



AMSTERDAM LAW SCHOOL, UNIVERSITY OF AMSTERDAM

Institute for Information Law

Research Proposal

Rethinking News and Media Law in Europe

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1. Introduction

The recent adoption of Australia's News Media and Digital Platforms Mandatory Bargaining Code¹ provides fresh impulses in the ongoing debate on appropriate revenue streams for independent quality journalism and sufficient support for media diversity in platform-based news communication. The new Australian legislation applies an amalgam of negotiation requirements to incentivise agreements for remuneration for news content on digital platform services, and compulsory arbitration if these negotiations reach an impasse. Seeking to strengthen the bargaining position of smaller news publishers, the Code specifically authorises press publishers to bargain collectively. In case of fruitless negotiations, the arbitral panel takes the final offers submitted by the parties as a starting point for determining an appropriate amount of remuneration. The panel can make adjustments in the light of public interest considerations and, in particular, the following assessment factors:

- the benefit of the news content to the digital platform service;
- the benefit of platform-based news distribution to the press publisher;
- the reasonable cost of news production to the press publisher;
- the reasonable cost of news distribution in Australia to the digital platform service;
- whether a particular remuneration amount would place an undue commercial burden on the digital platform service.²

For the further development of European news and media law, the Australian initiative is of particular importance. In 2013, the High-Level Group on Media Freedom and Pluralism tabled no less than 30 recommendations to support free and pluralistic media in the EU and sustain European democracy.³ Legislative reactions at EU level, however, remained limited to piecemeal approaches. The 2019 Directive on Copyright in the Digital Single Market (CDSMD)⁴ seeks to give press publishers control over the use of their press publications on online platforms by awarding exclusive neighbouring rights of reproduction and making available.⁵ The 2018 amendment of the Audiovisual Media Services Directive (AVMSD)⁶ adds specific rules for the regulation of video-sharing platform services.⁷ The Commission proposal for a Digital Services Act and a Digital

¹ The new Australian legislation is available at: <https://www.legislation.gov.au/Details/C2021A00021>.

² News Media and Digital Platforms Mandatory Bargaining Code, *supra* note 1, section 52ZZ.

³ The Recommendations are available at: <https://ec.europa.eu/digital-single-market/en/high-level-group-media-freedom-and-pluralism>.

⁴ 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, *Official Journal of the European Communities* 2019 L 130, 92.

⁵ See Article 15(1).

⁶ Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities, *Official Journal of the European Communities* 2018 L 303, 69.

⁷ See, in particular, Articles 28a and 28b.

Markets Act seek to complement these legislative measures with a more general upgrade of the rules governing digital services in the EU.⁸ To this day, however, an overarching approach to ensure news remuneration and media diversity in platform-based communication is missing in the EU.

Against this background, the Institute for Information Law (IViR) will use the momentum created by the Australian initiative and organise a roundtable of human rights, media, copyright, digital services and competition law experts to arrive at a recommendation for a more structured and integrated approach to news, media and online platform regulation in the light of the media freedom and pluralism objectives that led to the 30 recommendations of the 2013 EU High-Level Group.⁹ The roundtable discussion will address systemic issues of the media and platform landscape. On this basis, it will pave the way for a structural new approach within the legal framework and competences that follow from primary EU legislation.

As a repercussion of the developments in Australia, the roundtable and recommendation will provide important impulses for the debate in Europe. To allow this short-term initiative to culminate in new legislation following a more structured and overarching approach, however, more fundamental research is indispensable that explores

- the fundamental rights and democracy dimension of quality journalism and media diversity as a basis for a structural new approach to news and media law;
- the groundwork laid in the CDSMD and the discussion about revenue streams and fundamental changes in the market environment that accompanied the adoption of the new neighbouring right for press publishers;
- the groundwork laid in the AVMSD and the new rules following from the Digital Services Act and the Digital Markets Act as catalysts for a new overarching approach.

For this fundamental, long-term research that connects the dots between the EU Charter of Fundamental Rights, the CDSMD, the AVMSD and the proposed Digital Services Act (DSA) and Digital Markets Act (DMA), this research proposal seeks funding.

2. Methodology

The project will follow an interdisciplinary approach, combining legal and economic methods. As the catalogue of assessment factors in the new Australian legislation shows, the interdependency of benefits for online platforms and press publishers requires a careful economic analysis of market failures in relation to news production, business models and value creation in news media and internet platforms, gatekeeper functions and bargaining power. Therefore, the project will combine the described legal-doctrinal analysis with an economic analysis of changes in the news and media landscape. In addition, the work in the project will follow closely and enrich with guidelines and recommendations all new initiatives that are taken in the field of European news and media regulation and support, such as the announced preparation of a European Media

⁸ See <https://ec.europa.eu/digital-single-market/en/digital-services-act-package>.

⁹ The Recommendations are available at: <https://ec.europa.eu/digital-single-market/en/high-level-group-media-freedom-and-pluralism>.

Freedom Act¹⁰ and related action plans focusing on Democracy¹¹ and Media.¹² Following this general approach with constant updates including new policy initiatives, the work in the project will be divided into three work packages (WPs). As a horizontal research strand, the economic analysis – carried out by Dr. Joost Poort – will inform and enrich the work and discussion in all three WPs:

WP1: Fundamental Rights as a Basis for a Structural New Approach to EU News and Media Law

Leader: Prof. Dr. Tarlach McGonagle

Fundamental rights increasingly inform academic, law and policy thinking on the importance of quality journalism and reliable news in contemporary Europe. Since the Charter of Fundamental Rights of the European Union has acquired legal force, the European Union has been using fundamental rights more consciously and explicitly in its regulatory and other initiatives. A fundamental rights driven approach to media law and its safeguards for independent news (sources) is necessary in increasingly digitized democratic societies. Freedom of expression, independent media, critical journalism and public debate generally are all under pressure due to threats and violence against journalists; vexatious lawsuits (including SLAPPs) targeting journalists, the media and NGOs; concentrations of media ownership; political interference in media and editorial independence; massive losses of sales and advertising revenue; the dominant positions of key global platforms in the information ecosystem; the scale and speed of online disinformation. When framed in terms of fundamental rights, these disparate threats to a vibrant public debate can be addressed in a coherent and systemic way. States parties to the European Convention on Human Rights (including all EU member states) have a positive obligation to foster a favourable environment for freedom of expression and public debate, including online. This has far-reaching ramifications for the application of existing regulation and for the elaboration of future regulation. WP1 will examine the challenges facing independent media and news and explore a range of sustainable, rights-based regulatory and policy solutions to overcome those challenges.

The research in WP1 will be conducted in a dialogue with and between selected leading European scholars and experts from intergovernmental, civil society, journalism, media and internet sectors, taking into account interim results from the economic study. All members of the WP1 research group are leading, forward-looking scholars and experts in the area of fundamental rights and media regulation. Each member of the group will produce a commissioned thought-provoking research paper (“think piece”) on a subtopic to be designated.

WP2: Lessons From the AVMSD for an Overarching EU News and Media Law

Leader: Dr. Kristina Irion

The AVMSD is the centrepiece of EU media law that aims to, inter alia, safeguard media plurality and diversity, protect children and consumers, combat racial and religious hatred. The regulatory architecture of the AVMSD – which by origin had been EU legislation on television programmes –

¹⁰ See https://ec.europa.eu/commission/commissioners/2019-2024/breton/announcements/european-media-freedom-act_en.

¹¹ See https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2250.

¹² See <https://digital-strategy.ec.europa.eu/en/policies/media-and-audiovisual-action-plan>.

has been expanded to cover nonlinear audiovisual media services and, more recently, video platform services with user-generated content. This has contributed to a situation where the AVMSD's definitions and graduated approach to regulation are increasingly unfit to achieve its objectives in the current digital media environment. Against this background, WP2 will take digital media as a point of departure and rethink the regulatory approach in light of the specific media policy objectives highlighted above, the additional rules following from the Digital Services Package (DSA and DMA), and the quest for economically viable public interest content and news media. WP2 will devote particular attention to the distribution of competences between the EU and its Member States in the field of news and media regulation.

As the work in WP1, the research in WP2 will be conducted in a dialogue with and between selected leading European scholars, taking into account interim results from the economic study. All members of the WP2 research group are leading, forward-looking scholars in the area of the AVMSD. Coming from different parts of Europe, they are well versed to introspect the diversity of European media systems and attendant challenges for media plurality in order to co-create solutions for a future-forward approach to digital media regulation. Each member of the group will produce a commissioned thought-provoking research paper ("think piece") on a subtopic to be designated.

WP3: Lessons From the CDSM Directive for an Overarching EU News and Media Law

Leader: Prof. Dr. Martin Senftleben

With the adoption of the CDSMD, the EU has introduced a new neighbouring right for press publishers with regard to the digital use of their publications. Recital 54 of the CDSMD reflects the underlying objective to support a free and pluralist press and "ensure quality journalism and citizens' access to information." It is doubtful, however, whether an additional layer of copyright protection is sufficient to achieve this goal. As the new Australian legislation shows, a broader spectrum of measures may be necessary. Against this background, WP3 brings together leading experts in copyright and competition law to analyse the discussion and studies on the disruptive force of content aggregation and platform-based distribution services that accompanied the development and adoption of the new press publishers' right in the CDSMD. The research will also examine fundamental shifts with regard to gatekeeper functions and advertisement revenue, and explore experiences with the effects of the new press publishers' right (and national precursors) in EU Member States. In the light of the accompanying economic analysis of value creation and bargaining power, the work in WP3 will culminate in overarching insights that can be derived from the copyright debate and the critique of the "piecemeal" approach in the CDSMD. In the development of these overarching insights, WP3 will also consider the additional rules following from the Digital Services Package (DSA and DMA). As to collective bargaining and arbitration, the research group will examine whether the rules on copyright contract law – which have also been harmonised in the CDSMD – provide a useful model. Again, national experiences will be taken into account in this context. The insights from WP3 will serve as a basis for the development of a more comprehensive and universal regulatory model.

Again, the research in WP3 will be conducted in a dialogue with and between selected leading European scholars, taking into account interim results from the economic study. All members of the WP3 research group are leading, forward-looking scholars in the area of the CDSM Directive. Each member of the group will produce a commissioned thought-provoking research paper ("think piece") on a subtopic to be designated.

Academic Workshop Plenaries

The research papers evolving from the work in WP1, WP2 and WP3 will be made available open access on a dedicated project page on the IViR website. They will be discussed – together with underlying economic insights – in two “workshop plenaries” organised in Amsterdam and/or at Microsoft conference premises in Brussels or Berlin. The workshop plenaries serve the purpose of bringing all members of the different WP research groups together and share information and think pieces across the different legal disciplines under examination. Authors of research papers in one WP will receive feedback from researchers in the two other WPs. In this way, the workshop plenaries will allow the researchers in the project to identify overarching principles and develop solutions that combine rules from the areas of law under examination. Moreover, the workshop plenaries will include work in “policy labs” offering the opportunity to discuss solutions and new approaches proposed in the think pieces with policymakers (international, EU and national level) and specialists from the industry sectors involved.

The workshop plenaries will be invitation-only events. Besides the applicants and the members of the WP research groups, invitees to the workshops will be leading human rights, media, platform regulation, copyright and competition law scholars and economists (from the EU, the U.S. and elsewhere), legal practitioners and other specialists from the sectors involved, and high-level officials from national ministries, the European Commission (DG Markt, Copyright Unit, and DG Connect) and possibly WIPO.

In the workshop plenaries, the discussion will address the following general trends:

- the shift towards platform-based news and media consumption that leads to a trend of steering and organising the discourse on social, cultural and political issues, as well as commercial communication, with the help of network technology, apps that allow permanent micro-level points of contact with individual users, and big data streams that include personal data reflecting consumption patterns and individual preferences. In this new environment, online search, sales and social media platforms are central gatekeepers. The “classical” mass media, by contrast, hardly have direct access to the public anymore. Instead, they have become providers of information input and brands for “retrievable” content offers. From an economic perspective, this new media landscape has a deep impact on revenue streams. Online platforms with gatekeeper functions may be able to generate substantial profits without contributing much to the creation of original information products, such as news and other press publications;
- in society as a whole, the shift towards platform-based news and media consumption leads to a crisis of legitimacy in media regulation. Online platforms may have success in escaping traditional media obligations, such as the obligations laid down in the AVMSD, by reducing their role to mere providers of electronic communication or information society services with a focus on software and data infrastructures. A regulatory crisis may also follow from the invocation of fundamental rights, including the fundamental rights of platform users, to escape public regulation based on specific legislation. As a result, online platforms may enjoy considerable freedom to engage in self-regulation and devise tailor-made contractual solutions that support their model for distributing news and other media content;
- the shift towards platform-based news and media consumption has also led to a remarkable democratisation of information production. In the era of user-generated content, professionals compete with amateur creators of a wide variety of online content. While this trend has the positive effect of opening up market access and increasing content

diversity, it may have a corrosive effect on quality control and accuracy of information products.

In the light of these trends, the workshop plenaries will seek to react to the concentration of communication, electronic information and software services in the hands of online platform providers by combining legal rules and principles – ranging from fundamental rights to copyright, media and competition law – to arrive at an appropriate, overarching legal framework for news and media production, distribution and consumption in the described platform-based environment. The project will pave the way for this overarching legal framework against the background of an in-depth analysis of the value chain and business models of press publishers and online platforms. The work in the project will also constantly be updated in the light of new regulatory initiatives, such as the aforementioned European Media Freedom Act and relevant action plans.

3. Deliverables and Impact

The research project will **continuously generate policy and research papers (in 6-months intervals)** to stimulate and enrich the debate on a new approach to news and media law in the light of the challenges arising from platform-based services and with regard to new regulatory initiatives and policy approaches that evolve during the project. The work in WP1, WP2 and WP3 research groups will lead to 22 research papers (drafted by the applicants and the invited experts). Each workshop plenary and the final conference will yield **practice-oriented policy recommendations**. These policy recommendations will reflect the insights arising from the work in WP1, WP2 and WP3 and translate these insights into practical advice and guidelines that can inform the policy debate and new regulatory initiatives that take shape during the project. The policy labs organized during workshop plenaries will allow policymakers and specialists from the different industry sectors to comment on the work in WP1, WP2 and WP3, and enrich the policy recommendations with their expertise, feedback and practical experiences. All research output will be available **open access on dedicated project webpages on the IViR website**.

The applicants will ensure that all policy and research papers reach broad audiences in policy and academic circles alike. Moreover, the applicants will publish an **interim academic journal article mapping new directions in news and media law** under examination at the end of the first year of the project.

The work in the project will result in final publications that bring together the groundbreaking research papers evolving from the work in WP1, WP2 and WP3 and reflect the overarching legal principles and solutions that have been identified during the workshop plenaries. The final publications will appear in **special issues of leading, peer-reviewed European journals** and/or an **edited volume in a leading book series**. The publication of the research papers in special issues or book format will profoundly influence and advance news and media law in the EU. While the policy recommendations address and impact the latest policy approaches and regulatory developments during the project, the final publication will have unprecedented long-term value. Condensing the insights that have been obtained during the project, it will offer a solid basis for appropriate law and policy making with a deep impact on the interpretation and application of new press and media law in Europe. The bundling of the final publications in special issues or an edited volume will provide a central compass for an integrated, overarching approach to news and media law in the age of platform-based communication that is currently missing. With this research output, the project will pave the way for the envisioned new structural approach to news and media law and significantly impact EU law and policymaking.

To enhance the visibility of research results among policymakers and stakeholders, the main results of the work in WP1, WP2, WP3 and the integration of insights during workshop plenaries will also be summarised and condensed into final policy recommendations for a new, structural approach to EU news and media law. These insights and recommendations will be presented to the European Commission and the European Parliament at the end of the project.

4. Academic Independence

Pursuant to the principles of academic freedom and independence, laid down in the Declaration of Scientific Independence of the Royal Netherlands Academy of Arts and Sciences (KNAW),¹³ the applicants and all research partners in this project will enjoy complete intellectual independence from any third parties, including Microsoft. The research project concerns a politically sensitive topic, which makes it very important to guarantee and secure full academic independence and transparency. We can only conduct this research and reach convincing results, if we are not bound by specific objectives or expectations. Furthermore, all research results will be published in full under the final responsibility of the applicants. Upon acceptance of this proposal, IViR will create a project page on its website for the open access publication of research results and this grant proposal (excluding the financial paragraph).

5. Project Team

The project will be led by Prof. Dr. Martin Senftleben, Director of IViR. The work in the individual WPs will be led Prof. Dr. Tarlach McGonagle (WP1), Dr. Kristina Irion (WP2) and Prof. Dr. Martin Senftleben (WP3). The economic study will be carried out by Dr. Joost Poort.

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Research support will be provided by a research assistants.

Prof. Dr. Martin Senftleben is Professor of Intellectual Property Law and Director of IViR. His activities focus on the reconciliation of private intellectual property rights with competing public interests of a social, cultural or economic nature. Current research topics include the regulation of online platforms and user-generated content, the income situation of authors, and the implementation of the CDSMD. In collaboration with economists, Martin has published on new business models in the publishing sector and the disruptive force of content aggregation services, including news services and social media. During the legislative process leading to the CDSMD, he organised policy roundtables and contributed to the debate with policy recommendations that received broad support. Martin is a member of the Copyright Advisory Committee of the Dutch State. He provided advice to the World Intellectual Property Organization in several trademark and copyright projects. He is the President of the European Copyright Society (ECS) and a member of the Executive Committee of the Association littéraire et artistique internationale (ALAI). As a visiting professor, he was invited to the National University of Singapore, the Engelberg Center at NYU Law School, the Oxford Intellectual Property Research Centre, and the Intellectual Property Research Institute of Xiamen University. As a guest lecturer, he provides courses at the Centre for International Intellectual Property Studies (CEIPI), Strasbourg, the Munich Intellectual Property Law Center (MIPLC), and the Universities of Catania and Krakow.

Dr. Kristina Irion is Associate Professor at IViR and a leading expert on EU media law, the AVMSD and digital media regulation. She has published on EU competences and independent supervision in the media sector and is currently contributing to a research project on the promotion of

¹³ https://www.knaw.nl/shared/resources/actueel/publicaties/pdf/scientific_independence.pdf.

European content in the context of video-on-demand services. Kristina is motivated by the insight that cultural identity and diverse expression is formative for European values and democratic societies which requires special protections in the presence of globally distributed digital content platforms. Part of her research also covered small European media systems in democratic transition countries of the Western Balkans in a comparative perspective. In terms of societal relevance, much of the commissioned research she has led or contributed to did generate a significant impact on public policy, for instance the so-called INDIREG study on independent media supervisory authorities in EU audiovisual media law.

Prof. Dr. Tarlach McGonagle is Programme Director of the master Information Law and Associate Professor at IViR. He is also Professor of Media Law & Information Society at Leiden Law School. Tarlach specialises in a broad range of topics relating to international and European human rights law, especially the right to freedom of expression, and international, European and comparative media law and policy. Themes such as pluralism, diversity, tolerance, “hate speech”, disinformation, safety of journalists and the future of news have a central place in his research. He regularly advises and writes expert studies for various branches of the Council of Europe, the European Union, the Organization for Security and Cooperation in Europe (OSCE) and the United Nations. He is co-rapporteur of the Council of Europe’s Committee of Experts on combating hate speech, having previously served as a member of the Council of Europe’s Committee of Experts on quality journalism in the digital age and as Rapporteur of both the Council of Europe’s Committee of Experts on media pluralism and transparency of media ownership (2016-2017) and its Committee of Experts on protection of journalism and safety of journalists (2014-15). Tarlach is a senior researcher at the Netherlands Network for Human Rights Research and is co-chair of its Working Group on human rights in the digital age. He is a member of: the Euromedia Research Group; the Editorial Board of the European Audiovisual Observatory; the Editorial Board of Netherlands Human Rights Quarterly, and the Board of the Vereniging voor Media- en Communicatierecht.

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Dr. Joost Poort is Associate Professor and Co-Director of IViR. He works as an economist on various economic and multidisciplinary research projects in the field of copyright, telecommunications and media. Examples include studies on online piracy and enforcement measures against it, the financing of European films and the extension or renewal of licences for telecommunications and commercial radio. On 18 February 2015, he successfully defended his dissertation Empirical Evidence for Policy in Telecommunication, Copyright and Broadcasting. Joost started in 1998 as an economic researcher at Nyenrode Forum for Economic Research (NYFER), where he has been working as a senior researcher since 2000. From 2003 he worked at SEO Economic Research, initially as senior researcher and since 2008 as head of the Competition and Regulation cluster. Over the years, his research has increasingly focused on the economic aspects of copyright, telecommunications and media. Joost is lead author and in many cases project leader of a large number of studies and has written many articles and chapters in scientific, semi-scientific and popular media. He regularly speaks at scientific conferences and expert meetings and debates at home and abroad. In addition, he has written position papers and essays for various ministries and on several occasions was secretary of interdepartmental government committees. In addition, he has written position papers and essays for various ministries and on several occasions was secretary of interdepartmental government committees. Since mid-2015 he has been an Honorary Economics Fellow at CREATE, the RCUK Centre for Copyright and New Business Models in the Creative Economy, at the University of Glasgow.

6. Time Table

The project will commence in the Winter of 2021 and will continue for **two years** until the end of 2023. The planning for the project is as follows:

03/2022-09/2022	Establishment of research groups for WP1, WP2 and WP3, first WP group meetings of all three research groups (separately) and discussion of plans and ideas for individual research papers (“think pieces”) within the group. Drafting of preliminary discussion papers for first workshop plenary.
09/2022	First workshop plenary to bring all members of WP1, WP2 and WP3 research groups together and discuss cross-cutting issues, common themes and overarching principles for the further work on the individual research papers which are presented in the form of preliminary discussion papers. Invitation of external experts to enrich the debate and receive additional input, including policymakers and specialists from the different industry sectors for the work and discussion in policy labs. Drafting of a policy recommendation in the light of the most recent developments in the field of law and policymaking. DELIVERABLE: first policy recommendation.
10/2022-03/2023	Drafting of first version of research papers in WP1, WP2 and WP3, second WP group meetings to discuss these first versions and receive feedback from other members of the same WP. Drafting overview journal article on new directions in news and media law (applicants).
10/2022-11/2022	DELIVERABLE: interim academic journal article mapping new directions in news and media law (applicants) and highlighting new policy approaches and guidelines for law and policymaking in the light of the most recent developments and regulatory initiatives.
04/2023	Second workshop plenary to discuss draft research papers evolving from WP1, WP2 and WP3 and receive feedback from the members of the other two WPs. Invitation of external experts to enrich the debate and receive additional input, including policymakers and specialists from the different industry sectors for the work and discussion in policy labs. Discussion of overarching principles, solutions and new approaches to news and media law in preparation of the final conference. Drafting of a policy recommendation in the light of the most recent developments in the field of law and policymaking. DELIVERABLES: second policy recommendation.
05/2023-10/2023	Establishing final versions of the research papers in WP1, WP2 and WP3. Preparation of final publication of the research papers in special issues or in an edited volume. Preparation of presentation of WP1, WP2 and WP3 results in final conference. Drafting of final, overarching policy recommendation condensing project insights for final conference.
11/2023	Final conference: presentation of final papers and overarching insights leading to a new approach to news and media law. Presentation of overarching policy recommendations reflecting all project results and insights. Discussion of these final

recommendations with policymakers and specialists from the different industry sectors in policy labs to receive feedback and enrich the recommendations with the expertise and practical experiences offered by policymakers and industry specialists.

DELIVERABLE: final, overarching policy recommendation

12/2023

Preparation of final publications. Conclusion of project.

DELIVERABLE: 22 final research papers for publication in special issues of leading journals and/or edited volume in leading book series. Presentation of project insights and policy recommendations to the European Commission and the European Parliament.
