

Kluwer Copyright Blog

The long and bumpy road to copyright for the digital market – implementation of the CDSM in Poland – III: Press Publishers' Rights

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This series of posts presents the implementation of the [CDSM Directive](#) in Poland and discusses some of the controversies linked to the [new provisions in Polish law](#). The [first post](#) gave an overview of the implementation, including the new provisions on TDM and the implementation of Article 17 of the CDSM, and the [second post](#) discusses the right to remuneration of Article 18. This third post will cover Article 15, the rights of press publishers.



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Implementation of Article 15 CDSM – Rights of press publishers

Prior to the implementation of the CDSM Directive, Poland granted related rights only to publishers of first publications, *editio princeps*. To some extent, the protection of press publishers was addressed in the part dedicated to collective works, as “periodical publications” are listed as one example of collective works in Article 11 of the Act. Protection of press publications as envisaged by the CDSM Directive was, however, a novelty in Poland. Article 15 of the CDSM Directive is implemented now in section 3² of the chapter dedicated to related rights, in Articles 99⁷ – 99¹⁷.

1. Press publication

Press publication is defined in the Polish implementation as collection of works or subject matter protected within the related rights regime. A press publication is composed mainly of works comprised of words of a journalistic nature and constitutes an individual item within a periodical or regularly updated publication under a single title, such as a daily newspaper, magazine, news agency service or online news service, distributed for information purposes, in any form and by any means within the scope of economic or statutory activities and under the responsibility of the entity which exercises actual and legal control over it. Periodical publications distributed for scientific or academic purposes are not press publications.

According to the Polish law, protection extends to press publications including protected works or subject matter protected under the related rights regime. Therefore, if the elements which are not protected on these grounds are included in a press publication, their use will not entail an infringement of the publisher's related rights. Interestingly, the Polish legislator implements 'literary works' from Article 2(4) of the CDSM Directive as 'works comprised of words'. This broadens the scope of the definition of press publication, since, for example, podcasts may be understood as works comprised of words which could not have been protected if the legislator had opted, for example, for the term 'written works'. This choice could be seen as an attempt to respond to technological developments and the use of various methods to communicate information by the press.

2. Press publishers

A press publication is distributed within the scope of economic activity of the entity which exercises actual and legal control over the selection of the content disseminated. In the CDSM Directive the term 'actual and legal control' is not used. Unfortunately, it has not been further elaborated upon by the Polish legislator. "Actual control" could be understood to be the exercise of effective control, meaning taking the final decisions over both the selection of material included in a press publication and its organisation according to professional ethics. 'Legal control' could consist of ensuring that the production and dissemination of press publications and the acquisition of the legal titles to the works included in a press publication are in accordance with law.

3. Scope of the protection

Publishers, according to Article 99⁷, shall have the exclusive right to use and to manage the use of their press publications to the extent enabling ISSPs to reproduce and make available press publications. This way of defining the scope of publishers' protection is consistent with the scope of protection of all holders of related rights in the Polish law since they are also granted the exclusive rights to **use and manage the use of** the subject matter of protection to the indicated extent.

Publishers' rights can be assigned or licensed on the basis of Article 99⁷, according to which publishers have the exclusive right to **manage the use** of their press publications. Economic rights are transferable. The act explicitly indicates the situations within which the right **cannot** be transferred, as it does for performers' right to additional remuneration in Article 95³ of the Act.

4. Calculation of remuneration due to press publishers

According to Article 99¹² of the Act, contracting parties, in determining the remuneration due to

press publishers, can take into account revenues derived directly or indirectly by the service provider from the reproduction or making available to the public of the press publications, in particular revenues derived from advertising. The length of time for which of the press publication is used and its type could be taken into account as well. However, the legislator did not specify what type of press publication attracts higher remuneration which may, at the stage of application of the law, raise interpretative doubts and lead to abuse by the more powerful party.

5. Mediation mechanism

According to Article 99¹² (2) of the Act if, within 3 months from the date of submission by one of the parties of an offer to conclude an agreement between press publishers and ISSPs, the agreement is not reached, either party may apply to the President of UKE (President of Office of Electronic Communications, in Polish: Urząd Komunikacji Elektronicznej, hereinafter UKE) for mediation on the determination of remuneration. The mediation is conducted only when the parties agree to participate. However, in the case of failure to reach an agreement in the mediation or in the event that a party does not participate in mediation, the President of the UKE may, at the request of a party, issue a ruling on the amount of remuneration for the use of press publications by the ISSPs. The ruling is final, meaning that there is no appeal under the administrative procedure, and enforceable by way of court execution, provided that the remuneration is due.

The adoption of such a procedure has been criticised as contradicting the constitutional principles of the free market economy and freedom of contracting platforms.^[1] Moreover, the threat of media revenge was pointed out [\[here\]](#) to underline that platforms could seek retaliation for such far-reaching solutions by ceasing to display content from those publishers who would use the said mechanisms, or by significantly restricting such content. Indeed, such a scenario occurred, for example, in Czechia [\[here\]](#).

6. Exclusions from the protection

The protection, according to Article 99⁷ (3) of the Act, does not apply to personal, non-commercial uses; making a hyperlink to a press publication available to the public; individual words or very short extracts of a press publication; works or objects of related rights included in a press publication whose protection has expired or which have never been protected.

The publishers' rights do not apply to personal uses, not related to commercial purposes. The term 'personal use' implies a use of a press publication by a natural person and precludes a broad understanding of the concept of individual users including also legal persons, for example non-profit organisations. In consequence, the Polish legislator by referring to 'personal use' mixed 'private uses' with 'individual users' from the CDSM Directive. This is a simplification which cannot be considered to be in line with the purpose of the regulation. It limits the scope of the exclusion and has a potentially negative impact on the free flow of information online. It could be said that in any case the infringement of the publishers' protection occurs when a press publication is used by ISSPs without the authorisation of the rightholder. However, the question of the legal qualification of the uses of press publication by the non-profit organisations contributing in many cases through their activity to the free flow of information remains unanswered.

As regards the exclusion of short extracts of a press publication, the Polish legislator copy pasted the wording from Article 15(1) without adding any specification. It explained in the explanatory

memorandum accompanying the proposal for the legislation that any attempt to define this vague term of ‘very short extracts of press publication’ by setting a word or character limit can raise legitimate doubts on compliance with the CDSM Directive [\[here\]](#). This passive approach, chosen by some Member States including Austria, Portugal, Belgium, Estonia, Malta and Latvia, does not imply an incorrect interpretation of autonomous concepts from EU law. However, nor does it contribute to clarifying interpretative doubts in anticipation of the CJEU’s intervention in the matter.

Conclusion

In Poland we say that the last will be the first. So, it remains to be hoped that this last implementation in the EU will ensure a very effective protection of the press sector. As regards enabling the smooth and free flow of information, not disrupted by disputes between ISSPs and press publishers thanks to the new protection of the latter, it is already clear that this purpose can be difficult to achieve. This is due to the practices of some platforms, for example, Meta, which, in response to the introduction of the publishers’ protection in Poland, has restricted the visibility of publishers’ content online, to the detriment of their interests [\[here\]](#).

In Poland we say also that hope dies last – so let us hope.

[1] In Belgium, the constitutional complaint has been filed by Google and Meta which alleged that the legislation adopted violated the principle of freedom of trade and, in particular, the freedom of contract, by imposing the conditions under which contracts with press publishers must be concluded. Cases 7922 i 7925, <https://www.const-court.be/fr/judgments/pending-cases>. The Belgian court referred preliminary questions to the CJEU. Questions regarding scope of the Member States’ discretion were also referred by Italian courts. These questions have not yet been answered by the Court at the date of this publication.

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