



**Information Law
and Policy Lab**

**Strengthening
the Position of Freelance Journalists
in relation to the New Press
Publishers' Right**

Recommendations for National Implementation

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Amsterdam, August 30, 2019

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It has been written in partnership with the Nederlandse Vereniging voor Journalisten (NVJ). This report reflects the recommendations and conclusions of the authors of the ILP Lab. We are very grateful for the input received from the NVJ, Mireille van Eechoud, Bernt Hugenholtz and Stef van Gompel. This paper is published under an [Attribution-NonCommercial-NoDerivatives 4.0 International \(CC BY-NC-ND 4.0\) license](#).



1. Introduction

Last April, the European Parliament and Council agreed on the adoption of the heavily discussed Copyright in the Digital Single Market (DSM) Directive (Directive (EU) 2019/790). The next step in this process is for the Member States to implement the Directive into national legislation. National implementation of Directives allows the Member States a certain degree of discretion to decide on the exact rules to be adopted. In collaboration with the Dutch Union of Journalists (Nederlandse Vereniging van Journalisten, de NVJ), the Information Law and Policy Lab has written this report to provide recommendations on how to implement article 15 of the Directive while safeguarding freelance journalists' interests.

The authors of this report agree with the Dutch government's joint statement with Luxembourg, Poland, Italy and Finland of 20 February 2019, which expressed that the EU Copyright in the DSM Directive does not strike the right balance between the protection of right holders and the interests of EU citizens and companies.¹ This unfair balance especially comes into play in the so-called 'press publishers' right of article 15. The press publishers' right provides press publishers the exclusive right to authorize or prohibit the online use of their press publications by information society service providers.

A comparable press publishers' right has already been implemented, independently from the Copyright in the DSM Directive, in Germany and Spain in 2013 and 2014 respectively. Practice has shown however that those rights have not deemed effective. For example the total income that Germany's collective rights management organization VG Media secured for the exploitation of the press publishers' right was EUR 714.540, based on five licensing agreements,² while the CMO manages the rights of 191 press publishers.³ In Spain the press publishers' right even led to the termination of Google News in the country because of Google's unwillingness to license with press publishers. Learning from those two situations, it is of great importance that the implementation of the Directive into national legislation should provide journalists with genuine and effective tools to ensure remuneration. However, the provision may pose two risks for the protection of rights of freelance journalists in Europe.

First, a direct implementation of the text of the Directive would not necessarily ensure that journalists receive an appropriate share of the press publishers' revenues. Although article 15(5) of the Directive stipulates that Member States shall provide that authors of works incorporated in a press publication receive an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers, there are various circumstances that may render the author's entitlement to an appropriate share of the revenues uncertain. National implementation should therefore provide adequate safeguards to ensure that journalists will be able to also benefit financially from the press publishers' right.

¹ Statement of the Netherlands, Luxembourg, Poland, Italy and Finland to point 39 of the CRP I agenda of 20 February 2019 regarding the DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on copyright in the Digital Single Market.

² Bently et al, 'Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive', September 2017, p. 31.

³ Available at: <https://www.vg-media.de/de/digitale-verlegerische-angebote/berechtigte-presseverleger.html>.



Second, as media pluralism is an essential basis for freedom of opinion and is at the heart of European democracy, it is important to include sufficient safeguards for media pluralism in the Directive's national implementation. A direct implementation could negatively affect freedom of expression and reduce media pluralism in the Member States for the following reason. Freelance journalists depend on maximum exposure of their content. If news aggregators stop linking to journalistic content because they refuse to pay press publishers a licensing fee, diversity of online news content will quickly diminish, undermining media plurality.

This report presents several measures that can be included in national implementation in order to secure freelance journalists' interests on these two points. We advise national governments to consider adopting these measures to ensure that article 15 of the new EU Copyright in the DSM Directive will have the positive effect on freelance journalism that the Directive envisages.

2. The press publishers’ right and appropriate shares for journalists

Journalists are entitled to an appropriate share of revenues when press publishers license their content to Information Society Service Providers (‘ISSPs’). In this chapter, we discuss this extra remuneration for journalists. First, the Directive states that the press publishers right is not affecting rights resulting from employment contracts. We argue that this is a meaningless statement regarding freelance journalists, as they have not concluded employment contracts with publishers. Second, we consider that it is difficult to determine what an appropriate share of revenues is, which leads to uncertainty for journalists. Third, we discuss the transparency obligation that we find unclear in relation to the appropriate share of revenues. We conclude with a recommendation for national legislators on how to interpret an appropriate share of revenues.

No safeguarding of contractual arrangements

Subsection 5 of article 15 stipulates that journalists receive an appropriate share of the revenues that press publishers receive for the use of their press publications by Information Society Service Providers (‘ISSPs’). Recital 59 of the Directive also mentions this appropriate share of revenues, while acknowledging that this is without prejudice to national laws on ownership or exercise of rights resulting from employment contracts. The crux is that freelance journalists, half of the professional journalists working in the Netherlands,⁴ do not arrange employment contracts with press publishers, as that is the nature of working on a freelance basis. In practice, freelance journalists conclude contracts with publishers based on licenses for unlimited use. Freelancers then receive a lump sum that is paid once. It is difficult to see how any additional income that press publishers will receive from licensing to ISSPs will be calculated into this lump sum. Eventually, the fear is that this will still leave journalists empty handed.

How to determine appropriate shares?

As journalists are entitled to an appropriate share of the revenues that press publishers are making from licensing the use of the press publications to ISSP’s, it first has to be defined how much those revenues are. What is the additional income that press publishers receive from licensing? Furthermore, in no other piece of EU legislation the wording of an “appropriate share of revenues” is mentioned. The question is whether and how clarification has to be sought in other legal formulations.

Therefore, we recommend that national governments provide clarity on this topic.

2.1 National governments should enact an explicit transparency obligation

Important threats to quality journalism, and freelance journalism in particular, are posed by the increasing financial issues faced by journalists. In order to guarantee media pluralism, it is necessary to secure a setting in which quality journalism can survive.⁵ Therefore, to protect and promote media pluralism, national governments have the positive obligation to secure journalists financial interests.

⁴ Van Eechoud, ‘A publisher’s intellectual property right’, January 2017, p. 36.

⁵ FRA, ‘Violence, threats and pressures against journalists and other media actors in the EU’, November 2016, p.16-17.

This means that, in the implementation of the press publishers' right, the government should secure that adequate financial safeguards for journalists are in place.

2.1.1 Clarify relationship between transparency obligation and press publishers' right

As the EU legislator recognizes, journalists are in a weak bargaining position when concluding exploitation agreements with press publishers.⁶ In broader terms, the Directive aims at rebalancing contractual relationships between creators and their contractual counterparts.⁷ Authors and performers need information to assess the continued economic value of their rights.⁸ Article 19 of the Directive elaborates further on this statement by trying to protect authors against bad contracting. The article stipulates that authors (journalists) are entitled to receive relevant and comprehensive information on the exploitation of their works from exploiting parties (press publishers) to whom they licensed or transferred their rights. This means that the information that journalists are entitled to must be up-to-date, relevant to the exploitation of the work and it should cover all sources of revenues relevant to the case. Press publishers should provide information at least annually regarding all modes of exploitation and on all relevant revenues granted worldwide.⁹ The transparency obligation is an important legal tool for journalists, but in the Directive it only applies to "exploitation contracts". To ensure that journalists can enforce their right to an appropriate share of the revenues that press publishers receive for the use of their press publications right, **we recommend the national government to ensure that the transparency obligation also applies in the context of the press publishers' right.**

2.1.2 Do not adopt exception to transparency obligation

Subsection 4 of art. 19 of the Directive, states that the transparency obligation does not apply when the contribution of the author (journalist) is not significant having regard to the overall work. However, if the author demonstrates that he or she requires more information to claim additional, appropriate and fair remuneration under the so-called bestseller-clause of art. 20(1), the transparency obligation can be reinforced. This applies only when the remuneration originally agreed turned out to be disproportionately low compared to all the relevant revenues derived from the exploitation of the author's work. Member States can choose whether or not to adopt this exception to the transparency rule, according to subsection 4 of article 19 of the Directive.

The question here is what a significant contribution of the author is. The provision itself mentions the contribution of an author to the overall work. Recital 73 formulates it as the author's contribution to the overall work or other subject matter and all other circumstances of the case, such as market practices or the actual exploitation of the work. This is a much broader interpretation.

⁶ Recital 75. See also Van Eechoud, 'A publisher's intellectual property right', January 2017, p. 36; Bently et al, 'Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive', September 2017, p. 44; Recital 75.

⁷ Explanatory Memorandum Proposal Directive, under 2.

⁸ Recital 75.

⁹ Recital 75.

It is important for journalists to have clarity about the flow of revenues from the pieces they have written. A transparency obligation for press publishers could provide such clarity, but the manner in which it is written in the Directive is vague. Instead of granting adequate safeguards for journalists, article 19, subsection 4 establishes an argument for press publishers of not granting relevant information to journalists. When can a journalist claim additional remuneration, on top of an appropriate share of revenues? To ensure that the press publisher's right will be an effective tool for journalists to get an appropriate share of revenues and to receive additional remuneration for their work, **we urge the national government not to adopt an exception to the transparency obligation in contractual relationships between journalists and press publishers.**

2.2 National governments should examine collective rights management options

Collective rights management with regard to exercising the press publishers' right could strengthen the bargaining position for journalists and press publishers. Journalists are in a weak bargaining position. By collaborating they have better chances in effectualizing their rights. Working collectively, it gives them a stronger bargaining position. Furthermore, it is also possible for journalists and press publishers to work together in enforcing their rights against ISSPs. This should also be in the form of collective rights management. To stand even stronger, collective rights management could take place at the European level. It may be a time consuming operation, but the only suitable way to enforce rights for journalists and press publishers against big monopolists. **Therefore, national governments should examine the possibilities for collective rights management solutions that strengthen the position of journalists.**

3. The press publishers' right and media pluralism

As will be explained below, the press publishers' right not only directly affects journalists, it also poses indirect risks by affecting the media landscape as a whole, specifically with regard to media pluralism. National governments have several positive obligations regarding media pluralism. These positive obligations result in several recommendations with regard to national implementation of the press publishers' right.

Importance of media pluralism

Media pluralism refers to both the availability of a plurality of voices, analyses, opinions and issues, and the existence of a plurality of media outlets.¹⁰ The importance of media pluralism is reflected in the EU fundamental rights framework. In the jurisprudence of the European Court of Human Rights (ECtHR), media pluralism is considered an essential prerequisite for the right to freedom of expression and a crucial aspect of a functioning democratic society.¹¹ Media pluralism is central to democracy as it helps to ensure the availability and accessibility of diverse information and news. This is necessary

¹⁰ Reporters Sans Frontiers, 'Contribution to the EU public consultation on media pluralism and democracy', July 2016.

¹¹ See e.g. ECtHR 15 February 2005, ECLI:CE:ECHR:2005:0215JUD006841601 (*Steel and Morris v United Kingdom*).

for individuals to form opinions and exchange ideas, enabling them to participate in public debate.¹² A recent report on media pluralism in 28 European countries shows alarming trends with regard to media pluralism in all countries under consideration. Key risks for media pluralism include concentration of media ownership, insufficient provisions on the autonomy of journalistic content and deterioration in the basic guarantees for an enabling environment for freedom of expression.¹³

Directive on media pluralism

The EU Copyright Directive acknowledges the importance of media pluralism as well. As recital 54 emphasizes: “a free and pluralist press is essential to ensure quality journalism and citizens’ access to information. It provides a fundamental contribution to public debate and the proper functioning of a democratic society”. The goal of the press publishers’ right is to support a free and pluralist press.¹⁴ Recital 54 furthermore states the underlying problems that resulted in the press publishers’ right. It recognizes that publishers of press publications face difficulties in licensing the online use of their publications, when using online services such as news aggregators. According to the recital, this is a problem because the reuse of press publications is an important part of the business models and a source of revenue of press publishers. It further states that publishers of press publications are not being recognized as rightsholders in their own right, which makes the licensing and enforcement of the reuse of content complex and inefficient. The press publishers’ right is seen in recital 55 as a necessity to foster the availability of reliable information.

Implications of the Press Publishers’ Right for media pluralism

Many people have expressed concerns about the effects of the press publishers’ right on the protection of fundamental rights and freedoms. The right is said to have detrimental effects, especially on the freedom of expression, the freedom to receive information and media pluralism.¹⁵

“**Snippets**” are often mentioned in this discussion. New aggregators often use so-called “snippets”, fragments of news articles to provide a short summary of the article. With the introduction of the press publishers’ right, it is very likely that news aggregators will have to pay the publishers for the use of snippets. However, consumers consider these snippets a useful and time saving means to discover news. Because of the combination of snippets and hyperlinks, they tend to read more news articles from a larger variety of sources. Therefore, this practice contributes to media plurality and the press publishers’ right may negatively affect this.

¹² Recommendation CM/Rec(2018)1 of the Committee of Ministers to member States on media pluralism and transparency of media ownership (Adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers’ Deputies).

¹³ Centre for Media Pluralism and Media Freedom, ‘Monitoring Media Pluralism in Europe: Application of the Media Pluralism Monitor 2017 in the European Union, FYROM, Serbia & Turkey’, 2018.

¹⁴ Bently et al, ‘Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive’, September 2017, p. 15.

¹⁵ OpenForum Europe, ‘A publisher’s intellectual property right: Implications for freedom of expression, authors and open content policies’, available at: https://www.ivir.nl/publicaties/download/OFE_Implications_of_publishers_right.pdf, p.19.

In reaction to the Spanish press publishers' right, Google News decided to withdraw its service in Spain because paying to use snippets of press publications would not be profitable.¹⁶ This may harm media pluralism, as **accessibility and visibility will diminish** because news aggregators play an important role in the spreading of news, Google and Facebook being important news sources. Freelance journalists are especially dependent on online accessibility and visibility of their content, because in order to establish a reputation, they need maximum exposure of their work.¹⁷

Furthermore, because of the unclear scope of the press publishers' right, there is a lot of legal uncertainty as to the situations in which this right will be infringed. Even **freelance journalists themselves may contribute to infringement** of the press publishers' right, where they use "very short extracts" of press publications in their own articles, which will subsequently be used online by ISSPs. Moreover, to increase exposure, journalists often distribute their articles, which may contain short extracts of other news articles, on Facebook or other social media. This means that journalists might have to change their practice or may become more anxious about reusing short extracts of news publications in their own writings, which may harm media pluralism. **Therefore, national legislation should ensure that the press publishers right is explicitly aimed at news aggregators, instead of affecting individual journalists.**

3.1 National governments are obliged to take measures to ensure media pluralism

Member States are obliged to ensure effective media pluralism. To this end, Member States have several general positive obligations.¹⁸ First, Member States have a positive obligation under the ECHR to foster a favourable environment for freedom of expression and guarantee that the media are free and pluralistic.¹⁹ **Therefore, national governments are obliged to ensure that media pluralism is safeguarded when implementing the press publishers' right into national legislation.** Second, domestic law should contain adequate safeguards for journalists using information obtained from the internet, because the absence of such safeguards seriously hinders the exercise of the vital function of the press as a "public watchdog".²⁰ **Therefore, national legislation should take measures to guarantee that the press publishers' right does not hinder journalists in using information obtained from the internet.**

¹⁶ E. Rosati, 'Neighbouring Rights for Publishers: Are National and (Possible) EU Initiatives Lawful?', *International Review of Intellectual Property and Competition Law* 2016/47, 5, p.569-594.

¹⁷ S.J. van Gompel, 'The proposed publishers' right in press publications: an evidential mistake' in: J. Reda (Ed.), *Better Regulation for Copyright : Academics meet Policy Makers: Wed 6 Sept 2017 15:00-18:30: European Parliament, Room AP 1G3: University of Southampton, MEP Julia Reda, The Greens|EFA (pp. 11- 16). Brussels: The Greens|EFA in the European Parliament.*

¹⁸ Directorate-General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, 'A comparative analysis of media freedom and pluralism in the EU Member States', PE 571.376, September 2016, p.11.

¹⁹ Recommendation CM/Rec(2018)1 of the Committee of Ministers to member States on media pluralism and transparency of media ownership (Adopted by the Committee of Ministers on 7 March 2018 at the 1309th meeting of the Ministers' Deputies).

²⁰ ECtHR 5 May 2011, ECLI:CE:ECHR:2011:0505JUD003301405 (*Case of Editorial Board of Pravoye Delo and Shtekel v. Ukraine*), §64-66.

3.2 National governments should clarify unclear definitions of the Directive

The definitions in article 15 of “press publication” and “very short extract” are broad terms that could be interpreted differently in different circumstances. This creates legal uncertainty that can be detrimental for journalistic practice. For example, when journalists are unsure about content falling inside or outside the scope of the press publishers’ right, they may refrain from using content that as such is not infringing. This may create a chilling effect on reusing journalistic articles. **Therefore, it is important that national governments clarify these definitions.** This section will elaborate on the difficulties that should be taken into account when specifying these definitions.

3.2.1 “Press publication”

Article 2 sub (4) of the Directive gives an elaborate definition of press publication as a collection of journalistic nature which constitutes an individual item within a periodical or regularly updated publication and that is published under the initiative, editorial responsibility and control of a service provider. Questions arise here if there is a threshold for a collection, does it include two articles or more? Also, the concept of journalism has altered over the years. The European Court of Human Rights has for example ruled that NGO’s, academics or even citizens are to be provided the same level of protection as press, when they fulfill the role of ‘social watchdogs’.²¹

In recital 56 of the Directive the Commission further defines press publications as to only cover journalistic publications, published in any media, including on paper, in the context of an economic activity that constitutes a provision of services under EU law. Examples are publications in daily newspapers, weekly or monthly magazines of general or special interest, including subscription-based magazines, and news websites. Press publications contain mostly literary works, but increasingly include other types of works and other subject matter, in particular photographs and videos. The recital excludes press publications that cover websites, such as blogs, however only when the publication is not carried out under the initiative, editorial responsibility and control of a news publisher. This recital does not differentiate between commercial or non-commercial blogs. Questions arise here what the threshold is for having such responsibility and control. Many freelance journalists and photographers maintain a professional website with an online portfolio. These websites are very important for the visibility of the content of these journalists and photographers. In order to make sure that journalists can invoke their right to exploit their works independently ex Article 15(2) of the Directive, it is important that blogs, more specifically: websites or social media pages of the original authors, are explicitly excluded from the scope of “press publications” in national legislation. **In order to comply with Article 15(2) of the Directive, national law should explicitly exclude websites or social media pages of the original authors from the definition of “press publications”.**

3.2.2 “Very short extracts”

The press publishers’ right does not apply to individual words or “very short extracts” of a press publication, because this does not undermine the investments made by the publishers. This means

²¹ OpenForum Europe, ‘A publisher’s intellectual property right: Implications for freedom of expression, authors and open content policies’, available at:

https://www.ivir.nl/publicaties/download/OFE_Implications_of_publishers_right.pdf, p.34.

that news aggregators and other ISSPs could use very short extracts of articles without having to compensate the press publisher. However, the Directive does not elaborate on how many words constitute a “very short” extract. Also, it is unclear how this relates to the right to quotation as a limitation on copyright, which also applies in relation to the press publishers’ right pursuant to article 15(3) of the EU Copyright Directive. Therefore, it remains unclear (1) when press publishers, and therefore also journalists, are able to enforce the press publishers’ right and (2) if journalists may be contributing to infringing the press publishers’ right when incorporating short extracts of other news publications in their articles.

Recital 57 states that the press publishers’ right should have the same scope as the rights of reproduction and making available to the public in regular copyright law. Furthermore, recital 57 states that the press publishers’ right is subject to the same exceptions and limitations as those applicable to copyright law, including the right to quotation. If the press publishers’ right would be interpreted in a broader manner than intended in this recital, this would do significant harm to quality journalism and media pluralism. Quotations are commonly used in (online) journalistic news content, accompanied by comments or criticism.²² However, the sole exclusion of “individual words” or “very short extracts” in the article implies a rather broad interpretation. **Therefore, the law should explicitly state that the right to quotation also applies to the press publishers’ right.**

²² E. Rosati, ‘Neighbouring Rights for Publishers: Are National and (Possible) EU Initiatives Lawful?’, *International Review of Intellectual Property and Competition Law* 2016/47, 5, p.569-594.

4. Recap, conclusion and recommendations

To summarize, direct implementation of the provision on the press publishers' right in the new EU Copyright Directive may negatively affect freelance journalism in the Member States. Not only will this harm freelance journalists (financial) interests, but it will affect media pluralism as a whole. Both quality journalism and media pluralism are essential to the functioning of the democratic society. Therefore, national implementation of the Directive must take into account the importance of safeguarding freelance journalists' *appropriate share* of the press publishers' revenues and include effective measures to guarantee *media pluralism*. In order to accomplish this, we recommend that in national implementation the following is taken into consideration:

Recommendations on appropriate shares:

- National governments should ensure that the law explicitly states the **transparency obligation**.
- National governments should **examine the possibilities for collective rights management** to ensure that an appropriate share of revenues of the press publishers' right will flow to journalists.

Recommendations on media pluralism:

- National governments should clarify the definitions of "press publication", and "very short extracts" by:
 - explicitly excluding **websites or social media pages of the original authors** from the definition of "press publications"; and
 - explicitly stating that the **right to quotation** also applies to the press publishers' right.