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## The digital press and the defence of intellectual property rights: The Spanish conflict as a European Case Study

**Abstract**

**This article analyses the on-going struggle over property rights in journalism in Europe, with a particular emphasis on the situation in Spain. To do so, we have carried out a historical review of the main conflicts on which the defence of intellectual property on the internet has centred. The European legislative system has tended to shy away from involvement in the area. The decisions and actions of the Member States have revealed a lack of common policy in the field of intellectual property rights as a result of the facultative nature of EU Directives. State judicial bodies diverge in their regulation of the protection of the press regarding news aggregators. Intermediaries are deemed parasites of the transformed value chain of the press industry by certain sectors. In the face of the tension which has surfaced between editors and news aggregators, diplomacy would appear to have become a key player as mediation takes place, with the intermediaries attempting to reach press collaboration agreements with the giants of the net. The services and activities which feature in the digital environment outpace judicial orders and, consequently, out-of-court settlements appear to be preferred by some media. At the same time, they await the EU authorities' debate on the regulatory framework, which is expected to afford greater protection to press editors.**

**Keywords**

**Copyright, digital press, Spain, Europe, Google News, news aggregators.**

**1. Introduction**

The development of the press on the Internet is proving to be a complex process and with each step it would appear that the sector is having to deal with new problems and new players. During the first years, readers read the news on the websites of the newspapers. However, with the arrival of the 21<sup>st</sup> century, search engines took on a significant role as intermediaries. Search engines such as Google have become a key tool for viewing information and redirecting traffic towards the media.

Despite the visibility which the search engines and some new internet players have afforded the media news stories, editors have not always felt that these intermediaries have favoured them – over time Internet giants have challenged the Fourth Estate, breaking the balance and the business models of this industry of culture (Simón, 2016).

Services such as Google News, which was created in 2002, and other systematic news aggregators (Yahoo News, Flipboard, etc.), which show the headlines and the first lines of the information published in the newspapers along with a link to the media, have become a thorny issue for the press. “In 2006, the World Association of Newspapers accused the search engine of ‘kleptomania’ and launched a campaign against it for the exploitation of its contents” (Redondo, 2013: 60). Meanwhile, the directors of newspapers accused Google and the rest of aggregators of unfairly taking advantage of their work (Chyi, Lewis & Zheng, 2016: 2; Tworek & Buschow, 2016: 2127). Whilst it is true that, initially, the newspapers held a practically unanimous position, the US focus has varied with time. In the USA the pivotal moment of the conflict was between 2007 and 2010 (Chyi, Lewis & Zheng, 2016: 2), and the aggregator would soon be perceived as an ally rather than an enemy to be fought. By contrast, in Europe, the conflict has intensified over time and even though the situation differs from one country to another, Spain and Germany are leading the battle with their legislation against the aggregator, while European authorities debate a regulatory framework which affords news editors greater protection.

At the same time, the digitalisation of the video and audio archives of the press and the visibility which the search engines have granted to news from the past, have also led to tension between the European press and search engines. The demand for the right to be forgotten of individuals who were involved in stories meant that the media and the search engines tried to dodge the responsibility of managing this right with each side claiming it was the other's responsibility. Once the European authorities had determined that it was mainly the responsibility of the search engines<sup>1</sup>, the press felt that they were not doing a good job of managing the requests of the right to be forgotten (Santín, 2017: 304).

Although it is true that the prominence of search engines, in particular Google, has triggered a war in the field of journalism, it is also true that it has led to opportunities for growth and innovation for the media. Relations between Google and the press in Europe exemplify this ambivalence –press editors maintain open warfare against Google whilst, at the same time, in their relationship we can detect signs of harmony between the two players: agreements, policies of collaboration and project funding all form part of the relationship with the media, especially with the most powerful editors.

In this article we have studied the history of the defence of author's rights in the field of journalism in the digital age, and we have focussed our attention on the tension which prevails in Europe –and particularly in Spain– with Google, for the defence of author's rights in journalism. We go into more detail with precedents and solutions for the future and we finish by describing the current situation of the press and their relation with Google and the news agents which act as intermediaries.

## **2. Protecting the work of journalists**

During the 19<sup>th</sup> century, considerable steps were taken to protect the rights of authors – in addition to national laws being created, international laws also began to come into force, for

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<sup>1</sup> The EU Regulation 2016/679 of the European Parliament and the European Council, of the 27<sup>th</sup> of April, 2016, dealing with the protection of people in the area of how personal data are used and the free movement of these data states that search engines deal with data and, as such, they should be held responsible for the data they process. Along those lines, there is the finding of the European Court of Justice. Case number C-131/12 (Google Spain, S.L., Google Inc. / Agencia Española de Protección de Datos, Mario Costeja González) of the 13<sup>th</sup> of May, 2014.

example, the Berne Convention of 1886 for the protection of literary and artistic works (EDL 1973/1391). It was followed by, amongst others, the Universal Convention of Geneva of 1952 regarding author's rights (EDL 1952/50), and the World Intellectual Property Organization Copyright Treaty about performance phonograms, adopted in Geneva in 1996 (EDL 2000/86622). The laws about author's rights are included in what is generally called "intellectual property laws" and their evolution, as is pointed out by Rodríguez Pardo, "amounts to the chronology of constant development at the expense of the technological advances taking place in the *mass media*" (Rodríguez Pardo, 2001: 126). Such advances are currently being marked by the development of the Internet. It is an area in which conflicts involving newspaper editors and intermediaries are ever-present.

Above and beyond the conflicts between editors and players from outside the media, it is worth pointing out that, at the beginning, the fact that Internet brought with it new ways to use works and new ways to market them also led to conflicts between editors and those journalists who understood that they were giving their work for publication in print and not for digital platforms (Santín, 2007: 357). Currently, that problem is solved with the negotiation of the contract which is signed by the employer and the newspaper in which the latter, in general terms, grants the universal and unlimited economic exploitation of their author's rights to the company which hires them (San Martín, 2010: 7). This normally implies the appearance of their journalistic work in the different platforms which allow its distribution. (Corredoira y Alfonso, 2010: 125).

Having clarified that point, it must be pointed out that not all journalistic work enjoys author's rights – in the case of mere information, the judicial order does not always grant it added value. In that sense, we can distinguish between short news items, which are not subject to author's rights and which could even be written by robots, and journalistic genres which require greater presentation and present acknowledged creativity and originality and, thus, they are granted protection. That is established in the Berne Convention in article 2.8 which leaves daily news and simple information outside the auspices of protection<sup>2</sup>. In these cases, it is felt that the right of the public to access information is more important and, in addition, it questions "the possible originality in the composition and expression of such short news briefs which merely reflect actual facts" (Valdés, 2013: 80). Irrespective of this nuance, the intellectual work of the journalist and their final product falls within the broad concept of protected work.

The achievement of this legal protection which has been granted to journalistic work and the rights of the journalist as an author, as Díaz Noci (1999) states, is linked to the perception which the society and professionals from the field of journalism have of themselves. The professionalisation of the journalist, derived from the development of company journalism and that professionalisation, brought with it their recognition as an author. This recognition has been left open to question as the technological advances and the development of digital journalism have made it easier to copy information and generated a new environment of information exchange. On top of that, plagiarism has become a common feature of journalism. This has been demonstrated by the work of Gagé, Hervé and Viaud (2017) which states that in the French media only 36% of journalistic content is original and that 56% of all articles have less than 20% originality.

Given that scenario and the appearance of intermediaries, who seek to benefit from the journalistic work carried out by others, daily newspapers are looking for ways to protect their intellectual property rights. They resort to the "rhetoric of robbery" calling for the

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<sup>2</sup> That is stated in the Inter-American Convention on the Rights of the Author in Literary, Scientific and Artistic Works (Washington, 1946).

states to create new laws to resist the new media (Tworek & Buschow, 2016: 2127), but being careful not to see the distribution of their material harmed.

### 3. The first conflicts: press clippings

Around the mid-1990s, daily newspapers first appeared on Internet and, since then, they have had to deal with many changes. One of the most controversial of these was a consequence of the violation of intellectual property. The first signs of tension in the field of the press with regard to the digital framework soon arose with the so-called “*press clippings*” which had already appeared in their off-line version. In professional circles there was already question marks in the nineties regarding “those companies whose main activity is the sale of press summaries to institutions or companies (third parties), in other words, pieces of work which are simply and exclusively taken from other media and do not contain any original work” (Díaz Noci, 2003). They relied upon the right of quotation to carry out these practices for which they obtained an economic benefit.

EU law said nothing in this respect and the EU Directive 2001/29/CE which dealt with the harmonisation of certain aspects of author's rights and rights related to author's rights in the field of information, did not state a clear position concerning the problem of *press clippings*, in as much as it granted the Member States freedom to act. This position led to very differing situations with regard to the regulation of author's rights in a single market. According to the representatives of the Federation Internationale des Bureaux d'Extraits de Presse, the main hurdle faced by legislation in the area of copyright in Europe was precisely that the law varied from one country to another (Jiménez, 2003 cit a Henne). Whereas in Sweden, for example, sending news stories by fax was forbidden –they had to be sent physically– in Germany sending by fax was permitted but distributing them electronically was not and neither was it legal to make more than seven copies of any one document. In Spain and Italy no requirement existed whereas in the UK, France and Switzerland a levy had to be paid for each newspaper page copied (Jiménez, 2003).

Faced with the complexity of the problem, in Spain, where the law did nothing to stop the practice of *press clippings*, some media groups (Recoletos, Unedisa, Vocento, Prisa and Godó, formerly Prensa Ibérica) joined forces in 2002 in the so-called Press Rights Management Group (Gedeprensa) so that they could collectively defend their rights as editors and their right to receive compensation for the commercial exploitation of journalistic work. The Spanish Association for the Monitoring of Information and Advertising, and other private companies in the press cuttings sector opposed these editors' claims, on the basis of their right to quotation. Following a long legal process in which they debated not only the legality of press cuttings but also the monopoly position of the management group which accounted for 80% of Spanish newspapers, in 2006 the National Court allowed the creation of the Management Group and, at the same time, a legal reform was undertaken.

The Law 23/2006 modified the combined text of the Intellectual Property Law (TRLPI) harmonising and clarifying the existing legal rulings, restricting the limits of the right to quote for *press clippings* and letting each newspaper decide if it permitted this practice, if it required some form of fair compensation or if it established any reservation (TRLPI, article 32)<sup>3</sup>.

Most Spanish press editors ended up delegating the management of their rights to the Spanish Centre of Repographic Rights (CEDRO). As such, in Spain it is the CEDRO which, in accordance with the fees which each editor has established, looks after remuneration. This

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<sup>3</sup> For a judicial analysis of the reform, see the works of Corredoira y Alfonso (2012) and Peinado & Solana (2008) among others.

solution was satisfactory for the press but the development of technology soon threw up new problems for newspaper editors –news services appeared offering not the copying of the news stories but links to them<sup>4</sup>.

#### 4. Aggregators: A new model of distribution

Advances in new technologies would soon turn press cuttings into practically a minor problem (Xalabarder, 2015: 127). Search engines improved their services with greater specialisation all of which led to a new controversy: The use which news aggregators such as Google News, which first appeared in 2002, made of the news.

Although news aggregators were not a totally new thing – since the beginnings of the Internet manual aggregators already existed – the arrival on the scene of large companies like Google and Yahoo, with the creation of automated aggregators which made it possible to access content from a large number of sources, was the flame which lit the fuse of controversy (Guallar, et al, 2013: 43). Tworek & Buschow (2016: 2120) compare this modern-day struggle of the press against aggregators with the one which editors fought against the radio in the 1920s and 1930s. At that time, they were calling out for new laws to protect their work from the emerging media. The story is repeated almost a century later, but this time the emergence of new media signifies a more drastic modification of the distribution model of information and a transformation in the value chain of the press industry, which is knocking the large newspaper publishers off their stride.

The idea that some users may content themselves with the little information available on the link and, consequently, never access the news story in the original source, is something which worries the press sector. Based on this possible substitution effect, the idea that aggregators are acting like parasites of the press spread easily, as part of the sector found in these aggregators someone to blame for the steady fall in income which newspapers had been suffering.

The conflict between the media and news aggregators spread to social aggregators, which positioned themselves more and more powerfully as a reference for the news. In these cases it is the users, themselves, who determine the informative content which is to be published on this space by sending information of their interest and linking it to the original source. Users vote for and/or comment on the news stories (Guallar et al, 2013: 46).

These news ways to interact with information, and the changes in the model of use and reading of the press, have made it obvious that the importance of daily newspapers has begun to decrease with the possible exception of the opening lines of their information. With practices such as those performed by aggregators, some editors felt, and continue to feel, that they are losing most of the value of their product. However, it is not merely a question of a loss in direct readership, but also of advertising income as a consequence of fewer visits. By contrast, advertising income in the context of the internet is constantly increasing but this increase is not passed on proportionally to the press, since the internet giants account for the lion's share of advertising and almost 84% of global spending on digital advertising (not including the Chinese market) goes to Google and Facebook (*Financial Times*, 2017, quoting GroupM).

The battle for intellectual property rights which we consider in this piece of work has, as its basis, the fact that no monetary value is being given to the digital product, and the general search of European editors for ways to find compensation for their losses. However,

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<sup>4</sup> The possible infringement of the author's rights of website headlines by using links has been studied by the European Court of Justice. For a detailed analysis of the cases C-466/12 (Svensson Case) and C-348/13 (Best Water Case) see Jorge Córdova (2015). The text goes into detail about the different types of links and the judicial situations which derive from them.

“in free market competition, the difficulty with placing a value on editorial content is not concerned so much with competition from Google and other aggregators as with a distribution model in which the value chain is being modified” (Cea-Esteruelas, 2013: 356). It is a model which came into being with digitalisation and the arrival of Internet and which has meant the editorial sector has had to face a downturn in sales, a loss of advertising income and, at the same time, an increase in costs as a consequence of digital integration and generally free access to its content (Maestro, García-Santamaría & Pérez-Serrano, 2016).

#### 4.1. The response of Member States to Google News: From legal conflict to diplomacy

The face-off between aggregators, particularly Google News, and editors, knows no borders and in Europe the lack of legislative harmony has become manifest once again with regard to this issue. Member States are resolving the conflict in very different ways and with very uneven results. The diverse judicial points of view, the ability of the press to exert pressure in each country and even the particular moment when the issue is being resolved have all led to different solutions throughout Europe. Some of these scenarios are highlighted below.

The editorial sector in Belgium –through Copiepresse, the management group responsible for the editorial rights of the Belgian press– was, in 2006, one of the first lobby groups to take legal action against Google, alleging that, in publishing and storing the information from Belgian daily newspapers as cache, they were in violation of the law of author's rights in that country (Laurent, 2011; Braga de Siqueira, 2015: 218). In 2007, the courts of the first instance (case n° 06/10.928/C) and the appeal court in May of 2011 (case n°. 2007/AR/1730) ruled in favour of the management group and ordered the search engine to remove the information.

Faced with the judicial decision and having to pay a fine for not obeying the sentence in the first instance, Google removed all information from the daily newspapers associated with Copiepresse and also eliminated them from search engine results. The newspapers suffered a fall in traffic which made them rethink their decision and, barely three months later, they asked to be reinstated in Google links. Despite the tension which was evident during the long judicial process, in the end the editors and the search engine giant reached an agreement and once again the information from the Belgian dailies was indexed. Google agreed to advertise in the different media involved and facilitate advertising solutions to the editors on the Google search engine (in particular, AdWords) to find new readers. The search engine agreed to try to increase editors' income by the distribution of *premium* content. In addition, it made a commitment to implementing social tools in the field of the press to boost the participation of readers in those media and collaborate in the distribution of the original work of editors on mobile platforms. (Google Europe Blog, 2012).

In Germany, faced with the pressure from the editorial sector, in 2012 action began with a view to reforming the law regarding author's rights aimed at granting greater protection to the informative content of newspapers. In the legal debate, Google played a very active role, starting a campaign in which it encouraged its users to either email or call Members of Parliament (Bundestag) to protest against the bill. The campaign, with the slogan “Defend your network. Go on finding what you're looking for” claimed that a law for the distribution of broadcasting licences, such as the one they were trying to pass, meant less information for citizens.

The law was passed<sup>5</sup> and forced Google to modify a key feature of Google News. The situation went from news stories appearing on the aggregator by default if the contrary was not requested (*opt out*) to them not appearing if the creators did not give their explicit consent (*opt in*). This was in line with other “international measures for the protection of intellectual property and privacy on the Internet” (ADEPI, 2013). The search engine was forced to remove photos and snippets from those daily newspapers which had not given their consent and, in their place, they were only allowed to show deep linking. As had been the case in Belgium years before, the newspapers experienced a considerable fall in their traffic of readers and ended up handing over their rights for free, although they have not given up taking legal action, turning the focus of their attention to the EU institutions in Brussels with the idea of requesting a tax.

This would be a similar tax to the one imposed by law-makers in Spain and which is irrevocable for newspapers in the latest legislative reform of the TRLPI. That led to the closure of Google News around the end of 2014 –a case which, given its uniqueness, we will study in greater detail in the next section.

Other Member States, for example, France, have opted for diplomacy in their battle with Google. There, the French lobby of editors, with the help of the Government, forced Google to come to an agreement, the terms of which mean that the US company will have to pay 60 million euros to editors to help them with the digital transition and it must also commit to working alongside them with their engineers and technical know-how (Mora, 2013) during this transition. Although the goal of pay-per-content or pay-per-link has not been achieved, the agreement would appear to have been well received in the editorial sector. In 2016 Google also reached an economic agreement with the Italian Federation of Editors (FIEG) requesting that the search engine recognise both the value of the content (something which it had already done in France) and that of the technological infrastructure which it was providing (Bahón, 2017: 141). It is also true that this agreement was preceded by legal wrangles, since the FIEG had taken legal action against Google in 2009 for abuse of a dominant position. They claimed that newspapers which had requested to be unsubscribed from *Google News* were disappearing from the results of the Google search engine and they felt this was harmful to their interests. FIEG considered the Google search engine a complementary service to the websites of the newspapers whereas *Google News* was considered a service which substituted them. (De Paula Roig, 2011: 180)

## 4.2 Spain and the closure of Google News

As was mentioned above, the Google wrangle in Spain is worth special attention, not only because Google closed down the Google News service in Spain when the legislation required it to pay a tax for including in this service the opening lines of the news of Spain's press with a link to them, but also because the Spanish model could, in the future, be considered by European authorities.

After the victory of Spanish editors in restricting the right of quotation for press clippings, the sector of the press in Spain, through the Association of Editors of Spanish Newspapers<sup>6</sup> (AEDE, 2016), started a new battle in 2007, this time against news aggregators. The editors represented by AEDE sought, in this way, to obtain income rights similar to the ones which cinema, music and book authors already had for the use which aggregators made of their articles.

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<sup>5</sup> The transformation of the law came about by including in the German author's right law (Urheberrechtsgesetz-UrhG) a section (with the articles 87f, 87g y 87h UrhG) dedicated to the protection of press editorials (Oberfell, 2013: 229).

<sup>6</sup> Since the 18<sup>th</sup> of May, 2017, AEDE is now called the Association of Information Media (AMI) to open itself up to all information media, whether or not they are a pay-to-use service, digital or printed.

That request could be nothing other than a little surprising since, as Cotino points out (2013), the newspapers, by and large, and with the protection of the law, were against their content being used for commercial ends but, at the same time, they were handing them over to be circulated over the Internet:

Digital media in Spain (...) explicitly facilitate their content being aggregated, compiled, and, to a certain extent, reused by users. That is what happens when the communication medium is the one that actively facilitates the RSS source –the feed for users to subscribe. There is also explicit consent when the medium gives authorisation on its own website for its news story to be assessed for possible inclusion on a news aggregator (for example, in the Spanish media with the icon *Menéame*). The same thing happens when explicit permission is given to recommend the news story on Facebook or to Tweet it. In all of these cases, it will be difficult, from a legal perspective, to deny the possibility of reusing the information of the digital medium in some way or another (Cotino, 2013: 56).

Despite the apparent contradictory attitude which was being shown by a considerable part of the press sector (and which continues to be the case today), the aim of charging for the summaries which Google and other aggregators make available to users led to another reform of the TRLPI. In this way, and following the request of the AEDE, the Law 21/2014 introduced a new paragraph in article 32.2 of the TRLPI in which it expressly authorises the search engines to include a link for Internet news stories for free and to aggregators in exchange for an appropriate fee, which editors cannot refuse:

Article 32.2 The making insignificant fragments of content available to the public by electronic news aggregator services by publishing them in newspapers or on journalistic websites whose goal is either purely informative, to create public opinion or for entertainment, does not require authorisation, notwithstanding the author's rights, or those of others entitled to those rights, to receive any equitable compensation. This right is unwaiverable and will come into effect through the entities which manage intellectual property rights. Be that as it may, if any third party makes any image, photographic work or even a photograph available to the public in newspaper publications or websites it will be subject to authorisation.

Notwithstanding what has been stated in the previous paragraph, providers placing services in the public domain which facilitate searches by single words which are referred to in the previous paragraph will not be subject to authorisation or equivalent compensation as long as that putting of services in the public domain has no commercial ends and it is strictly limited to that which is necessary to answer the search which a user has made previously. The making public of the service must include a link to the website from which the content originated.

The position of the press in the face of this reform which establishes an unwaiverable tax, neither was, nor is, unanimous. Even within the now-extinct AEDE there were voices of disagreement, for example that of the then president of the PRISA Group. Opposition from the sector of editors has been led by the Spanish Free Press Association (AEGP) and the Spanish Newspaper Editors Association (AEEPP, 2017), which is against this option since it does not deem news aggregators to be their direct competitors but rather favourable agents as they “encourage readers to redirect to the website of the original publication to reach complete information, thus increasing the number of visits” (NERA, 2015: 3).

The justification for making the fee unwaiverable was to avoid what has happened in Germany and Belgium where Google, faced with having to pay for links to certain media, chose to exclude them from its services. They probably thought that, if the tax was demanded by all the editors of the country, Google's response would be more moderate.



However, the position of Google News and other aggregators such as NewsUP in the face of this reform and the inevitable payment of a tax was to close down their services in Spain. The closure of Google News in Spain meant, according to different studies (Calzada & Gil, 2016; Athey, Mobius & Pal, 2017), a fall in the number of daily visits to the Spanish media. Calzada y Gil (2016) reckon this fall was in the region of 11% and they revealed that it was more significant in terms of international visits and also affected the sporting press more drastically.

Apparently, the law has not been beneficial, as the visits to newspapers have fallen slightly and, in addition, for a long time no aggregator agreed to pay the tax, either because they had closed down or they had managed to avoid the payment, for the moment, vetoing the content of the most avid supporters of the tax –the media which are associated with AEDE. This would be the case of the social aggregator, Menéame, which, after years of activity, has become the new target of CEDRO and, at the beginning of 2017, began to take measures to demand the payment of the tax (Méndez, 2017).

Irrespective of how the case of Menéame turns out, the situation looks like changing since Upday, a European news service for mobile phones developed by *Axel Springer* in conjunction with Samsung, which has begun to operate in Spain, has been the first to pay editors for the inclusion of non-significant fragments of digital content (CEDRO, 2017), after lengthy negotiations with CEDRO. The German group, with its news aggregator, Upday, has decided to pay, both for strategic reasons (paying the tax gives you a competitive advantage over the rest by including publications which the others cannot), but also because the group led the German battle against aggregators, so it was obliged to preach by example.

The difficulties of the agreement between Upday and CEDRO, which closed down at the end of June 2017, were caused mostly by how much had to be paid. Regarding the basis of Article 157 of the TRLPI, which obliges management bodies not only to set general, simple and clear tariffs which determine the remuneration required for the use of journalistic content and to value and consider in each case “the economic earnings obtained by the user for the commercial exploitation of the work” (art.157, TRLPI), negotiations began. The aggregator of *Axel Springer* negotiated a reduction of 0.05044854 euros per active daily user which CEDRO set up initially as a tax for aggregating news stories (Agudo, 2017), as Upday (like Menéame in its day had done), felt that figure was too high. At the time of printing this article, we do not know the agreed quantity.

## **5. The necessary EU response to the issue of aggregators**

The decisions and actions of the Member States reveal the lack of a common policy in the area of intellectual property rights as a consequence of the facultative nature of EU directives. Europe has opted for harmonising the period of protection of author's rights and certain associated rights with a series of directives (93/98CEE, 2006/116/CE 2011/77/EU) and regulating author's rights in the field of radio broadcasting. However, intellectual property rights in the field of the press are still mainly protected by national laws rather than EU laws. In the light of this fact, the press sector has manifest the need or opportunity for a line of common regulation in the new information society in which editors, as Emily Bell (2017: 68) states, have lost control over distribution.

The tense conflict in some countries for the defence of author's rights has led to European authorities trying to offer a common solution for Member States. Following that line, the European Commission announced in November 2016 its intent to modernise author's rights in the EU. The Commission has proposed the introduction of a right for editors, similar to the one which already exists in EU Law for film producers, recording producers and other players in creative industries, for example, radio-broadcasting groups. In doing so, the EU is acknowledging the fundamental role of the press in investing in

quality content, the information of which is essential for sustaining a democratic society (Comisión Europea, 2016). The main European news agencies have followed suit, claiming that their health depends directly on the media and the idea of something being free in journalism is a myth. Agencies warn that “if there is no readjustment, what is going to happen is a foregone conclusion. Media will continue to disappear. The citizen will not be informed appropriately or, in some countries, the State will be forced to make up for the shortage of resources of the media”. Consequently, the tax-payers will be the ones who will pay for the loss of profit which companies like Google and Facebook provoke (*Le Monde*, 2017).

The European proposal is, therefore, heading towards a single digital market but with the great handicap that the text presented by the Commission is not without controversy and not everybody sees it as being the solution. Despite the criticism which it has provoked due to its similarities to Spanish legislation which was met with strong opposition, the payment for systematic aggregation is compatible with the Berne Convention and also timely in the framework of fair competition. The much-needed balance of interests in this field “not only refers to rights and freedoms of the owners with respect to free movement of information but also the need for the law to balance the commercial concerns of all stakeholders involved” (Ricketson & Ginsburg, 2016: 46).

The norm would appear to recognise a similar right to the one set out by the Spanish legislation, although the payment method has not been specified and may depend, once again, on the negotiations of each country. Since Google News left countries like Spain, Google's position now appears to be close to pulling out of the entire EU if a harmonised European position is reached in tune with those countries who are most aggressively against Google. That is what the company indicated when it warned that any norm of that type could limit the chances of Google transferring traffic to the media for free via Google News or its search engine. It claims that “paying to show fragments of information is not a viable option for anyone” (Koch, 2016 cit. a Atkinson).

The details of the proposal which is to be debated in the European Parliament and which must be passed by the Member States, will determine the future of relations between the press and large search engines. For the moment, in the face of those threats, Europe seems ready for a fight and has questioned whether Google is “prepared to give up a market of 28 countries and 500 million people, which, in addition, has close ties with countries such as Switzerland and Norway” (Prieto, 2016 cit. a Oettinger).

The situation for the press appears to be a complex one, but in this hostile Internet environment noteworthy European initiatives have surfaced, demonstrating that co-operation with the large aggregators is possible. One such case which is worth highlighting is the Dutch online news aggregator, *Blendle*. It is based on micropayments and has a social network configuration. It is an aggregator which stemmed from a passion for journalism (Carlson & Usher, 2016) with the goal of adding rather than taking away and which has shown that innovation (Föster & Godulla, 2017) is the way ahead if we are to safeguard the press.

An innovation which came about thanks to Google. The different battles which the explorer is involved in with Europe have led the giant to reconsider its communication policy in the old continent (Sheftalovich & Hirst, 2015) and, at the same time, to acknowledge communication mistakes it made, in creating the *Digital News Initiative (DNI) program*<sup>7</sup>, to support innovation in European digital journalism, and, probably, to calm the temper of the main daily newspapers. This innovation has been seen as the key for the feasibility of the

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<sup>7</sup> Google, in particular, set aside a fund in 2016 and 2017 of 150 million euros to support innovation in the digital journalism industry. <https://www.digitalnewsinitiative.com/programmes/>.

media in the digital era at a time when the press is facing uncertainty over the reconversion of its business model. Faced with the financial crisis and the crisis of the sector itself and a public which is more and more elusive and less loyal to newspapers, Google's change of strategy appears to have convinced the media (even the Spanish ones), as they have taken part enthusiastically in the different tenders of ideas which have been held to obtain funding for the development and improvement of digital journalism. However, we must not overlook the fact that these aids of Google arrive in Europe at a moment of great judicial tension and almost a decade later than the USA. There, in 2006, when tension between editors and aggregators began to manifest themselves, alliances were forged between the press and the technological companies Yahoo and Google (*El Mundo*, 2006a, 2006b).

## 6. From aggregators to social networks

Moving beyond aggregators and without resolving the media conflicts in that field, social networks and application such as Facebook, Twitter, WhatsApp, YouTube... are taking on the role of key players in the distribution of information, as newspapers now claim that the number of readers coming from social networks is rising steadily (*El País*, 2016; Nielsen & Schrøder, 2014). That role for the networks will probably increase, not only because studies (Casero-Ripollés, 2012: 154; Gottfried & Barthel, 2015; Newman *et al*, 2016; Santín & Álvarez-Monzoncillo, 2017) clearly show that, for young people, social networks have become their main source of information but also because, in general, they – the networks – are investing in tools which make it easier to get information from those arenas.

In the realm of journalism and social networks, the main conflicts with regards intellectual property have affected the audiovisual sector and have developed around YouTube. As an example we can mention the confrontation between the daughter company of Google in France and the Institut National de l'Audiovisuel (INA) and, in Spain, with Mediaset.

Besides this tension in the audiovisual sector, the relationship between newspapers and social networks is peaceful in terms of author's rights. The press uses them to promote their content and interact with readers (Said-Hung *et al*, 2013; Carrera *et al*, 2012; Marta-Lazo & Garcia-Idiaguez, 2014) and some media –most of them European (*ABC*, *El País*, *The Guardian*, *Le Parisien*, *Spiegel*, *Bild*, *La Stampa*...)- allowed Facebook to offer readers the chance of viewing the news on the website without the user having to leave the social network. One innovation which was set up in May 2015 through *Instant Articles* and which newspapers can access in exchange for gaining a profit from their content on the social network even permits advertising on the published pieces and exploits native advertising – sponsored articles.

This distribution in the field of Spanish editors left the following questions hanging as a symptom of the uncertainty that the media were, and are, experiencing in the middle of this new digital scenario: Can a media communication group build a loyal customer base on social networks? Can the shared content become a stable source of income for a media group? (García Murga, 2016: 148).

At the beginning, Facebook went out of its way to come up with formulas which, beyond generating some income for the media, actually appealed to editors and the latter were keen to insert their news in *Instant Articles*. It even included systems whereby editors could obtain the intangible benefit of a closer relationship with their readers in the digital environment, incorporating two features which allowed greater interaction with users: The *Like* option on the editor's page and the possibility of subscribing to the news bulletins of the user's chosen editors. This could convert the occasional reader on social networks into a registered or subscribed reader. This is a complex step as studies (Ju, Jeong & Hsiang, 2014:

8) reveal that the presence of the media on social networks does not necessarily lead to a significant increase in the number of new digital subscribers.

The formula which Facebook proposed, despite having been presented on the social network previously, and received by editors with great enthusiasm on both occasions, and despite the possible success of the actions mentioned above, was neither welcomed with open arms by editors nor was it considered as a top priority by Facebook in the end (MediaLap Press España, 2017; Brown, 2018).

Facebook's ambition to gain a more significant role within the news has run out of steam. It tried to position itself in the world of journalism with the failed *FB Newswire* (Casero-Ripollés, 2015) and it has tried again with *Instant Articles*, but it has not managed to gain a foothold in the world of journalism and *fake news* have even led to it being discredited by the general public. That was what probably triggered a change of strategy in 2018. The *timeline* of users gave personal publications priority over brands and media (Rull, 2018) and *Instant Articles* took a back seat for Facebook after several changes in algorithms. The media have questioned this position for not recognising the social value of professional journalism and not knowing how to solve the problem of the publishing of fake news (Murdoch, 2018, Martín, 2018).

The winners as a result of this situation may be Twitter, the journalists' social media, and Google, which always appears to be ready to successfully exercise its internet hegemony. Its project, *Accelerate Mobile Pages* (AMP) is growing as newspapers use video more and more, while it explores the area of news alerts with *Newsstand*. So, the role of Google in its relationship with the media appears, once again, to be key, although the focus of attention, on this occasion, is on social networks.

## 7. Comments and Conclusions

Digital convergence (the transformation of both printed, audio and video analogical material into binary files) has generated two important consequences: (1) different types of information can be stored digitally on the same devices; and (2) contents can be distributed, either legally or illegally via the same channels. If we add the improvement in software of the different viewing and storage products and the improved connectivity of the multiple networks we find ourselves copying and distributing with consummate ease (Shy, 2011).

The distribution and viewing of information create a large network. For example, digital newspapers become a horizontal transmission because a website may be read simultaneously by many readers. Having said that, from then on, a dilemma arose because information tends to become a public good, as it is more and more difficult to exclude users by charging a price and there is no rivalry between consumers.

After a liberal policy as regards author's rights in the sector of the press, the European legislative system has led to very different national regulations. Given that scenario the EU has advocated harmonising the law and offering a judicial framework which protects the press from parasite-like links. The situation does not appear to be easy. Google would not seem to be prepared to pay any tax for linking the contents of Google News and the media would not appear to want to relinquish this service. Without Google in the market, the newspapers have lost circulation, but without a tax everything would return to individual negotiations between the press lobby groups in each country.

In the digital environment, services and activities moved more quickly than judicial orders and due to this lack of regulation –or, a very lax one– out-of-court settlements, have convinced some media. As an example of this we have the agreements which Google have closed with the French and Italian press and to which new agreements have been added, which the US company has signed with different media and European institutions. These agreements turned into economic aids and technological support which have reached

Europe by the hand of the giant one decade later than in the USA. However, they are proof that diplomacy in the old continent with Google and its news aggregator, for the moment, appears to offer more effective results than a direct confrontation in the courts. The legislative reform in Germany, and especially in Spain, make it evident that large aggregators boast considerable ability to pressure, in particular Google, which accounts for 90% of searches in Europe.

The bottom line is, Internet giants like Facebook, Google and Amazon have become “attention merchants” (Wu, 2016: 5), just as the newspapers, radio and the television were before them. They have all had to attract the attention of the consumer with something which appears to be free and then sell that interest to advertisers. In this way, double-sided platforms, which depend on customer loyalty, have been created. This could generate negative externalities for society as with so much competition, content may gravitate towards morbose or sensationalist stories, but also positive elements, for instance, a greater diversity of sources. The traditional media observe how these new, more efficient competitors take a large share of the advertising cake which *they* used to dominate.

The innovation programs – some of them within the framework of the DNI – which produced collaboration synergies between the diverse players involved in the conflict seemed to be a good idea, but will probably not be enough. The newspapers have made a deal with one who had been considered their enemy but sometimes, in somewhat desperate situations and after judicial struggles which they have won, only to surrender. Their actions give us an idea about the future of a sector which has been forced to transform itself by the technological advances and also to give up part of its journalistic production and reconsider the routes it can take to distribute and market its content. Being able to count on Google or Facebook would appear to be beneficial for increasing international visits in particular, but the fee is not altogether clear: for example, local newspapers charge for receiving local users but not international ones.

One part of the sector sees these Internet companies as predators which are devouring the advertising earnings on the network without giving back more than mere crumbs to the content editors. For other media (especially those which are exclusively digital and more modest) these companies allow them visibility for a public which very often does not know their newspaper and reaches it via this means. As writings have shown, the debate is, essentially, to determine if the substitutionary effect or the market expansion effect is more important.

The aggregators constitute an important challenge for journalism in as much as they question old, established authorities. Google radically expands access to the news; it offers diverse points of view in contrast to the singular voice of the newspapers; it breaks the classic conventions in the selection of news stories and the creation of a hierarchy; it changes the contextualisation of information and it overcomes its physical restrictions. (Carlson, 2007). Access is preferred over order and makes us consider what journalism is, and what it should be.

The role of social networks as an informative tool does not appear to be diminishing and in this space, in one way or another, the newspapers should also look for readers and make their content count in a context of abundance and noise which often casts a shadow on the journalistic work. Newspapers must improve their product, seeking quality as a differential factor. The future of the media requires, more than ever before, differential, ingenious, high-quality journalistic content to survive in the informative jungle of networks and the threat of aggregators.

Besides all that, the media must take advantage of the network and the services of the technological giants (like *Google Analytics*) to know their readers better and improve their services. The struggle of the European press in the old continent has, apart from the protection of the journalistic product, opened another front – following the trace of readers

on the net. Protectionist European politics appears to want to protect the intellectual property of journalistic work but also to deprive the media of the data which their readers produce. Quality journalism without salaries does not exist and it is essential for the press to seek ways of placing a monetary value on good journalistic content and manage the capture of advertising income more effectively.

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