

DSM SERIES – PART 2

# The new press publishers' right: will Big Tech push back?

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In the second of our series of briefings on the DSM Directive, we examine the new press publishers' right in Article 15 of the Directive and ask: why is it needed, what are its limits and will it work?

The internet has transformed how news and other content is created, distributed and consumed. Many people reach for their phones, laptops or tablets to read the news instead of buying newspapers or magazines. While news can be obtained by going directly to press publishers' websites and apps, more and more people are going through (and often staying on) online services like news aggregators, search engines or social media platforms – a recent study found that 60% of readers find news through search engines. As a result, the argument goes, press publishers should be in a position to receive remuneration for any re-publication of their content by 'Big Tech' information society service providers ("ISSPs") (such as search engines, news aggregators and media monitoring services) as some of those ISSPs sell ads on their own sites.

To address this perceived market imbalance, Article 15 of Directive (EU) 2019/790 on Copyright in the Digital Single Market (the "DSM Directive") gives press publishers a new right which is designed to improve the bargaining position of press publishers in order to negotiate better licensing deals with online services that reuse their content.

## WHAT IS THE RIGHT AND WHY IS IT NEEDED?

The right, which is a new ancillary or neighbouring right to copyright, gives

press publishers the exclusive right to authorise the reproduction and making available to the public of their press publications for online uses by ISSPs such as search engines, news aggregators and media monitoring services. In essence, this means that press publishers should, in theory, be able to negotiate new or improved licensing terms with ISSPs that make press publishers' content available on their online services. The right lasts for two years after the press publication is published.

But are press publications, like newspapers and magazines, not already protected by copyright? Not adequately, according to the EU. While the authors of each article that makes up a magazine or newspaper will benefit from copyright in that article, the EU perceived that this right alone is an insufficient legal basis for press publishers to protect their content online and secure a return on their investment. This is because copyright attaches to *authors* and not to those that that commission, edit, format or publish their work (i.e. press publishers). According to Recital 54 of the DSM Directive, this absence of a distinct right for publishers of press publications makes licensing and enforcing rights in press publications "complex and inefficient." So, the right provided for in Article 15 of the DSM Directive gives press publishers a new right to protect the overall press publication, which is distinct from the copyright in each of the articles that make

up the press publication (which, unless assigned to the press publisher, vests in the author).

## QUALIFYING FOR THE PRESS PUBLISHERS RIGHT

Article 15(1), although short, contains a number of criteria that must be met in order to qualify for the right:

- First, it applies only to publishers of press publications. The DSM Directive provides a detailed definition of "press publisher" and the recitals add further context to its meaning, but in summary, the press publications covered by the right are those whose purpose is to inform the general public and which are periodically or regularly updated under editorial supervision, such as daily newspapers, weekly or monthly magazines or general or specialist interest and news websites. Scientific journals and blogs are specifically excluded.
- The publisher must be established in an EU Member State. Recital 55 gives guidance on what this means, stating that publishers should "have their registered office, central administration or principal place of business within the Union." This sets the bar relatively high and would seem to exclude EU-based correspondents or bureau offices. Also, as the UK has confirmed that it will not be transposing the DSM Directive,

press publishers with offices only in the UK will not qualify for protection.

## LIMITS TO THE RIGHT

Article 15 of the DSM Directive was heavily lobbied at EU level (and lobbying continues at national level, as the implementation date of the DSM Directive, 7 June 2021, gets closer) so it is unsurprising that there are limits to the right. However, these limits are vague and their scope is likely to be the subject of legal dispute:

- The right does not apply to the use of "individual words or very short extracts of a press publication". This raises obvious questions – as all content is made up of individual words, how many individual words are too many? Likewise, the meaning of "very short extracts" is likely to be a battleground between press publishers and ISSPs, particularly in the context of catchy headlines and the all-important first few sentences of a news story or article that grabs the reader's attention. Recital 57 also clarifies that the right does not extend to "mere facts" reported in press publications.
- The right does not apply to "acts of hyperlinking". However, under EU copyright law, unauthorised hyperlinking can, in certain circumstances, be an act of copyright infringement. Therefore, there appears to be a disconnect in how hyperlinking is treated under substantive copyright law on the one hand and its neighbouring press publishers right on the other. As hyperlinking is how news stories are shared online, this is likely to be an area that will require clarification.
- The right does not apply to private or non-commercial uses of press

publications by individual users. While this seems fairly benign, what it means exactly is not very clear: is posting a news story on your Facebook or Tweeting to thousands of followers private? Is it non-commercial when an ad appears next to your post or tweet? These are all important issues that will need to be worked out in order to understand the practical scope and application of the press publishers' right.

## WILL IT WORK?

While there are legal questions and uncertainties over the application and scope of Article 15, the bigger question is undoubtedly a commercial one: will Article 15 work?

The reality is that press publishers rely on search engines and other online services to drive traffic to their sites. In a world of information overload, the ability to search for news stories is a useful service. For the most part, the opposite is not the case: Big Tech does not rely on press publishers or their content – yes, they may benefit indirectly from reusing it, but it is likely a tiny part of their overall business. Giving press publishers a new legal right is therefore unlikely to change this commercial reality. It will be interesting to see how these commercial and market forces will play out on a European-wide level when Article 15 is implemented and press publishers start relying on it.

## WHAT DOES THIS MEAN FOR YOUR BUSINESS?

If you are a press publisher:

- Do you fall within the definition of a press publisher for the purposes of Article 15?

- If so, are you going to try and re-negotiate licensing deals with ISSPs, or enter into licensing agreements for the first time? Can you do this alone, or should you come together with other press publishers?
- Do your publications come within the scope of Article 15?
- Authors of works incorporated in a press publication are to receive an appropriate share of the revenues that press publishers earn for the use of their press publications by ISSPs – you will need to work out how to calculate and distribute this "appropriate share of the revenues" to your writers. Will this differ depending on whether the writers are employees or freelancers?

If you are an ISSP that reuses press publications:

- Will you change how you reuse press publications on your service?
- Will you apply different rules for press publications which are more than two years old?
- How you will respond to requests from press publishers for license fees to reuse their press publications on your service?

In the next article in our series on the DSM Directive we will be looking at Article 17 and how it creates a new liability regime for online content-sharing service providers for copyright infringement.

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