Why we have to vote on the Trilogue mandate
remarks on the JURI-result regarding the copyrights in the digital single market

As shadow rapporteur in CULT, for our group GUENGL I would like to deepen some arguments and explain why I had promoted that we request as whole group to vote on the outcome of the Legal Affairs Committee in the plenary and why I would reject the mandate for the trilogue.

An ancillary right for press publishers don't do what does it promise: Art. 11

One of the most controversial articles in the Copyright directive is the European-wide implementation of an ancillary copyright for press publishers, in which platforms, blogs, information portals linking to articles and documentation have to pay for this referencing by acquiring licenses. Licenses are usually purchased for copyrighted content, for a particular type of use, once or multiple times, for a limited period of time, etc. Licenses for references, contrary to references to copyrighted content have never existed. That would be an over-interpretation of copyright. It transfigures the publishing work into a creative act.

The part of the press publishers, who stand behind the Art. 11, argues that it wants to support journalism and media pluralism with the "Linktax" and thus Art. 11 would finally benefit the authors in the journalistic field. A participation from the potential revenues trough the "Linktax" by the actual creators, journalists, photographers and reporters, is however not to be found in the legislative proposal.

Journalism should be well remunerated, no doubt. However, the crisis of press publishers in the Internet age is obvious. But the "Linktax" is not a way to improve sustainable both the situation of the journalists and the market position of the press publishers, as long as press publishers do not change their own marketing strategies on the Internet.

Like other creative works, journalistic works are protected by copyright, even with all older directives. To reimburse journalists well, must be solved within the *copyright contract law*. There is a lot of this within the copyright regulation proposed in Art 14 - 16. But the concrete reference to journalists can’t be found there, either.

An independent ancillary copyright for press publishers helps neither journalists nor media pluralism. Even it isn’t helpful for the press publishers, as the experiences from Germany and Spain show us, in which the ancillary copyright was regulated for press publishers (after 2010) and it has visibly failed. In Spain, google had switched off google news for a short time following the start of the special press publisher right. The result was a significant drop in sales, ultimately it was a blow to media diversity and the publishers themselves.

Linking to news portals is de facto advertising. Press articles can be found faster, sometime to be found at all. Many professionals can inform themselves quickly through the Internet. What publishers do when someone uses their links/snippets, whether they work with pay-walls, offer online subscriptions, this is ultimately up to the publishers and depended on their preferences.

In Germany, the existing law only hurt journalists and publishers, and Google was rewarded with a free license in the end after losing € 10 million to lawyers.[1] The functioning of the law has been analyzed in big studies and the result was, that the new law had no impact on the market position of major press publishers, but it has caused a great deal of damage to small news portals and uncertainty for bloggers who can't afford large law firms. The lobbyists behind the law in Germany are Springer, the Funke media and Burda, who are also significantly behind the European lobbyists EMMA / ENPA.
Together with Oettinger they have taken the second attempt in 2015, although they have failed miserably in practice. The German Association of Journalists (DJV) says very clearly: There is no interest behind paragraph 11 in paying journalists better. The association even writes in a press release[2] in which it speaks out against this ancillary copyright: "*This is an interference with the rights of authors, who incapacitate them and harm their financial interests.*" The Journalists Association considers Art. 11 to be harmful because it promoted buy-out-contracts and thus makes journalists even less lawful towards the publishing houses. The current compromise on Art 11 includes paragraph 4a. Although this suggests a redistribution of the generated revenues of the press-publishers to journalists, but it usually leaves their regulations to the member states. Nevertheless, the chairman of the association has now made a 180 degree turnaround and now he agrees with the current compromise in Art. 11, but he writes at the same time: "*A policy that is knitted with a hot needle harms the authors in case of doubt. I wish for an intensive exchange of arguments in the European Parliament.*" (Art. 13 is nevertheless rejected by the DJV.)[3]

There is no reason to repeat this nonsense at the European level.

Those who are supposed to affect Art. 11 - Google and other big news platforms - are not. At this point, the better way would finally be to properly tax these big platforms. In a real taxation, the press publishers do not decide what happens to the money, but the society decides what it spends the money for. If we want to promote more media pluralism,

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[1] myth no 8: https://www.golem.de/news/urheberrechtsreform-die-zehn-mythen-des-leistungsschutzrechts-1806-135022-4.html

[2] https://www.djv.de/startseite/profil/der-djv/pressebereich-download/pressemitteilungen/detail/article/eu-verlegerrecht-ist-murks.html - 24/03/2017 - „EU publishing law is botch" - „La loi sur l'édition de l'UE est bâclée" - In seiner Pressemeldung hält der Verband auch fest, das es doch verwunderlich ist, dass sich der Verband der Deutschen Zeitungsverleger (BDZV) nicht einmal der *„Kritik an der Kündigung der Gemeinsamen Vergütungsregeln für Freie an Tageszeitungen durch den DJV stelle"*. Da kann es nicht weit her sein mit der Behauptung, man fühle sich einem guten - und damit auch gut bezahlten Journalismus verpflichtet.

[3] https://www.djv.de/startseite/profil/der-djv/pressebereich-download/pressemitteilungen/detail/article/djv-fuer-modernes-urheberrecht.html

journalism and media literacy, it is a decision of the public and not those who like to instrumentalize the situation of the journalists argumentatively for their own purposes. In Germany, even the newspapers ZEIT and Süddeutsche Zeitung (SZ) reject this separate press publishing law. There are also big press publishers who think Art 11 is wrong and see that this is all about a politically staged market redistribution between new and traditional giants.

For small and alternative news portals that could not pay "linking licenses", Article 11 would be a real innovation barrier. I think we can't want that as a leftist.

We may also require public and international control over the search algorithms of Google and others, in the sense that advertising should not influence search hierarchies. We also demand something similar to newspapers and other medias, where we insist that editorial and advertising be separated. But that is probably more for a future debate. So let's start with the often-voiced demand for fair taxation of the large platforms.

Close the value gap with the help of upload filters? A dangerous idea - Art 13

The upload-filters already exist. Its fatal effect of restricting the fundamental right to freedom of expression has long been working on. A campaign video from the feminist initiative "Pinkstinks" was recently blocked by YouTube's ContentID filter. But Pinkstinks hadn't uploaded a content from the broadcaster RTL, as the algorithm filtered, but RTL had used the campaign song of Pinkstinks in a broadcast, without paying attention to the source. The upload-filter - ContentID - even blocked the actual creators as users who had lawfully uploaded material.[4]

With the implementation of Article 13, the assumption that those who upload something will act culpably until their innocence is proven, becomes the rule. This is now the second paragraph thought, the dispute regulation paragraph, which some proponents of Art. 13 are proud of, because they believe that they have solved that with upload filters, do not recognize whether they are dealing with a parody, a quote or similar artifacts. MEP Giorgos Grammatikakis of the S&D has presented this solution in detail as a compromise in his mail to all MEPs last week, supported from a lot of MEPs, Stelios Kouloglou und Patrick Le Hyaric from our group, too.

The case of Pinkstinks' automatic censorship shows, however, that this compromise is not the answer, as the campaign referred to an ongoing re-launch of an RTL program that appraises expectant models. If at some point in court it is decided that Pinkstinks uploaded their own material, then it is too late. The censorship was effective. A voice against

[4] http://copybuzz.com/de/copyright/you-wouldnt-steal-a-meme-the-threat-from-article-13/#! und hier: http://www.spiegel.de/netzwelt/web/pinkstinks-video-gegen-gntm-gesperrt-ein-vorgeschmack-auf-die-upload-filter-a-1197172.html

women's body norms was blocked and inaudible to the public. Afterwards, nobody needs a confirmation that a censorship machine was wrong. This is not the way to regulate a fair communication in the internet.

In paragraph 13, upload filters are considered a mandatory means of reducing the value gap for creatives they have been forced to accept on the web.[5]

It's right, we need better means to reward creatives on the web, for example flat rates, collective licenses, and other options. The already active upload filters are the wrong solution to go one step further. The upload filters are constitutionally dangerous and can't replace a better copyright contract law (see proposals in Art. 14 - 16), which we absolutely need. It is just a privatized and technical censorship that we do not need. And their previous existence has not diminished the value gap!

Conclusion, more material and the final text:

The current results in Art. 11 & Art. 13 would be enough to vote against the mandate for the trilogue on Thursday, 5th of July.

Two years ago Germany's most popular media outlets presented their internal traffic statistics to prove that they are already dependend on the multiplier potential from google and social media. Between 15 to 50 percent of their trafic comes through links via google or social media.
On the contrary, if we now force google & Co. to pay for the simple listing of results or the simple possibility to share an article via twitter, the traffic for those platforms will even decrease. Decreased traffic will be followed by lower revenues through advertising. Less advertising means less money for the online outlets. Means a smaller salaray for journalists. It's true, the dominant position of google & Co. is worrying and we have to continue or better: We have to finally start to elaborate new concepts. To smash the current system without providing an alternative will not work out. Not at all. Not for the journalists, not for creatives, not for the users. In the long run not even for the publishers.

There are other reasons, too, to reject the result of the Legal Affairs Committee. The exceptions in science, education and cultural heritage (Arts 3 - 5) are hardly thought out. Also, the current state of affairs contains only a few improvements that really strengthen the legal status of creatives towards platforms, collecting societies and publishers. More

[5] „*1.b Members States shall ensure that the implementation of such measures shall be proportionate and strike a balance between the fundamental rights of users and rightholders and shall in accordance with Article 15 of Directive 2000/31/EC, where applicable not impose a general obligation on online content sharing service providers to monitor the information which they transmit or store*." - This is the current proposal, only it does not stand up to reality, as described above in the text.

transparency in the collecting societies, the bestseller clause is a beginning, but no big step towards a better, harmonized European copyright. The patchwork of 28 copyrights in the member states is only little changed with this result.

If we vote against the mandate on Thursday, we will discuss media pluralism and freedom of expression up to the fair payment of creatives in the context of a fair copyright seriously and with better solutions that pay more attention not only to individual users but also to institutional users, such as museums & libraries. Not only wikipedia has earned an exception clause, that's necessary for a lot of cultural institutions.[6]

In addition to comments based on the decision of our JURI rapporteur, for example the Irish Labor Party member Nessa Childers wrote last week to all MEPs.[7] She focused on the ACTA-debate and remembered us on the dangerous *Deep Packet Inspections.* On the one hand the supporters of Article 11 claim, that we have to beat the dominance of google and facebook. On the other the very same people want to permit facebook and google to become the police against copyright infringements, that privatized law enforcement (in Art. 13) and doesn't make sense to me at all.

In her media freedom report, which was adopted in early May, Barbara Spinelli warned the Commission and member states against "blocking, filtering, disturbing and closing digital spaces". Not only when it comes to copyright enforcement, it seems that the dangerous upload filters are the favorite mean, but also to fight against hatred, fake news and extremist content. Finally, this is a ticket for privatization of the law enforcement and control by the big Internet platforms; a huge threat to democracy.

As you can see, all groups have different positions, inside the groups, too. For me, this reflects one thing:

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[6] In Germany, the trade union ver.di has backed the results of the Legal Affairs Committee. But ver.di has only in view the employees from the publishing houses and from collecting societies. That is understandable and their task. But it doesn't helps the many self-employed workers in the cultural-creative field, still the individual as well as the institutional users, such as libraries, museums. The dimension that we need to keep in mind for a fair copyright reform is essentially substantial and wider.

[7] Nessa Childers gave us some material and voices including the the longer no published study for the JURI-committee.
1. Study commissioned by Parliament's DG IPOL at the request of the JURI committee, which takes a critical view of the directive:
http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU(2017)596810_EN.pdf
2. Open letter from 25 EU academic institutions:
https://www.create.ac.uk/blog/2018/04/26/eu_copyright_directive_is_failing/
3. A critical study from Christina Angelopoulos, University of Cambridge:
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800
4. Open letter from over 70 internet experts, including Wikipedia's co-founder and the inventor of the World Wide Web:
https://www.eff.org/deeplinks/2018/06/internet-luminaries-ring-alarm-eu-copyright-filtering-proposal

We have to go more and much deeper into the debate. That's our responsibility as deputies. If we're not sure we cannot give out consent. The potential risk is much too high. We have to discuss our different stands and, frankly speeking, we have to gain more knowdledge on this topic because I doubt, that we all really understood what it's all about. For me, that's a clear reason to not give the mandate for trilogues and to continue our debate in the group and the plenary, with an open outcome. But now, it seems much too early, to let the German EPP (Oettinger's text and Voss' work) go into trilogues with the council.

The current compromises on Art 11 and 13, agreed in the JURI-committee

CA 12 - Article 11

Article 11
Protection of press publications concerning digital uses

1. Member States shall provide publishers of press publications with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC ***so that they may obtain fair and proportionate remuneration*** for the digital use of their press publications ***by information society service providers.***

1a. The rights referred to in paragraph 1 shall not prevent legitimate private and non-commercial use of press publications by individual users.

2. The rights referred to in paragraph 1shall leave intact and shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject-matter incorporated in a press publication. Such rights may not be invoked against those authors and other rightholders and, in particular, may not deprive them of their right to exploit their works and other subject-matter independently from the press publication in which they are incorporated.

2a. The rights referred to in paragraph 1 shall not extend to acts of hyperlinking.

3. Articles 5 to 8 of Directive 2001/29/EC and Directive 2012/28/EU shall apply *mutatis mutandis* in respect of the rights referred to in paragraph 1.

4. The rights referred to in paragraph 1 shall expire ***5*** 20 years after the publication of the press publication. This term shall be calculated from the first day of January of the year following the date of publication.

The right referred to in paragraph 1 shall not apply with retroactive effect.

4a. Member States shall ensure that authors, receive an appropriate share of the additional revenues press publishers receive for the use of a press publication by information society service providers.

CA 14 -Article 13

Article 13

Use of protected content by online content sharing service providers

-1a. Without prejudice of Art. 3 (1) and (2) of the Directive 2001/29/EC online content sharing service providers perform an act of communication to the public and shall conclude fair and appropriate licensing agreements with rightholders, unless the rightholder does not wish to grant a license or licenses are not available. Licensing agreements concluded by the online content sharing service providers with rights holders shall cover the liability for works uploaded by the users of their services in line with terms and conditions set out in the licensing agreement, provided that these users do not act for commercial purposes or are not the rightholder or his representative.

1. Online content sharing service providers referred to in paragraph -1a shall, in cooperation with rightholders, take ***appropriate and proportionate*** measures to ensure the functioning of ***licensing*** agreements ***where*** concluded with rightholders for the use of their works or other subject-matter ***on those services.***

In the absence of licensing agreements with rightsholders online content sharing service providers shall take, in cooperation with rightholders, appropriate and proportionate measures leading to the non-availability of copyright or related-right infringing works or other subject-matter on those services, while non-infringing works and other subject matter shall remain available.

1a. Member States shall ensure that the online content sharing service providers referred to in the previous sub-paragraphs shall apply the above mentioned measures based on the relevant information provided by rightholders.

The online content sharing service providers shall be transparent towards rightholders and shall inform rightholders of the measures employed, their implementation, as well as when relevant, shall periodically report on the use of the works and other subject-matter.

1.b Members States shall ensure that the implementation of such measures shall be proportionate and strike a balance between the fundamental rights of users and rightholders and shall in accordance with Article 15 of Directive 2000/31/EC, where applicable not impose a general obligation on online content sharing service providers to monitor the information which they transmit or store.

2. ***To prevent misuses or limitations in the exercise of exceptions and limitations to copyright law,*** Member States shall ensure that the service providers referred to in paragraph 1 put in place ***effective and expeditious*** complaints and redress mechanisms that are available to users in case of disputes over the application of the measures referred to in paragraph 1. ***Any complaint filed under such mechanisms shall be processed without undue delay. The rightholders should reasonably justify their decisions to avoid arbitrary dismissal of complaints.***

Moreover, in accordance with Directive 95/46/EC, Directive 2002/58/EC and the General Data Protection Regulation, the measures referred to in paragraph 1 should not require the identification of individual users and the processing of their personal data.

Member States shall also ensure that, in the context of the application of the measures referred to above, users have access to a court or other relevant judicial authority to assert the use of an exception or limitation to copyright rules.

3. Member States shall facilitate, where appropriate, the cooperation between the ***online content sharing service providers*** information society service providers***, users*** and rightholders through stakeholder dialogues to define best practices ***for the implementation***

of the measures referred to in paragraph 1 in a manner that is proportionate and efficient, taking into account, among others, the nature of the services, the availability of technologies and their effectiveness in light of technological developments.