

Kluwer Copyright Blog

The journalists' share

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The discussion on creators' remuneration is gaining momentum. The main reason: the growing popularity of generative AI and its potential to substitute human creative labour. With the current income streams in danger, new ways of remunerating creators are put forward. The most intuitive proposition is that for providers of generative AI, big tech, to remunerate creators whose works are used to train algorithms. The press sector strongly supports this position, with the argument usually phrased as media organisations, not individual journalists, benefitting from licensing.



Image by [Engin Akyurt](#) from Pixabay

Looking back, the transfer of value from big tech to creators, infamously referred to as 'the value gap' problem, was a core issue for the [Copyright in the Digital Single Market \(CDSM\) Directive](#) to tackle. While it is art. 17 CDSM which was to play the central role in closing of this gap (and as [recently noted by Keller on this blog](#), likely failed to do so), it is not the only relevant provision. Pursuant to art. 15(5) CDSM Directive, journalists, or to be more accurate, authors of works included in press publications, are entitled to receive an appropriate share of the revenues press publishers collect from platforms for online use of their publications. This journalists' share made it into the CDSM Directive rather unnoticed, and was not controversial, unlike the press publishers' right it derives from.

The journalists' right, which might be qualified as a residual remuneration right (see [Riis](#)), is not directed at online platforms, but press publishers, instructing them to share the benefits they receive, regardless of who holds the copyright in journalists' works (a publisher or a journalist). While this share might at first seem counter intuitive since the press publishers' right as a neighbouring right rewards organisational and financial efforts of the publishers, considering both the EU legislator's intention to guarantee appropriate and proportionate remuneration for authors and performers (art. 18 CDSM) and the fact that it is the journalists' work which is a key element of a press publication, it does not seem unjustified. One might even dare to suggest that this is the only upside of the press publishers' right, especially compared to competition-based frameworks such as [the Australian News Media Bargaining Code](#) which do not envisage direct remuneration of creators.

With the implementation of the CDSM Directive nearly at its end (Poland, the outlier, is currently [proceeding its implementation through the Parliament](#)), and the discussions on remuneration of creators intensifying, it seems timely to ask whether journalists are receiving their ‘appropriate’ share, and what ‘appropriate’ actually means.

Who is entitled to a share?

While I refer to the right to receive an appropriate share as the journalists’ share, it is worth noting that the beneficiaries of the right do not need to be journalists, as Art. 15(5) CDSM Directive gives an entitlement to ‘authors of works incorporated in a press publication’ in general. The journalism profession is (or not) regulated independently by each member state, and there is no common understanding of who is a journalist in the EU. As such, implementations which limit the group of beneficiaries to professional journalists ([Croatia](#), [France](#)) or authors of journalistic works ([Italy](#)) go against inclusive character of the journalists’ share.

What is ‘appropriate’?

Rather unsurprisingly, only a handful of the member states decided to implement the provision on the journalists’ share by explicitly indicating what part of publishers’ revenues creators are entitled to receive. And among those that did, the share varies quite significantly. While in [Italy](#), journalists are due to receive between 2-5% of publishers’ revenues, in [Bulgaria](#) the share should be minimum 20% and at least 1/3 in [Germany](#). In [Greece](#), the percentage depends on the proportion of journalists employed by a publisher, compared to those involved on casual basis. It is either 15% or 25%, with the former owed to journalists when less than 60% of them are salaried employees, which could be read as the Greek legislator’s attempt to reward the publishers providing creators with more stability. The share guaranteed by the [Lithuanian](#) implementation (to be followed by Poland) is the most generous, reserving 50% of the revenues to authors.

A brief look at the above percentages shows the lack of consistency between member states, which is difficult to justify as it is rather unlikely that the news production processes and sector practices vary so significantly between the countries (they might between the outlets). Valuing the output of a journalist in Italy 25 times less than that of their Lithuanian colleague seems unwarranted. Poland, even though still lagging behind, is an interesting case to consider, since the agreement on the equal split of revenues between publishers and journalists was made very early, with publishers’ and journalists’ organisations ([IWP](#) and [ReproPol](#)) compromise [predating the CDSM proposal](#). Such unanimity seems quite unique and stands apart from the discussions in France.

The French implementation does not specify a percentage of revenues due to journalists, [favouring collective bargaining instead](#). The appropriate share should be determined in a company agreement or other collective agreement, and if the parties do not reach a consensus within 6 months from start of negotiations, the [case can be referred to the Copyright and Related Rights Commission \(CDADV\)](#). The offers made and accepted in France are rather inconsistent. In [May 2022 AFP](#) reached an agreement with journalists’ organisations to pay an annual fee of 275 EUR to each full-time AFP journalist. However, an offer of 220 EUR per year made by [Le Figaro in 2021](#) was rejected, as was the offer of 3% of revenues made by [20 Minutes](#). The decision made by the CDADV with respect to [the EBRA group](#) (regional press) marking 18% as an appropriate share

was appealed by the SNJ, a journalists union. APIG, an alliance representing general information publishers, refused to negotiate an agreement with journalists organisations.

The collective bargaining route to setting the journalists' share has also been taken by Belgium. A dispute in Malta can be referred to the Copyright Board, and one in the Netherlands, to the Dispute Committee. Those are, however, exceptions. The majority of member states do not create a mechanism to set the value of the appropriate share or to mediate this value in case of a disagreement between the parties, leaving journalists to fend for themselves.

How to exercise?

Sometimes, however, the mechanism for determination of the share due is set indirectly, by requiring or allowing journalists to exercise their right via collective management organisations (CMOs). This allows the use of structures already in place, with a CMO representing journalists negotiating with publishers or their organisations. The mandatory collective management is envisaged in Germany, Sweden, Belgium and Croatia. A CMO can be called upon also when the law remains silent on the issue, as in the Netherlands, where the journalists' share is being negotiated between Stichting OPR on behalf of publishers and LIRA and Pictoright representing authors.

When it comes to the exercise of the right, it is worth mentioning, that even though the journalists' share should be qualified as a residual remuneration right, only one member state (Slovenia) explicitly precludes its waivability, two (Belgium and Greece) preclude its transfer and two (Croatia and France) note that the share should be separate from a salary of an employed journalist. To the contrary, Romania states that the appropriate share is not due to journalists who are employed or who transferred their copyright to a publisher, strongly limiting the application of the journalists' share. Alas, not only deciding what is appropriate, but also collecting one's share comes with obstacles.

The (common) transparency problem

Are journalists receiving their appropriate share then? Possibly, but unlikely. First, journalists receiving a share from the press publishers depends on the publishers being remunerated by platforms. While there is no source comprehensively reporting on the deals being made between publishers and platforms, thanks to the press reports we do know that licensing agreements are being concluded, but their scale is considerably less than that originally expected by publishers. Following from the delayed implementation, negotiations with platforms (mostly Google) are delayed, causing a domino effect on the appropriate share talks. Secondly, considering the lack of transparency of agreements which were concluded between press and platforms, the assessment of appropriateness of share offered to journalists might be rather difficult. The newly introduced general transparency obligation (art. 19 CDSM) could be of help, however, little attention was paid to this provision during the transposition process, resulting in its general and largely inoperative character. The criteria for the assessment are also uncertain, with different sums and percentages put forward by the legislators and stakeholders without due justification and explanation of methodology used.

It does not seem that the right to appropriate share is currently making a substantial difference to the journalists and their incomes. Considering its complex positioning, between big tech, content producers and creators, the appropriate share problem could offer valuable lessons for the ongoing discussion on remunerating creators in the GenAI age.

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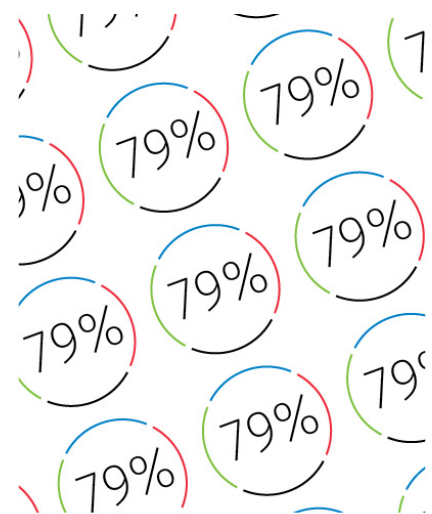
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