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Hold the Presses! Fair Use on the Internet

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European Union, *Before* the 2019 Directive

- E.g., Belgian Court, 2007: Google no right to display lead paragraphs from French-language Belgian news sources when aggregating news stories
  - **Originality**: accepted (snippets of press articles containing essential elements of articles are protected by copyright)
  - Right of **quotation**: denied (no use for explanation, reference, criticism or illustration)
  - Right to **report current events**: denied (rationale is to allow medias to report current events quickly without having to obtain consent of authors first; here Google displayed articles during 30 days)
  - **Freedom of expression**: denied (can be limited by copyright laws)
  - **Fair use**? not an exception *per se*

European Union, the 2019 Directive

- Art **15** Directive 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/ECE
  - Member States shall provide publishers of press publications established in a Member State with the rights provided for in Article 2 (**reproduction**) and Article 3(2) (**communication**) of Directive 2001/29/EC for online use of press publications by information society service providers
  - Do not apply to **private** or **non-commercial** uses of press publications by individual users
  - Do not apply to use of **individual words** or **very short extracts** of a press publication
  - Whereas, § 58: "it is important that the exclusion of very short extracts be interpreted in such a way as not to affect the **effectiveness** of the rights provided for in this Directive"
  - **Appropriate share** of revenues to the press

European Union, *After* the 2019 Directive

- France, 2019: implementation of Directive into national law
  - **Remuneration** due to publishers based on factors such as human, material and financial **investments** made by publishers and press agencies, **contribution** of press publications to political and general information and **importance** of use of press publications by online public communication services (e.g., Google News)
  - Online public communication services to provide press publishers and press agencies with **all the information** relating to use of press publications by users as well as all other information necessary for evaluation. transparency of remuneration
  - If no agreement within 6 months, either party may refer to a **Commission**, which will help find an amicable solution
  - If no agreement, Commission determines remuneration

European Union, *After* the 2019 Directive

- France, 2020: French Competition Authority ordered Google to take several measures towards French press
  - French law implementing the Directive aims at setting up the conditions of **balanced negotiation**
  - However, Google unilaterally decided to **stop displaying** headlines/snippets/pictures/videos unless so agreed by press free of charge
  - Google also refused to communicate any information allowing determination of fair remuneration and reproduced, in some instances, full titles of press articles on the ground that they do not fall under the law
  - Google holds a **dominant position** on the French market of internet searches
  - Press cannot afford to be excluded from Google
  - Google ordered to negotiate in **good faith**

European Union, *After* the 2019 Directive

- France, 2021: French Competition Authority fined Google **EUR 500 million** for not having negotiated with French press in good faith
  - ✓Had excluded press agencies from negotiation, without legal basis
  - ✓Had disclosed only partial/belated information regarding revenues
  - ✓Had included in negotiation the mandatory conclusion of global licence ("Showcase") covering entirety of press articles
- France, 2022: agreement between Google and French press >> Google will make offer and disclose information to the French press. An arbitral tribunal will be competent if no agreement

Switzerland

- No legislation, no case law
- Wait & see approach: look at EU legislation and assess whether useful/efficient or not
- New bill to be drafted by end of 2022
- Legislative process takes time

THANK YOU