



Rialtas na hÉireann
Government of Ireland

**Report on the Results of the Consultation related to the
Future of Media Commission Report Recommendation
6-9 on the Copyright Directive (EU) 2019/790 with
particular reference to Article 15 - *Protection of press
publications concerning online uses***

Department of Enterprise Trade and Employment
November 2024

Context

This report presents a summary and analysis of submissions in response to the Public Consultation on the Future of Media Commission Report Recommendation 6-9 on the Copyright Directive (EU) 2019/790 with particular reference to Article 15 - Protection of press publications concerning online uses.

This report was commissioned by the Department of Enterprise, Trade, and Employment.

November 2024

Reason for the Public Consultation

The purpose of the consultation was to seek views on how Article 15 of EU Directive 2019/790 on Copyright in the Digital Single Market (as transposed by Regulation 13 of Statutory Instrument number 567 of 2021) is operating in practice. This is in line with Recommendation 6-9 of the Future of Media Commission Report – the relevant extract of which is as follows:

“The review should include an assessment of the actual and forecast economic benefits flowing to Irish publishers as a result of negotiated agreements; the views of publishers and platforms regarding the conduct of negotiations; the experience of individual publishers and collectives in regard to negotiations; the experience of local and national publishers; and the degree of transparency and consistency in agreements across qualifying media organisations.”

Related to this recommendation, Article 30 of the DSM Copyright Directive obliges the European Commission to review the Directive’s implementation no sooner than June 2026. The Department of Enterprise, Trade and Employment will engage with the European Commission to ensure that the Commission’s review takes account of the issues raised by the FOMC and by the stakeholders as reflected in this report.

The Responses

A list of the respondents is set out below. The Department notes the difference in response rate between stakeholders representing press publishers and those representing online platforms and others.

The Public Consultation

The Consultation was published in December 2023 and the views of both press publishers and online platforms were invited. Respondents were as follows:

Press Publishers

Business Post

The Irish Times Group

Local Ireland

Magazines Ireland

Mediahuis Ireland

Newsbrands Ireland

Radó Teilifís Éireann

Information Society Service Providers

Google Ireland Ltd.

Technology Ireland – Ibec

Others

National Union of Journalists – Trade Union

Marita Conlon McKenna – Writer

The Key Findings

Regulation 13 - Protection of press publications concerning online uses

The questions considered by stakeholders (press publishers, information society service providers and others), along with a summary of the replies received, are set out below.

[**Questions 1 to 3** related to general information from respondents, i.e., their identity, whether they are press publishers, information society service providers (online platforms), collective management organisations, representative organisations, or others. The full list of respondents is set out on page 4.]

Question 4. Does Regulation 13 of the European Union (Copyright and Related Rights in the Digital Single Market) Regulations 2021 impact or place obligations on you/your organisation directly? What are these obligations?

Information society service providers acknowledged that Regulation 13 impacts them and outlined particular initiatives that have been undertaken in response to the requirements of this Regulation. One particular information society service provider described a particular initiative which, it believes, responds to its obligations under Regulation 13.

Another point made by information society service providers is that while Regulation 13 establishes a new right for press publishers to seek control over the use (by information society service providers) of their copyright-protected content, there is no compulsion for both sides to reach an agreement. The ability for both to freely contract on this issue remains.

Press publishers acknowledge that while Regulation 13 does not directly place an obligation on them, it confers a critically important right for them to claim

revenues from the online use of their publications by information society service providers. It places an onus on platforms (information society service providers) not to infringe the copyright of rightholders (press publishers) and puts an obligation on the platforms to enter fair and proportionate contractual arrangements for any use of content generated by publishers.

Press publishers also remark that unfortunately the current legislation does not provide for a properly functioning or meaningful press publisher right. The traditional news media revenue model is reliant on advertising generating a significant portion of annual revenue. However, due to the change in consumer habits in terms of how they search for and consume news content, the vast majority of advertising revenue that is generated by news media goes to information society service providers rather than to press publishers who invest significant amounts to deliver the journalism that consumers are seeking.

Question 5. Have you engaged in negotiations in relation to the rights of publishers of press publications as outlined in Regulation 13? If so, in your view, have these negotiations been conducted in a fair and constructive manner?

An information society service provider has responded that it has proactively sought to identify potential press publishers with which to engage and, ultimately, to seek to reach agreement. It successfully reached agreements with some press publishers, and negotiations with others are still ongoing.

Press publishers have referred to the lack of engagement on this issue by most information society service providers, with only one willing to engage in negotiations pursuant to Regulation 13. Regarding the negotiations that have taken place, these have not been conducted in a fair and constructive manner. The main reason given for this is the lack of transparency of the methodology used by the information society service providers in calculating the remuneration

that is due to be paid to press publishers. Unless both parties have access to that information/data, it is impossible to discuss whether or not the calculation is fair or appropriate. Therefore, there has been little meaningful progress made on how the content (news articles) should be valued.

Other reasons given for the negotiations not having been negotiated in a fair and constructive manner are an undervaluation of the content (should be about 40% of the revenue earned from its use according to one study referenced), and a perceived imbalance of bargaining position between the parties.

Also, according to press publishers, most information society service providers have simply refused to engage in negotiations with press publishers. That refusal to engage cannot be considered to be fair and constructive in relation to press publishers' rights under Regulation 13. In addition, the difference in bargaining power between information society service providers, who by and large are international highly profitable companies, and Irish press publishers is not conducive to fair and constructive negotiating. Also, the dependence of press publishers on the relevant platforms (the information society service providers) who are the key gateways to the online world, further exacerbates this imbalance of bargaining power.

In addition, one press publisher also noted that it has been disadvantaged (sidelined) by its relatively small size compared to larger publishers and other media operators. It suggested that engagement by information society service providers should not be influenced or impacted by the relative size of the individual publishers or their market importance.

A response from another stakeholder includes the fact that many of the key stakeholders (information society service providers as well as press publishers) do not recognise trade unions. Also, inadequate legislation (collective

bargaining) diminishes the ability of trade unions to negotiate on a range of collective issues. The position of freelance workers is especially precarious.

Question 6. If negotiations have resulted in an agreement in relation to the remuneration due to the press publisher for the use, by the information society service provider, of the relevant press publications; is the agreed remuneration fair and adequate in your view?

An information society service provider remarked that remuneration that is negotiated and agreed willingly between the parties is, in principle, appropriate, even though parties may have started the negotiations with different expectations. It is not aware of how fairness could be understood objectively in this particular context but believes that the agreements it has already reached with press publishers provide considerable benefits for those press publishers.

It considers that the remuneration it offered for the press content is based on the widely accepted notion that it should be reasonable in proportion to the value derived from its usage. In particular, remuneration in exchange for the transfer of copyright and related rights shall be reasonable in relation to the economic value of the use of the rights and take into account the nature and scope of the use of the content.

A number of press publishers have indicated that discussions with information society service providers have not yet progressed to the negotiation phase. In relation to the negotiations that have taken place, they have not yet resulted in an agreement. They consider that the amounts offered have been entirely inadequate, in no way reflected the investment made by the publishers in the content and are devoid of any real reference to the value of the content as utilised by the information society service providers.

In addition, some offers were presented by bots without any detail regarding methodology or information underpinning the offer. Despite numerous attempts by press publishers to arrange meetings with information society service providers to discuss the offers, they were met with no response.

A separate factor raised by a press publisher is that in order to ensure that remuneration is fair and adequate, agreements need to ensure that payments are backdated to the date of the transposition of the Copyright in DSM Directive (12 November 2021). It cannot accept any offer that purports to be future facing only.

Question 7. If negotiations have resulted in an agreement, has there been a sufficient degree of transparency, from the information society service provider, in relation to specific information on the use of the relevant press publications (if included in the agreement) in your view?

An information society service provider has responded by saying that its firm view is that both parties to the negotiation must be transparent and constructive. Information from press publishers is also useful to information society service providers in assessing the value of the content, including the value provided by its circulation online to the press publisher itself. It has also stated that it has, at all times, sought to conduct negotiations with press publishers as transparently as possible in light of the confidential and commercially sensitive nature of such information. The methodology used (to calculate the remuneration offer), together with accompanying data, including data on attributable revenue and applied rates, has been communicated to press publishers. Negotiations with a number of press publishers are still ongoing and it is in the process of negotiating terms on which certain information, that is confidential to that information society service provider, would be provided to press publishers.

It adds that in any licensing agreement, it believes that obligations of the parties, in relation to the exchange of information, should be determined under the terms of the agreement, subject to freedom of contract. No party can be obliged to disclose information, in particular proprietary information, in this context; nor can a party be obliged to disclose information that is irrelevant to any copyright-related act.

Press publishers are of the united view that there has not been sufficient transparency from information society service providers in relation to key information on the direct and indirect benefits they enjoy from the use of news articles/content on their platforms. This is notwithstanding the fact that some press publishers have, in their discussions or correspondence with information society service providers, outlined the specific information/data they require. Also, some information society service providers have requested press publishers to sign non-disclosure agreements around negotiations that have taken place which further adds to the lack of transparency.

This absence of transparency (in relation to the information sought by press publishers) has hindered negotiations, and therefore the conclusion of agreements, as bargaining positions are extremely unbalanced. Press publishers are left unable to make a full and informed assessment of the value attached to their content without this information/data.

Finally, a press publisher has noted the perceived differences, between itself and an information society service, in identifying the direct and indirect economic benefits derived from its content by the information society service provider. It suggests that a critical first step in any negotiation will be to establish a consensus on what constitutes a fair and objective valuation methodology, and transparency on the information/data used in order to form that view.

Question 8. If parties to negotiations failed to reach an agreement on the amount of appropriate remuneration due to press publishers for the online use of their press publications by information society service providers, what were the barriers to reaching an agreement, in your view?

An information society service provider has identified the following as barriers to reaching an agreement:

- unsubstantiated and oversized expectations by press publishers regarding their remuneration entitlements;
- misunderstanding or mistaken expectations by press publishers in relation to the legislation in that it guarantees payments;
- press publishers are not considering the continued benefit to them for having their content circulated on the information society service provider's platform during the course of the negotiations;
- unreasonable licensing terms; and
- differences in opinion in relation to the terms on which confidential information would be provided to facilitate these negotiations and the nature of the information/data that ought to be provided in the context of these negotiations.

Further comments from information society service providers are that any negotiation for remuneration should be based on a data-based measurement as it is the only fair way to agree a fair license agreement. This will avoid creating unrealistic expectations that may hinder agreements being reached.

Press publishes have identified the following as barriers to reaching an agreement:

- the lack of an enforcement mechanism in the legislation that requires information society service providers to engage in negotiations or the ways in which the negotiations are to be conducted;
- the unwillingness of information society service providers to engage in negotiations at all, in particular with smaller press publishers;
- the lack of a requirement in the legislation for information society service providers to provide information/data (on the benefits it derives from its use of content) to press publishers;
- the lack of a mechanism in the legislation to offer guidance to determine the value of the content (to the information society service providers) if its value is disputed;
- there is no requirement in the legislation for parties to enter into mandatory arbitration if an agreement is not reached after a certain amount of time; and
- an enormous gap in bargaining power between the parties.

Question 9. Is there any other information in relation to negotiations or any resulting agreement that you wish to add?

An information society service provider referred to the very low number of news queries on its search engine; they accounted for less than 2% in 2023. It also added that it does not display advertisements or generate revenue from the vast majority of news searches. In addition, it offers additional methods to support the news industry (this sentiment was also stated by a representative of other information society service providers).

The information society service provider added that press publishers remain in full control in relation to whether their content appears on its platform and whether and how that content can be previewed. The DSM Copyright Directive

introduced a new economic right for press publishers but intentionally preserved the freedom to agree a contract between both parties, that is, the information society service providers and the press publishers. There are already legitimate business models based on mutually agreed commercial arrangements with press publishers.

Specific Comments/Proposals from Information Society Service Providers

- Transparency is important and it is important that this transparency goes both ways. It is crucial to note that information and transparency from press publishers may also be beneficial to information society service providers.
- Information/data sharing and the measurement of that information/data should form part of the negotiations in the contractual agreements.
- Article 15 (Regulation 13) is designed to ensure flexibility and to take into account the different ways information society service providers operate and allow them and press publishers to determine whether and on what basis they may or may not engage. The Irish Statutory Instrument that transposed the Copyright Directive does not confer a legal obligation to agree a licence.

Specific Comments/Proposals from Press Publishers

- It is desirable to include a legislative amendment for a requirement for the sharing of information/data by information society service providers on its usage of news articles/content with press publishers. This would provide

the basis for negotiations to take place on an even keel. The legislation should also identify specifically what that information/data should be.

- An amendment to the legislation to provide greater guidance on the factors which should inform the determination of fair remuneration.
- Government intervention in order to implement binding rules on information/data sharing, and on valuations in the event that parties are unable to reach agreement on the value of the content.
- The provision of mandatory arbitration where no agreement has been concluded by a set date.
- A need for genuine engagement between information society service providers and press publishers, through their representative bodies, in order to develop a meaningful and sustainable solution and clear and substantial payments to publishers.
- A voluntary system of collective management by press publishers by which to negotiate with information society service providers.
- Once appropriate agreements are concluded, the payments to be made should be backdated to the date of the transposition of the Copyright Directive, i.e., 12 November 2021.
- An intervention by the Government (the Competition Authority in the case of France) when parties are unable to reach an agreement as in other EU Member States such as France and Denmark.

A response from another stakeholder outlines that attention is drawn to Regulation 13(7) “*Authors of works incorporated in a press publication shall receive an appropriate share of the revenues that press publishers receive for the use of their press publications by information society service providers.*” The respondent notes that it continues to be disappointed that the Regulation does not specify a mechanism to ensure that this will happen. It suggests that the

revenue earned should be split evenly between press publishers and journalists and that the funds should be distributed by the relevant collecting societies.

A response from another stakeholder outlines that writers are reliant on (press) publishers to protect their works. Many small Irish press publishers have already closed, and this may continue over time. There is concern whether agreements can be made, and remuneration paid to writers (by information society service providers), if press publishers continue to close/cease trading.

Conclusion

The findings related to Recommendations 6-9 of the Copyright Directive (EU) 2019/790, particularly in reference to Article 15 concerning the protection of press publications concerning online uses, highlight several key issues and challenges in its implementation. While the Directive establishes a new right for press publishers to receive remuneration from information society service providers for the online use of their content, the process of achieving fair agreements has proven to be complex and contentious.

Information society service providers acknowledge their obligations under Article 15 (Regulation 13) and have reported some progress in negotiations with press publishers. However, the majority of press publishers' express dissatisfaction with the overall negotiation process. A key issue highlighted is the perceived significance of disparity in bargaining power, with large, international information society service providers dominating smaller, local press publishers, leaving the latter at a disadvantage. The absence of an enforcement mechanism within the current legislation to compel information society service providers to engage meaningfully in negotiations, particularly with smaller press publishers, potentially exacerbates this imbalance.

Transparency, or the lack thereof, is another recurring theme. Press publishers report a sense of insufficient transparency regarding the data utilised to calculate remuneration offers as well as the overall value derived from the use of their content. Information society service providers, while noting the importance of transparency, maintain that certain proprietary data cannot be disclosed due to business confidentiality concerns. This lack of clear data-sharing mechanisms has hindered meaningful discussions on the fair valuation of news articles/ content.

Furthermore, the issue of remuneration itself remains unresolved. Press publishers maintain that the amounts offered are often inadequate and do not reflect the significant investment made in producing high-quality journalism. Offers have sometimes been generated using automated systems, further compounding frustrations. Additionally, many publishers believe that payments should be backdated to the transposition date of the Directive (12 November 2021), but this has not been uniformly accepted by information society service providers.

Some stakeholders' proposals suggest the need for legislative reform to address these challenges including amendments to include mandatory data-sharing requirements, clearer guidelines on what constitutes fair remuneration, and mechanisms such as binding arbitration in the event of negotiation failures. There are also calls for Government intervention in order to ensure a fair and balanced playing field as well as potential involvement by the Competition and Consumer Protection Commission to address disparities in bargaining power.

In summary, while Article 15 of the Copyright Directive, as transposed by Regulation 13, offers a promising framework for all parties to work towards securing fair remuneration for the online use of press publishers' content, its current implementation has exposed significant difficulties. The Department has

noted these difficulties as expressed by all stakeholders concerned. It remains committed to finding solutions, with stakeholders, to the difficulties expressed as part of this consultation. This will include full engagement with the EU Commission on this particular issue in order to ensure that the Commission's planned review of the implementation of the entire Directive (in 2026) takes full account of the issues raised in this consultation. In the meantime, the Department will reflect further on the issues raised.