Kluwer Copyright Blog

Empowered to negotiate or obliged to contract? Lessons from the Italian implementation of the press publishers' right

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Introduction

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By introducing the press publishers' right in art. 15 of the Directive on Copyright in the Digital Single Market (CDSM), the EU legislator wanted to aid press publishers in licensing and enforcing their rights in press publications. The hope was that once press publishers are recognized as rightsholders in the EU legislation, their legal standing will be strengthened and platforms will have no choice but to negotiate with publishers and pay licensing fees. The fact that similar legislative initiatives failed in Germany and Spain was not discouraging (with Google shutting down Google News service in Spain and the German ancillary right not generating any substantial revenues before its repeal). The European Commission, mostly in the person of then Commissioner Günther Oettinger, believed that by putting the weight of the EU behind the new right, Google (and the like) would have to pay the piper. The reality is, however, more complex.

The press publishers' right provides publishers of press publications with two exclusive rights (of reproduction and making available), which allow them to authorize or prohibit the use of their content by information society service providers. They can also opt for making their press content available for free. What the press publishers' right does not do is specify how the publishers who would like to provide authorization in exchange for remuneration are to negotiate licensing deals with platforms. Some of the Member States have decided to fill this gap during the implementation process, prompted by the events in France, where Google initially refused to negotiate with press publishers, and was later forced to the negotiation table by the French Competition Authority. Whereas a fair amount of Member States has opted for some form of collective bargaining or

collective management when implementing art. 15 CDSM Directive, Italy has decided to go a step further.

The Italian experience

As most Member States, Italy started the process of implementation of the CDSM Directive with some delay. In the very first Draft Scheme of implementation (that remained unpublished, but was accessible by insiders and MEPs), the Italian transposition of the press publishers' right was envisioned as a verbatim translation of art. 15 CDSM Directive. This was in line with what the Italian Parliament had instructed the Government to do, i.e. transposing the provision slavishly, ensuring that "press publishers are granted adequate protection" and effective legislative guidance is provided to define the notion of "very short excerpts" and determine the profit share due to the individual authors of press articles (for an English translation see here).

However, things changed in the consolidated version of the Implementation Decree, which eventually entered into force last December. The resulting addition of **Article 43-bis** to the Italian Copyright Act is a much longer and articulated provision than expected. Under the Italian version of art. 15 CDSM Directive, not only press publishers are given a specific neighboring right for the online use of their press content. Platforms are also under the obligation to contract with the press publishers requesting so and pay them a fair remuneration. If no agreement on the amount of the remuneration is reached between the parties within 30 days, the **Italian Communications Authority (AGCOM)** will set the licensing fee taking into consideration, among others, the number of visualizations of the press article, the years of activity, size, and market relevance of the press publisher.

Heated debates followed. The time originally allocated for examination by the competent Parliamentary committees had to be prolonged due to a lively Parliamentary discussion between those supporting the consolidated version of Art.43-bis and those opposing it. On the one side, the Italian Association of Press Publishers (FIEG) strongly backed the Government's decision to establish a facilitated negotiation mechanism to overcome market imbalances between publishers and Internet giants. On the other side, the **Italian Competition Authority (AGCM)**, the Italian Association of Online Press (ANSO), and the Italian Association of Publishers (AIE) expressed strong concerns towards the CDSM Directive as a whole and, specifically, opposed the Government's excessive interference with the realm of private business negotiations. The opinion issued by the AGCM is emblematic in this regard: it argues that the suggested transposition of art. 15 CDSM Directive exceeds the margin of discretion left to Member States, and jeopardizes competition by (i) **limiting private autonomy** without any evidence of market failures legitimizing such choice (the AGCM seems to imply that the representation organizations of press publishers have the capacity to sit and negotiate with multinational companies of the caliber of Google and Facebook); (ii) establishing criteria for fair licensing fees that overly favor big press publishers; and (iii) vaguely defining the notion of short extracts (on the debated definition of short extracts see also here and here).

Awaiting the AGCOM Regulation (expected for the summer, see also here) that will further define the criteria and technicalities of the new negotiation mechanism, Italy is grappling with deeply polarized and resentful feeling across the press sector, which leaves little hope for a smooth enhancement of media plurality online.

Freedom to negotiate

Whereas Italian approach is unique in the EU, it is not unique globally. The final offer arbitration, a mechanism which AGCOM is to follow when setting a licensing fee in case of disagreement between the parties, is at the heart of the Australian News Media Bargaining Code adopted in February 2021. The Code, like the EU's press publishers' right aims to regulate the relationship between news media and digital platforms. However, the Code does not belong to the realm of copyright, and it does not award news media any new rights. What it does is to create a negotiation framework.

The problem with adopting the Code-inspired negotiation framework in the EU is that the press publishers' right, unlike the Code, does not involve an obligation to bargain, and a recent controversial attempt to introduce such an obligation via the Digital Markets Act has reportedly failed. A national implementation which **changes the right into an obligation** interferes with a built-in freedom that the press publishers' right offers: freedom to decide whether to authorize or not to authorize the use of press publications, and whether to request remuneration for the authorization.

This freedom was forcefully requested by some of the publishers' associations during the public discussion on the press publishers' right and it was confirmed by the European Commission when answering a parliamentary question on permissibility of implementation of the new right via the mechanism of mandatory collective management. The Commission emphasized the need to preserve "publishers' choice to authorize or prohibit the use of their publication" during the transposition process. The Italian implementation eliminates this freedom.

What we need to remember is that press publishers do not constitute a homogenous group. While majority of the legacy media publishers, often represented by such organisations as ENPA, EMMA, EPC, and News Media Europe are outspoken supporters of the press publishers' right, some of the innovative and small media companies, including those represented by European Innovative Media Publishers, are skeptical if not openly opposed to it. This division has been visible during the Italian discussion, too. Thus, the implementation process should cater to both of those groups.

Conclusion: what we can learn

The case of the implementation of the press publishers' right in Italy showcases how copyright regulation, even when modernizing itself looking for a more solid digital balance, gets stuck in a tug-of-war between a few big industrial players, too often and too exclusively focused on money transactions.

While condemning or supporting the hazardous choice by the Italian Parliament, the public debate has completely lost its focus on key aspects of art. 15 CDSM Directive:

- The intention to safeguard **freedom of information** by excluding news of the day and "short extracts" from the scope of the neighboring right. The Italian transposition opted for quite a vague definition of extracts as "any portion of text that still requires the reading of the full press

article [in order to be enjoyed]". As a more or less direct result, posting and sharing of Italian press articles via social media comes now without picture previews.

- The scope of the press publishers' right and the **meaning behind "information society service providers"** with different interpretation on inclusion of social media within the scope among Member States (see a recent post here). Additionally, the lack of explanation could create uncertainties for educational or cultural institutions hosting e.g. press archives.

- The intention to **fairly remunerate journalists and photo-reporters** securing adequate remuneration to them. After several Parliamentary tables for study and discussion on this specific matter, new remuneration rules have been set in the quantum of 2%-5%. Peculiar that no voices – neither of support nor disapproval – could be heard from journalists and their unions on this. To compare, the "appropriate" share if indicated using the set percentage in other jurisdictions, can be as high as 1/3 (Germany) or 50% (Poland). France, outspoken advocates for the press publishers' right, decided to address this issue in collective agreements between representative organizations. The deadline for concluding the agreement passed months ago, and to date no agreement was concluded.

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