

Kluwer Copyright Blog

The DSM Copyright Directive: Article 15: What? - Part II

Richard Danbury (City, University of London) · Thursday, April 29th, 2021

This blog looks at Article 15 of the (Directive on Copyright in the Single Digital Market (CDSM Directive), the press publishers' right.



Article 15, as regular readers of this blog will recall from [this](#), and [this](#), and [this](#), and [this](#) post, creates a right ancillary to copyright that benefits some publishers. It is triggered when some agents perform some online acts in respect of some specific content: in brief, online reproduction and making available news content produced by news publishers by commercial Internet concerns.

The blog comes in two parts. Part 1 evaluates some of the reasons set out in the recitals for the passing of this provision ([here](#)). Part 2 considers what content the article catches.

What changed in the drafting process?

This blog examines one element of what actually has been passed into law in Article 15. This was the subject of extensive lobbying and discussion, as the previous blog described. This didn't reflect well on the process of law-formation at the EU. But, it's not true to say that all submissions in the evolution of the text that became Article 15

were disregarded. For example, in 2018, Professor Lionel Bently made [this](#) contribution about specific drafting flaws in the text being discussed. Many were resolved in the provision that the EU passed. These changes were improvements, and the passed text now includes specific exclusions from the ambit of article 15 of:

- As to use, liability for private or non-commercial uses of press publications;
- As to acts, hyperlinking and acts other than reproduction and making available;
- As to content, individual words or very short excerpts - frequently called snippets;
- As to effect, the possibility of invoking the right against other rightsholders - such as journalist authors;
- As to duration, a period of 2 years is set out in the provision on the statute book, while 20 years had at one point been proposed.

However, it remains the case that Article 15 is not a well-drafted piece of legislation. What has been passed is overly expansive in its ambit, and uncertain in its effect.

What content is protected?

Article 2 (4) sets out the content that the ancillary right protects. This is that of a 'press publication'. A press publication is not a news report as such, but a collection of different material, with *collection* being the key concept, as it is this to which protection under Article 15 adheres.

The material that's collected should be mainly literary works, but as recital 56 makes clear, it may also include other types of copyright protected work, such as audio or audio-visual news. Art 2(4) also states that the subject matter of the collected work must be of a journalistic nature, but again it need not *only* be journalistic. Other subject matter can comprise parts of the collection.

It will be seen that this is both a very broad, and an ill-delineated definition of the content that's protected under the new right. As has been [noted](#), there's no limiting requirement that the content in question to be - say - original, or have been expensive to put together. The absence of an expenditure requirement is particularly curious, seeing as the rationale for the right as set out in the recitals is the fact that large Internet companies are free riding on news publishers' investments (see recitals 54, 55, 58). The remaining parts of Article 2 (4) seem intended to mitigate this deficiency, as they attempt to confine this rather wide definition. But, despite being read as a conjunctive list, this they do not do.

Art 2(4)(a) provides that the collection that is protected under Article 15 must constitute an 'individual item' within a periodical, or regularly updated publication under a single title. It gives the example of what such a title would be, by referencing newspapers and special interest magazines as a model. Yet the drafting here is a little odd, and its effect may not be to confine, but to actually expand the scope of Article 15.

This is because the article says that collection itself must comprise an individual item *within* a periodical. It will be remembered that it is not the periodical itself that is protected, but a collection within it. Periodical published news has traditionally consisted of, and does so to this day, a bundle of different collections of content. A publication comprises both a mosaic and a Russian doll of collections. Given the fact that the boundaries of what is a protected collection are not clearly defined by Article 2, it seems inevitable that one journalistic work will fall into a variety of different collections, even within one publication. And, of course, as a collection doesn't have to comprise only journalistic work, the number of possible collections multiplies.

That means any potential infringing act related to a single piece of content may be grounds for a variety of different breach actions at the same time. This is because the content may be the member of a variety of nested and overlapping collections within one publication. There may, therefore, be multiple legal suits that arise for one restricted act, where that act involves a work (journalistic or other) that is present in multiple collections in one publication. What's more, if a piece of content is in a collection in a variety of publications, which happens - for example - when an article is syndicated, the possible breach actions further multiply.

Art 2(4)(b) seems to attempt to confine the protected content to a collection that has a specific purpose. This purpose is to provide the general public with information related to news. Were the clause to end there, it would so confine the content, but what it gives with one hand, it takes with the other: it ends with the words 'or other topics'. That would seem to mean that a collection of works not related to news (but meeting the other requirements of Art 2(4)) could be protected. This would be so where the collection had a purpose of providing the general public with information relating to topics other than news. A collection of weather reports, or knitting patterns, or recipes, or a catalogue of Lego minifigures, if falling in other respects under Art 2(4), would be caught by the press publishers' right. That seems a rather expansive protection to be borne by society.

Moreover, it's unclear from the text who the agent is that has to have the purpose in question that's envisaged by Art 2(4)(b). The strict wording of the Directive is deficient, as it suggests that the collection itself has to have this purpose. But purposes are qualities that sentient agents have, and a collection isn't a sentient agent. The purpose presumably must, by reading Art 2(4)(c), be that of the publisher. This is drafting flaw but, given that - as has been described - the purpose is so broad, this deficiency and ambiguity may not amount to much in practice.

Art 2(4)(c) is slightly more successful, viewed from the terms of restricting the content. The collection in question must be published under the initiative, editorial responsibility and control of a service provider. That said, it doesn't matter in which media the publication in question happens, so this is still quite broad, and doesn't only benefit traditional newspapers. Legacy radio and television news publishers may be provided with rights under Article 15.

Article 2(4)(c) should be read in conjunction with recital 55, which is effective at limiting the right, but is also somewhat controversial. It explains that the 'concept of publisher of press publications should be understood as covering service providers,

such as news publishers or news agencies' when they publish news, as defined in the Directive. Blogs are expressly excluded by recital 56, because they are not the editorial responsibility of a news publisher.

The controversy is that, as some have [observed](#), this does raise the prospect of protecting established players and dissuading new entrants, thereby encouraging concentration in the market and a lack of source diversity, also known as media pluralism. This is because some blogs evolve into news publishers. One eminent example in recent times is the investigative journalism site [Bellingcat](#), which started as a blog run by a young unemployed man, Elliot Higgins, in the front room of his house in Leicester. Bellingcat is now an investigative journalism platform with a [global](#) reputation. Article 15's effect in dissuading new players is inconsistent with another landmark piece of EU law, the [Audio Visual Media Services Directive](#). One of its stated goals is to safeguard media pluralism. It is less than ideal, to say the least, if one effect of the CDSM Directive is at odds with this.

Article 2, the definition section, ends with a clause excluding from the ambit of protection scientific or academic periodicals, which earlier drafts did not. This omission was, as mentioned, the subject of trenchant criticism from Lionel [Bently](#).

Beyond Article 2, there is one further provision that determines what content the right covers. This is contained in Article 15(1). This provides that the rights afforded by Article 15 do not apply to the use of individual words, or very short extracts of a press publication. Recital 58 explains that this is on the grounds that such use 'may not undermine the investments made by publishers of press publications'. This is a little odd for, as has been mentioned, there's no requirement under Article 15 that a news publisher's collection have required expenditure to produce to gain protection. Moreover, as has been noted [elsewhere](#), the fact that this content is not protected by Article 15 doesn't exclude it from other forms of copyright protection, where it is - for example - sufficiently original under the [Infopaq](#) standard.

Recital 57 confirms also that the right should not extend to 'mere facts reported in press publications', an important point, consistent with the widely-established copyright doctrine that the right protects expression and not ideas. That at least is an effective limitation of the ambit of Article 15.

What next?

Despite the breadth of its coverage, given the experience of the precursors of Article 15 in Germany and Spain it's unlikely that this provision will be effective in forcing Google and others to disgorge some money to news publishers. That was a conclusion of [this](#) analysis into the effect of the Spanish law, and [this](#) report for the European Parliament. That said, to be fair, current arguments in France suggest it [might](#).

But perhaps more importantly, even if it does, there must be doubts that Article 15 will achieve the long-term aim of benefitting society. This is not least because of its

breadth, set out here; and the absence of appropriate obligations placed on press publishers to ensure the quality of their product, as argued for in the previous blog. In short, whatever one's feelings about the actions of Google and other large Internet information companies, Article 15 risks encouraging concentration of media power into the hands of established news (mainly legacy print) publishers, and creates a bar to new entrants. These features amount to a risk that the effect of Article 15 will be to chill, rather than encourage, the free flowing of information that is the lifeblood of a healthy democracy.

This post is part of a series on the Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (CDSM Directive):

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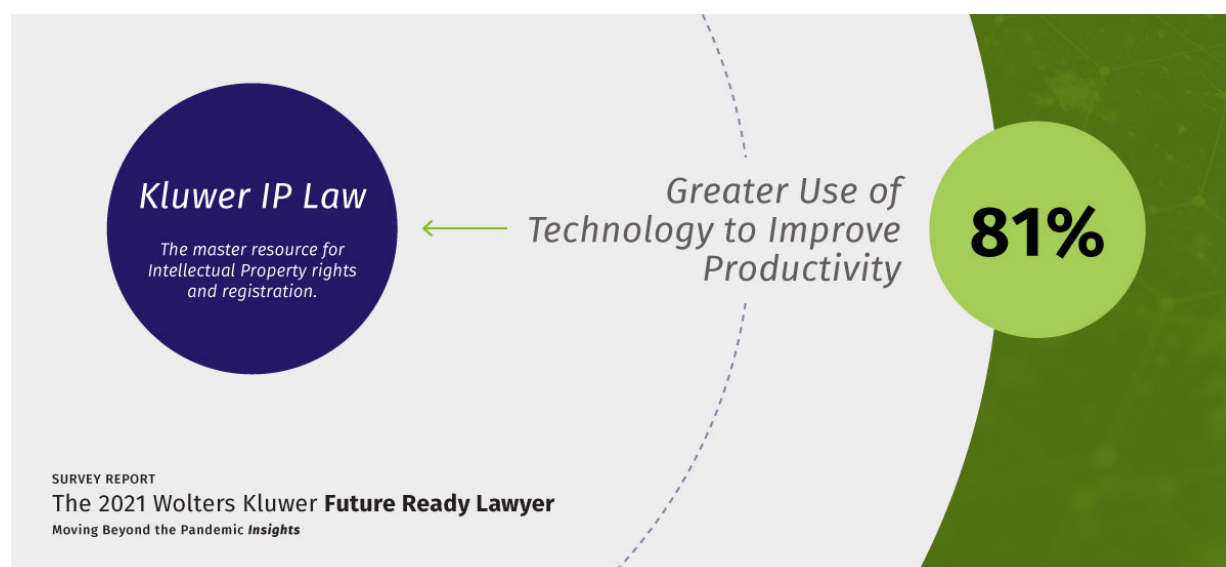
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