



CCIA's comments on the compatibility of the EU Copyright Directive with Austria's Federal Act amending the Austrian Copyright Act (TRIS notification 2021/799/A)

Introduction

The European Union (EU) Member States are transposing the new EU Copyright Directive (2019/790) (EU Directive). The new digital press publishers' right (Article 15, previously known as Article 11) was a highly contentious and controversial provision. After months of protracted debate, EU lawmakers reached agreement striking a carefully considered balance, giving publishers of press publications more control to authorise and prohibit the use of their publications online, while at the same time preserving the ability for everyone to discover, access, and share information online. This balance is essential to the good functioning of the internet economy. Some EU countries, like Austria, are taking certain liberties in their interpretation of the EU rules, putting at risk the equilibrium reached.

The Computer and Communication Industry Association (CCIA Europe) appreciates the opportunity to provide comments to the TRIS notification process (2021/799/A) of the European Commission on Austria's transposition of the EU Copyright Directive. To adopt the EU rules, Austria developed a Federal Act amending the Copyright Act. This Federal Act inserts a section 76f(7), which makes it mandatory for all publishers to licence these rights collectively only by collecting societies (the CMO Clause).

CCIA Europe supports the goals of the EU Copyright Directive and the principle that a "free and pluralist press is essential to ensure quality journalism and citizens' access to information" (as stated in Recital 54). However, we are concerned that the proposed CMO Clause, as presently worded, may risk violating key European laws and principles and could fragment the harmonised approach in the EU with respect to press publication rights. The proposed CMO Clause, which is of a mandatory nature; (1) does not reflect the terms or the intent of Article 15 of the EU Directive; (2) undermines the principle of freedom of contract, and; (3) is practically problematic and likely to create significant uncertainty and confusion among publishers and platforms. While publishers *may* wish to engage collecting societies to assist in the management of the press publication right, implementing a *mandatory* CMO requirement would be incompatible with the EU Directive.

How compatible is the Austrian Federal Act on Copyright with the EU Copyright Directive?

A. The CMO Clause is foreign to the EU Directive

The CMO Clause seeks to impose a mandatory collective management scheme in Austria for the new press publication right, requiring that certain (vaguely-defined) "claims" be brought "only by" collecting societies. This provision, which appears to give exclusive powers to collecting societies, is not found in Article 15 of the EU Directive nor in any complementary articles or recitals therein pertaining to the press publication right.

Further, the CMO Clause is stated to apply only to claims against "dominant service providers". The term "dominant service providers" is foreign to Article 15 of the EU Directive and is not defined in the complementary section of the Austrian Copyright Act. This selective carveout for dominant service providers may be inappropriate in circumstances where a platform cannot be deemed dominant without reference to a specific market, and the relevant market will vary depending on many factors, including the services provided and audience for those services.

The implementation of the proposed CMO Clause, which is alien to the EU Directive, into Austria's national law risks fragmenting the rules pertaining to press publication rights within the EU and would make Austria



an outlier. Furthermore, such a scheme would undermine the principle of the freedom of contract and is fundamentally incompatible with the intent of Article 15 of the EU Directive, which seeks to preserve publisher control, as further discussed below.

B. The European Commission does not support mandatory collective management for press publication rights

The European Commission has confirmed on multiple occasions that a mandatory collective management mechanism is incompatible with Article 15 of the EU Directive. In November 2021, Commissioner Thierry Breton personally underscored the exclusivity of this right on several occasions. Specifically, in answer to a European Parliamentary question, Commissioner Breton stated that: “The Commission considers that Member States are not allowed to implement Article 15 of EU Directive (EU) 2019/790 on copyright in the digital single market (the ‘DSM Directive’) through a mechanism of mandatory collective management. Article 15 grants publishers of press publications the exclusive rights to authorise or prohibit the distribution and the making available of their publications by information society services. Imposing mandatory collective management would deprive publishers of this exclusive right by precluding publishers’ choice to authorise or prohibit the use of their publication”.

Article 15 is intended to give publishers greater control over their press publications, not less. A mandatory collective licensing would fundamentally limit publisher control/choice and would offset the careful balance between publishers and platforms that is sought by Article 15.

C. The CMO Clause undermines the freedom of contract

Article 15 of the EU Directive was passed as a result of careful negotiations between Member States with input from publishers, online services (both social media platforms and news aggregators), and user groups. The resulting provisions seek to balance these parties’ interests through the creation of a new right for press publishers with the ability for publishers and online services to *freely contract*. Maintaining freedom of contract and allowing press publishers to control the use of their press publications is especially important in the context of the digital age, because, practically, publishers often *choose* to upload their own publications online on digital platforms and rely on the platforms as a means to build engagement with users and increase their audience. Article 15 therefore is designed to ensure flexibility and to take into account the different ways online services operate and allow publishers and online services to determine whether and on what basis they may or may not engage.

We are concerned that the CMO Clause in the Austrian Federal Act may impact the careful balance of Article 15 and undermine the principle of freedom to contract that is embedded within the EU Directive (see Recital 61) and in Austrian law. Publishers must retain their individual right of disposition, and we consider that this has both legal and practical dimensions:

1. ***The EU Directive recognises the need for the parties to have freedom to determine any arrangements:*** The needs of different publishers, and the way they use online platforms, varies considerably. It is therefore important that publishers and platforms have the contractual freedom to determine appropriate arrangements that are mutually beneficial and reflect the specific needs of those parties. For example, as mentioned, many publishers see the value in using digital platforms (e.g. social media) to disseminate content and build audiences. Publishers and platforms need to have the freedom to take these individual requirements into account. The concept of contractual freedom is recognised within the EU Directive itself. Adopting a mandatory collective management mechanism will severely impact these rights.



2. **Press publishers must maintain choice and control:** As underscored by Commissioner Breton’s statement above, publishers must have the choice to authorise or prohibit the use of their publications. Given the wide variety of publishers and the very different services offered by platforms and news aggregators, it is not the case that one-size-fits-all. We therefore have concerns that the use of mandatory collective management in relation to the press publication right will remove the ability for publishers and platforms to determine appropriate arrangements and will override the freedom of contract for all parties concerned.
3. **In practice, mandatory collective management is likely to lead to confusion in the market:** It is unclear how the CMO Clause, and the mandatory collective management structure stipulated therein, would operate in practice:
 - a. As mentioned, it is unclear what “claims” the CMO Clause is intended to cover, nor is it clear how that mechanism would operate vis-a-vis “dominant service providers”. This uncertainty may lead to confusion in the market and contribute to disputes, delays, or disruption of the application of the new press publication right in Austria.
 - b. Secondly, it is important to understand that there are numerous different business models employed by press publishers and that not all online services are alike. We are concerned that it will be difficult in practice for platforms to know whether a particular publisher is or is not part of the collective management scheme. Where publishers continue to voluntarily upload their content to platforms, it will be unclear whether the permissions provided by those publishers are effective.

D. The CMO Clause might lead to a patchwork of copyright rules in Europe

Imposing a mandatory collective management would diverge from the EU’s copyright rules. It could therefore set a dangerous precedent, leading to a patchwork of different copyright rules amongst all the EU member states. That fear isn’t unfounded. Croatia recently adopted its “copyright and related rights law” paving the way for mandatory collective management.

Conclusion

Accordingly, whilst collective licensing *may* be an option that publishers wish to pursue, implementing a *mandatory* scheme will lead to severe confusion and challenges in the market. A mandatory collective management mechanism does not align with the terms and intent of the EU Directive, is likely to be ineffective, and may in practice limit how publishers voluntarily display their content on social media platforms. We therefore recommend that the CMO Clause in the Austrian Federal Act amending the Austrian Copyright Act be rejected. Publishers and platforms should retain the freedom to determine their own arrangements in relation to press publication rights.