# Kluwer Copyright Blog

## Why the implementation of the Italian press publishers' right might not be compatible with EU Law

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Much has been said about the press publishers' right, introduced by Article 15 of the Directive on Copyright in the Digital Single Market (CDSM). Aimed at ensuring remuneration for publishers when their publications are reused online by news aggregators, Article 15 grants press publishers the right of reproduction and the right of making available for online uses of their press publications by information society service providers. Since its introduction in preparatory works, the new related right has attracted strong criticism and triggered one of the most intense debates surrounding the legislative process that led to the adoption of the CDSM Directive.

As a result, the original text of Article 15 CDSM was subject to a number of amendments. Yet, its final version still presents problematic traits. An important but relatively neglected flaw is its silence on the features of the licensing mechanism that Member States may and shall adopt for the management of the press publishers' right. Such a partial harmonization, which has already given rise to controversies in France, paves the way for diverging national transpositions, with the risk of causing an even greater fragmentation. At the same time, the lack of clarity on the options available for Member States is also prone to facilitate – or at least not to prevent – the adoption of potentially invalid regulatory solutions. The licensing scheme adopted by the Italian implementation of Article 15 represents a perfect case in point.

**The Italian press publishers' "creative" negotiation and licensing scheme**

The Italian legislator transposed the CDSM Directive with the Legislative Decree (Decreto

Legislativo, D.Lgs.) no.177/2021, issued on the basis of a parliamentary delegation, which amended the Italian Legge sul diritto d'autore (l.aut.).

Article 43bis l.aut. introduces the new press publishers' right and adopts in several instances language that slavishly follows Article 15 CDSM. Still, the Italian legislator did not shy away from using at times the margin of discretion left by the EU text. This is particularly visible in the definition of the negotiation and licensing scheme envisioned for the exercise of the new related right.

The wording chosen to define the amount to be paid to publishers – "a *fair* compensation" – is suggestive, for it reflects language that is generally used in the context of exceptions and mandatory licensing, when exclusive rights become remuneration rights. The semantic choice is in line with the hybrid nature of the negotiation and licensing scheme described by the provision, some elements of which make it close to forms of assisted or collected negotiations, others to mandatory licensing, collective licensing or private levy schemes.

The Italian Communications Authority (*Autorità Garante per le Comunicazioni*, AGCOM) is given regulatory, arbitrage and enforcement powers. Within 60 days from the entry into force of Article 43bis l.aut., AGCOM was expected to issue a decree elaborating on the criteria to be used when determining the amount of fair compensation due to press publishers – criteria for which Article 43bis provided some guidance, proposing taking into account, e.g., the size of the publisher's company, the years the latter was active on the market, the number of visits on the article page, the technological and infrastructural investments made, etc. To date, the decree has yet to be drafted.

An aspect that remains fully obscure is the interplay between these criteria and the parties' freedom to contract. The Italian provision requires the negotiation of the contract to be conducted "taking into account the criteria set by AGCOM" (Art. 43bis (9)). Then, however, it offers both publishers and platforms the possibility to request the intervention of the Authority if no agreement is reached within 30 days, and gives AGCOM another 30 days to define which of the parties' proposals is the most acceptable vis-à-vis the criteria set by the Regulation. If none aligns, AGCOM may determine *ex officio* the amount. The mechanism is similar to that of a contractual arbitrage, as demonstrated by the fact that after the final amount is determined, publishers and providers are still responsible for the conclusion of the agreement.

The most controversial aspect, however, lies in the consequences Article 43bis l.aut. attaches to failure to reach a license agreement. The provision, in fact, gives each party the right to refer the matter to the court, and "also to commence proceedings under Article 9, law 18 June 1998, no.192", which regulates claims relating to abuse of economic dependence and provides, among its remedies, not only compensation but also specific performance and duty to contract. This implies that press publishers may be compelled to conclude a license with providers. As a result, their freedom of contract may well be eliminated, and with it the principle of prior consent, which is at the center of the distinction between preventive rights and remuneration rights.

Clearly, the introduction of guided negotiation processes, potentially compulsory licenses and pervasive arbitrage power by AGCOM is inspired by the objective of creating a level playing field for all publishers vis-à-vis platforms. However, all that glitters is not gold, particularly when the solutions envisioned significantly depart from the guidelines provided by higher legislative sources and their judicial interpretations. This is the case for Article 43bis l.aut., which not only adopts an

approach that diverges quite remarkably from Article 15 CDSMD, but also raises questions of invalidity if evaluated against the indications coming from the EC and the CJEU.

**Hints from the EC and the CJEU**

Early in the transposition process, several national legislators raised questions on the margin of discretion left to Member States in defining licensing and distribution schemes under Article 15 CDSM. To shed light on the matter, MEP Vondra asked the Commission whether mandatory collective management schemes were allowed, obtaining a straightforward denial. The Commission argued, in fact, that this choice would have turned the preventive press publishers' right into a remuneration right. The answer was not unexpected, and perfectly in line with the CJEU's indications in the landmark decision *Spedidam v INA* (C-484/18).

In *Spedidam* the Court had to decide on the compatibility of Articles 2, 3 and 5 InfoSoc Directive with Article 49 of the French law on freedom of communication, which granted INA (*Institut national de l'audiovisuel*) the prerogative to exercise performers' rights on performances recorded and broadcast by national television channels, according to conditions and upon a remuneration set in agreements between INA and performers' organizations. The answer was affirmative, but the relevance of the decision lies in its reasoning, which almost slavishly follows that in *Soulier and Doke* (C-301/15), issued on a similar question, but in the field of authors' rights. At stake in *Soulier*, was the validity of the French Decree No 2013-182, which introduced an extended licensing scheme for out-of-commerce books published before 2001, to facilitate their circulation. The law instituted a database, managed by the National Library, which indexed such books on a rolling basis. Six months after indexing, the rights of digital reproduction and communication to the public over the titles passed to a collecting society, which first had to try licensing them back to the original publishers, and only in the case of rejection/no response could it place the license on the market. Rightholders had six months to oppose the indexing, while authors could always block the publication by showing harm to their reputation. However, they could do so only by proving they were the sole rightholders, and only while the title was commercialized.

In both cases, the CJEU argued that Articles 2-3 InfoSoc cover both the enjoyment and the exercise of the two rights, which are preventive in nature, so any act covered by their scope requires rightholders' prior consent to be legitimate. Implied authorizations may be allowed, but only if their conditions are clearly specified. The Court considered this requirement not met in *Soulier* but fulfilled in *Spedidam* by means of a presumption that was legitimate and rebuttable at any time.

**Potential invalidity claims**

Article 43bis l.aut. may trigger a number of invalidity claims.

The first, but less problematic, is the nature of the criteria indicated as guidelines for the AGCOM Regulation. The list includes elements that have nothing to do with the value of the news and the publisher's investments. This may be considered incompatible with EU law, following similar reasoning that which led the CJEU to exclude the admissibility of private levy schemes that used calculation criteria not linked to the prejudice suffered by rightsholders, contrary to the InfoSoc preamble for the private copy exception.

The most dangerous aspect, however, is the negotiation scheme. Albeit formally different, its functional effects are not far from those of a collective management scheme, where rightholders cannot individually negotiate with users, not even when they are unsatisfied with the conditions bargained for by collecting societies. This already makes the Italian solution conflict with the guidance provided by the EC. Even worse, the possibility for both parties to sue if no contract is concluded after AGCOM set the amount, with no limitation as to the remedies available, makes it possible for providers to impose on publishers a duty to contract. This means stripping away publishers' freedom of contract, with a full compression of the principle of prior consent and the transformation of their preventive right into a remuneration right. Since Article 43bis l.aut. does not grant any opt-out possibilities nor presumptions of consent based on reasonable grounds, if called to interpret the provisions, the CJEU may well rule that, in order to avoid invalidity, the Italian provision should be read as not allowing the issuance of duty-to-contract injunctions on publishers.

It will not take much for Article 43bis l.aut. to trigger litigation, and thus for the Court to be called to action. Until then, the Italian provision remains a clear example of the dangerous effects, uncertainties and fragmentation which yet another imperfect harmonization is likely to cause, as if nothing had been learnt from past mistakes.

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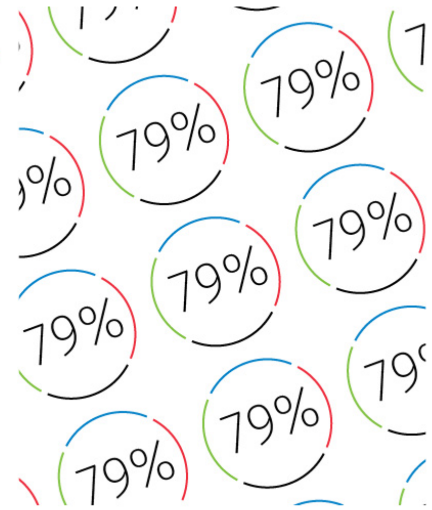


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