shared by J Curran and J Seaton, *Power Without Responsibility : Press, Broadcasting, and the Internet in Britain* (7th edn Routledge, London ; New York, NY 2009).

## Appendix 1: Summary of results of comparative study

### Summary of the interventions studied

Australia	<i>Fairfax Media Publications Pty Ltd v Reed international Books Australia Pty Ltd</i> <sup>158</sup>
Belgium	<i>Google v Copiepresse</i> (First Instance, re-hearing) <sup>159</sup>
Belgium	<i>Google v Copiepresse</i> (Appeal) <sup>160</sup>
Denmark	<i>Danske Dagblades Forening v Newsbooster</i> <sup>161</sup>
Denmark	<i>Infopaq v Danske Dagblades Forening I</i> (CJEU) <sup>162</sup>
Denmark	<i>Infopaq v Danske Dagblades Forening II</i> (CJEU) <sup>163</sup>
Denmark	<i>Infopaq International A/S v Danske Dagblades Forening</i> <sup>164</sup>
EU	<i>Svensson v Retriever Sverige AB</i> <sup>165</sup>
Germany	"Paperboy" <sup>166</sup>
Germany	Frankfurter Allgemeine Zeitung and an Austrian aggregator. <sup>167</sup>
Germany	<i>Elektronischer Pressespiegel</i> Judgment of 11 July 2002 I ZR 255/00
Spain	<i>Megakini</i> (Pedragosa v Google), Supreme Court <sup>168</sup>

<sup>158</sup> [2010] F.C.A. 984 (Federal Court of Australia)

<sup>159</sup> 13 February 2007; No 06/10/928/C of the general roll (Court of First Instance, Brussels)

<sup>160</sup> Presented 11/5/2011, Cause List No: 2007/AR/1730 (Court of Appeal of Brussels, 9th Chamber)

<sup>161</sup> SHD February 19, 2003, Case V 110/02 CHECK CITATION

<sup>162</sup> C-5/08, [2009] EUECJ C-5/08 (16 July 2009)

<sup>163</sup> C-302/10, [2012] EUECJ C-302/10

<sup>164</sup> Case 97/2007, 15 March 2013

<sup>165</sup> *Svensson v Retriever Sverige AB* C-466/12, [2014] Bus LR 259, [2014] ECDR 9

<sup>166</sup> "Paperboy" Judgment of 17 July 2003 (BGH I ZR 259/00), BGH [2001] GRUR 958 (German Federal Supreme Court)

<sup>167</sup> "Uptime Systemlösungen GmbH LG München i, Az.: 7 O 13483/08 . NB have not found official report of the case

UK	<i>Newspaper Licensing Agency v Meltwater Holdings</i> (Court of Appeal) <sup>169</sup>
UK	<i>Public Relations Consultants v Newspaper Licensing Agency</i> (Supreme Court) <sup>170</sup>
UK	<i>Newspaper Licensing Agency Ltd and others v Public Relations Consultants Association Ltd</i> (CJEU) <sup>171</sup>
USA	<i>Barclays v Theflyonthewall.com</i> (Appeal) <sup>172</sup>
USA	<i>AP v Meltwater</i> <sup>173</sup>

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<sup>168</sup> *Megakini [Pedragosa v Google]* Tribunal Supremo (Civil ch.) Sentencia n. 172/2012, 3 April 2012, discussed in R Xalabarder, 'Spanish Supreme Court Rules in Favour of Google Search Engine... and a Flexible Reading of Copyright Statutes?' (2012) 3 Journal of Intellectual Property, Information Technology and Electronic Commerce Law 162

<sup>169</sup> *Newspaper Licensing Agency v Meltwater Holdings* [2011] EWCA Civ 890

<sup>170</sup> *Public Relations Consultants Association v Newspaper Licensing Agency (Meltwater)* [2013] UKSC 18

<sup>171</sup> *Newspaper Licensing Agency Ltd and others v Public Relations Consultants Association Ltd* Case C-360/13; [2014] WLR (D) 244

<sup>172</sup> *Barclays Capital Inc v Theflyonthewall.com Inc* 650 F.3d 876, 2011 Copr.L.Dec. P 20,117, 99 U.S.P.Q.2d 1247, 39 Media L. Rep. 2009, 77 A.L.R.6th 793

<sup>173</sup> *Associated Press v Meltwater* 931 F.Supp.2d 537, S.D.N.Y. Mar. 21, 2013 (US District Court for Southern District of New York)

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