TWO MODELS OF RIGHTS MANAGEMENT IN DIGITAL JOURNALISM

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INTRODUCTION

The appearance of the Internet brought in the early 2000s a wider spread of the news with no cost to the consumer, but on the other hand, digital intermediaries arose in this sector. Such services have as main goal to present the news of the day in a centralized, organized and easily accessible manner. Furthermore, in order to carry their activity, aggregators, and search engines reuse the headline, a snippet, and a reduced photograph —thumbnail— from the original article. The shift from physical to digital newspapers has caused a major change on the sources of revenues that sustain the press. Nowadays, press publishers depend mostly on digital advertising benefits, public support (like in France[1]), or on paywalls[2]. Despite such efforts to find new income streams, press publishers have been unable to make up the earnings derived from the sale of physical newspapers[3]. Information society service providers (ISSPs) have been accused of being free riders of the press publishers and journalists, exploiting their contents without financially contributing to their creation. It is, thus, how the value gap is deemed to have been born.

In the previous decade, several Member States tried to put an end to this situation Germany being the first one. In 2013 by modifying the Copyright Act (UrhG)[4] it added the dispositions §87f-§87h in order to introduce a new related right for press publishers[5]. On the other hand, in 2014 Spain reformed Article 32, the quotation exception, of its

[1] LEBOIS, A., «La légitimité du nouveau droit voisin de l'éditeur et de l'agence de presse», *Légipresse*, HS no. 62, 2019, p. 1 on line version.

[2] This has shown dissimilar levels of acceptance throughout the EU Member States. See NEWMAN, N., FLETCHER, R., ROBERTSON, C. T. , EDDY, K. & KLEIS NIELSEN, R., *Digital News Report 2022*, Reuters Institute for the Study of Journalism, Oxford, 2022, pp. 18-19.

[3] The total loss of revenues of press publishers between 2010 and 2014 got up to an amount of €13.45 billion (13%). See EUROPEAN COMMISSION, *Commission Staff Working Document Impact Assessment on the modernisation of the EU copyright rules*, Brussels, 14th Sep. 2016, p. 156.

[4] Urheberrechtsgesetz, vom 9. September 1965.

[5] Via Achtes Gesetz zur Änderung des Urheberrechtsgesetzes vom 7. März 2013.

Copyright Act (TRLPI)[6] in order to create a remunerated statutory licence in favour of press publishers[7]. Thus, Article 32.2 1º TRLPI allowed news aggregators to make available to the public non-significant excerpts of press publications. In return, these services were turned into debtors of a fair compensation which the press publishers or, where appropriate, other rightholders were the creditors of. The lawmaker decided that this right ought to be unwaivable and subject to mandatory collective management.

This Spanish initiative did not reach the hoped success—as we will see later—, nor did the German, hence the EU decided to act in a harmonized manner[8]. Article 15 of the Digital Single Market Directive (DSMD)[9] establishes an investment-justified neighbouring right in favour of press publishers. Following the German model, they are conferred the exclusive rights of authorizing or prohibiting the reproduction and making available to the public acts made by ISSPs. Additionally, journalists are granted the right of an appropriate share of the revenues obtained by publishers. Nevertheless, the DSMD remains silent on whether these rights can be unwaivable and subject to mandatory collective management or not. Therefore, the debate on the desirability of these elements in the newspapers sector has returned vigorously.

Transforming Shakespeare's words in *Romeo and Juliet*: «two models of press rights management, both alike in controversy, in fair Europe, where we lay our scene, face each other over being the most suitable for the defence of journalists and press publishers' rights». This contribution aims to analyse their convenience in the light of the international treaties and the European acquis. For such aim, the main traits of both models will be analysed and confronted (**I**). Then, an assessment of their results will be made (**II**) to, finally, reach some conclusions on the topic.

I. CONFRONTATION OF THE TWO MODELS

Before starting the analysis, it is convenient to know why the Spanish legislator imposed unwaivability and mandatory collective management. Despite the reinforcement

[6] Real Decreto Legislativo 1/1996, de 12 de abril, por el que se aprueba el Texto Refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia.
[7] Via Ley 21/2014, de 4 de noviembre, por la que se modifica el texto refundido de la Ley de Propiedad Intelectual, aprobado por Real Decreto Legislativo 1/1996, de 12 de abril, y la Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil.
[8] EUROPEAN COMMISSION, *Commission Staff*, cit., p.160.
[9] Directive 2019/790, of 17 April 2019, on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

of the German press publishers' position, their lack of negotiation power allowed Google to press them to grant free licences[10]. The Spanish lawmaker wanted a stronger protection, hence the aforementioned characteristics. For greater conciseness, a thorough study of each and every feature of the two solutions will not be made. Instead, the attention will be placed just on the waivability (**1**), and the mandatory collective management (**2**).

1. Unwaivability vs. waivability

Usually, rightholders are able to transfer or waive their rights, notwithstanding, the lawmaker may establish unwaivability in special cases preventing rightholders from disposing of their rights. Unwaivability is often imposed for two reasons: firstly, because of the special importance of the right concerned and, secondly, due to the weak market position of rightholders, which leads to low bargaining power[11].

Both Article 14 ter of the Berne Convention (BC)[12], and Article 1 of the Resale Directive (RD)[13] state that the resale right of the author of a work of art is inalienable and unwaivable. In this case, equity motivates unwaivability. The resale right is a protective instrument, so it would make little sense to waive it[14]. Unwaivability and inalienability serve to the purpose of protecting the author on the first sale against the pressures of art market players and speculators by ensuring a remuneration that reflects the success of their work in the future[15]. On the other hand, scholars have argued as well that the unwaivability guarantees the effectiveness of the right. Since only preventing authors from giving it up would assure a future remuneration[16].

It is as well common in EU Member States to make a right unwaivable once an author or performer has transferred it to a producer. An example can be found in Article

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[10] ROSATI, E., «Neighbouring Rights for Publishers: Are National and (Possible) EU Initiatives Lawful?», *IIC*, vol. 47 iss. 5, 2016, p. 573.
[11] BERCOVITZ RODRÍGUEZ-CANO, R., «Tasa Google o canon AEDE: una reforma desacertada», *Revista Doctrinal Aranzadi Civil-Mercantil*, no. 11, 2015, p. 30.
[12] Berne Convention for the Protection of Literary and Artistic Works, of 9 September 1886.
[13] Directive 2001/84/EC, of 27 September 2001, on the resale right for the benefit of the author of an original work of art.
[14] CASAS VALLÉS, R., «Comentario a la Ley 3/2008» in *Comentarios a la Ley de Propiedad Intelectual* (BERCOVITZ RODRÍGUEZ-CANO, R., coord.), 4th ed., Tecnos, Madrid, 2017, p. 494; and LUCAS, A., LUCAS, H.-J. & LUCAS-SCHLOETTER, A., *Traité de la propriété littéraire et artistique*, 5th ed., LexisNexis, Paris, 2017, pp. 463-464.
[15] DESBOIS, H., *Le droit d'auteur en France*, 2nd ed., Dalloz, Paris, 1966, pp. 340-341.
[16] MINERO ALEJANDRE, G., «Comentario al artículo 14 ter» in *Comentarios al Convenio de Berna para la protección de obras literarias y artísticas* (BERCOVITZ RODRÍGUEZ-CANO, R., coord.), Tecnos, Madrid, 2013, p. 1.238.

5 of the Rental and Lending Rights Directive (RLRD)[17]. It states that authors or performers retain the right to obtain a non-waivable equitable remuneration when the rental right has been transferred. In order to achieve the goal of Recital 5 RLDR —guarantee an adequate income— it is necessary to avoid producers forcing authors and artists to relinquish their rental right. For lack of bargaining position, the latter are likely to accept whatever condition producers set[18]. Furthermore, it ought to be considered as well that, in many cases, the transferee of that right is the employer of the creator, hence the latter is in an even weaker position.

On the other hand, creators may have right to fair compensations, whose rationale is slightly different from the aforementioned rights, for they are established in order to make up for the harm suffered due to an exception. That reparatory nature affects any consideration regarding unwaivability. Although Article 5.2 b) of the Information Society Directive (ISD)[19] states nothing on the unwaivability for the private copying fair compensation, the CJUE has ruled favouring it. In the *Luksan* case[20], it had to be decided whether or not a national rule which established in favour of the film producer a broad presumption of transfer of rights, including the right to fair compensation for private copying, was contrary to European law. In practice, this meant that the authors had to give up this ancillary right. In the paragraph 100 there is a clear answer: *the EU legislature did not wish to allow the persons concerned to be able to waive payment of that compensation*. It is true that here the CJUE is deciding on a legal presumption of transfer of rights, notwithstanding, its conclusions can be applied to relinquishing acts between individuals. To do otherwise would stand against the spirit of the ISD[21]. Afterwards, in the *Reprobel* case, it is stated that authors cannot be completely deprived of the fair compensation for the publishers' exclusive benefit[22]. In the CJEU's judgement *VG Wort* the previous conclusions are reinforced. When the private copying exception has been established, an authorising act from the rightholders has no legal effects, so it does not alter neither the harm, nor the compensation[23]. In short, the EU legislator's intention is to

[17] Directive 2006/115/EC, of 12 December 2006, on rental right and lending right and on certain rights related to copyright in the field of intellectual property.
[18] NÉRISSON, S., «The Rental and Lending Rights Directive» in *EU Copyright Law. A Commentary* (STAMATOUDI, I. & TORREMANS, P., eds.), 2nd ed., Edward Elgar, Cheltenham, 2021, p. 136.
[19] Directive 2001/29/EC, of 22 May 2001, on the harmonisation of certain aspects of copyright and related rights in the information society.
[20] CJEU, 9th Feb. 2012, *Luksan* (C-277/10), ECLI:EU:C:2012:65.
[21] SIRINELLI, P., Note on the *Luksan* case, *RIDA*, no. 232, 2012, p. 413.
[22] CJEU, 12th Nov. 2015, *Reprobel* (C-572/13), ECLI:EU:C:2015:750, nos. 44-49.
[23] CJEU, 27th Jun. 2013, *VG Wort* (C-457/11 to C-460/11), ECLI:EU:C:2013:426, no. 37.

prevent authors from waiving their rights to a fair compensation in order to grant them an effective protection.

The private copying fair compensation is usually unwaivable in many Member States, such as Spain (Art. 25 TRLPI) or Germany (§63a UrhG). This exception can also harm publishers, therefore they might be entitled to receive fair compensation. For this reason, Article 25.2 TRLPI grants this right to authors, performers, publishers, and producers. However, only the first two are not able to waive their right. This shows the intention of protecting weaker parties. On the other hand, Article 32.2 1º TRLPI, as reformed in 2014, was heavily criticised for being the first case in which unwaivability served to protect the interests of companies and not of a natural person[24]. We think that unwaivability, as configured for private copying, would have been more appropriate for the news aggregation limitation. In short, unwaivability serves to protect a natural person, the creator, against his counterparty in contracts for the exploitation of a work. In the relationship between press publishers and journalists, the latter are the weakest, hence if somebody needed unwaivable rights, it would be them[25].

In other matters, prior to the enactment of Article 32.2 1º TRLPI, the Spanish Competition Authority (CNMC) issued a report where this question was addressed[26]. There was stated that an unwaivable ancillary right in favour of press publishers would raise an access barrier to the market of news aggregation benefiting the already stablished companies and discouraging the entrance to the market to new and potentially better services. Additionally, if rightholders cannot decide whether they grant a licence and under what conditions, open access policies and, especially, creative commons licences would be seriously diminished negatively affecting access to information rights[27].

2. Mandatory collective management vs. voluntary collective management

The role played by collective management organizations (CMOs) is not a subject that is widely addressed in international treaties. Recent conventions make no mention of the topic, though there were some proposals to regulate mandatory collective

[24] LÓPEZ MAZA, S. «Comentario al artículo 32» in *Comentarios a la Ley*… cit., p. 655.
[25] BERCOVITZ RODRÍGUEZ-CANO, R., «Tasa Google… cit., pp. 31-32.
[26] CNMC, Informe PRO/CNMC/0002/14, 16th May 2014, p. 9.
[27] XALABARDER PLANTADA, R., «The remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government - Its Compliance with International and EU Law», *IN3 Working Paper Series*, 2014, pp. 16-18.

management in the WIPO Copyright Treaty, of 20 December 1996[28]. The BC, on the other hand, contains some openly constructed references. Articles 11 bis.2 and 13.1 BC are usually deemed as the basis for establishing compulsory licences for the broadcasting and the sound recording rights. But, when stating that Member States shall be free to determine the conditions of exercise of those rights, it can be understood that mandatory collective management might be deemed as a condition as well[29]. Likewise, Article 14 ter.3 BC also leaves the question of the resale right management to the Member States.

On the other hand, generally speaking, European law also allows Member States to impose this mechanism for certain rights, as in Articles 5.3 RLRD and 6.2 RD. Likewise, Articles 9.1 and 10 of the Satellite Cable Directive (SCD)[30], which regulate the cable retransmission right are relevant in this matter as well. Both will be discussed later.

From the above, it can be concluded that, according to international treaties and European law, mandatory collective management may be acceptable both for exclusive and simple remuneration rights. Nevertheless, it is necessary to delve further into this issue. An exclusive right is the rightholder's power to authorize or prohibit the use of a subject-matter and it must be granted unconditionally. Any limitation must not exceed the extent permitted by the BC. Compulsory collective management is not *per se* a limitation of the content of the right, but a condition for its exercise, as it deprives the author of the ability to authorise or prohibit the use and to negotiate its terms, conditions, and remuneration[31]. Moreover, Article 16 of the Collective Rights Management Directive (CRMD)[32] provides that CMOs must conduct negotiations with users in good faith and their licensing terms must be based on objective non-discriminatory criteria. This ultimately means that CMOs are obliged to license those users who meet the established requirements[33]. Consequently, collective management entails the loss of control of the work or the performance by authors and performers respectively.

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[28] FICSOR, M., *Collective Management of Copyright and Related Rights*, WIPO, Geneva, 2022, p. 40.
[29] *Ibidem*, p. 86; and SÁNCHEZ ARISTI, R., «Comentario al artículo 11 bis» in *Comentarios al Convenio*… cit., p. 993.
[30] Directive 93/83/EEC, of 27 September 1993, on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.
[31] VON LEWINSKI, S., «Mandatory collective administration of exclusive rights: a case study on its compatibility with international and EC copyright law», *Copyright Bulletin*, Jan.-Mar. 2004, p. 6; and FICSOR, M., *Collective Management*… cit., p. 86.
[32] Directive 2014/26/EU, of 26 February 2014, on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.
[33] As literally reflected in some Member States legislation. See Art. 163 TRLPI, or §34 Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten durch Verwertungsgesellschaften.

In addition, the CJEU has had occasion to rule on the management of exclusive rights by a CMO in its judgements on the cases *Soulier and Doke* and *Spedidam*[34]. On the basis of Article 5.2 BC, authors have the right not only to the enjoyment of the right, but also to its exercise which, in case of an exclusive right, it is exercised in a preventive manner. Although the CJUE does not provide in these judgements any further guidelines on mandatory collective management —for it decides on an opt-out system for extended collective licenses—, these conclusions may be applied to it. Member States are entitled to define the conditions for the exercise of an exclusive right, as long as they do not deny them their own preventive structure, nor empty it of its content[35]. These judgments reinforce the idea that mandatory collective management is a condition of the exclusive right that deprives the rightholder of certain powers. Consequently, it must be limited.

Mandatory collective management of exclusive rights may, thus, be imposed only in extraordinary cases. Recourse to CMOs should be generally on a contractual basis, in other words, compulsory collective management should be subsidiary[36]. The foregoing assertion might be drawn from the careful way in which the aforementioned CRMD regulates the relationship between rightholders and CMOs. For example, its Recitals 2, 6, and 19 stress out the owners' freedom to choose CMOs. Actually, Recital 2 expressly states that: *it is normally for the rightholder to choose between the individual or collective management*. This principle is repeated in Article 5.2, which is further complemented by paragraph 4 reflecting the right to terminate contractual relations with the CMO. These provisions aim to strengthen the rightholders' position keeping them able to decide for themselves and safeguarding individual management[37].

Knowing that mandatory collective management of exclusive rights should be reserved for special cases, we could ask ourselves: which cases? This mechanism is only justified when individual management of rights is impossible or unfeasible, otherwise the

[34] CJEU, 16th Nov. 2016, *Soulier and Doke* (C-301/150), ECLI:EU:C:2016:878. CJEU, 14th Nov. 2019, *Spedidam* (C-484/18), ECLI:EU:C:2019:970.
[35] BENABOU, V.-L., «Pourquoi l'arrêt Soulier et Doke dépasse le cas ReLire : le contrôle par la CJUE des modalités de l'autorisation préalable de l'auteur», *Dalloz IP/IT*, no. 2, 2017, p. 3 on line version.
[36] LUCAS, A., LUCAS, H.-J. & LUCAS-SCHLOETTER, A., *Traité*… cit., pp. 811-812 ; and SIIRIAINEN, F., «Gestion des droits d'auteur et des droits voisins par un organisme . – Chapitres I à III du Titre II du Livre III de la Partie I du Code de la propriété intellectuelle . – CPI, art. L. 321-1 à L. 323-15», *JCl Propriété littéraire et artistique*, Fasc. no. 1.550, 20th Mar. 2018 (updated: 1st Jun. 2022), par. 9.
[37] GUIBAULT, L. (updated by JAQUES, S.), «The Collective Rights Management Directive» in *EU Copyright*… cit., pp.532-533.

authors' rights must be left intact[38]. On the other hand, certainly, some rights are only effective thanks to this mechanism. In fact, it has been argued that compulsory collective management may be a necessary instrument to comply with Article 36 BC, which requires Member States to take the necessary measures to make the Convention effective[39]. The mentioned Articles 9.1 and 10 SCD follow this rationale. The former establishes mandatory collective management for the cable retransmission right of individual rightholders. But in case of broadcasting organizations, recourse to CMOs will not be compulsory (Article 10). Broadcast enterprises are few and easily identifiable, while individual rightholders are uncountable, hence individual negotiations are almost impossible, then mandatory collective management is needed to facilitate acquisition[40].

On the other hand, scholars have maintained that mandatory collective management is the natural path to collect and distribute the amounts due for simple remuneration rights[41]. It is true that they do not imply the author's control over the work. Even so, the exercise of a right does not only consist of the authorization or prohibition of use, but also includes the power to negotiate the remuneration to be paid. Therefore, it could be argued that the previous criteria to impose compulsory collective management —impossibility to conduct an individual negotiation— might be applied to simple remuneration rights as well. An example of this is the resale right, whose management the EU leaves the Member States free to decide for. Germany, for example, has not imposed collective management (§26 UrhG). On the other hand, in Spain it was not subject to mandatory collective management until this mechanism was imposed by the Ley 2/2019, de 1 de marzo. No justification of such a substantial change was provided. We deem —as many scholars did— the ancient regime to be most suitable since the rightholder and the relevant acts in a work of art's resale are perfectly identifiable[42].

The abovementioned principle advises to conduct collective negotiations and management when the acts subject to an ancillary right are produced massively and by unidentifiable subjects. Thus, based on this consideration, Article 32.2 1º TRLPI was

[38] FICSOR, M., *Collective Management*… cit., pp. 88-89; and BERCOVITZ RODRÍGUEZ-CANO, R., «Tasa Google… cit., p. 27.
[39] *Ibidem*, pp. 41-42.
[40] DREIER, T., «Satellite and Cable Directive» in *European Copyright Law. A Commentary* (WALTER, M., & VON LEWINSKI, S., eds.), OUP, Oxford, 2010, p. 455.
[41] FICSOR, M., *Collective Management*… cit., pp. 96-100; SIIRIAINEN, F., «Gestion des… cit., p. 9 ; and VON LEWINSKI, S. «Réflexions sur le rôle et le fonctionnement des sociétés d'auteurs», *Propr. Intell.*, no. 18, 2006, p. 28.
[42] CASAS VALLÉS, R., «Comentario… cit., p. 498.

heavily criticized. Although newspaper articles are object of massive aggregation, the ISSPs who carry it out are few and identifiable[43]. Individual negotiations are, then, possible, and desirable. Consequently, preventing press publishers from negotiating themselves was against their interests.

On the other hand, the CNMC on the mentioned report also dissented of mandatory collective management due to the anticompetitive effects it entailed[44]. Likewise, in a previous report, the CNMC had noted that the Spanish legislator has unjustifiably introduced this mechanism in more cases than those foreseen by the EU. Compulsory collective management enhances CMOs' monopolistic situation leading to an ineffective management. In conclusion, mandatory collective management constitutes a legal restriction hat hinder the entry of new operators[45]. For all the above, the CNMC advised to reduce strictly this mechanism to those cases enshrined in the directives.

To conclude, apart from the fact that collective management is sometimes the only way to guarantee a real content to a right, voluntary recourse to CMOs has numerous advantages. Firstly, CMOs have a greater bargaining position than authors who are in a situation of imbalance *vis-à-vis* the companies that make use of their works, which, moreover, usually are their employers[46]. On the other hand, obtaining a license through a CMO gives the user greater legal certainty and reduces negotiation costs. However, these advantages do not detract from the conclusion reached above. Compulsory collective management should be reserved for those cases in which individual management is unfeasible, and this restriction is particularly marked in the case of exclusive rights.

II. ASSESSMENT OF THE TWO MODELS

By means of Art. 80 of the Real Decreto-ley 24/2021, de 2 de noviembre, the new press publishers' right was transposed in Spain, hence —logically— Article 32.2 1º TRLPI's remunerated exception was abrogated. It is, therefore, possible to examine the results of the six years of application of this limitation (**1**). Afterwards, a review of the press publishers' right transposition in some Member States will be conducted (**2**).

[43] LÓPEZ MAZA, S. «Comentario al… cit., p. 654; and XALABARDER PLANTADA, R., «The remunerated… cit., pp. 11-12.
[44] CNMC, Informe PRO/CNMC/0002/14, cit., p. 9.
[45] CNMC, Informe E-2008-04, 21st Dec. 2009, pp. 8; 48-51; and 99.
[46] VON LEWINSKI, S., «Mandatory collective… cit., p. 2.

1. Assessment of the Spanish remunerated exception

Article 32.2 1º TRLPI quickly caused unease within the digital journalism sector. Negative responses did not take long to come, and shortly after the reform was approved in Parliament, Google News announced the closure of its services in Spain arguing that the payment of the fair compensation would prejudice their activity and, therefore the access to information[47]. Consequently, the exception was not widely applied. In fact, CEDRO, the CMO in charge of literary works rights management, only formalized agreements on the payment of compensation with a few aggregators, such as Huawei[48]. In this regard, it is worth noting the amounts collected in recent years on account of the press aggregation exception. According to CEDRO's 2021 annual report, the collection made for this concept in 2021 amounted to €49,895, while in 2020 and 2019 it was €138,995 and €49,895, respectively[49]. These quantities would probably have been substantively higher if Google News had not abandoned the Spanish market.

Due to its limited application, the courts had little opportunity to interpret and shape Article 32.2 1º TRLPI. The only example is the judgment 208/2021 of Madrid Commercial Court no. 16 on the *CEDRO vs. Google* case[50]. Deciding whether the service Google Discover constitutes an aggregator, the Court made some notable reflections. Firstly, it stated that the provision of a mandatory collective management is not *per se* contrary to the European competition law without going into further details. However, the Court considered that the reproduction and making available to the public of a snippet of two lines does not constitute an act of aggregation, therefore it escapes the remunerated exception's scope. Finally, although even the judge states that Google's refusal to provide the relevant data has a negative impact on its calculation, the tariff used to calculate the amount due (€1,113,275.76) was declared inequitable and not transparent.

To sum up, it is possible to consider this judgment the final blow to the Spanish experience which recently had already been abrogated. Likewise, the German neighbouring right had been declared inapplicable by the CJEU two years before[51]. Article 32.2 TRLPI presented numerous inconsistencies with international and European

[47] GINGRAS, R., «An update on Google News in Spain», *Google Europe Blog*, 11th Dec. 2014.
[48] CEDRO, *CEDRO cierra un acuerdo con Huawei para colaborar con el sector de medios de información*, 7th Oct. 2019.
[49] CEDRO, *Memoria anual 2021*, 2022, pp. 73-74.
[50] Madrid Commercial Court no. 16, 20th Dec. 2021, no. 208/2021, ECLI:ES:JMM:2021:11356.
[51] CJEU, 12th Sep. 2019, *VG Media* (C-299/17), ECLI:EU:C:2019:716.

law and raised severe barriers to the internal market[52]. But it was the unwaivability and compulsory collective management, which caused a considerable rigidity, what ultimately prevented this reform from achieving the expected results. In conclusion, leaving little room for negotiations makes it difficult to balance interests.

2. National transpositions of the DSMD

Despite Article 15's silence on whether or not the neighbouring right can be unwaivable and subject to mandatory collective management, the European Commission has provided for a rather clear guidance[53]. Member States are not allowed to impose CMOs mandatory action, because it would deprive the rightholders of exercising an exclusive right. On this basis, Member States shall implement Article 15 DSMD.

By means of adding the Articles L. 218-1 to L. 218-5 to its Code de la Propriété Intellectuelle (CPI), France was the first country to transpose the press publishers' related right. Article L. 218-3 indicates that it may be transferred, thus, nothing prevents publishers from granting free licences. With regards to collective management, though it was initially envisaged to be mandatory, it was made voluntary, as the latter system was seen to be more beneficial for the reliability of online news[54]. In other matters, the French legislator's effort to define the criteria to be followed when setting the remuneration is highly admirable. Inspired by the copyright regime, Article L. 218-4 enshrines the proportionality principle, then the remuneration must be based on the revenues obtained from the exploitation avoiding a standard fee[55]. As seen in the Spanish experience, an accountability obligation has a great importance, hence, whereby Article L. 218-4 III CPI ISSPs will have to supply all relevant data to calculate the remuneration[56].

Finally, journalists right to an appropriate share of the revenues is regulated in Article L. 218-5 CPI. No further guidance on what is to be understood as «an appropriate share» is given —except that it shall not have a salary character. Nonetheless, the French legislator describes the process of negotiations thoroughly. France, in this sense, places

[52] BERCOVITZ RODRÍGUEZ-CANO, R., «Tasa Google… cit., pp. 11-21; XALABARDER PLANTADA, R., «The remunerated… cit., pp. 19-39; and ROSATI, E., «Neighbouring Rights… cit. pp. 583-584.
[53] EUROPEAN PARLIAMENT, *Answer given by Mr Breton on behalf of the European Commission*, E-004603/2020, 9th Nov. 2020.
[54] See: LUCAS, A., «Droit voisin de l'éditeur de presse», *Propr. Intell.*, no. 72, 2019, p. 67.
[55] AZZI, T., «Commentaire de la loi du 24 juillet 2019 tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse», *Dalloz IP/IT*, no. 1, 2020, p. 4 on line version.
[56] LUCAS, A., «Droit voisin… cit., p. 67.

an enormous role to professional associations, unions and CMOs, giving this right a strong collective character. In case of failure of negotiations, a specific commission will help the parties to reach an agreement, and, ultimately, it will decide the final amount.

As in the past, Google suddenly changed its content display policy to avoid paying remuneration[57]. Under the risk of losing visibility, publishers did not have very much of a choice. Yet, several press associations brought Google to the French Competition Authority (AC). In its first decision, in order to impose interim measures, the AC analyses whether these actions are likely to constitute an abuse of a dominant position[58]. It is worth recalling that the notion «dominant position» has been defined by the CJEU as a position of economic strength which enables a company to prevent effective competition on the market by giving it the power to behave independently of its competitors, customers, and consumers[59]. The AC declared that this company's acts are likely to constitute an abuse in three dimensions. First, the sudden change of Google's policy might be considered an imposition of unfair trading conditions characterized by the absence of negotiations. Likewise, Google might have committed accessory discrimination. Finally, this company had circumvented the newly created neighbouring right distorting its spirit and goal. For all the above, the AC stablished the conservative measures requiring Google to negotiate with French publishers in good faith. Google did not want to, in any case, conduct such bargaining, so it tried to avoid its obligations by supplying incomplete and partial data. For this reason, The CA published a second decision condemning Google to pay half a billion euros for breach of the principle of good faith and thus failing to comply with the injunctions[60]. This marked a turning point on the issue, and later, Google submitted a series of commitments whereby it compromised to conduct negotiations with all the press publishers envisaged by the CPI in good faith and supplying all the relevant data. These undertakings were accepted by the AC last year[61]. As a preliminary conclusion, it can be stated how useful an effective answer from the competition law might be.

France was the testing ground of the press publishers neighbouring right, and Member States paid close attention to what was happening with Google. This conflict and

[57] GINGRAS, R., «Nouvelles règles de droit d'auteur en France : notre mise en conformité avec la loi», *Blog Google France*, 25th Sep. 2019.
[58] AC, Décision 20-MC-01, 9th Ap. 2020. See also: CHONE-GRIMALDI, A.-S., «Google enjoint de négocier des licences avec les éditeurs de presse», *Légipresse*, no. 10, 2020.
[59] CJEU, 14th Feb. 1978, *United Brands* (C-27/76), ECLI:EU:C:1978:22, no. 65.
[60] AC, Décision 21-D-17, 12th Jul. 2021.
[61] AC, Décision 22-D-13, 21st Jun. 2022.

the desire that it should not occur in other Member States is reflected in the various transpositions, and that is particularly marked in Spain. The Spanish transposition in Article 129 bis TRLPI is inconsistent. At some points it goes unnecessarily further than the DSMD, while others in need of more development are not the focus of attention. To begin, the decision in Article 129 bis.4 TRLPI not to make the publishers' neighbouring right unwaivable and subject to mandatory collective management is welcomed. On the other hand, the fear of a conflict with Google imbues paragraph three of this Article. This firstly points out the principles which have to guide the negotiations such as contractual good faith, and the exclusion of abuse of a dominant position, among others. Was this specification necessary? Are not these principles contained in other parts of the legal system? Finally, Article 129 bis.3 states that Section I of the Intellectual Property Commission shall have jurisdiction in disputes concerning the agreement. However, the process is not detailed, which raises many questions, for example, if this process is a mediation or an arbitration mechanism[62]. Regarding journalists' right to an appropriate share, Article 129 bis.8 just adds that its rightholders may entrust its management to a CMO. As a final point, one of the major absences in this provision is the criteria for the remuneration of editors and journalists, something that would have undoubtedly improved their position.

The Italian transposition contained in Article 43 bis of the Italian Copyright Act (LDA)[63] contains an exhaustive regulation of the negotiation and licensing question. Without enshrining unwaivability or compulsory collective management, so much emphasis has been placed on the protection of publishers through assisted negotiation and arbitration that it has been described as a hybrid mechanism between individual and collective negotiation[64]. In this matter, the Italian Communications Guarantee Authority (AGCOM) has been vested several powers, the first of which is the establishment of criteria for the remuneration, which, by the way, is surprisingly described as fair compensation (*equo compenso*). The Italian legislator also sets a number of principles which must guide the negotiations in paragraph 9. Yet, in case of failure of negotiations, one of the parties may ask the AGCOM to determine the final amount to be paid. Nonetheless, the most astonishing part is the appropriate share due to journalists which is

[62] SÁNCHEZ ARISTI, R. & OYARZABAL OYONARTE, N., «Decadencia y caída del TRLPI: la trasposición de la Directiva 2019/790 sobre derechos de autor en el mercado único digital», *Pe. I.*, no. 69, 2021, p. 114.
[63] Legge no. 633 sul diritto di autore 2022, 22nd April 1941.
[64] SGANGA, C. & CONTARDI, M., «The new Italian press publishers' right: creative, fairness-oriented… and invalid?», *JIPLP*, vol. 17 no. 5, 2022, p. 423.

strictly shaped. According to Article 43 bis.13, freelance journalists will receive between the 2%-5% of the publisher's revenues, while employees will fixate the quantity via collective agreements.

Clearly, the appropriate share right is the element which most varies throughout Member States. In Germany, the legislator has decided to set a minimum quota of one third of the revenues obtained by the publisher (§87k UrhG). Nevertheless, a contrary arrangement can be made if it is reached through a collective agreement. It is remarkable that this right is subject to mandatory collective management. Even though some scholars[65] do not see this as problematic with respect to DSMD, we have to disagree. In this line, Croatia has also established that the journalists' right to an appropriate share shall be managed collectively without offering further guidance[66]. On the other hand, even though Poland has not yet transposed the DSMD, there is a legislative proposal to that purpose. There it is foreseen that authors shall receive half of the revenues obtained by publishers, for it is considered to be a proper reflect of journalists' contributions[67]. To conclude, none of these countries regulate a negotiation or arbitration process for publishers and ISSPs, nor do they set any criteria as regards publishers' remuneration.

CONCLUSION

In the process of strengthening journalists and press publishers' position, the principles enshrined in the international treaties and in the European law must not be distorted. Unwaivability is deemed to be an element reserved to simple remuneration rights to protect the weakest link in the value chain, a natural person, a creator. Compulsory collective management, on the other hand, must be reserved for the situations where individual management is unfeasible or supposes unreasonable costs. In short, rightholders should be enabled to negotiate and exercise their rights themselves.

In a digital age, a balance of interests must be found, as the Spanish experience has shown. To that purpose, flexibility is necessary. Consequently, the right of press publishers, as an exclusive right in favour of a legal person, should neither be unwaivable nor subject to mandatory collective management. The latter feature does not seem

[65] VON LEWINSKI, S., «La mise en oeuvre de la Directive sur le marché unique numérique de 2019 en Allemagne», *RIDA*, no. 271, 2022, p. 82.
[66] Art. 167 Zakon o autorskom pravu i srodnim pravima NN 111/21.
[67] KOWALA, M., «The Polish transposition of the press publishers' right: waiting for the miracle?», *JIPLP*, vol. 17 no. 5, 2022, pp. 434-435.

appropriate for the journalists' right to an appropriate share either, as the parties involved, and the acts of exploitation are well identified. However, as a simple remuneration right in favour of the creator, the journalist's right to an appropriate share could be unwaivable, for it meets all the exposed requirements. On the other hand, we have seen the dissimilar solutions that Member States are implementing when transposing DSMD, specially in regard to the authors' remuneration right. We consider the quota system of Italy, Germany, and Poland to be unduly inflexible and it restraints them from pursuing their own interests. Such differences raise barriers in the internal market contradicting DSMD's goals. Thus, it would not be unusual for the CJEU to seek further harmonisation.

To conclude, both tech giants' dominant position and press publishers weaker bargaining position are undeniable. And, even though mandatory collective management is not advisable, the recourse to CMOs could be effective, but on a voluntary basis, for it is true that they are able to enhance rightholders bargaining position. Likewise collective negotiation, mediation and arbitration might be a useful tool. But, in any case, competition law must accompany all these solutions to ensure a remuneration that enables the sustainability of the digital journalism market.

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