

# Kluwer Copyright Blog

## Saving the printed press – the Croatian implementation of Article 15 of the DSM Directive

Branka Maruši? (Stockholm University) · Monday, December 19th, 2022

*Give me twenty-six soldiers of lead and I will conquer the world.*

This quote is often attributed to Johannes Gutenberg, Benjamin Franklin, Karl Marx, or all of the above. Even if we cannot identify the exact author of these words, we can recognise that these three individuals all understood the power of the twenty-six letters of the alphabet, the written word, and the printing press. Just like the Croatian legislator when implementing Article 15 of the [DSM Directive](#).



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### Favouring the press publishers

To the readers of this blog who have been following (for example [here](#) or [here](#)) the debates around the enactment and implementation of the DSM Directive – a directive that aims to be in sync with the ‘rapid technological developments’ – the above sentence might seem counterintuitive. Yet the Croatian legislator caters to the printed press thrice in its ‘[new and better version](#)’ of the Croatian Copyright Act (CCA). Firstly, it verbatim recognises works made by the press as works of authorship. This inclusion was criticised as a redundant addition since newspaper articles are already considered literary works. Furthermore, it introduces an accompanying new moral right of attribution for the first source of the ‘news of the day’. Works of authorship are protected through economic and moral rights afforded to the copyright holder. Unlike economic rights, that safeguard the economic interests of copyright holders, moral rights are a specific legal instrument that allow certain creators to control the treatment of their works and their presentation to others. However, ‘news of the day’ are works that are out of the scope of copyright protection under Article 2(8) of the Berne Convention. This prompted some commentators to label this new addition a [quasi-moral right](#) – since there is no work of authorship to which the new moral right is attached. Nevertheless, a more precise characterisation is that this is a new related right. In this legal solution, the object of

protection – news of the day – is protected by an enforceable moral right. Here, the press publisher, broadcaster, and journalist, as rightholders, can have their status of being the first source of the ‘news of the day’ protected only as a misdemeanour by a fine. Thirdly, the CCA introduces a [gold-plating transposition of Article 15 of the DSM Directive](#).

### **Adding and subtracting from the scope of Article 15**

In the implementation of this provision of the DSM Directive the CCA goes beyond the provision of Article 15 in two different respects. The first concerns the offline uses of press publications. The second concerns the provision of an extended catalogue of economic rights.

The introduction of the protection for [offline uses of press publications](#) was already criticised in the online public consultations as inconsistent with the wording of Article 15 of the DSM Directive. The Croatian legislator’s response to this criticism was quite underwhelming. In essence, the Croatian legislator claimed that the broadening of the scope of the press publishers’ right was made to meet the specific needs of the Croatian market in the publishing sector. The argument was made that there was a need to protect both publishers who publish press publications in physical copies and those operating in the online environment. The argument was strengthened by the claim that this type of protection emphasises the importance of protecting the freedom and pluralism of the media and promotes freedom of expression and the further democratisation of society. This response was never substantiated with any data or evidence.

The second area in which the CCA broadened the scope of Article 15 is the catalogue of economic rights that are provided to press publishers under the DSM Directive. Under Article 15, press publishers are granted two economic rights for the online use of press publications – the right of reproduction, and the right of making available. With regard to online uses, Article 166 CCA incorporates both the right of reproduction and the right of making available to the public for press publishers. Nevertheless, it also adds another right – the right of communication to the public. The reason why the Croatian legislator provides this additional right in the catalogue of economic rights for online use of press publications is quite elusive. In practical terms, this gold-plating transposition does not add much to the protection. A more problematic gold-plating transposition is the provision of Art. 165 CCA that grants protection for the offline uses of press publications. Here, the Croatian legislator provides a generous catalogue of economic rights that includes almost all economic rights found in the CCA – except public recitation and public performance. To be specific these are (a) the right of reproduction, (b) the right of distribution, (c) the right of renting and lending, (d) the right of communication to the public, including the making available right, and (e) the right of adaptation. Moreover, the term of protection for online use is set at 10 years.

But the Croatian legislator didn’t only add to the scope of Article 15 of the DSM Directive, it also subtracted. Article 15(5) of the DSM Directive stipulates an obligation for the Member States to provide authors of works incorporated in a press publication with an appropriate share of the revenues that press publishers receive for the online use of press publications. Article 167 CCA introduces mandatory collective licensing for original press publications and original photographs when they are used as a part of a press publication in online use. These licensing schemes only cover professional journalists and photographers. Moreover, this rule allows press publishers to choose whether authors that are not professional journalists or photographers have a share in the revenue. If a person is not a professional journalist or photographer covered by some sort of an

employment or commission agreement and their work is used by a press publisher, they (a non-professional journalist or photographer) are effectively in a position where they can forfeit their economic rights (in online and offline use). Therefore, this provision of the CCA has the effect of excluding non-professional categories of authors from sharing the revenue and runs counter to the obligation in the provision of Article 15(5) of the DSM Directive.

### **Saving the printed press**

When one looks at the legislative choices made by the Croatian legislator one wonders if something that is technologically becoming obsolete (such as the printed press) – since the world is turning digital – can be saved by providing ‘more rights’. Moreover, the analysis of these legislative choices does not build confidence in them producing the effect of saving the printed press. Rather the opposite: the new additions seem to be a cosmetic exercise that is either redundant or noncompliant with EU law.

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