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Article

The remodelled intersection between copyright and antitrust law to straighten the bargaining power asymmetries in the digital platform economy

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ABSTRACT

This article provides an assessment of the interplay between copyright, contract freedom and antitrust law in the current digital platform economy, as it was settled by the European legal strategy for a (fair) digital single market. It primarily focuses on the Digital Single Market (DSM) Directive and the Digital Markets Act (DMA) Proposal, evaluating if competition law instruments represent exceptional or structural remedies to correct the current failures of contract freedom and copyright enforcement within the delicate balance between authors, editors and online platforms.

KEYWORDS: Copyright, Antitrust, Snippets, DSM Directive, Digital Markets Acts, Artificial Intelligence

MARKET POWER, BARGAINING POWER AND COPYRIGHT IN THE DIGITAL PLATFORM ECONOMY: INTRODUCTORY NOTES ON THE EU LEGAL FRAMEWORK

In recent years, digital platforms' power and resilience have registered a notable upward trend. The Covid-19 crisis has consolidated such success even more, given that during the lockdown only digital relationships were admitted.[1] Platforms have played a vital role in making social distancing tolerable and building a counter-reply based on virtual—both social and economic—interactions to tackle this unpredictable emergency.[2] Nevertheless, all that glitters is not gold. Indeed, after a more careful

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1 See the Explanatory Memorandum of the Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act, or DSA) of 15 December 2020, COM(2020) 825 final, '[T]he coronavirus crisis has shown the importance of digital technologies in all aspects of modern life. It has clearly shown the dependency of our economy and society on digital services and highlighted both benefits and risks stemming from the current framework for the functioning of digital services . . ..'

2 Martin Kenney and John Zysman, 'COVID-19 and the Increasing Centrality and Power of Platforms in China, the US, and Beyond' (2020) 16 Management and Organization Review 747–52.

analysis, the digital platform economy has revealed a twofold dimension. On one hand, now individuals have access to countless amounts of services; moreover, thanks to the enhancement of cyberspace new businesses were born and, at the same time, some of the existing ones have remodelled their organizational structures and strategies allowing them to sharply grow. However, on the other hand, a significant part of these new services tends to be offered by only a few powerful companies that operate as real gatekeeper of specific markets.[3]

As it described by the explanatory memorandum of the Proposal of the European Commission on contestable and fair markets in the digital sector (Digital Markets Act, or DMA),[4] there are over 10,000 online platforms operating in the European digital economy, most of them small and medium enterprises; yet, only a restricted number of prominent online platforms gain the prevalent share of the overall value therein generated.

The present morphology of the digital market counts few large tech companies which run their core business as monopolists. At the same time, they try to acquire or increase their power in different markets owned by the remaining tech giants. This scenario, reflecting hybrid situation between monopoly and oligopoly, has been provokingly named 'moligopoly'.[5] It is the result of the so-called 'one-stop-shop strategy' according to which big-tech companies seek to offer as many services as possible on their platforms. It leads consumers to avoid switching on different platforms to meet their various needs.[6] As a matter of fact, online operators wish to create a sort of addiction to their platform, generating the alleged lock-in effect.

Furthermore, the accurate collection and organization of huge amount of information, which is notoriously referred to as big data,[7] is considered one of the most valuable assets in the digital platform economy.[8] Indeed, big data allow to reveal

3 According to Cani Fernández, 'A New Kid on the Block: How Will Competition Law Get along with the DMA?' (2021) 12 Journal of European Competition Law & Practice 271–72, gatekeepers can be defined as 'large digital platforms that serve as an important gateway for business'. However, the ambiguity of this definition raises doubts as for the exact frame of application of the rules intended for gatekeepers.

4 Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector of 15 December 2020, COM(2020) 842 final, point 1. For a critical review of the proposal see Alexandre De Streel (ed), *The European proposal for a Digital Markets Act. A first assessment*, *Centre on Regulation in Europe* (Bruxelles 2021).

5 Nicolas Petit, *Big Tech & the Digital Economy. The Moligopoly Scenario* (OUP 2020).

6 Marketing studies have shown that the level of consumer satisfaction is usually higher when their shopping time and energy are properly managed due to the availability of a wide range of services and products, that they would usually find in a one-stop shop. See Leonard Berry, Kathleen Seiders and Dhruv Grewal, 'Understanding Service Convenience' (2002) 66 Journal of Marketing 1–17. In this sense, with specific regard to financial markets see Oscar Borgogno and Giuseppe Colangelo, 'The Data Sharing Paradox: BigTechs in Finance' (2020) 16 European Competition Journal 492–511; Mariateresa Maggiolino and Martina Scopsi, 'La Prospettiva Antitrust Sulle Big Data Companies e i servizi Finanziari' in Giusella Finocchiaro and Valeria Falce (eds), *Fintech: Diritti, Concorrenza, Regole* (Zanichelli 2019) 183–204.

7 The Oxford Learner's Dictionary defines big data as 'sets of information that are too large or too complex to handle, analyse or use with standard methods', <https://www.oxfordlearnersdictionaries.com/definition/english/big-data?q=big+data> accessed 20 July 2021.

8 art 3.6, let. (c) of the DMA expressly states that entry barriers to the market often derive from data driven advantages, mainly related to the provider's access to and collection of personal and non-personal data. Thus, data can be collected and organized to reach a competitive advantage which can be exploited against other businesses, representing a powerful strategic asset. However, such relevance is not fully understood by Internet users as they act as their data are at zero cost. The discrepancies between individuals' stated

patterns, trends and associations, especially relating to human behaviour and interactions. As a consequence, this has enabled corporations to move more from one market to another more easily than before.[9] To this purpose, Scholars have pointed out that the big-data-driven economy has affected the structure of digital markets. In particular, it has promoted the exploitation of network effects[10] even in those markets that may seem different or far from the ones where the digital company was established at first. This is the case of examples like Google, Apple, Facebook, Amazon and Microsoft (also known as GAFAM[11]). The fact that they are the exclusive

privacy expectations, as described in surveys, and consumer market behaviour in going online is commonly referred to as privacy paradox. That is why privacy is considered as a market failure. For further analysis see Susanne Barth and Menno DT De Jong, 'The Privacy Paradox – Investigating Discrepancies between Expressed Privacy Concerns and Actual Online Behaviour – A Systematic Literature Review' (2017) 34 Telematics and Informatics 1038–58. From a critical viewpoint see Martin Kirsten, 'Breaking the Privacy Paradox: The Value of Privacy and Associated Duty of Firms' (2020) 30 Business Ethics Quarterly 65–96.

9 Indeed, in the digital economy, market participants are considering the monetary value of information about users more and more, as noted in the Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018, establishing the European Electronic Communications Code, OJ L 321/36, Recital 16.

10 Network effects can be identified as the attractiveness of a platform based on its number of users. See Jonathan B Baker, 'Protecting and Fostering Online Platform Competition: The Role of Antitrust Law' (2021) Journal of Competition Law & Economics '[A]s platforms gain more users, they often become more valuable to users, which may allow them to attract even more users . . . '. On the opportunities and challenges raised by the big-data driven economy see, without claiming to be exhaustive, Maria Lillà Montagnani and Antonia von Appen, 'IP and Data (Ownership) in the New European Strategy on Data' (2021) 43 European Intellectual Property Review 156–63; Joe Cannataci, Valeria Falce and Oreste Pollicino (eds), *Legal Challenges of Big Data* (Edward Elgar Publishing 2020); Maria Lilla Montagnani, 'Dati e proprietà intellettuale in Europa: dalla "proprietà" all'"accesso"' (2020) 1 Il diritto dell'economia 539–69; Valeria Falce, 'Uses and Abuses of Database Rights: How to Protech Innovative Databases Without Jeopardizing the Digital Single Market Strategy' in Peter Drahos, Gustavo Ghidini and Hanns Ulrich (eds), *Kritika: Essays on Intellectual Property*, vol 4, (Edward Elgar Publishing 2020) 180–222; Augusto Preta, 'L'economia dei dati e l'intelligenza artificiale tra politica economica, concorrenza e regolazione dei mercati' in Valeria Falce (ed), *Fairness e innovazione nel mercato unico digitale* (Giappichelli 2020), 173–88; Jonathan B Baker, *The Antitrust Paradigm. Restoring a Competitive Economy*, (Harvard University Press 2019); Daniel Gervais, 'Exploring the Interfaces between Big Data and Intellectual Property Law' (2019) 10 Journal of Intellectual Property, Information Technology & Electronic Commerce 2–19; Valeria Falce, 'Il valore dei dati nell'era dell'innovazione' in *Studi per Luigi Carlo Ubertazzi* (Giuffrè 2019) 299–320; Valeria Falce, 'Copyrights on Data and Competition Policy in the Digital Single Market Strategy' (2018) 1 Rivista italiana di Antitrust 32–44; Valeria Falce, 'L' "insostenibile leggerezza" delle regole sulle banche dati nell'unione dell'innovazione' (2018) 4 Rivista di diritto industriale 377; Mariateresa Maggiolino, *I Big Data e il diritto antitrust* (Egea 2018); Francesca Vessia, 'Big Data: Dai Vantaggi Competitivi alle Pratiche Abusive' (2018) 4 Giurisprudenza Commerciale 1064–93; Valeria Falce, Gustavo Ghidini and Gustavo Olivieri (eds), *Informazione e Big Data tra innovazione e concorrenza* (Giuffrè 2017); Vincenzo Zeno-Zencovich, *Ten Legal Perspectives on the 'big data revolution'* (Editoriale scientifica 2017); Giuseppe Colangelo, 'Big Data, Piattaforme Digitali e Antitrust' (2016) 3 Mercato Concorrenza Regole 425–60.

11 GAFAM are the result of the uncontrolled digital capitalism made possible by the famous 26 words settled in the Section 230 of the American Telecommunication Act, 8 February 1996: 'No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider'. This has made the cyberspace a sort of anarchist zone since providers cannot be deemed liable for conducts usually penalised in the 'analogical' world. As the European safe harbour, Section 230 was aimed at flourishing the Internet society by protecting the investors in a risky sector. However, the current power acquired by Big Tech demonstrated the need for an amendment (or probably a repeal) of this much-debated Section. For further details see in particular Jeff Kosseff, *The Twenty-Six Words That Created the Internet* (Cornell University Press 2019). On this point

owners of the most commonly used digital infrastructures—in which big data play a crucial role—gives them unprecedented market power. One of the latest market segments in which big-techs are expanding is the audio-visual one, as witnessed by the acquisition of Metro Goldwyn Mayer by Amazon.[12] It seems reasonable to believe that this operation will further enrich Amazon data portfolio with detailed preferences of current and potential customers, raising the barriers to entry even more.[13]

The dominant position of the above-mentioned companies raises concern under competition law and under contract law when inappropriately misused to win over weaker businesses that certainly hold a smaller bargaining power.[14] It may also give rise to copyright issues when the weaker party is prevented from enforcing its rights on the net due to the (obsolete regime of) platforms' liability exemption or given its curtailed negotiating power; in both cases, exploitation rights on copyrighted works might be jeopardized.[15] The cross-border dimension of the phenomenon makes it impossible to adequately manage the issue at national level only.[16] Otherwise, the regulatory fragmentation would affect the effectiveness of uniform protection, raising legal uncertainties on this subject if differently addressed by each single State. Also, issues like fairness and contestability of digital markets would risk to remain unsolved

see Gustavo Olivieri, 'Dal mercato delle cose al mercato delle idee' in Maurizio Sciuto Umberto Morera (eds), *Le parole del diritto commerciale* (Giappichelli 2017) 9; Guido D'Ippolito, 'Il principio di limitazione della finalità del trattamento tra data protection e antitrust. Il caso dell'uso secondario di Big Data' (2018) 6 Diritto dell'Informazione e dell'Informatica (Il) 943–87. Regarding the InsurTech market see Vincenzo Iaia, Giorgia Marra and Edoardo Paolini, 'InsurTech: Realtà e Prospettive Della Digitalizzazione del Mercato Assicurativo' in Antonio Nuzzo (ed), *FinTech, Smart Technologies e Governance dei Mercati* (Luiss University Press 2021, forthcoming); Antonella Cappiello, *Technology and the Insurance Industry, Re-configuring the Competitive Landscape* (Palgrave Pivot 2018). As it concerns the FinTech sector see Cristiana Schena and others, 'Lo sviluppo del FinTech. Opportunità e rischi per l'industria finanziaria nell'era digitale' (2018) Quaderni Fintech Consob 90–92.

12 James Fontanella-Khan and Dave Lee, 'Amazon Agrees Deal to Buy MGM for $8.45bn' *Financial Times* (London, 26 May 2021).

13 Baskaran Balasingham and Hannah Jordan, 'Big Data and Competition Analysis under Australian Competition Law: Comeback of the Structuralist approach?' (2020) Journal of Antitrust Enforcement 1–26.

14 DMA, para 5, 'The combination of those features of gatekeepers is likely to lead in many cases to serious imbalances in bargaining power . . . '.

15 About the need of rethinking copyright to make it more suitable for the digital age see Marco Ricolfi, 'Consume and Share: Making Copyright Fit for the Digital Agenda' in Melanie Dulong de Rosnay and Juan Carlos Martin (eds), *The Digital Public Domain: Foundations for an Open Culture* (OpenBook Publishers 2012) 49–60. The Author suggests to limit copyright only to the moral right of attribution (excluding economic rights), calling it copyright 2.0.

16 This reasoning is the result of the subsidiarity principle settled by art 5 of the Treaty on the European Union, OJ C 326/13. It aims at ensuring that decisions are taken as closely as possible to the citizen and that constant checks are made to verify that action at EU level is justified in light of the possibilities available at national, regional or local level. According to this principle, the EU does not take action (except in the areas that fall within its exclusive competence), unless it is more effective than action taken at national, regional or local level. In other words, the intervention of the European legislator is justified when a specific objective cannot be achieved by Member States. To this purpose, point 2 of the DMA acknowledges that the problems it addresses are of a cross-border nature, and not limited to single Member States or to a subset of Member States. Indeed, the digital sector as such and in particular the core platform services provided or offered by gatekeepers have a cross-border nature, proven by the volume of cross-border trade, and the still untapped potential for future growth, as illustrated by the pattern and volume of cross-border trade intermediated by digital platforms (almost 24% of total online trade in Europe is cross-border).

in some States. At least a supranational intervention is therefore required, in compliance with the subsidiarity principle[17].

As regards the EU's perspective, the mission letter of 10 September 2019, in which the President of the European Commission charged its Executive Vice-President to make Europe fit for the digital age, is emblematic.[18] In this respect, the EU has developed a complex legal strategy including several measures aimed at rebalancing the multiple interests at stake in cyberspace. The key coordinates of this strategy can be found in the communication of the EU Commission, *Shaping Europe's digital future*. It expressly establishes the objective of a frictionless and fair digital single market, where companies of all sizes operating in any sector can compete on an equal level playing field; in this sense, they can use digital technologies at a scale able to boost their productivity and global competitiveness.[19]

This article will assess the efficiency and the effectiveness of the solutions implemented by the European legislator to create a common level playing field in the creative sector. It focuses on the remedies to enforce copyright online as well as on the measures to enhance the negotiating power of copyright holders in the digital environment. Thus, particular attention will be devoted to the EU Directive on copyright in the Digital Single Market (hereinafter, the DSM Directive, or the Directive),[20] which contains two sets of provisions committed to this specific purpose:

1. *ex ante* principles that should guide each contracting party during the negotiation phase on the exploitation of rights involving copyrighted contents (pararagraph 2);
2. *ex post* remedies that should be applied in case of unlawful online dissemination of those contents through online platforms (pararagraph 3).

A related issue is linked to the potential use of an algorithm to control the lawfulness of the contents uploaded on the platform. This has given rise to a heated debate

17 For further discussion on the principle of the subsidiarity see Hermann-Josef Blanke and Stelio Mangiameli (eds), *The Treaty on European Union. A commentary* (Springer 2013) 261–65; here, it is defined a mechanism establishing that the smaller und nearer unit shall act primarily, and the next hierarchical unit shall act only if the smaller unit is not capable to fulfil its task.

18 Mission letter of 10 September 2019, from the President of the European Commission Ursula von der Leyen to the Executive Vice-President Margrethe Vestager, 'Over the next five years, Europe must focus on maintaining our digital leadership where we have it, catch up and move on to next generation technologies first. . . . Your mission I would like to entrust you with the role of Executive Vice President for a Europe fit for the digital age'.

19 European Commission, Communication 'Shaping Europe's digital future', 19 February 2020, 3.

20 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019, on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130/92. For some interesting notes on this Directive, see in particular João Pedro Quintais, 'The New Copyright in the Digital Single Market Directive: A Critical Look' (2020) 42 European Intellectual Property Review 28–41; Federico Ferri, 'The Dark Side(s) of the EU Directive on Copyright and Related Rights in the Digital Single Market' (2020) China–EU Law Journal; Ted Sapiro and Sunniva Hansson, 'The DSM Copyright Directive: EU Copyright Will Indeed Never Be the Same' (2019) 41 European Intellectual Property Review 404–14. For a critical comparison of the DSM Directive with the more tech-friendly and laissez-fair approach settled into the American Digital Millennium Copyright Act, see Pamela Samuelson, 'Regulating Technology through Copyright Law: A Comparative Perspective' (2020) 42 European Intellectual Property Review 214–22.

about the ability of the algorithms, even those equipped with artificial intelligence (AI) systems, to distinguish between lawful and unlawful uploads; this is mainly due to the difficult task required from program developers and AI feeders 'to teach' the exceptional regime, like in case of parody or criticism.[21] Consequently, the values underpinning such exceptions, like the freedom of expression and scientific development, might be undermined. It is thus needed to verify whether AI systems could be deployed to enforce copyright online in the perspective of ensuring a common level playing field between content producers and content distributors (paragraph 4).

Furthermore, one of the copyright exceptions provided by the DSM Directive deserves a specific focus: that is the case of the much-debated snipped exception, which allows the reproduction of very little extracts of press articles online. The interpretation of this lawful use could lead to mixed results, dependent on the preference for a quantitative or a qualitative solution. This issue has of course a substantial impact on the scope and effectiveness of protection of authors and editors as it defines the limits of free use of online platforms. It is therefore necessary to identify a well-balanced criterion which takes into account the antagonist interests at stake (paragraph 5).

The analysis will then concentrate on a paradigmatic case involving the implementation of the DSM Directive in France; this has required the French Competition Authority's intervention against Google to reduce its bargaining power in favour of press editors. Interestingly, the Authority applied antitrust rules to protect editor's rights on their copyrighted works (paragraph 6). Moreover, Google's conduct would have also been relevant under the DMA Proposal if it had already entered into force (see above, paragraph 7).

Finally, the article will assess whether antitrust rules would represent an exceptional or a structural solution to correct the failures of contract freedom and copyright enforcement in the new economy of digital platforms (paragraph 8).

EX ANTE PROVISIONS FOR RESHAPING THE BARGAINING POWER ASYMMETRIES BETWEEN CREATORS AND PLATFORMS

The double-edged dimension of digital markets also concerns creative businesses since the unceasing technological developments constantly transform the way works are created, produced, distributed and exploited.[22] On the one hand, the arrival of the Internet has helped authors and editors benefit from a potential worldwide marketplace capable of providing them with more customers than ever. On the other hand, this promising shop window is controlled by few big companies that settle their own conditions for its exploitation, considering that the so-called 'datification' of copyrighted works has enabled their wide lawful and unlawful dissemination. This condition has increased the value gap between creators and digital platforms, thus posing almost two problems:

21 Artificial Intelligence systems, as powerful as they may be in processing data, lacks emotions, especially empathy. *Amplius*, Christine Sinclair, 'Parody: Fake News, Regeneration and Education' (2020) 2 Postdigital Science and Education 61–77 and the following references in para 4.

22 DSM Directive, Recital 3.

1. the fair remuneration of authors and editors, frequently jeopardized as a result of the growing bargaining power of digital platforms;
2. the online copyright protection for the unauthorized spread of creative works on the Internet through the services provided by online platforms.

To this purpose, the DSM Directive has set up the foundation for a legal framework aimed at answering these tangled questions. It intends to ensure the equitable sharing of the value generated by online content distribution along the value chain.[23] In particular, one of its main goals is to enhance a well-functioning and fair marketplace that would allow rightsholders to share the economic benefits created by the Internet which at the same time would not disproportionately affect digital platforms and the technological development. This ambitious objective includes two sets of rules. The former has a programmatic role and basically involves the licensing activity; the latter one has a punitive role as it acts in the pathological phase of copyright infringement. Considering the previous application of the first set of rules, the first ones will be conventionally referred to as '*ex ante* principles', while the latter ones will be named '*ex post* remedies'.

As regards the *ex ante* principles, a cross-reading of some selected articles, that seem to be linked one an other, is proposed. The main rules dedicated to the purpose of reshaping creators' bargaining power are settled by Articles 15, 18, 19 and 20.[24]

Firstly, Article 15 entitles publishers of press publications established in a Member State to a new neighbouring right (also called 'link tax')[25]: this will be granted when information society service providers (we conventionally name them

23 European Commission, Communication 'Towards a modern more European copyright framework' COM(2015) 626 final, 9 December 2015, para 4.

24 The Directive boosts preventive mechanisms of fair remuneration for copyright holders and performers aimed at solving the peculiarly asymmetric nature of the platform-business relationship. This is in line with the objective settled by the above-mentioned Communication of the European Commission, *Shaping Europe's digital future*, 5, to provide '*ex ante* rules to ensure that markets characterised by large platforms with significant network effects acting as gatekeepers, remain fair and contestable for innovators, businesses, and new market entrants'.

25 On the nature of the right established by art 15 of the DSM Directive in favour of press editors see, with no claim of exhaustiveness, Elżbieta Czarny-Drozdzejko, 'The Subject-matter of Press Publishers' Related Rights under Directive 2019/790 on Copyright and Related Rights in the Digital Single Market' (2020) 51 International Review of Intellectual Property and Competition Law 624–41; Maria Daphne Papadopoulou and Evanthia-Maria Moustaka, 'Copyright and the Press Publishers Right on the Internet: Evolutions and Perspectives' in Tatiana-Eleni Synodinou and others (eds), *EU Internet Law in the Digital Era: Regulation and Enforcement* (Springer 2020) 99–136. For some stimulating comments on art 15, dating back to its wording as a Proposal, see Ana Quintela Ribeiro Neves Ramalho, 'Beyond the Cover Story – An Enquiry into the EU Competence To Introduce a Right for Publishers' (2017) 48 International Review of Intellectual Property and Competition Law 71–91. Cristophe Geiger, Oleksandr Bulayenco and Giancarlo Frosio, 'Opinion of the CEIPI on the European Commission's Copyright Reform Proposal. With a Focus on the Introduction of Neighbouring Rights for Press Publishers in EU Law' (2016) 1 *CEIPI Studies Research Paper*. A further critical viewpoint was suggested by Stavroula Karapapa, 'The Press Publication Right in European Union: An Overreaching Proposal and the Future of News Online' in Enrico Bonadio and Nicola Lucchi (eds), *Non-Conventional Copyright. Do New and Atypical Works Deserve Protection?* (Edward Elgar 2018); Eleonora Rosati, 'Neighbouring Rights for Publishers: Are National and (possible) EU Initiatives aLwful' (2016) 47 International Review of Intellectual Property and Competition Law 569–94.

digital platforms, even if this reality is more fragmented[26]) use their articles on the net, except for very short extracts, the so-called 'snippets'. In this way, press editors would not lose exploitative control over their works when they are uploaded on the Internet. However, it would be difficult to agree on the precise definition of 'short extract' to determine the specific limit over which the reproduction of some words of an article entitles its author(s) and/or editor to be rewarded (paragraph 5). In any case, the introduction of a specific right on behalf of press publishers should encourage platforms to start negotiations with rightsholders if they wish to keep on displaying their works.

Article 18 directly inaugurates the principle of appropriate and proportionate remuneration for (all kind of) authors and performers.[27] This provision is also aimed at avoiding the circumvention of Article 15, which does not specify the rewarding criteria of press editors, as it would be formally respected by agreeing on a little remuneration. As a result, Article 15 has to be read in combination with Article 18, in the sense that the rewarding for authors and/or editors (including press publishers) must not amount to a sum below the threshold of appropriateness and proportionality. The nebulous meaning of appropriate and proportionate will be clarified by national judges through a case-by-case assessment.

In addition to this, Article 19 provides the so-called 'transparency obligation', which entitles authors and performers to the right of receiving regularly (at least once a year) up to date, relevant and comprehensive information about the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights. In particular, it will be related to the mediums of exploitation, all revenues generated and remuneration due, taking into account all the different peculiarities of each sector. This rule aims at facilitating the uneasy mapping of the cross-border and multiform uses of copyrighted works in the digital environment. It is functional to ensure that the rightsholder(s) is in a position to ask for an adequate and proportionate remuneration, as expressed by Article 18 of the Directive. The information related to the exploitations of a given content plays a key role for the quantification of a fair rewarding. Indeed, the author is not usually equipped with the tools to monitor the circulation of its work. The reporting obligation may represent an efficient remedy to remove—or at least reduce—the information asymmetries and cognitive bias which specifically characterize the relationships between cultural industries (thus including authors and editors) and digital platforms.[28]

26 For instance, on the differences between platforms and aggregators under antitrust law see Thibault Schrepel, 'Platforms or Aggregators: Implications for Digital Antitrust Law' (2021) 12 Journal of Competition Law & Practice 1–3.

27 On this point, see Giulia Priora, 'Catching Sight of a Glimmer of Light: Fair Remuneration and the Emerging Distributive Rationale in the Reform of EU Copyright Law' (2020) 10 Journal of Intellectual Property, Information Technology and E-Commerce Law 330–43.

28 On this subject, see the enlightening study carried out by Michele Bertani, 'Tra paternalismo ed autonomia negoziale: il nuovo assetto dei rapporti fra autore, artista ed impresa culturale nel digital single market' (2020) 2 Orizzonti del Diritto Commerciale 453–518.

The adequacy and proportionality of the remuneration must be maintained throughout the whole contractual relationship between the rightsholder and the platform. Therefore, Article 20 establishes that Member States are obliged to set mechanisms that grant creators and executors a fair remuneration—even if the collective bargaining agreement does not provide a contract adjustment mechanism[29]—should the remuneration originally agreed be disproportionately low compared to all the revenues that the counterparty obtained from the exploitation of such works. The *ratio* under Article 20 arises from the fact that several copyright license agreements are of long duration, and the current economic value of the negotiated rights likely turns out to be significantly higher than initially estimated.[30] It means that even if the rewarding appeared to be adequate at the time the agreement was closed, the DSM Directive intends to preserve its adequateness for the entire duration of the deal.

For instance, the unpromising cover book of 'Harry Potter and the Philosopher's Stone' firstly published in 1997, constitutes an emblematic example. Could anyone imagine that after 20 years that story of strange wizards and fantastic beasts would have built a business of more than $25 billion[31]? If the original agreement between J.K. Rowling and Bloomsbury could not have been changed, it would have raised a shared sense of unfairness and disproportionality by comparing the initial rewarding agreed with its following extraordinary success. Simultaneously, the right to review the agreement must equally concern any online distribution deal. In a nutshell, authors and editors must be entitled to adjust the economic conditions to exploit their works to make them proportionate with their real success.[32]

From a theoretical viewpoint, the rules that should guide future commercial relationships in the creative market clearly tips the balance in favour of content creators. They set the legal bases to give more power to the weaker party (authors and editors) whose negotiating power has greatly been reduced over the past two decades. Nevertheless, it will be interesting to see how digital content distributors will deal with the new regulatory framework boosted by the DSM Directive, especially when national legislators will implement it. Indeed, although the mentioned rules contain some prominent measures to reshape the bargaining power asymmetries between rightsholders and platforms during the licensing phase, the analysis of Google's reaction will highlight a noteworthy discrepancy between the law in the book and the law in action (paragraph 6).

29 In general, the collective bargaining in the creative industry is incentivised by the DSM Directive as it can foster transparent conditions between creators and rightsholders. See DSM Directive, Recital 77. For a deep analysis of the EU *acquis* concerning the collective bargaining on the exploitation rights on copyrighted works see Maria Letizia Bixio, *Modelli di gestione collettiva a tutela dei diritti d'autore. Itinerari tra dinamiche concorrenziali ed interferenze di diritto sovranazionale* (Giappichelli 2020).

30 DSM Directive, Recital 78.

31 Emma Jacobs, 'How JK Rowling Built a $25bn Business' *Financial Times* (London, 26 June 2017) <https://www.ft.com/content/a24a70a6-55a9-11e7-9fed-c19e2700005f> accessed 16 July 2021.

32 For instance, Italian Law already provides a possible solution that could be applied for disproportionate agreements, which is the resolution for excessive burden (art 1467 of the Italian Civil Code); nevertheless, it seems that the aim of the Directive is to enhance further and more rapid mechanisms to ensure creators an equal reward.

EX POST REMEDIES AGAINST ONLINE COPYRIGHT INFRINGEMENT AIMED AT BRIDGING THE VALUE GAP ACROSS CONTENT PRODUCERS AND CONTENT DISTRIBUTORS

The openness to upload copyrighted works through online platform services is another factor that contributes to undermining the possibility of content creators to share the economic opportunities created by the Internet. Indeed, the supply and distribution chain of creative industries has progressively evolved from analogical to digital. This transformation has led rightsholders to lose control over the exploitation of their contents since they could circulate in the cyberspace without any authorization.[33] Consequently, content creators or licensees risk not to be rewarded for such uses, and their losses typically enrich two kinds of operators:

1. online pirates, who run alternative cheaper distribution channels that allow access to music, movies, and other works based on acts of free riding that directly harm rightsholders;
2. online platforms, considering that their revenues—mostly coming from advertising campaigns—depend on the number of users and on the amount of time they spend on the platform, which are both reliant on the volume of available (free or copyrighted) contents,[34] thus indirectly harming real content producers.

This article will mainly focus on second type of operator, as this issue is thoroughly addressed by the DSM Directive. Indeed, the value gap between content producers and online content distributors is clearly outlined by the Directive, according to which:

> '[a]lthough online services enable diversity and ease of access to content, they also generate challenges when copyright-protected content is uploaded without prior authorisation from rightsholders. Legal uncertainty exists as to whether the providers of such services engage in copyright-relevant acts and need to obtain authorisation from rightsholders for content uploaded by their users who do not hold the relevant rights in the uploaded content, without prejudice to the application of exceptions and limitations provided for in Union law. That uncertainty affects the ability of rightsholders to determine whether, and under which conditions, their works and other subject matter are used, as well as their ability to obtain appropriate remuneration for such use'[35].

Rightsholders' lack of control on the dissemination of their works hinders their ability to claim an adequate remuneration based on the real use of copyrighted

33 For a comprehensive perspective of the challenges and opportunities concerning the IP protection in the economy of digital platform see European Parliament, *Liability of Online Platforms*, Panel for the Future of Science and Technology (Bruxelles 2021) 37–43.

34 Ioannis Revolidis, 'Internet Intermediaries and Copyright Enforcement in the EU: In Search of a Balanced Approach' in Marcelo Corrales, Mark Fenwick and Nikolaus Forgó (eds), *New Technology, Big Data and the Law. Perspectives in Law, Business and Innovation* (Springer 2017) 223–48.

35 DSM Directive, Recital 61.

content. Such scenario favours online platforms as they can earn revenues from the advertisements displayed near the copyrighted work that they do not produce nor bear the costs. Thus, they capture a huge share of the advertising revenues by free riding, excluding rightsholders from participating to them. This gap has further increased during the Covid-19 crisis considering that people have spent more time than usual on digital platforms and a part of them preferred to use pirate channels.[36]

First of all, it is important to highlight that although the Directive literally refers to 'content sharing service providers' or 'information society service providers', it is better to apply an extensive time-proof notion that will include any platform providing online services through which users can share contents with a community.[37] Indeed, a broader definition may also consider the technological developments that could give rise to new entities or new activities that could formally fall outside the Directive's scope, despite being able to threaten the same interest herein protected.

Still, the present need to bridge the value gap across content creators and content distributors expressed by the DSM Directive derives from the fact that until its implementation, digital platform can be exempted from liability for the unlawful exploitation of copyrighted contents uploaded by their users being under the safe harbour protection of Article 14 of the E-commerce Directive.[38] The liability exemption could be simply obtained whenever the platform alleges the unawareness of its users' illicit conduct, claiming that it does not have the technical and financial resources to make preventive and rapid control. Moreover, Article 15 of the E-commerce Directive prohibited Member States from imposing providers a general surveillance obligation. The *ratio* under the regulatory framework settled by the E-commerce Directive was to encourage investments in the newest—at that time—digital businesses. The policy choice on which kind of incentive would be more appropriate to achieve that objective fell on a regulatory framework providing a safe space of immunity for those companies who would have taken such risk. Nevertheless, the opportunities of fostering new markets and new trades came at a cost, as the scale and rapid ubiquity of the Internet reduced the marginal cost of infringing third parties' copyrights nearly to zero.[39]

Besides, 20 years after the enactment of the E-commerce Directive, technology has sharply evolved, and the growing power acquired by online platforms has shown the need for a new legal framework that could take the new market (im)balances

36 The Ipsos-Fapav report, *La pirateria audiovisiva in Italia*, 2019, 34–36, shows that during the Covid-19 crisis the number of pirates raised by 10% and the number of piracy acts has quadrupled from the last year (243 million piracy acts during quarantine against 69 million registered in a common two-month period of 2019).

37 DSM Directive, Recital 62, 'the definition of an online content-sharing service provider laid down in this Directive should target only online services that play an important role on the online market by competing with other online content services, such as online audio and video streaming services, for the same audiences. The services covered by this Directive are services, the main or one of the main purposes of which is to store and enable users to upload and share a large amount of copyright-protect content . . . '.

38 Directive (EC) 2000/31 of the European Parliament and of the Council of 8 June 2000, on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178.

39 Ben Algrove and John Groom, 'Enforcement in a Digital Context: Intermediary Liability' in Tanya Aplin (ed), *Research Handbook on Intellectual Property and Digital Technologies* (Edward Elgar 2020) 506.

into account reconsidering the competing interests at stake. Over the years, the safe harbour's compromise has showed not to be adequate to the current economic reality anymore.[40] As pointed out by the Advocate General Saugmandsgaard Øe in a recent case,[41] the changing digital environment legitimizes a change in the balance of intermediary liability for digital platforms. It justifies a passage from a mere notice-and-takedown system to one that makes them primarily liable for users' uploads.

More specifically, before analysing the new regime settled by the DSM directive, it should be outlined that the European case-law played a central role in reconceptualizing the liability regime of online platforms; the aim was to try to rebalance the trade-off that has been deepened over the past two decades between digital platforms' interests and third parties' rights.[42] For this purpose, the Court of Justice of the European Union (the 'CJEU') started by building the distinction between passive and active hosting providers to decide respectively on the availability or unavailability of the safe harbour.[43]

Starting from *Google v Louis Vuitton*,[44] the CJEU has stated that the content provider's active role in presenting and promoting sales offers enables them to have knowledge or control of the data related to its offers. In this case, the provider cannot be eligible for the safe harbour and must be held liable for the data that have been stored. Then, in *L'Oreal v e-Bay*,[45] the CJEU—dealing with the content provider liability for trademark infringements performed by its users—has excluded the neutral position of the platform when it provides its users real shopping assistance; this entails, in particular, the optimization of the presentation and promotion of its sales offers. Such an active role of the platform necessarily gave it the knowledge or control of data relating to the said offers, including their unlawfulness. Lastly, in *Stichting Brein v Ziggo*[46] the CJEU affirmed that making available and managing an online sharing platform employing indexation of metadata related to protected works must be qualified as an act of communication to the public[47]; this represents an

40 Maria Lillà Montagnani and Alina Yordanova Trapova, 'Safe Harbours in Deep Waters: A New Emerging Liability Regime for Internet Intermediaries in the Digital Single Market' (2018) 26 International Journal of Law and Information Technology 294–310.

41 Case C-401/19, *Republic of Poland v European Parliament, Council of the European Union* (2021) ECLI:EU:C:2021:613, para 134, stating that 'Adapting copyright to the digital environment and establishing, in this field, a liability regime for online sharing services which ensures a fair balance between all of the rights and interests at stake is, undoubtedly, a "complex" task'.

42 On the fundamental role played by the CJEU in modernizing —and harmonizing—copyright at the EU level see Eleonora Rosati, *Copyright and the Court of Justice of the European Union* (OUP 2019).

43 For a deeper analysis of the online platforms' liability regime see Vincenzo Iaia, 'Towards the EU Directive on Copyright in the Digital Single Market: From the Hosting Provider Liability in the RTI/Yahoo Case to its Critical Implementation in Italy' (2020) 15 Journal of Intellectual Property Law & Practice 823–28.

44 Case C-236/08 *Google France and Google* [2010] ECLI:EU:C:2010:159, para 120.

45 Case C-324/09 *L'Oréal and Others* [2011] ECLI:EU:C:2011:474, para 123.

46 Case C-610/15 *Stichting Brein* [2017] ECLI:EU:C:2017:456, para 39. For an extensive discussion about the *Stichting Brein* case, with specific reference to platforms' liability for providing hyperlinks to copyrighted content without authors' authorisation, see Jane Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing-Content: International and Comparative Law Perspectives' (2018) 41 Columbia Journal of Law & Arts 153–71.

47 On the evolution of the right of communication to the public on the Internet see Lionel Bently and others, *Intellectual Property Law* (5th edn, OUP 2018) 161–77.

exclusive right of the copyright holder[48] which falls within the scope of Article 3 of the EU InfoSoc Directive.[49]

The *ratio* behind all the above decisions is the effective enforcement of copyright and related rights in the digital environment to ensure rightsholders a fair remuneration for the exploitation of their works, even the unlawful ones. Bearing in mind the traditional teachings from the economic analysis of law, these rights are crucial to ensure and maintain economic and social development through innovation. Otherwise, most of the creators would be discouraged from creating.[50]

The CJEU, in its evolutive interpretation of the online platforms' liability regime, took into account the unstoppable advances in technology and the financial power gained by those operators; this has allowed them to carry out wide-ranging supervision on the content uploaded by their users[51], being able to prevent violations and to run the actual 'far web'.[52] This phenomenon has urgently called courts to redefine the boundaries of providers' liability for violations committed by their users—particularly copyright infringements—to avoid weaker parties' rights from being seriously jeopardized.[53]

Given these premises, the much-debated Article 17 of the DSM Directive has granted the requests of content creators—overcoming the pressure of lobby groups sustaining digital platforms[54]—through the introduction of a direct liability regime for content sharing service providers in case of copyright infringements.[55] It is an *ex post* remedy to compensate authors and editors for the unauthorized exploitation of their works.[56]

48 As it is also granted at international level by art 8 of the WIPO Copyright Treaty of 20 December 1996, which expressly entitles the authors of literary and artistic works of the exclusive right of authorizing any communication to the public of their works, by wire or wireless means.

49 Directive (EC) 2001/29 of the European Parliament and of the Council of 22 May 2001, on the harmonization of certain aspects of copyright and related rights in the information society, OJ L 167.

50 William Landes and Richard Posner, 'An Economic Analysis of Copyright Law' (1989) 18 The Journal of Legal Studies 325–63.

51 For instance, see the ability of Twitter in detecting and blocking 470 Trump's tweets related to the American Presidential election after the storming of the US Capitol carried out by its supporters. For further information see Kate Conger and Mike Isaac, 'Inside Twitter's Decision to Cut-Off Donald J. Trump' *New York Times* (New York, 16 January 2021) <https://www.nytimes.com/2021/01/16/technology/twitter-donald-trump-jack-dorsey.html>accessed 17 July 2021.

52 Iaia (n 43) 828.

53 For statistical information about the losses caused by digital piracy on Italian movie industries see the report issued by Ipsos-Fapav, *La pirateria audiovisiva in Italia*, 2019. The report shows that the damage caused by piracy to the audiovisual sector amounts to €591 million (p 26). For further discussion on this topic see Liye Ma and others, 'An Empirical Analysis of the Impact of Pre-Release Movie Piracy on Box Office Revenue' (2014) 25 Information Systems Research 590–603. With specific reference to the solutions adopted by the Motion Picture Association of America see Paul McDonald, 'Hollywood, the MPAA, and the Formation of Anti-piracy Policy' (2016) 22 International Journal of Cultural Policy 686–705.

54 For instance, we might consider the backflash from the protest led by the Italian Wikipedia that blocked the access to its pages against the EU copyright reform risking to cause the potential closing of the website. For further information see BBC News, *Italy Wikipedia shuts down in protest at EU copyright law*, 3 July 2018, <https://www.bbc.com/news/world-europe-44696302> accessed 17 July 2021.

55 For further discussion see Eleonora Rosati, 'The Direct Liability of Online Intermediaries' in Giancarlo Frosio (ed), *Oxford Handbook of Online Intermediary Liability* (OUP 2020) 336–48.

56 The doctrine has raised a heated debate about the (un)correct wording of this article. See indicatively Giancarlo Frosio, 'Reforming the C-DSM Reform: A User-based Copyright Theory for Commonplace Creativity' (2020) 51 International Review of Intellectual Property and Competition Law 709–50; João Pedro Quintais and others, 'Safeguarding User Freedoms in Implementing Article 17 of the Copyright in

Apart from providers start-ups, able to benefit from a more favourable treatment[57], the reformed liability regime settled by the DSM Directive should be applicable to all digital platforms, except when:

1. they have demonstrated that they made their best efforts to obtain an authorization by the rightsholders;
2. they have ensured the unavailability of specific works for which the rightsholders have provided the relevant and necessary information, following high industry standards of professional diligence;
3. they have quickly disabled access to content upon adequate proved notification from the rightsholders (through a faster cease and desist mechanism)[58], also showing they made best efforts to prevent future unauthorized uploads.

Therefore, whether one of these conditions is not respected, the platform is directly liable for unauthorized act of communication to the public, as Article 17.3 excludes the applicability of the liability exemption provided by Article 14 of the E-Commerce Directive. As a matter of fact, Article 17 aims at fostering the development of the licensing market between rightsholders and digital platforms. The clearer liability regime set out by this provision creates a legal basis for rightsholders to authorize the use of their works when uploaded by platforms' users, thereby increasing their licensing and remuneration possibilities.[59] In this perspective, the *ex ante* solutions end the *ex post* remedies here analysed are more intertwined than they initially appeared.

One of the main concerns arising from the interpretation of Article 17 regards the correct definition of 'best efforts': indeed, its equivocal meaning will basically drop the line between the availability and the unavailability of the liability exemption. To this purpose, Recital 66 of the DSM Directive establishes that the content providers' liability must be based on the model of the content sharing service providers that

the Digital Single Market Directive: Recommendations from European Academics' (2020) 10 Journal of Intellectual Property, Information Technology and E-Commerce Law 277–82; Sebastian Felix Schwemer, 'Article 17 at the Intersection of EU Copyright Law and Platform Regulation' (2020) 1 Nordic Intellectual Property Law Review; Christina Angelopoulos and João Pedro Quintais, 'Fixing Copyright Reform: A Better Solution to Online Infringement' (2019) 10 Journal of Intellectual Property, Information Technology and E-Commerce Law 147–72; Karina Grisse, 'After the Storm - Examining the Final Version of Article 17 of the New Directive (EU) 2019/790' (2019) 14 Journal of Intellectual Property Law & Practice 887–99.

57 See DSM Directive, art 17, para 6.

58 The need for prompt intervention strongly affects sport events. The draft report issued the 17 November 2020 by the European Parliament on the challenges of sport events' organisers in the digital environment (2020/2073(INL) highlights as follows: the phrase 'acts expeditiously' currently set up in art 14 of the E-Commerce Directive (until art 17 of the DSM Directive will entry into force) means that it is valid 'immediately from the notification of the infringement by rightsholders and no later than 30 minutes after the start of the sport event'. The draft report takes into account the specific needs of this market, laying down the presumption that an intervention beyond the thirtieth minute should be deemed not to be efficient.

59 Communication from the Commission to the European Parliament and the Council *Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market Brussels*, COM(2021) 288 final of 4 June 2021, 1–2.

made their best efforts in accordance with the high industry standards of professional diligence. It is easy to assume that the duty of diligence is higher than the one expressed at the E-Commerce Directive enactment. Thus, the notion of best effort shall be interpreted in a stricter sense. However, the best effort obligation cannot be further detailed by imposing specific conducts on digital platforms, as the content of this obligation could rapidly change along with the unstoppable technological developments. In other words, a list of specific obligations under the meaning of best effort might become obsolete in the short-term.

It seems reasonable to believe that the European and national courts will better define the best effort obligation on a case-by-case basis; the same will also happen to the notions of adequate and proportionate remuneration. National legislators clearly play a crucial role during the internal transposition of the DSM Directive[60].

To this purpose, the Italian Parliament has delegated the Government to implement the DSM Directive according to Article 9 of the Bill no 1721 of 14 February 2020.[61] The Bill has highlighted the need to adequately reward press editors and authors for the online exploitation of their works (lets. h, l, and m), in accordance with Article 15 of the Directive. If the Government forces digital platforms to negotiate a fair remuneration with editors and authors, such platforms could decide to index only free articles, as already happened in France (paragraph 6). In this case, the Italian Competition Authority ('Autorità Garante della Concorrenza e del Mercato', AGCM) will most likely intervene to restore the bargaining power.

However, in March 2021, probably aware of the French case, Google signed an agreement with the major Italian editors to reward them through the app 'News Showcase'.[62]

60 The initial term for the transposition of the Directive was set on the 7 June 2021. Nevertheless, many Member States are falling behind with their transposition schedules for almost two reasons, namely disruption caused by the ongoing COVID-19 pandemic and the postponed publication of the Commissions' Guidance on the application of art 17 which happened just three days before the deadline set by the Directive. In this sense, Eleonora Rosati, 'Five Considerations for the Transposition and Application of Article 17 of the DSM Directive' (2021) 16 Journal of Intellectual Property Law & Practice 265–70. The delay has led the European Commission to start an infringement procedure against 20 Member States. It has asked them to communicate the measures they are adopting to implement the DSM Directive within two months. See ANSA, 'Al via la procedura di infrazione contro l'Italia e altri 20 paesi sul copyright' (26 July 2021) <https://www.ansa.it/europa/notizie/rubriche/altrenews/2021/07/26/al-via-la-procedura-di-infrazione-contro-litalia-e-altri-20-paesi-sul-copyright_362f37f6-d3b2-4afa-9c73-aa2d327478c7.html> accessed 26 July 2021. On the perspectives of implementation of art 17 of the DSM Directive see The European Copyright Society, 'Comment of the European Copyright Society Selected Aspects of Implementing Article 17 of the Directive on Copyright in the Digital Single Market into National Law' (2020) 11 Journal of Intellectual Property, Information Technology and E-Commerce Law 115–31. See also the original interpretation proposed by João Pedro Quintais and Martin Husovec, 'How to License Article 17 of the Copyright in the Digital Single Market Directive? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms' (2021) 4 GRUR International 325–48; in their work, the Authors state that art 17 provides a framework of potential options for Member States to modulate their implementations to different national laws, practice and market realities, qualifying it as a *sui generis right*, as it must be located ù outside of the pre-existing framework of the InfoSoc Directive.

61 Iaia (n 43) 828.

62 The agreements involve 13 Italian editorial companies, giving Google Showcase users access to content from 76 national and local papers. In October, Google announced to be willing to pay $1 billion to publishers from all over the world for their news over the next three years through Showcase, which will be launched in Germany at first, then in Belgium, India, the Netherlands and other countries. Probably this budget will not be enough to grant an adequate remuneration, but it represents a first substantial step

Most concerns refer to the implementation of Article 17 of the Directive (which is really a big powder keg): in particular, Article 9, let. n) of the aforementioned Bill delegates the Government to define the specific obligations for content sharing service providers; in this sense, specific attention will be given to the standards of diligence allowing the judge to assess whether a provider has made the best efforts or not. According to the Bill, the standard of diligence should be determined on the principle of reasonableness. It might seem obvious that the legislator shall not implement the Directive unreasonably.[63] However, this statement may be interpreted in several ways, giving rise to potential opposite outcomes. For instance, one could argue that the best effort required from the provider should merely consist of the license request to the rightsholder, whereas another one would ask the provider to start an actual negotiation with a professional mediator. It would thus be desirable that the Government will not use the parameter of reasonableness to assess the best effort obligation; this would prevent digital platforms from exploiting such term in their favour.[64]

RISKS AND OPPORTUNITIES OF THE ROBOTIC CONTROL VIA ARTIFICIAL INTELLIGENCE SYSTEMS

It is a well-known fact that one of the most prominent technologies of the 21st century is artificial intelligence (AI). There are still many attempts to provide a definition of AI compatible with its specific characteristics and its continuous evolution. At European level, the Communication of the Commission, *Artificial intelligence for Europe*,[65] provided a broad notion according to which AI refers to 'systems that display intelligent behaviour by analysing their environment and taking actions – with some degree of autonomy – to achieve specific goals'. A more precise definition is provided by the High-Level Expert Group on AI appointed by the EU Commission,[66] which describes AI as:

> 'a complex of software (and possibly also hardware) systems designed by humans that, given a complex goal, act in the physical or digital dimension by perceiving their environment through data acquisition, interpreting the collected structured or unstructured data, reasoning on the knowledge, or processing the information, derived from this data and deciding the best action(s) to take to achieve the given goal. AI systems can either use symbolic rules or learn a numeric model, and they can also adapt their behaviour by analysing how the environment is affected by their actions. As it is also a scientific discipline, AI includes several approaches and techniques, such as machine learning (of which deep learning and reinforcement learning are specific examples), machine reasoning (which includes planning, scheduling, knowledge representation and reasoning, search, and optimization),

towards this direction. For further details see Elvira Pollina,Cristina Carlevaro and Cristina Carlevaro, 'Google Signs News Content Deals with Italian Publishers' *Reuters* (London, 24 March 2021).

63 Iaia (n 43) 828.

64 ibid.

65 European Commission, Communication 'Artificial intelligence for Europe' COM(2018)237 final of 25 April 2018.

66 High-Level Expert Group on AI, *A Definition of Artificial Intelligence: main capabilities and disciplines*, 8 April 2019, 6.

and robotics (which includes control, perception, sensors and actuators, as well as the integration of all other techniques into cyber-physical systems)'.

AI, through its self-learning mechanisms, has a huge potential. Indeed, it could improve healthcare; increase the efficiency of farming; contribute to climate change mitigation and adaptation; improve the efficiency of production systems through predictive maintenance[67]; or, as regards copyright enforcement, it could help platforms to detect and remove unlawful contents more rapidly.[68] At the same time, AI entails several potential risks, such as opaque decision-making, gender-based or other kinds of discrimination.[69] Distinguishing between copyright infringements and exceptional lawful uses would, thus, be challenging, especially in case of criticism or parody.[70] Indeed, the way AI could recognize a caricature, a pastiche, a scientific quotation, or a review is controversial.[71] AI's exact functioning is still deemed as a real black box.[72] This lack of knowledge due to an unclear functioning of the algorithm could legitimate unlawful censorship, compromising the freedom of expression and the freedom of arts. Thus, AI feeders should work as 'master teachers' in making each software able to recognize copyright exceptions. The AI deployment should comply with the obligation of confining technical protection measures to prevent only unauthorized uses of copyright works, as settled by the CJEU in *Nintendo v PC Box*.[73] However, even master teachers may be affected by bias—especially discriminatory ones—which could be transferred to AI.[74] Some bugs may also be registered when adopting

67 EU Commission, white paper *On Artificial Intelligence – A European approach to excellence and trust*, COM(2020)65 of 19 February 2020, 1.

68 For a rich overview of this topic see Giancarlo Frosio, 'Algorithmic Enforcement Online' in Paul Torremans (ed), *Intellectual Property and Human Rights* (Kluwer Law Int'l 2020) 709–44.

69 ibid.

70 The exceptional regime is settled by art 17, para 7 of the DSM Directive. See also the Recital 70 of the Directive.

71 On the hard task of identifying the user generated contents when they fall into the exceptional regime of the DSM Directive as parodies or critics see Daniela Caterino, 'Prime osservazioni sul trattamento degli User-Generated Contents nella direttiva UE Digital Copyright' (2019) 1 Annali italiani del diritto d'autore, della cultura e dello spettacolo 282–312.

72 For some doctrinal attempts to understand AI systems, see Bram Wiele, 'The Human-machine Synergy: Boundaries of Human Authorship in AI-assisted Creation' (2021) 43 European Intellectual Property Review 164–71; Alexandre De Streel and others, *Explaining the Black Box: When Law Controls AI* (Centre on Regulation in Europe, 2020); Amina Adadi and Mohammed Berrada, 'Peeking Inside the Black Box: A Survey on Explainable Artificial Intelligence' (2018) 6 IEEE Access 52138–60; Tarleton Gillespie, *Custodians of the Internet: Platforms, Content Moderation, and the Hidden Decisions That Shape Social Media* (Yale University Press 2018); Frank Pasquale, *The Black Box Society. The Secret Algorithms That Control Money and Information* (Harvard University Press 2016).

73 Case C-355/12 *Nintendo v PC Box* [2014] ECLI:EU:C:2014:25, para 31: 'That legal protection is granted only with regard to technological measures which pursue the objective of preventing or eliminating, as regards works, acts not authorised by the rightholder of copyright . . .. Those measures must be suitable for achieving that objective and *must not go beyond what is necessary for this purpose*' [my emphasis].

74 See Maayan Perel and Niva Elkin-Koren, 'Black Box Tinkering: Beyond Disclosure in Algorithmic Enforcement' (2017) 69 Florida Law Review 181–97, who highlight that translating qualitative doctrines such as fair use or even the piracy control into 'codish' thresholds or proxy measures is a process that in itself may result in unintentional alterations of settled doctrines.

a quantitative technology, eg the digital fingerprint,[75] as it would be difficult to establish how many fingerprints the AI should count to recognize infringing content. A combination of a quantitative and qualitative approach might be expected, although this could still be doubtful as for the contents falling in a 'grey zone' (the likely infringing content).

Given these premises, a part of the doctrine excludes that parody or critical control could be delegated to automation: the reason is that human control will allow us to maintain our critical and social faculties in an age when there is too much going on.[76] The Author reaches such conclusions assuming that 'while humour could be built in the artificial intelligence, we are more likely to laugh at robots than with them'.[77] This argument is only supported by (questionable) ethical and naïf considerations rather than juridical and practical ones. In this perspective, I am not fully convinced that AI systems cannot play any role neither in intercepting piracy acts nor in assessing of lawful uses. Considering the embryonic development of AI technology, I cannot either side the *dictum* "the answer to the machine is the machine"[78] according to which AI should represent the panacea to all the copyright enforcement problems.

In the current state of the art, the solution lies in the middle. A primary assessment on the lawfulness or unlawfulness of a specific activity may be delegated to an algorithm equipped with AI.[79] To be compliant with the prohibition of general monitoring obligation established by Article 17.8 of the DSM Directive, it would be allowed to block only manifestly infringing or equivalent content, while the other uploads would benefit from a presumption of lawfulness.[80] However, the software would play a significant role in the content moderation, and it is likely to have growing importance. The constant advances in machine learning suggest that a system like Content ID could improve its ability to automatically distinguish between fair

75 *Amplius*, Philipp Johnson, 'Technical controls' in John Adrian Lawrence Sterling (ed), *World Copyright Law*, IV (Sweet & Maxwell 2008).

76 Sinclair (n 21) 77.

77 ibid.

78 Charles Clark, 'The Answer to the Machine is in the Machine' in Jon Bing and Thomas Dreier (eds), *Norwegian Center for Computers and Law* (CompLex 2005).

79 Matthew Sag, 'Internet Safe Harbors and the Transformation of Copyright Law' (2017) 93 Notre Dame Law Review 499, who shares the opinion that computers could be trained to make an initial assessment of the likelihood of fair use issues requiring further investigation.

80 In this sense, see the opinion of Advocate General Saugmandsgaard Øe in the Case C-401/19, *Republic of Poland v European Parliament, Council of the European Union* (2021) ECLI:EU:C:2021:613, para 205, stating that digital platforms 'may be obliged to detect and block only content which is "identical" and "equivalent" to that subject matter: this means content whose unlawfulness seems clear in the light of the "relevant and necessary" information provided by the rightsholders. In such cases, since an infringement is highly probable, that content may be presumed to be illegal. It is therefore appropriate to block it preventively, asking the users concerned to demonstrate its lawfulness – for example, by having a licence, or by showing that the work is in fact in the public domain – in the context of the complaint mechanism'. On this point, see Bernd Justin Jütte and Giulia Priora, 'On the Necessity of Filtering Online Content and its Limitations: AG Saugmandsgaard Øe outlines the borders of Article 17 CDSM Directive' *Kluwer Copyright Bog* (20 July 2021), fearing that drawing the line between *prima facie* copyright violations and borderline cases (eg short extracts, transformative uses, adapted works) might remain the usual dilemma; this would blur the division of labour and adjudication competence between digital platforms and national courts.

uses and copyright infringements by analysing data from disputes within the system.[81] Being realistic, the improving capacity of the algorithm in filtering content is more efficient than a human (perhaps bored) control on myriads of uploads. Delegating an algorithm of this function is also consistent with the DSM Directive as it states that digital platforms can adopt different means to avoid the availability of unauthorised copyright-protected.[82] Amongst such means, there is no reason to exclude AI.

As a *pendant* to the machine initial assessment, there should be rapid mechanisms that would allow rightsholders and legitimate users to ask for a human control whenever they believe the algorithm has taken a wrong decision. This would allow human to focus only on the most controversial issues.

Importantly, the criteria followed by the software must be transparent to ensure the possibility of a subsequent human control. The transparency obligation is expressly established by Article 13, paragraph 1, let. c) of the DSA Proposal. Indeed, it states that platforms are obliged to publish a report containing '[T]he number and type of measures taken that affect the availability, visibility and accessibility of information provided by the recipients of the service and the recipients' ability to provide information, categorized by the type of reason and basis for taking those measures'.

It has been rightly argued that transparency would ensure to fulfil with two other requirements forming the backbone of a fair judicial process, namely accountability and contestability.[83] Accountability refers to taking responsibility for the decision. Contestability is the power to dispute the results of an automated enforcement decision. Obviously, without a clear understanding of the functioning of the algorithm neither accountability nor contestability can be guaranteed.[84]

Hence, it would be advisable that platforms start working on the explainability of the algorithm(s) they employ and on the datasets with which they 'feed' them.

SNIPPETS AT THE CROSSROADS BETWEEN FREE USE AND COPYRIGHT INFRINGEMENT

Another exceptional regime that should be 'taught' to AI systems (assuming that humans have firstly understood it) regards the so-called snippets. Neither the DSM

81 ibid. The Authors highlight that the obligations to make 'best efforts' and conform with 'high industry standards of professional diligence' likely imply that advanced filtering and content-recognition technologies will have to be employed by digital platforms. The notice and take down mechanism cannot be upheld anymore because it disproportionately burdens rightsholders who would have to chase infringers themselves. Thus, a primary and questionable filter should be delegated to the machine. See also Zoubin Ghahramani, 'Probabilistic Machine Learning and Artificial Intelligence' (2015) Nature 452.

82 DSM Directive, Recital 66.

83 Giancarlo Frosio and Cristophe Geiger, 'Taking Fundamental Rights Seriously in the Digital Service Act's Platform Liability Regime' (2021 forthcoming) *European Law Journal*, available at SSRN: <https://ssrn.com/abstract=3747756 or http://dx.doi.org/10.2139/ssrn.3747756> accessed 20 July 2021, arguing that these due process safeguards must be embedded in algorithmic enforcement mechanisms established by digital platforms, taking into consideration what is feasible and sustainable. They suggest to encourage non-judicial mechanisms, as they may still use adjudicative, dialogue-based or other culturally appropriate and rights-compatible processes. In this respect, the duty of states is not purely limited to establishing accessible state judicial systems, but also raising awareness of, or otherwise facilitating access to, non-state-based grievance mechanisms.

84 ibid.

Directive nor other legal sources provide a definition of snippets. However, they may be conventionally defined as small portions of articles that, from a systematic reading of the DSM Directive, are not covered by copyright, nor they fall in the scope of the new related right established for press publishers under Article 15.

The DSM Directive has confirmed that the exploitation of tiny portions of copyrighted works does not integrate copyright infringement. Referring to press articles, the Directive stated that '[t]he rights provided for in the first subparagraph shall not apply in respect of the use of individual words or very short extracts of a press publication'.[85] Such short extracts are qualified as snippets, and they fall outside the copyright and related rights regime. Anyone can exploit them without integrating a copyright infringement. However, the following question arises: what is the shortest length of an extract to be protectable under copyright? Conversely, what is the highest length of an extract pertaining to a copyrighted content that can be freely used? The answers to these questions are crucial to adequately map the areas protected by copyright and the new press editors' neighbouring right as well as those belonging to the public domain. The agreed length will drop the line between copyright (or *sui generis* right) infringement and freedom of expression.

On this topic, EU Commission's press corner merely stated that the assessment of a very short extract would be conducted as not to affect the effectiveness of the new press editors' rights.[86] More parameters can be found in the French transposition law, when establishing the criteria for the remuneration of press articles, namely (i) the human, material and financial investment;, (ii) their contribution to political and general information and (iii) the importance of their use by online publications services.[87] I believe that the legal criteria should be further detailed taking related behavioural studies into account. Especially in this sector, rules cannot be detached from reality. It is essential to understand the habits of both analogical and digital newspaper readers, as well as the online advertising market's functioning. For instance, a relevant question is whether 15 words of an article are enough to satisfy the information needs of the users, being able to replace the press publication itself or enticing readers to click the link for a complete information. Another issue is whether users are willing to pay for a single article or they prefer to read only free articles. It should be also acknowledged the extent to which the platform contributes to the circulation of news and how news contribute to platforms' popularity and

85 DSM Directive, art 15, para 1.

86 EU Commission, *Questions & Answers: EU Negotiators reach a breakthrough to modernise copyright rules*, 13 February 2019, 'Does the new press publishers' right also cover parts of press publications (so-called "snippets")? According to the text adopted today, the use of individual words and very short extracts of press publications does not fall within the scope of the new right. This means that information society service providers will remain free to use such parts of a press publication, without requiring an authorisation by press publishers. When assessing what very short extracts are, the impact on the effectiveness of the new right will be taken into account'.

87 French intellectual property code ('code de la propriété intellectuelle', hereinafter 'c.p.i.'), art 218, para 4, 'La fixation du montant de cette rémunération prend en compte des éléments tels que les investissements humains, matériels et financiers réalisés par les éditeurs et les agences de presse, la contribution des publications de presse à l'information politique et générale et l'importance de l'utilisation des publications de presse par les services de communication au public en ligne'.

advertising revenues.[88] Data at hand, the regulator is required to intervene accordingly.

A further uncertainty arises from the fact that the DSM Directive limits the scope of the neighbouring right for commercial uses of press publications.[89] However, in the current reality whereby many (apparent) non-profit activities have hidden making-profit purposes, distinguishing between commercial and non-commercial uses is getting remarkably thinner.[90]

Thus, it seems reasonable to believe that these issues will remain open until the case-law will set the boundaries of the exception established by Article 15 of the Directive. Conversely, the public domain area will be identified by exclusion.

A LESSON FROM THE CASE *AUTORITÉ DE LA CONCURRENCE V GOOGLE*. THE FAILURE OF COPYRIGHT AND CONTRACT FREEDOM?

In regards to the reactions of big platforms to the new copyright regime established by the DSM Directive, Google's response to the French transposition law—with specific reference to the press editors' new right[91]—deserves special attention.

The French law has entitled press editors to the neighbouring right of being remunerated for the online circulation of their contents, to redefine the so-called 'partage de la valeur' between rightsholders and platforms. The new right expires two years after publishing the press article. That term shall be calculated from the 1st January of the year following the date of that press publication.[92] Google's answer to such a new regulatory framework was to index only those editors accepting the free publication of their works, excluding *a priori* the chance for editors to negotiate a minimum reward. In practice, the vast majority of press publishers have granted Google free licenses to display their articles on Google News. Otherwise,

88 It is not in doubt whether news contributes to platforms' success (the *an*) as it is a definite fact. Recital 54 of the DSM Directive reports that 'the wide availability of press publications online has given rise to the emergence of new online services . . . for which the reuse of press publications constitutes an important part of the business models and a source of revenue'. What should be acknowledged is the exact measure to which news contribute to platforms' success (the *quantum*).

89 DSM Directive, art 15, 'The rights provided for in the first subparagraph shall not apply to private or non-commercial uses of press publications by individual users'.

90 In this sense, see Andrew Tyner, 'The EU Copyright Directive: "Fit for the Digital Age" or Finishing It?' (2020) 26 Journal of Intellectual Property Law 283.

91 French Law of 24 July 2019, no 775 creating a related right for the benefit of news agencies and press publishers. France is the first Member State that has implemented art 15 of the DSM Directive. To this extent, it represents the testing ground for the EU copyright reform.

92 French c.p.i., art 211, para 5, which literally implements art 15.4 of the DSM Directive. It would have been more reasonable that the *dies a quo* coincided with the day of publication of the press article in order to grant the same amount of time to all publications. Conversely, the current wording of the rule benefits those people publishing their works in the first months of a year as their right will start expiring from the following 1st January. According to such terms, an author publishing its article the 2nd January would be granted 2 years and 364 days of protection while another one publishing the 31 December would just be entitled to 2 years and 1 day of protection.

they would have lost their visibility in favour of their competitors accepting Google's blackmail.[93]

The French Competition Authority (hereinafter FCA), urged by some associations of press publishers,[94] started an investigation to hear the complainants and Google. On 9th April 2020, the Authority ordered Google to start negotiations in good faith with press editors within three months, retroactively covering the fees due after the French Law entered into force on 24th October 2019. Additionally, the Authority started another investigation against the big tech platform for discriminatory abuse of dominant position based on the equal treatment of different articles from diverse press editors.[95] It started by assessing Google's dominant position. It emerged that Google's market share was around 90 per cent at the end of 2019. Furthermore, the online search engine market is characterized by solid entry and expansion barriers linked to significant investments necessary to develop a search engine technology. Google has taken advantage of its dominant position by imposing certain unfair transaction conditions on publishers and news agencies, which would have allowed it to avoid any form of negotiation to exploit editors' rights. Clearly, Google's zero-price strategy would have never been possible if it had not covered a dominant position in the general search engine market. The Mountain View company has placed publishers and news agencies in a situation where they had no choice other than to comply with its policy without the chance of claiming any recompense.

Accordingly, the FCA has found that such conduct had produced severe and immediate adverse effects on the press sector, which, considering its current crisis, deprived editors and news agencies of a vital resource for the sustainability of their activities. Therefore, the Authority has introduced a specific negotiating obligation (under its control) on the basis that a contractual settlement would represent the best option for bridging the value gap between platforms and copyright holders. The FCA has considered that the unequal bargaining power amongst such operators can be reshaped by imposing the stronger party of an obligation to fairly remunerate the weaker one.

The fact that the FCA has been brought to intervene by adopting competition law solutions—after qualifying Google's display policy as a potential discriminatory abuse of dominant position—demonstrated that the introduction by the DSM Directive of a renewed copyright regime more favourable to authors and editors turned out not to be enough.

Although the mentioned decision may consist of an *extrema ratio* solution, it is not unlikely that other States could adopt antitrust instruments to enforce the DSM Directive when private negotiations reveal a market failure. A similar case occurred

93 For further details see the critical analysis proposed by Philippe Mouron, 'L'Autorité de la concurrence au secours du droit voisin des éditeurs et agences de presse' (2020) 54 Revue Européenne des Médias et du Numérique 10–14.

94 Namely the *Alliance de la Presse d'Information Générale* (APIG), the *Syndicat des Èditeurs de la Presse Magazine* (SEPM) and *the Agence France-Presse* (AFP).

95 At the European level, the discriminatory abuse of dominant position is sanctioned by art 102, let. (c) TFEU. On this topic see Inge Graef, 'Differentiated Treatment in Platform-to-Business Relations: EU Competition Law and Economic Dependence' (2019) 38 Yearbook of European Law 448–99.

in Germany, whereby a collecting society and 41 publishers filed a competition complaint against Google for abuse of a dominant position, which the Bundeskartellamt (the German Federal Competition Authority) rejected in 2015, as done by the Berlin Regional Court the year later.[96] It is not unlikely that German judges will change this orientation, since they have already shown a certain openness to apply antitrust rules as a 'gap filler'[97] in anomalous cases not directly covered by such rules.[98]

The adoption of antitrust instruments to enforce copyright has been wisely qualified as 'strange' by the doctrine.[99] This is due to a double reason. Firstly, antitrust rules are ordinarily applied to end dominant positions generated by the exclusive rights related to copyright or to other intellectual property rights.[100] The relationship

96 For a deeper analysis see Martin Kretschmer and others, 'The European Commission's Public Consultation on the Role of Publishers in the Copyright Value Chain: A Response by the European Copyright Society' (2016) 36 European Intellectual Property Review 592–95. For an interesting comparison of the opposite routes followed by the French and the German Antitrust Authorities see Giuseppe Colangelo, 'Enforcing Copyright through Antitrust? The Strange Case of News Publishers against Digital Platforms' (2021) Journal of Antitrust Enforcement 1–29. Moreover, the Author proposes a valuable comparative analysis of the solution adopted by other States to ensure the sustainability of the publishing sector, including *inter alia* the hot news doctrine inaugurated in the USA by the Second Circuit in *National Basketball Association v Motorola*, 105 F. 3d 841 (1997). The Court outlined a five-step test that news organizations should demonstrate to protect their creative and financial efforts: '(i) the plaintiff generates or collects information at cetain cost or expense; (ii) the value of the information is highly time-sensitive; (iii) the defendant's use of the information constitutes free-riding on the plaintiff's costly efforts to generate or collect it; (iv) the defendant's use of the information is in direct competition with a product or service offered by the plaintiff; (v) the ability of other parties to free-ride on the efforts of the plaintiff would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened'.

97 Nicolas Petit, 'France v Google: Antitrust as Complement to Copyright Law?' (2019) < https://www.linkedin.com/pulse/france-v-google-antitrust-complement-copyright-law-nicolas-petit/> accessed 21 July 2021, criticizing such 'technique' of using antitrust law as a 'gap filler' for other legal regimes.

98 See the ruling of the Bundeskartellamt against Facebook of 6 February 2019, B6-22/16. In this case, the German Antitrust Authority prohibited Facebook from combining user data from different sources since it has imposed exploitative business terms, punished under s 19 (1) of the German Competition Act. After this ruling, Facebook subsidiaries, like WhatsApp or Instagram, have been allowed to keep collecting data for their services upon voluntary consent by their users to such a practice. It means that if Facebook does not receive an express consent, it may no longer combine the different data collected as it did until that time. The crushing argument leading to this decision is the alleged risk that the combination of third parties' data with Facebook accounts has allowed the Menlo Park company to gain competitive edge over its competitors in an unlawful manner. Facebook has increased market entry barriers, which in turn has strengthened its market power towards end customers. Consequently, the aggressive data strategy carried out by the dominant supplier of advertising space in social networks has consistently reduced the advertising market's dynamicity. Indeed, the Authority's intervention was extremely required (and welcomed).

99 Colangelo (n 96) 1–29.

100 The milestone decision towards this theory was issued more than 25 years ago by the CJEU in the Case C-241/91 *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities* [1995] ECLI:EU:C:1995:98. More precisely, in para 2 the CJEU stated that 'the exercise of an exclusive right by a proprietor may, in exceptional circumstances, involve abusive conduct. Such will be the case when broadcasting companies rely on copyright conferred by national legislation to prevent another undertaking from publishing on a weekly basis information (channel, day, time and title of programmes) together with commentaries and pictures obtained independently of those companies in three different cases: where, in the first place, that conduct prevents the appearance of a new product, a comprehensive weekly guide to television programmes, which the companies concerned do not offer and for which there is a potential consumer demand. This conduct represents an abuse under heading (b) of the second paragraph of Article 86 of the Treaty; where, second, there is no justification for that refusal either in the activity of

between antitrust and copyright is typically antagonistic. However, in this case, they reach a different intersection. They seem 'accomplices' since the abuse of dominant position is not applied to grant free or non-discriminatory access to the goods or services offered by the copyright holder (being normally qualified as essential facilities). It is rather used to ensure that such access is not free providing the copyright holder with suitable remuneration based on the quantity and quality of its work. Secondly, the adoption of antitrust rules to create a legal obligation to deal is based on the essential facility doctrine. In a nutshell, it requires (i) there to be two markets, often expressed as an upstream market and a downstream market.[101] Typically, one firm is active in both markets and other firms are active or wish to become active in the downstream market; (ii) a downstream competitor wishes to buy an indispensable input from the integrated firm to operate in downstream market; and (iii) but is refused on an unjustified basis.[102] The demonstration of the three afore mentioned conditions obliges the company operating in the upstream market to provide the essential input on fair non-discriminatory terms. It may even be assumed that the search engine owned by Google could be qualified as an essential facility; the legal obligation would be that of supplying (thus selling) spaces on its search engine. It would—and could—not be an obligation to buy specific products or services. A refusal to buy cannot be equated with a refusal to supply since a company is free to decide what rights or products are compatible with its business model.[103] Given these axiological coordinates, the intervention of the FCA seems not consistent under—almost traditional—antitrust law. Nonetheless, from a practical viewpoint, it is undeniable that

television broadcasting or in that of publishing television magazines; and where, third, the companies concerned, by their conduct, reserve to themselves the secondary market of weekly television guides by excluding all competition from the market through denial of access to the basic information which is the raw material indispensable for the compilation of such a guide'. This decision was followed by C-418/01 *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* (2004) ECLI:EU:C:2004:257, in which it was specified that 'the refusal by an undertaking which holds a dominant position and owns an intellectual property right in a brick structure indispensable to the presentation of regional sales data on pharmaceutical products in a Member State to grant a licence to use that structure to another undertaking which also wishes to provide such data in the same Member State, constitutes an abuse of a dominant position within the meaning of Article 82 EC where the following conditions are fulfilled: (i) the undertaking which requested the licence intends to offer, on the market for the supply of the data in question, new products or services not offered by the owner of the intellectual property right and for which there is a potential consumer demand, (ii) the refusal is not justified by objective considerations (iii) the refusal is such as to reserve to the owner of the intellectual property right the market for the supply of data on sales of pharmaceutical products in the Member State concerned by eliminating all competition on that market'. For some interesting comments see Roberto Caso and Giulia Dore, 'Copyright as Monopoly: The Italian Fire under the Ashes' (2016) 26 Trento Law and Technology Research Group; Ariel Ezrachi and Mariateresa Maggiolino, 'European Competition Law, Compulsory Licensing, and Innovation' (2012) 8 Journal of Competition Law & Economics 595–614; Gustavo Ghidini, 'Collisione? Integrazione? Appunti sulla intersection fra diritti di proprietà intellettuale e disciplina(e) della concorrenza' (2005) 2 Mercato, concorrenza, regole 247.

101 Sally Van Siclen, 'The Essential Facilities Concept' (1996) Organization for Economic Co-operation and Development 7.

102 In the EU *acquis*, see Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs und Zeitschriftenverlag GmbH & Co. KG and others* (1998) ECLI:EU:C:1998:569.

103 Colangelo (n 96) 15. In the same vein, see Nicolas Petit, 'France v Google: Antitrust as Complement to Copyright Law?' (2019) <https://www.linkedin.com/pulse/france-v-google-antitrust-complement-copyright-law-nicolas-petit/> accessed 21 July 2021, arguing that unless a firm is under a duty to provide a service – akin to a universal service obligation – exit from a market (here by Google) is not an antitrust abuse.

the 'antitrust gap filler solution' has reached the objective of remunerating press publishers in the digital ecosystem.

Indeed, after nine months from the FCA' s order, Google closed an agreement with APIG that would grant its members the chance to upload their articles on News Showcase: Google launched this new application to reward editors in proportion to certain criteria, such as the level of the audience, the whole number of daily publications and their contribution to public information.[104] Although more work needs to be done, such agreement is a first signal that gives hope for a fairer distribution of the economic opportunities created by the Internet.[105]

It is worth noting that the same day that Google reached an agreement with the French editors, it threatened the Australian government to remove news from the platform in Australia if it had enacted a mandatory code of conduct forcing the platform to remunerate the news media for using their contents.[106] The Australian Competition and Consumer Commission suggested the adoption of a mandatory code of conduct aimed at equalizing the bargaining imbalance which includes a final offer arbitration process in case of deadlock. It has been argued that the baseball-style arbitration is consistent with the aim of ensuring a sharing of revenues between platform and news media organizations without twisting copyright laws or involving antitrust enforcement.[107] Also the European legislator is evaluating this solution; indeed, Andrus Ansip, member of the European Parliament and former commissioner, told the Financial Times that the DSA and DMA Proposals could be amended to implement some aspects of the Australian reforms.[108] These include the option of binding arbitration for licensing agreements and requiring tech companies to inform publishers about changes to how they rank news stories on their sites.

The Australian solution deserves greater attention in the light of the recent fine issued by the FCA against Google for failing to comply with the regulator's orders on how to conduct talks with French news publishers.[109] In particular, Google had

104 Lexis Veille, *Droits voisins des éditeurs de presse: signature d'un accord entre l'APIG et Google*, 25 January 2021, <https://www.lexisveille.fr/droits-voisins-des-editeurs-de-presse-signature-dun-accord-entre-lapig-et-google> accessed 18 July 2021.

105 The following step should be granting press publishers complete information about the relevance of their content to the business model of the platform. Recital 53 of the DMA reported that 'The conditions under which gatekeepers provide online advertising services to business users including both advertisers and publishers are often non-transparent and opaque. This often leads to a lack of information for advertisers and publishers about the effect of a given ad. To further enhance fairness, transparency and contestability of online advertising services designated under this Regulation or fully integrated with other core platform services of the same provider, the designated gatekeepers should therefore proceed as follows: they should provide advertisers and publishers, when requested, with free of charge access to the performance measuring tools of the gatekeeper; at the same time, they should give all the information needed for advertisers, advertising agencies acting on behalf of a company placing advertising, as well as for publishers to be able to check the provision of the relevant online advertising services independently'.

106 Robert Hard, 'Google Threatens To Shut Down Search Engine In Australia If Forced To Pay Publishers For News' *Forbes* (22 January 2021).

107 Colangelo (n 96) 24, highlighting the efficiency of this tool in tackling SEPs disputes over FRAND licensing terms.

108 Javier Espinoza and Alex Barker, 'EU Ready to follow Australia's Lead on making Big Tech Pay for News' *Financial Times* (8 February 2021).

109 Reuters 'France fines Google 500 mln euros over copyright row' (13 July 2021) <https://www.reuters.com/technology/france-fines-google-500-mln-over-copyright-row-2021-07-13/> accessed 23 July 2021.

violated four of the seven injunctions issued by the FCA, notably the following obligations (i) to enter into negotiations in good faith with press publishers and agencies; (ii) to communicate the information needed to a transparent assessment of the remuneration provided for in Article 218-4 of the French c.p.i.; (iii) to ensure that a principle of strict neutrality is respected during negotiations, so as not to affect the indexing, classification and presentation of protected content taken up by Google on these services; and (iv) to ensure the compliance with a principle of strict neutrality of negotiations on any other economic relationship that may exist between Google and press publishers and agencies. Despite the above-mentioned agreement with APIG, the FCA has found that Google disregarded, in several respects, the injunctions that oblige it to act in good faith.

In addition to the fine, the FCA has furthered ordered Google (i) to propose a remuneration offer meeting the requirements of the law and the decision for the current use of protected content on Google's services to the entering parties that would request it; (ii) to supplement this offer with the information provided for in Article 218-4 of the French c.p.i. This information must include an estimate of the total revenues generated in France by the display of protected content on its services; it must also indicate the share of revenues generated by the press publisher or the agency at the origin of the requested offer of remuneration. This estimate should detail a number of income items detailed in this decision.[110]

Finally, to ensure the effective execution of such injunctions, the FCA had levied a fine of €300,000 per day of delay at the end of the two-month period starting from the date of the formal request to reopen negotiations made by each of the complainants.

THE FURTHER LAYER OF LIABILITY UNDER THE DMA PROPOSAL

The *Autorité de la Concurrence v Google* case is also an emblematic example of what kind of conducts the DMA Proposal (hereinafter DMA or the Proposal) aims to contrast.

Firstly, it must be outlined that the DMA is a European regulatory tool conceived to reinforce the capacity of keeping digital markets more contestable, fair and transparent by early controlling unfair practices.[111] To some extent, it is a more effective tool to tackle unfair conducts compared to the traditional antirust remedies provided by Articles 101 and 102 of the Treaty on the Functionning of the European Union (the 'TFEU'). The DMA has shorter deadlines and does not require to show that a particular course of conduct harms consumers. It directly applies whenever a platform qualified as gatekeeper is not compliant with the list of obligations established by Articles 5 and 6.[112] As a matter of fact, it adds a further layer of liability that needs

110 French Competition Authority 'Remuneration of related rights for press publishers and agencies: the Autorité fines Google up to 500 million euros for non-compliance with several injunctions' (13 July 2021) <https://www.autoritedelaconcurrence.fr/en/press-release/remuneration-related-rights-press-publishers-and-agencies-autorite-fines-google-500> accessed 23 July 2021.

111 Fernández (n 3) 271–72.

112 ibid. The Author highlights that the DMA will apply not only to instances that escape the scope of the current competition rules, but also to cases that could be targeted by both sets of rules. It requires to establish strong coordination mechanisms between the application of the DMA and that of competition

to be coordinated with the labyrinth of EU measures setting other forms of liability.[113]

If the DMA had already been converted into a Regulation it would have been applicable to Google, as it meets the Proposal's subjective and objective requirements. They do not necessarily coincide with those of antitrust law as their specific target is represented by gatekeepers. Regarding the subjective conditions, there is no doubt that Google could have been qualified as a gatekeeper under the DMA[114] considering that:

1. it has a significant impact on the internal market;
2. it provides a core platform service that serves as an essential gateway for business users to reach end-users;
3. it enjoys an entrenched and durable position in its operations.[115]

As for the objective requisites, it is reasonable to believe that Google's conduct would fall within the scope of the Proposal, specifically under Article 6, paragraph 1, let. d),[116] as it refrains gatekeepers 'from treating more favourably in ranking services and products offered by the gatekeeper itself or by any third party belonging to the same undertaking compared to similar services or products of third party and apply fair and non-discriminatory conditions to such ranking'. This provision shows the crucial importance of ranking activities in the digital marketplace, in line with one of the DMA's primary purposes: identifying the new strategies through which

law provisions, not only within the European Commission but also between the latter and the national competition authorities of the EU Member States. He expressly states that 'Just as the enforcement of Articles 101 and 102 TFEU does require strong coordination between the European Commission and the national competition authorities to avoid parallel investigations and discrepancies on the substantive analysis of market conditions, a smooth enforcement of the DMA would require the set-up of similar coordination mechanisms between enforcers'.

113 For an exhaustive study that maps and critically assesses the whole range of digital platforms' liabilities, taking hard and soft law, self-regulation, as well as national legislation into consideration, see Andrea Bertolini, Francesca Episcopo and Nicoleta-Angela Cherciu, 'Liability of Online Platforms' (2021) European Parliament, Study Panel for the Future of Science and Technology.

114 More precisely, Google can be deemed as a global gatekeeper since it is the owner of eight products with over 1 billion monthly active users (Android, Chrome, Gmail, Google Drive, Google Maps, Google Play, Search and YouTube) and it has more than 90% share of the global search market. For further details see Davod Tsui and others, 'Regulators Lean In To U.S. Big Tech Firms' *S&P Global Ratings* (25 August 2020) <https://www.spglobal.com/ratings/en/research/articles/200825-regulators-lean-in-to-u-s-big-tech-firms-11624217?utm_campaign=corporatepro&utm_medium=contentdigest&utm_source=Antitrust> accessed 18 July 2021.

115 According to DMA, arts 2–3, a gatekeeper is a provider of core platform services. More specific characteristics can be found in DMA, point 2, which describes a gatekeeping condition if the following conditions are met: (i) market's high concentration, when one or very few large online platforms have set trade conditions highly independently from their (potential) challengers, customers or consumers; (ii) dependence on a few large online platforms acting as gateways for business users to reach and have interactions with their customers; (iii) the power by core platform service providers often being misused by means of unfair behaviour among economically dependent business users and customers.

116 arts 5 and 6 of the DMA establish a wide list of obligations addressed to platforms that have been designated as gatekeepers, irrespective of any potential efficiencies that might arise from the prohibited practices. The European Commission is entitled to modify the list of obligations for all gatekeepers and to further specify them for specific cases.

exclusionary conduct may be performed on the Internet. Behavioural studies observed that the results of any research ranked at the second, third, or to the following pages become essentially invisible, taking the tendential laziness of Internet users into account.[117] Indeed, internauts focus just on the early results.

In the light of the above, Google has applied discriminatory and unfair conditions against press editors since it has treated different authors and editors in the same (regrettable) way, basically imposing the waiver of any rewarding. It could be argued that this rule is specifically addressed to ranking activities aiming at sanctioning the deindexing of services and products offered by the undertakings which do not belong to the gatekeeper. Thus, it could not be applicable to Google since it has not preferred undertakings that strictly belong to the platform. They are just businesses that have granted Google a free license to publish their content because they did not want to be deindexed. In this sense, the discrimination was not made between undertakings belonging to Google and undertakings that do not belong to it. However, the intention of the European legislator seems to discourage all the discriminations that unduly enrich the gatekeeper. The term 'belong' may be interpreted in an extensive way so to also include those undertakings that have consented to manifestly unfavourable conditions because of the strong bargaining power of the counterparty. In other words, according to an authentic interpretation of Article 6, paragraph 1, let. d) of the DMA, it discourages discriminations in raking services between undertakings which do not belong to the gatekeeper and undertakings that are substantially controlled by the gatekeeper as they depend on it from the economical point of view.[118] This is bolstered by the fact that the DMA expressly considers the economic dependence of a business as an indicator that would justify the power of the Commission to impose additional obligations, whether behavioural or structural, paying due regard to the principle of proportionality.

1. Moreover, even if such conduct would not have been relevant under Article 6 of the DMA due to a restrictive interpretation, it would surely have matched the conditions expressly stated by Article 10 of the aforementioned act. According to it, the Commission is entitled to introduce new obligations for gatekeepers, as they can also be used as a parameter to verify the (un)lawfulness of the conducts already settled by Articles 5–6. It states that a practice shall be considered to be unfair or limit the contestability of core platform services when: 'there is an imbalance of rights and obligations on business users and the gatekeeper is obtaining an advantage from business users that is disproportionate to the service provided by the gatekeeper

117 Such studies have proposed the so-called paradox of choice (also named choice overload), according to which consumers only express their true preferences when a few options are submitted to them rather than a multitude, Alexander Chernev, Ulf Böckenholt and Joseph Goodman, 'Choice Overload: A Conceptual Review and Meta-Analysis' (2015) 25 Journal of Consumer Psychology 333, quoted by Schrepel (n 26) 2. For further studies on the ranking effects see Raluca Ursu, 'The Power of Rankings: Quantifying the Effect of Rankings on Online Consumer Search and Purchase Decisions' (2018) 37 Marketing Science 530–52.

118 On the need to give a stronger role to economic dependence in the platform-to-business relationship as it is scarcely addressed by antitrust law, see Graef (n 95) 499.

to business users'. In this case, it is undeniable that Google, by obtaining free licenses on thousands of press articles, has gained a disproportionate advantage from press publishers compared to the service it provides to them;

2. 'the contestability of markets is weakened as a consequence of such a practice engaged in by gatekeepers'. Of course, the press sector has been significantly damaged as it was deprived of any financial reward for the services it typically offers. This kind of strategy makes the press markets less and less attractive in the potential investors' eyes.

Nonetheless, the obligations established by the DMA which address the positions of economic dependence (both including those already set out in Articles 5–6 and those that will be introduced *ad hoc* by Article 10) should be coordinated with the existing national legislations that already contrast the abuse of economic dependence in heterogeneous ways.[119] In addition, the fact that the same conducts may be sanctioned by antitrust law highlights the need of finding a solution in the light of this further regulatory framework. Otherwise, an identical act could be subjected to multiple penalties resulting in a disproportionate response to it. A solution to such a dangerous risk of "collision" between different layers of liability is required at the European level.

CONCLUDING REMARKS: THE REMODELLED INTERSECTION BETWEEN COPYRIGHT, CONTRACT FREEDOM AND COMPETITION LAW FOR A (DELICATE) LONG-TERM LEVEL PLAYING FIELD

The above analysis highlights that the new challenges posed by the digital platform economy cannot be adequately tackled by a *laissez-faire* policy,[120] including those

119 See the Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in arts 81–82 of the Treaty on the European Community (2003) OH L 1/1, Recital 8, allowing Member States to adopt and apply on their territory 'stricter national competition laws which prohibit or impose sanctions on unilateral conduct engaged in by undertakings. These stricter national laws may include provisions which prohibit or impose sanctions on abusive behaviour toward economically dependent undertakings. Furthermore, this Regulation does not apply to national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced'. As outlined by Emmanuela Truli, 'Relative Dominance and the Protection of the Weaker Party: Enforcing the Economic Dependence Provisions and the Example of Greece' (2017) 8 Journal of European Competition Law & Practice 579, Germany, France, Portugal, Czech Republic, Greece and Italy used this option to adopt specific rules on the abuse of economic dependence. The Italian legislator has introduced the abuse of economic dependence under art 9 of the Law no 192 of the 18 June 1998 (outside of the Italian Antitrust Law). It is defined as the situation in which a firm is in the extent to which trade with another undertaking involves excessive imbalance of rights and obligations. The abuse of economic dependence can be easily applied compared to the abuse of dominant position as the former is not based on the hurdles and burdens of standard antitrust analysis. To this purpose, see the decision of the Milan Court of First Instance, no 25998 of the 12 October 2017, in which it has specified that while the abuse of a dominant position, relevant under antitrust law, involves the need to first identify the relevant market, the abuse of economic dependence does not require the dominant position of an undertaking as it widely addresses to the abuses and imbalances of companies in the context of a negotiation relationship.

120 As previously mentioned, digital markets produce information externalities that cannot be separately priced from a specific goods or service. Because of this failure in pricing, markets will not be efficient. That is why some form of government intervention is necessary, Shubha Ghosh, 'Competition in Digital

regarding the value gap between content producers and online content distributors.[121] These two industries must work together for their mutual survival, given their symbiotic relationship into account. Indeed, content creators require new efficient channels of distribution and remuneration; at the same time, online content distributors need as many contents as possible to increase the number of users trafficking on their platform. There must be a common level playing field amongst such operators to ensure new sustainable business models.

Although too much time has spent to acknowledge the inefficiencies of the current scenario, the EU legislator is setting up the legal basis for restructuring the markets imbalances through the introduction of multiple rights, liabilities, and remedies. The *fil rouge* of these measures is represented by the common aim of redistributing the enormous economic opportunities created by the cyberspace, thus terminating the 'far web' owned by Internet giants.

In sum, despite the copious amount of uncertainties related to snippets, the DSM Directive has recognized a new controversial neighbouring right for press publishers,[122] also introducing the principle of appropriate and proportionate remuneration to tackle the erosion of the bargaining power of weaker parties. In addition, it has revised digital platforms' standards of diligence by establishing their direct liability, should they not demonstrate to have made the (highly-discussed) best efforts. As a matter of the fact, European and national courts as well as national legislators bear the burden to eliminate the manifold ambiguities of interpretation raised by the DSM Directive.

Moreover, it seems that new technologies, including AI-based ones, cannot represent—for the time being—the best solution to all copyright enforcement problems, as they are still not able to distinguish between lawful and unlawful uses of digital contents. This does not exclude that a primary filter may be delegated to an AI system. It would be entitled to block only manifestly infringing or equivalent contents, while the other uploads would benefit from a presumption of lawfulness. In that case, the platform should provide a redress mechanism involving humans to control the legitimacy of the decision made by the machine. This division of responsibilities would make humans concentrate on those 'grey zones' that cannot be solved by the software. However, the current opaque algorithmic reasoning requires platforms to work on the transparency of the decision-making process. The explainability of the

Markets' in Tanya Aplin (ed), *Research Handbook on Intellectual Property and Digital Technologies* (Edward Elgar 2020) 466.

121 The doctrine has also pointed out that the time is right for wondering about a joint liability of Internet users that now hide themselves behind the anonymity. More specifically, it has been highlighted that the best solution is not to introduce a general ban on anonymity—as it would be impracticable for many reasons both of an ethical and regulatory nature—; moreover, in some cases there would also be the introduction of a double level, ie anonymity towards the public and a 'non-anonymity' (a personalization, a liability) towards the provider, so that the person who commits the offense could be easily identified. For further discussion see Giusella Finocchiaro, 'Digital Services Act: la ridefinizione della limitata responsabilità del provider e il ruolo dell'anonimato' (2021) MediaLaws Simposio: verso il Digital Services Act.

122 On the opportunity of adopting other solutions rather than just expanding property rights, as provided by the DSM Directive, see Alain Strowel, 'Advocating an EU Copyright Title' in Paul Torremans (ed), *EU Copyright Law: A Commentary* (2nd edn, Edward Elgar 2021) 1104–17. The Author interestingly highlights the need to combine such solutions with fiscal incentives, subsidy schemes and soft laws.

decision would ensure two essential principles of a fair judicial process, namely its accountability and contestability.

The *Autorité de la Concurrence v Google* case has shown the long-lasting intimate relationship between copyright, contract freedom and competition law. It has highlighted that contract freedom and the introduction of new rights under the copyright umbrella may lead to market failure also (and especially) in the digital environment. Such result is even more frequent when one party is a platform enjoying a dominant position allowing it to control access to the market.[123] Indeed, gatekeepers are unavoidable trading partners for news businesses, having a negotiating power that may threaten the viability of publishers' businesses[124]. The bargaining power asymmetries and the ambiguous liability regime outlined above have increased the value gap between content creators or content licensees and digital content distributors. As a result, they risk jeopardizing rightsholders' chance to be remunerated for the exploitation of their works in the digital environment. Besides, an obsolete legal framework would *de facto* dismantle the current system of protection of other essential values and rights which are likewise involved. Alongside the contract freedom and copyright, let us think about the freedom of expression and the right of information, the freedom to conduct a business, the freedom and pluralism of media.[125] In this grim scenario, online platforms defend themselves by claiming that stricter rules will rise to a paradigm shift that will chain technological development. More than a paradigm shift, it seems a 'paradigm slip' whose purpose is to avoid—or minimize—the application of remedies and guarantees established for weaker parties[126]. Even some solutions provided by the DSM Directive to 'partage la valeur' of the revenues generated by the Internet, as admirable as they may be, are unable to grant an adequate level playing field. Indeed, the Directive represents one of the most critical EU strategy pieces for reallocating the economic opportunities born in the digital ecosystem, which are currently monopolized by Internet giants. Nonetheless, as emerged from Google case, its reaction was to find a way to circumvent the new copyright regime. This would have been a winning plan if the FCA would not have scrutinized its counterstrategy.

123 The replies of citizens and stakeholders to the Commission's public consultation and the feedback of the National Competition Authorities replying to the Commission's questionnaire before the issuance of the DMA indicate that market failures appear to be widespread across the whole European Union. However, they are concentrated in digital markets of cross-border nature. For further details, see the Summary of the Stakeholder Consultation on the New Competition Tool <https://ec.europa.eu/competition/consultations/2020_new_comp_tool/summary_stakeholder_consultation.pdf> accessed 20 July 2021 and the Summary of the contributions of the NCAs to the impact assessment of the new competition tool <https://ec.europa.eu/competition/consultations/2020_new_comp_tool/summary_contributions_NCAs_responses.pdf> accessed 20 July 2021.

124 Colangelo (n 96) 1.

125 On this point see Oreste Pollicino, *Judicial Protection of Fundamental Rights on the Internet. A Road Towards Digital Constitutionalism?* (Hart Publishing 2021); Giancarlo Frosio and Cristophe Geiger, 'Taking Fundamental Rights Seriously in the Digital Service Act's Platform Liability Regime' (2020) SSRN <https://ssrn.com/abstract=> accessed 18 July 2021; Giancarlo Frosio, Cristophe Geiger and Elena Izyumenko, 'Intermediary Liability and Fundamental Rights' (2019) 6 *CEIPI Studies Research Paper*.

126 Alessandra Quarta, 'Narratives of the Digital Economy: How Platforms Are Challenging Consumer Law and Hierarchical Organization' (2020) 20 Global Jurist 20.

In the aforementioned case, it initially appeared that competition law instruments have successfully redressed a new balance amongst the multiple interests at stake. Even if the use of antitrust law as a gap filler has been criticized by the doctrine for several reasons (paragraph 6), the fact the Google had signed an agreement with APIG led to believe that the antitrust intervention had reached the objective (failed by Article 15 of the DSM Directive) of rechanneling advertising revenue to upstream segments of press industry. However, the recent intervention by the FCA shows that the issue of law enforcement concerns antitrust law likewise. This shows that the path towards an effective rebalance of the bargaining power asymmetries is still long. More generally, it causes doubts about what should be the most appropriate legal basis to fight the bargaining power asymmetries in the creative sector.

To this purpose, the introduction of a new layer of copyright by Article 15 of the DSM Directive was specifically aimed to ensure the sustainability of the publishing industry by encouraging the cooperation between press publishers and digital platforms.[127] However, the lifebuoy launched by the EU legislator under the copyright umbrella turned out to not be enough as it resulted from Google's elusive conduct. Irrespective of the success or failure of the FCA's interventions, the unexpected adoption of antitrust measures to enforce the new exclusive right has revealed a new shadow of the *liaison* between copyright and antitrust law. From being antagonists, they appear to be accomplices.[128] The two sets of rules share the common objective of encouraging cultural and technical progress for the welfare of the community.[129] However, they pursue this aim through two intertwined mediums, namely the enrichment of the cultural and technical heritage and the dynamicity of these markets. Copyright is of course dedicated to the first medium while antitrust law regards the second one. Nonetheless, they are connected by a biunivocal relationship: new copyrightable works will be tendentially produced if antitrust rules grant the conditions to ensure the race to those who innovate more and to those who innovate better; at the same time, the dynamicity of the innovation market will be preserved only if creators are granted a legal effective protection and remuneration for their works.

127 ibid. The Author concludes that the goal of policy makers to support journalists cannot be pursued by twisting copyright laws or involving antitrust enforcement.

128 Nicolas Petit, 'France v Google: Antitrust as Complement to Copyright Law?' (2019) <https://www.linkedin.com/pulse/france-v-google-antitrust-complement-copyright-law-nicolas-petit/> accessed 21 July 2021, highlighting that 'antitrust law and policy in unilateral conduct/abuse of dominance cases to date has mostly been about cracking intellectual property ("IP") rights open, not effectuating them . . .. It would be quite of a Copernican revolution, if antitrust law was used to increase royalties, not lower them'.

129 On copyright's rational(s) see David Boies, 'Cyperspace and Antitrust' in *Proprietà intellettuale e cyberspazio* (Giuffrè 2002) 9–12 according to which 'The rational of the doctrines of patent and copyright abuse is straightforward. In the United States there is no presumed "natural law" right to intellectual property rights. Patents and copyrights are granted, and only granted, for the purpose of encouraging creative activity that, it is believed, will benefit consumers sufficiently to justify the award of limited rights. The extent of the rights granted is limited to the legislature's judgement as to what rights are necessary to encourage and sustain a desirable level of creative activity, balanced with the negative consequences of any exclusive franchise'. See also William Fisher, 'Theories of Intellectual Property' in Stephen Munzer (ed), *New Essays in the Legal and Political Theory of Property* (CUP 2001) 168–99. The welfare of consumers alongside with the economic efficiency is pursued by antitrust rules, as outlined by Daniel Crane, 'Rationales for Antitrust: Economics and Other Bases' in Roger Blair and Daniel Sokol (eds), *The Oxford Handbook of International Antitrust Economics* (OUP 2014).

It is true that the exclusive rights granted by copyright may give rise to dominant positions addressed by antitrust law to restore the conditions for an effective market by 'unenforcing' copyright. But when the dominant position is owned by third parties who may threaten the sustainability of the copyright industry, antitrust rules must likewise be applied to enforce copyright for reaching the same objective. In both cases, private interests (belonging to the copyright holder or to the digital platform) weaken in favour of market interests.

As a matter of fact, the French case has brought to light an interesting new shadow of the relationship between antitrust and copyright. The former one is not necessarily applied to contrast the latter one since it can also be used as a (questionable performing) tool to enforce copyright. It is very likely that there will be many more cases strengthening this new link between copyright and antitrust, given the shared increasing attention of the EU legislator to grant fairness and contestability of the creative European platform-based market. In sum, the unorthodox antitrust intervention does not seem to be an exceptional solution because the platform economy is properly characterized by few (m)oligopolistic companies that perform anticompetitive conducts different from those typical of 'analogical' markets. The most modern forms of abuses of dominant position—both exclusionary and exploitative[130]—by digital platforms can be intercepted by competition law. But they can also be addressed by other sets of norms whose enforcement is demanded to antitrust authorities too. In particular, even if a large part of the new conducts able to distort the market could already fall into the scope of Article 102, TFEU, they would also be punishable under Articles 5–6 of the DMA, should it become an EU Regulation.[131] Nonetheless, the unclear nature of these rules, being in the middle between consumer law and antitrust law, risks to foster double sanctions for the same conducts. For instance, a more favourable treating in ranking services and products offered by the gatekeeper itself compared to the treatment reserved to other undertakings could be relevant under both regulations: namely, under the DMA, as prohibited by Article

130 For an interesting analysis on the difficulties that a competition authority might face when it comes to sanctioning exploitative abuses in digital markets see Marco Botta and Klaus Wiedemann, 'Exploitative Conducts in Digital Markets: Time for a Discussion after the Facebook Decision' (2019) 10 Journal of European Competition Law & Practice 465–78.

131 It is reasonable to believe that if the DMA becomes an EU Regulation, the equal rewarding of creators should be granted *a fortiori* to comply with the additional threshold of fairness. In a perfect world, this principle should be further applied whenever the platform does not meet the criteria for being designated as gatekeeper. It is true that fairness was indeed conceived to regulate the precise gatekeeper-to-business (G2B) and platform-to-business (P2B) relationships. However, it cannot be denied that the issue of bargaining power asymmetries involves the whole digital economy, from business-to-consumer relationships (B2C) to business-to-business ones (B2B). It could be assumed that fairness is part of the *acquis communautaire* by now, and it will be progressively evoked in every transaction in the name of the good functioning of the European digital market. In other words, although this principle was typically introduced to reshape the relationship of power between online players and 'offline' copyright holders, it would seem reasonable to believe that it should be deployed as a key value orienting the whole digital economy. It would ensure a sustainable development of the European digital—but also analogical — market. As concerns the P2B relationships, see the Regulation 2019/1150/EU of the European Parliament and of the Council of 20 June 2019, on promoting fairness and transparency for business users of online intermediation services, OJ L 186/57. For an interesting comment, see Federico Ruggeri, 'Regole di trasparenza e rapporti tra imprese nei mercati digital: il Regolamento (UE) 2019/1150 sull'intermediazione online e i motori di ricerca' (2021) II Il diritto dell'informazione e dell'informatica.

6, let. (d), but also under antitrust law, considered a discriminatory abuse of dominant position according to Article 102, let. (c) of the TFEU. The intervention of the respective authorities (namely the European Commission and the national competition authorities) must be coordinated to avoid disproportionate sanctions that could likewise affect the market. When the European Commission is the sole competent authority, it should adopt a global view of all the relevant rules applying a unique sanction for the unlawful conduct. Otherwise, its action would violate the principle of *ne bis in idem*. There is a need to set up a mechanism between competition authorities and inside each competition authority that will coordinate the two sets of rules.[132]

More precisely, there is also a third legal framework addressing identical conducts, namely the abuse of economic dependence. It makes it harder to provide a coordinated response to unfair conducts considering that the abuse of economic dependence is treated heterogeneously across Member States. Nevertheless, since national competition authorities are also charged of enforcing these norms there are good chances to avoid overlapping sanctions at least at national level. It would be advisable that the division of tasks between commissioners would be linked to the conduct and not to the violated rules so to grant a consistent response for similar or identical behaviour. Since the abuse of economic dependence may have cross-border dimensions, an intervention of the European legislator would certainly be welcomed. An even more desirable outcome would be that the final version of the DMA rearranges the legal order currently endangered by an uncoordinated regulatory framework; this may give rise to overlapping sanctions (and remedies) for the same conduct. For instance, it has been showed that the ranking activity may be relevant under Article 15 of the DSM Directive, Article 6 of the DMA, Article 102 of the TFEU and the eventual national legislation sanctioning the abuse of economic dependence. Additionally, if also the European legislator follows the Australian solution, the legal toolkit would be even wider including a code of conduct with a mandatory baseball arbitration clause.

Undoubtedly, the regulator should limit platforms' freedom of contract when their dominant positions lead to unfair or arbitrary outcomes.[133] But such limitation must be adopted within a consistent legal framework that would ensure its proportionality. The legal order could be restored by setting hierarchical relations between the different rules involved. It could be based on the respective values protected by each law. The residual application of the least relevant rules would avoid the same conduct from being sanctioned multiple times, resulting in a disproportionate

132 Fernández (n 3) 272.

133 To this purpose, see the proposal for a DSA, Recital 38: 'whilst the freedom of contract of providers of intermediary services should in principle be respected, it is appropriate to set certain rules on the content, application and enforcement of the terms and conditions of those providers in the interests of transparency, the protection of recipients of the service and the avoidance of unfair or arbitrary outcomes'. On the overlapping risks between the DSM Directive and the DSA proposal see extensively João Quintais and Sebastian Felix Schwemer, 'The Interplay between the Digital Services Act and Sector Regulation: How Special is Copyright?' (2021), <https://ssrn.com/abstract=3841606 or http://dx.doi.org/10.2139/ssrn.3841606> accessed 20 July 2021.

response. It is true that it could depend on the pluri-offensive effects arising from a single conduct, but it causes confusion in identifying the most appropriate legal basis. In conclusion, the European legislator has the pivotal role of clarifying the axiological coordinates that would allow judges, authorities and national legislator to govern the ever-increasing intersections between copyright, antitrust law and other legal regimes with a view to ensure the sustainability of the creative sector in the renewed European platform-based digital market.