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Is Harmonization Good if the End Result Is Even More Fragmentation?

The Case of Article 15 CDSM Directive and the Exclusion of 'Very Short Extracts'

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17.1 INTRODUCTION

While declining revenues in the press publishing sector are not a new phenomenon, they have become particularly problematic since the early 2000s, with some commentators pointing to the internet and news aggregation services as primarily responsible for this.[1] In Europe, possible solutions to tackle this issue were initially identified at the national level. These encompassed both the conclusion of agreements between news aggregators and local press publishers (e.g., in Belgium, France, Italy) and the adoption of legislative initiatives in relation to news content (Germany, Spain).[2] With regard to the latter, prior to the introduction of Article 15 of Directive 2019/790 on Copyright in the Digital Single Market (CDSMD),[3] Germany and Spain legislated, though with different mechanisms, to achieve objectives similar to those presented in recitals 54 and 55 CDSMD.[4]

This chapter partly builds upon the analysis contained in Chapter 3 of E. Rosati, *Copyright and the Court of Justice of the European Union*, 2nd ed. (Oxford: Oxford University Press, 2023). All internet sources were last accessed on 26 February 2024.

[1] G. Price, 'Opportunities and challenges for journalism in the digital age: Asian and European perspectives' (2015), Chatham House – The Royal Institute of International Affairs at 3; P. Madsen and J. Andsager, 'Aggregating agendas: Online news aggregators as agenda setters', Paper presented to the Association for Education in Journalism and mass communication annual conference, August 2012; M. Calin et al., 'Attention allocation in information-rich environments: The case of news aggregators' (2015) 62(9) *Management Science* 2543–2562.

[2] See the discussion in E. Rosati, 'Neighbouring rights for publishers: Are national and (possible) EU initiatives lawful?' (2016) 47(5) *International Review of Intellectual Property and Competition Law* 569–594 at 571–574.

[3] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ 2019 No. L130.

[4] See further E. Rosati, *Copyright in the Digital Single Market. Article-by-Article Commentary to the Provisions of Directive 2019/790* (Oxford: Oxford University Press, 2021), pp. 253–257.

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In 2013, Germany introduced legislation (Sections 87f, 87g and 87h of the German Copyright Act) vesting press publishers with a waivable right over their news content. In 2014, Spain reformed its quotation exception (Article 32 of the Intellectual Property Law) and introduced a non-waivable right to 'equitable remuneration' that, in its substance and despite its different nature, was similar in its end goals to the German press publishers' right. Neither initiative managed to achieve the underlying objectives though. Indeed, focusing specifically on the German and Spanish experiences, the European Commission's Impact Assessment accompanying its 2016 Proposal for what would be adopted, three years later, as the CDSMD[5] ('Proposal') acknowledged that these had been somewhat 'ineffective', and linked such ineffectiveness to 'the lack of scale of national solutions'.[6] Insofar as the German provisions are concerned, it should be further noted that they became unenforceable after the *VG Media* judgement of the Court of Justice of the European Union (CJEU).[7] There, the Court regarded the lack of notification by the German government to the European Commission as a breach of that Member State's obligations under Directive 98/34.[8]

Although neither the European Commission's 2015 'Digital Single Market Strategy'[9] nor the subsequent 'Communication Towards a Modern, More European Copyright Framework'[10] contains references to the situation of press publishers and the need for intervention in this field at EU level, in its Proposal the European Commission included a provision (Article 11) that would introduce at the EU level a new related right in favour of press publishers for the digital use of their press publications. With the stated goal of helping press publishers 'increase their legal certainty, strengthen their bargaining position and have a positive impact on their ability to license content and enforce the rights on their press publications'[11] and

[5] Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM/2016/0593 final – 2016/0280 (COD).

[6] European Commission, 'Commission staff working document – Impact assessment on the modernisation of EU copyright rules – Part 1', SWD(2016)301, para. 5.3.1.

[7] Case C-299/17, VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH v Google LLC, successor in law to Google Inc. [2019] ECLI:EU:C:2019:716. Prior to the CJEU judgement, in the same sense as the resulting decision; see B. Vesterdorf, 'The effect of failure to notify the Spanish and German ancillary copyright laws' (2015) 37(5) *European Intellectual Property Review* 263 at 265–267.

[8] Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998, OJ 1998 No. L217, 18–26.

[9] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, a Digital Single Market Strategy for Europe', COM/2015/0192 final, 2015.

[10] European Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Towards a Modern, More European Copyright Framework', COM/2015/0626 final, 2015.

[11] European Commission, 'Commission staff working document – executive summary of the impact assessment on the modernisation of EU copyright rules accompanying the document Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market', SWD(2016) 302 final, 3.

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ultimately reward their investment in press publications, the Proposal (Explanatory Memorandum) highlighted the difficulties that press publishers faced when seeking to license the use of their publications and prevent unauthorized uses by online services. While a number of Member States had already intervened to remedy or reduce the negative impact of reduced revenue in the press publishing sector, action at the EU level appeared necessary in order to avoid further fragmentation and remedy the already mentioned shortcomings of existing national solutions.[12]

Further to a complex and admittedly contentious legislative process, Article 15 CDSMD was eventually adopted. The rationale supporting EU intervention is manifold. Recital 54 links the introduction of Article 15 to the need to facilitate press publishers when licensing the use of press publications to providers of 'new online services'. This, in turn, would serve to support a 'free and pluralist press' in its function 'to ensure quality journalism and citizens' access to information'. Contributing to the realization of a 'fair marketplace' (recital 3) is one of the key objectives of the CDSMD: recital 55 is rooted in an idea of fairness, stressing the need to acknowledge '[t]he organisational and financial contribution of publishers in producing press publications'. This, in turn, would serve to 'foster the availability of reliable information'.

Following the expiry of the deadline for the national transpositions of the CDSMD on 7 June 2021 and with Member States having now transposed its provisions, including Article 15, the state of copyright harmonization in the post-CDSMD landscape returns a fragmented if not altogether depressing image. With specific regard to the national transpositions of the press publishers' right, some countries have opted to provide their own definitions of certain key concepts in the EU provision that – it is submitted – are instead to be regarded as autonomous concepts of EU law (e.g., beneficiaries, addressees, exclusions), while others have opted for problematic modalities through which the right is to be exercised.[13] An example of the latter is the Italian transposition of Article 15 CDSMD, which – at the time of

[12] European Commission, 'Impact assessment', para. 5.3.1.

[13] See, e.g., C. Sganga and M. Contardi, 'The new Italian press publishers' right: Creative, fairness-oriented … and invalid?' (2022) 17(5) *Journal of Intellectual Property Law & Practice* 421–428 at 422–427 (with regard to the Italian transposition); B. Marušic, 'The implementation of Article 15 of the DSM Directive in Croatia: A gold-plating provision' (2022) 17(9) *Journal of Intellectual Property Law & Practice* 741–747 at 742–745 (having regard to the Croatian transposition); U. Furgał, 'The emperor has no clothes: How the press publishers' right implementation exposes its shortcomings' (2023) 72(7) *GRUR International* 650–664 at 658–669 (considering the Italian and Belgian transpositions, as well as Czech [at the time] draft law). Prior to the enactment of the Italian transposition of the provision, the Italian Competition Authority (AGCM) was also concerned that the proposed would be *inter alia* incompatible with EU law: AGCM, *AS1788 – Recepimento della Direttiva UE 2019/790 (Direttiva Copyright)*, 27 September 2021, Bollettino 38/2021, available at: www.agcm.it/dotcmsdoc/bollettini/2021/38-21.pdf, 27–31. On the latter, see also the discussion in G Rapaccini, 'Il nuovo diritto connesso degli editori online', in S. Lavagnini (ed.) *Il Diritto d'Autore nel Mercato Unico Digitale. Direttiva (UE) 2019/790 e D.Lgs. n. 177/2021 di Recepimento* (Turin: Giappichelli, 2022), pp. 170–172.

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writing – is already at the centre of litigation before Italian courts and also a pending referral to the CJEU.[14]

By focusing on the exclusion of 'very short extracts' of press publications in the fourth sub-paragraph of Article 15(1) and considering some selected national transpositions thereof, this chapter seeks to investigate (i) whether the divergent national transpositions of the exclusion of 'very short extracts' will ultimately thwart the harmonization objective underlying Article 15 CDSMD; and (ii) whether certain national transposition approaches are to be held incompatible with EU law and, if so, what the solutions for that could be.

This analysis is connected to European media law in the sense that it focuses specifically on the press sector from the perspective of the relation (and friction) between EU harmonization goals and resulting national approaches. It is intended to add to the existing body of literature on Article 15 CDSMD from an EU perspective by focusing specifically on national transposition approaches. It is hoped that the resulting conclusions can also inform law-making at the national level in relation to other areas of the law affected by the process of EU harmonization.

The chapter is structured as follows. Section 17.2 considers the EU preemption doctrine as applied to copyright provisions and identifies Article 15 CDSMD as a provision that requires a minimalistic transposition in national law. Section 17.3 reviews selected national transpositions of Article 15 with specific regard to the exclusion of 'very short extracts', the goal being not to provide an exhaustive overview of all Member States' legislations but rather to identify problematic approaches in the fulfilment of Member States' own obligations under EU law. Section 17.4 considers the consequences of incorrect transpositions of Article 15. Section 17.5 concludes the discussion. Ultimately the questions posed in the title of the chapter (Is harmonization good if the end result is even more fragmentation?) is answered in the sense that harmonization is necessary but where the instrument chosen is a directive, it is imperative that national legislatures correctly interpret and act within the freedom afforded to them under EU law.

17.2 THE EU DOCTRINE OF PREEMPTION AND THE CASE OF ARTICLE 15 CDSMD

In order to appreciate the freedom that Member States enjoy in transposing provisions of EU directives – including Article 15 CDSMD – into their own legal systems, a discussion needs to be undertaken of the principles of EU supremacy and

[14] See E. Rosati, 'Breaking: First CJEU referral on press publishers' related right (Italian-style)', The IPKat, 13 December 2023, available at: https://ipkitten.blogspot.com/2023/12/breaking-first-cjeu-referral-on-press.html. On 10 July 2025, Advocate General Szpunar issued his Opinion in the case, which remains pending at the time when this contribution is being sent to press: Case C-797/23, Meta Platforms Ireland Limited v Autorità per le Garanzie nelle Comunicazioni and Others, Opinion of Advocate General Szpunar [2025] ECLI:EU:C:2025:552.

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the related yet distinct doctrine of EU preemption. Supremacy of EU law over EU Member States' laws is one of the cornerstones of the overall EU integration process: it denotes the superiority of the EU legal order over national legal orders.[15] The doctrine of EU preemption is closely associated with EU supremacy yet remains distinct from it[16] and is now codified[17] in Article 2(1)–(2) of the Treaty on the Functioning of the European Union[18] (TFEU). Yet, compared to EU supremacy, the attention devoted to the doctrine of EU preemption is still limited. As a leading theorist of EU preemption has bluntly put it: 'The contrast between the academic presence of the supremacy doctrine and the shadowy existence of the doctrine of pre-emption in the European literature is arresting.'[19]

All this said, insofar as intellectual property (and so copyright) is concerned, this is an area of shared competence between the EU and its Member States. This means that, once the EU has exercised its competence in a certain field and adopted rules on a particular matter, EU Member States may no longer legislate. This should not be intended as an overall ban to legislate in relation to a certain area as a whole, but only as preemption from legislating in relation to the elements of the EU action in question.[20] It has been detailed that, compared to EU supremacy, preemption is less explored. If we take the case of intellectual property and copyright, however, the situation is even more dire when contrasted to other areas where EU harmonization initiatives have been undertaken.[21] On the one hand, scholarship has not really engaged with questions of preemption in the copyright field; instead, it has advanced the idea that EU copyright law – in particular the Information Society Directive 2001/29[22] ('ISD') with regard to available exceptions and limitations under Article 5 therein – would allow a substantial degree of flexibility. On the other hand, Member States' transpositions of relevant directives have often occurred through

[15] See the discussion in R. Schütze, *European Union Law*, 2nd ed. (Cambridge: Cambridge University Press, 2018), pp. 121–126.

[16] R. Schütze, *European Constitutional Law* (Cambridge: Cambridge University Press, 2012), p. 364.

[17] In definitive terms: K. Lenaerts, P. Van Nuffel and T. Corthaut, *EU Constitutional Law* (Oxford: Oxford University Press, 2021), para. 5.026.

[18] Consolidated version of the Treaty on the Functioning of the European Union, OJ 2012 No. C326.

[19] Schütze, *European Union Law*, p. 138. Substantially in the same sense but specifically comparing the attention received by preemption in the internal sphere (restraints that the enactment of EU legislation imposes on national law-making powers) to that in the external sphere (limitations that the exercise of EU internal competences imposes on Member States' power to undertake international commitments), see A. Arena, 'Exercise of EU competences and pre-emption of Member States' powers in the internal and the external sphere: Towards "grand unification"?' (2016) 35(1) *Yearbook of European Law* 28 at 28–29.

[20] Protocol No 25 on the exercise of shared competences, OJ 2008 No. 115. See further C. Barnard and S. Peers (eds.), *European Union Law* (Oxford: Oxford University Press, 2014), pp. 108–109.

[21] See the discussion in D. Chalmers, G. Davies and G. Monti, *European Union Law*, 3rd ed. (Cambridge: Cambridge University Press, 2014), pp. 210–215.

[22] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ 2001 No. L167.

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the adoption, by individual legislatures, of language departing from that of the corresponding EU provisions *and* envisaging an altogether different scope of resulting national provisions. Nevertheless, as consistent CJEU case law also indicates, the EU copyright system is such that a uniform approach is required and that Member States' freedom to legislate is significantly limited.

17.2.1 *Harmonization Techniques and Member States' Discretion*

The process of EU copyright harmonization has been mostly carried out through the instrument of directives. Under Article 288(3) TFEU, 'A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.' In all this, when it comes to the EU copyright directives and the degree of freedom enjoyed by Member States in the subsequent transposition process, it is possible to identify three groups of provisions.

There is a first group that allows Member States the very option of whether or not to introduce certain mechanisms into national law (Group 1). Then there is a second group of provisions that require Member States to undertake certain initiatives, while also granting them substantial discretion (Group 2). Finally, there are provisions that are prescriptive in content and scope (Group 3). In turn, the freedom of Member States, insofar as their transposition and application are concerned, is extremely limited.

While it is true, as detailed here, that the TFEU allows national authorities to determine the form and methods they use to achieve the result mandated by a certain EU directive, it would be parochial to think that the choice between different approaches to national transpositions is always something within the complete discretion of EU Member States. There are provisions of EU law that actually provide a choice between copying and elaboration (minimalistic and non-minimalistic methods of transposition), but this is not always the case.[23] In the context of the present discussion, the provisions belonging to Groups 1 and 2 grant Member States the possibility to adopt a non-minimalistic method of transposition; the provisions that are part of Group 3 require instead a minimalistic transposition approach.

17.2.2 *The CDSMD and Article 15*

Article 15 is an example of a Group 3 provision as defined here. It requires Member States to provide publishers of press publications established in a Member State with the rights provided for in Article 2 and Article 3(2) ISD for the online use of their

[23] See the discussion in R. Král, 'On the choice of methods of transposition of EU Directives' (2016) 41(2) *European Law Review* 220–242. In the specific copyright context, see also recently Case C-260/22, *Seven.One Entertainment Group GmbH v Corint Media GmbH*, Opinion of Advocate General Collins [2023] ECLI:EU:C:2023:583, paras. 36–37, contrasting Art. 2(e) and Art. 5(2)(b) ISD.

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press publications by information society service providers (ISSPs).[24] Among other things, Article 15(1) excludes individual words and very short extracts from the scope of protection.

Considering this configuration of the provision, the notion of 'very short extract' is admittedly an autonomous concept of EU law and Member States are not allowed to provide a definition thereof in their own national transpositions of Article 15. As the CJEU clarified early on in *Ekro*:

> The need for a uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the relevant regulations.[25]

All this is expression of the principle of autonomy and is regarded by the CJEU itself as 'settled case-law'.[26] The CJEU has often employed this standard in its copyright case law, with the practical effect of strengthening the harmonization of copyright laws across the EU. Although arguably neither the Court nor its Advocates General (AGs) have systematically or even explicitly developed a doctrine of EU preemption in the EU copyright field, the application of preemption has been material and prompted by the objective of achieving certain internal-market-rooted outcomes for prejudicial questions posed by national courts. The practical, result-oriented use of EU preemption may be seen in all areas affected by copyright harmonization: subsistence requirements, exclusive rights, exceptions and limitations, and national legislative initiatives.

Three key factors have contributed to developing and shaping the Court's application of preemption in the field of copyright. The first has been the use of and reliance on the aforementioned interpretative standard according to which, when a certain provision in an EU directive makes no reference to national legislation, relevant concepts are not to be defined at the national level but are rather intended to constitute autonomous concepts of EU law. As such, they are to be given a uniform interpretation and application throughout the EU, with the result that Member States are not allowed to determine the limits thereof in an inconsistent and unharmonized manner. The second has been the internal market-building rationale underlying the entire EU copyright harmonization process

[24] As to the underlying concept of 'information society service', see Art. 2(5) CDSMD.

[25] Case C-327/82, *Ekro BV Vee- en Vleeshandel v Produktschap voor Vee en Vlees* [1984] ECLI:EU:C:1984:11, para. 11.

[26] Case C-433/20, *Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH v Strato AG* [2022] ECLI:EU:C:2022:217, para. 20, referring to Case C-395/16, *DOCERAM GmbH v CeramTec GmbH* [2018] ECLI:EU:C:2018:172, para. 20 and the case-law cited therein.

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and, with that, the need to comply with the wording and scope of EU provisions and avoid fragmentation at the national level. The third has been an expansive reading of the harmonization achieved at EU level, with the result that the room for national legislative initiatives in the field of copyright has been substantially limited or even removed.

17.3 ARTICLE 15 AND ITS NATIONAL TRANSPOSITIONS: THE EXCLUSION OF 'VERY SHORT EXTRACTS'

Like the earlier German press publishers' right, Article 15(1) CDSMD *inter alia* excludes from the scope of protection the use of very short extracts of a press publication. Like the German legislation, the CDSMD does not define what constitutes a 'very short' extract.

17.3.1 *The Rationale of Related Rights (Including Article 15) and the Resulting Scope of Protection*

The right granted under Article 15 CDSMD is a related right. As such, the conditions for and rationale of protection differ from copyright. Protection under the latter is premised on the originality of the work at hand or part thereof. In accordance with what the CJEU itself calls 'well-established case-law'[27] and 'well-settled case-law',[28] originality is established when – through the choice, sequence, and combination of such elements as words, figures, or mathematical concepts – an author expresses their creativity in an original manner[29] and exercises 'creative freedom'.[30] What is required is thus for the author 'to express [their] creative abilities in the production of the work by making free and creative choices', so that they 'can stamp the work created with [their] "personal touch"'.[31] Indeed, 'mere intellectual effort and skill' in creating a work are not relevant to establishing originality.[32] In addition, the originality criterion is not satisfied when the creation of a work 'is dictated by technical considerations, rules or constraints which leave no

[27] Case C-469/17, *Funke Medien NRW GmbH v Bundesrepublik Deutschland* [2019] ECLI:EU:C:2019:623, para. 49.

[28] Case C-588/21 P, *Public.Resource.Org and Right to Know v Commission and Others*, Opinion of Advocate General Medina [2023] ECLI:EU:C:2023:509, para. 89.

[29] Case C-5/08, *Infopaq International A/S v Danske Dagblades Forening* [2009] ECLI:EU:C:2009:465, para. 45. In the same sense, see Case C-393/09, *Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury* [2010] ECLI:EU:C:2010:816, para. 50, and Case C-406/10, *SAS Institute Inc. v World Programming Ltd* [2012] ECLI:EU:C:2012:259, para. 67.

[30] Joined Cases *Football Association Premier League Ltd and others against QC Leisure et al.* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08) [2011] ECLI:EU:C:2011:631, para. 98.

[31] Case C-145/10, *Eva-Maria Painer v Standard VerlagsGmbH and Others* [2011] ECLI:EU:C:2011:798, paras. 89 and 92.

[32] Case C-469/17, para. 23.

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room for creative freedom'.[33] Related and *sui generis* rights are not at all premised on this logic.

The right of reproduction of rightholders other than authors protects 'not intellectual creation but financial investment'.[34] As such, the subject matter of related rights is protected irrespective of its originality. In *Pelham*, the CJEU considered the scope of protection afforded to phonogram producers in relation to the unauthorized reproduction of very short audio snatches from a phonogram for inclusion in another phonogram under Article 2(c) ISD in accordance with the sampling technique. The Court ruled that the reproduction of a phonogram, even when such a reproduction is very short, must in principle be regarded as a reproduction 'in part' of that phonogram within the meaning of the provision insofar as it is recognizable to one's ear (the ear of whom, however, is oddly left unclear[35]) and that part *reflects the investment* made by the rightholder.[36] This finding is consistent with the objective of guaranteeing a high level of protection and safeguarding the specific objective of the exclusive right of the phonogram producer, referred to in recital 10 ISD, 'which is to protect a phonogram producer's investment'.[37]

With *specific* regard to phonograms, the CJEU also held that 'where a user, in exercising the freedom of the arts, takes a sound sample from a phonogram in order to use it, in a modified form unrecognisable to the ear, in a new work, it must be held that such use does not constitute "reproduction" within the meaning of Article 2(c) of [the InfoSoc] Directive 2001/29'.[38] In reaching this conclusion, the Court was clearly mindful of the importance of respecting third-party freedom of artistic expression. Specifically protected under Article 13 of the EU Charter,[39]

[33] Case C-683/17, *Cofemel – Sociedade de Vestuário SA v G-Star Raw CV* [2019] ECLI:EU:C:2019:721, para. 31, referring to Case C-604/10, *Football Dataco Ltd and Others v Yahoo! UK Ltd and Others* [2012] ECLI:EU:C:2012:115, para. 39. In the same sense, see also Case C-833/18, *SI and Brompton Bicycle Ltd v Chedech / Get2Get* [2020] ECLI:EU:C:2020:461, paras. 24–26.

[34] Case C-476/17, *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben*, Opinion of Advocate General Szpunar [2018] ECLI:EU:C:2018:1002, para. 28.

[35] On this aspect of the judgement, see also: J. Parish, 'Sampling and copyright – Did the CJEU make the right noises?' (2020) 79(1) *Cambridge Law Journal* 31–34 at 33; M. Senftleben, 'Flexibility grave – Partial reproduction focus and closed system fetishism in CJEU, Pelham' (2020) 51(6) *International Review of Intellectual Property and Competition Law* 751–769 at 757; B. J. Jütte and J. P. Quintais, 'The Pelham Chronicles: Sampling, copyright and fundamental rights' (2021) 16(3) *Journal of Intellectual Property Law & Practice* 213–225 at 216; G. Westkamp, 'Two constitutional cultures, technological enforcement and user creativity: The impending collapse of the EU copyright regime?' (2022) 53(1) *International Review of Intellectual Property and Competition Law* 62–93 at 73–74.

[36] Prior to the decision, cf. L. Bently et al. (on behalf of the European Copyright Society), 'Sound sampling, a permitted use under EU copyright law? Opinion of the European Copyright Society in relation to the pending reference before the CJEU in case C-476/17, Pelham GmbH v Hütter', 2019, para. 3.9, available at: https://tinyurl.com/bdh2rwsr, recommending the Grand Chamber to consider a reproduction 'in part' actionable only if as it significantly prejudices the economic interests of the rightholder.

[37] Case C-476/17, paras. 29–30.

[38] Ibid., para. 31.

[39] Charter of Fundamental Rights of the European Union, OJ 2012 No. C326.

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this fundamental freedom has received some timid mentions in other EU intellectual property instruments[40] but – insofar as copyright is concerned – the decision in *Pelham* represents the first explicit mention thereof.[41] Some commentators have suggested that the test of recognizability could be generally applicable as a limitation to the scope of the right of reproduction for rightholders other than authors.[42] Others have considered that, more than reproduction, the issue considered and the approach adopted by the CJEU would be a matter of adaptation, with the result of yet another *de facto* harmonization effort on the side of EU judiciary.[43]

Despite the specific sound sampling context of the CJEU ruling in *Pelham* and the fact that – at the time of writing – the Court has not yet had the opportunity to address specifically the right of reproduction of the other reproduction rightholders listed in Article 2 ISD, the broader teaching appears to be that there is reproduction 'in part' within the meaning of Article 2(b)-(e) ISD when what is being reproduced without the permission of the relevant reproduction rightholder interferes with the opportunity, which the rightholder should have, of realizing satisfactory returns on their investment.[44] This conclusion appears consistent with the qualified test of infringement recently adopted by the CJEU in *CV-Online Latvia* in relation to the *sui generis* database right under the Database Directive.[45] There the CJEU held that not all extractions of re-utilization without consent of a database are potentially relevant under the *sui generis* database right. What is required, instead, is that the extraction and/or re-utilization at issue adversely affect the investment made in the obtaining, verification, or presentation of the content of a database. The test is

[40] Specifically recital 21 in the preamble to Regulation (EU) 2017/1001 of the European Parliament and of the Council of 14 June 2017 on the European Union trade mark (codification) OJ 2017 No. L154, and recital 27 in the preamble to Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trade marks (recast), OJ 2015 No. L336. S. Geiregat, 'Trade mark protection for smells, tastes and feels – Critical analysis of three non-visual signs in the EU' (2022) 53(2) *International Review of Intellectual Property and Competition Law* 219–245 at 243, submits that trade mark legislation has the potential to leave more leeway than copyright in accommodating external limitations to protection after the Grand Chamber ruled out the possibility to apply the EU Charter rights directly lacking an available exception or limitation. At the time of writing, a referral concerning the interplay between trade mark protection and third-party freedom of expression is pending before the CJEU: Case C-298/23, *Inter IKEA Systems BV v Algemeen Vlaams Belang VZW, S, T, U and V, Vrijheidsfonds VZW* (in progress).

[41] See also the discussion in C. Geiger and E. Izyumenko, 'The constitutionalisation of intellectual property law in the EU and the *Funke Medien*, *Pelham* and *Spiegel Online* decisions of the CJEU: Progress, but still some way to go!' (2020) 51(3) *International Review of Intellectual Property and Competition Law* 282–306 at 293–294.

[42] K. Grisse, 'On the significance of (un)recognisability for the reproduction right in European copyright law' (2022) 44(2) *European Intellectual Property Review* 78–90.

[43] Senftleben, 'Flexibility grave', 758–759.

[44] Case C-476/17, para. 38.

[45] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ 1996 No. L77.

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thus whether a risk has been posed to the possibility of redeeming that investment through the normal operation of the database in question.[46]

Such an approach to related rights offers the distinct advantage of setting some threshold to the protection afforded under them[47] and could be also employed in non-ISD situations. This, it is submitted, is the case of the related right of press publishers under Article 15 CDSMD. It is evident from the preamble to that directive that the rationale of the related right under Article 15 is, as stated, to allow press publishers to recoup their investments by creating licensing and enforcement opportunities (recital 54) and acknowledge the organizational and financial contribution they make in producing press publications, so as to also ensure the sustainability of the publishing industry and foster the availability of reliable information (recital 55). Like all related rights under EU law, what Article 15 protects is not the intellectual creation of press publishers but their investment. As such, the test for reproduction 'in part' of a press publication should be investment-based.[48] Considering this policy background, it seems justified to draw a parallel with the approach adopted in *Pelham* which, as explained, also evolved from the CJEU's intention to safeguard the investment made by phonogram producers.

Bringing the notion of 'very short extract' in line with this approach, it becomes apparent that no hard-and-fast definition of what qualifies as 'very short' may be provided in national law. Instead, it is the task of the CJEU to define the concept of 'very short extract' with sufficient precision in its case law. Moreover, some guidance to establish when an extract is in fact too short to be protected may be derived in the first place from recital 58, which explains that the use of press publications by ISSPs may consist of the use of press publications in their entirety or parts thereof. In this sense, the use of parts of a press publication (for example, titles and headlines[49]) may also have self-standing economic relevance. However, not all uses of a press publication will have such relevance. In other words, the unauthorized use of individual words or very short extracts may not be such as to undermine the investment made by press publishers in the production of a press publication and, with that, the effectiveness of the right under Article 15. Ultimately, the goal of the right, which was adopted in a context of 'massive aggregation and [unauthorized] use of press publications by information society service providers', is precisely to stimulate a licensing market for press publications.

[46] Case C-762/19, *SIA 'CV-Online Latvia' v SIA 'Melons'* [2021] ECLI:EU:C:2021:434, para. 47. Approving of the Court's approach, see E. Derclaye and M. Husovec, 'Sui generis database protection 2.0: Judicial and legislative reforms' (2022) 44(6) *European Intellectual Property Review* 323 at 323–325.

[47] Cf. P. B. Hugenholtz, 'Neighbouring rights are obsolete' (2019) 50(8) *International Review of Intellectual Property and Competition Law* 1006–1011 at 1008–1010; C. Sganga, 'The many metamorphoses of related rights in EU copyright law: Unintended consequences or inevitable developments?' (2021) 70(9) *GRUR International* 821–833 at 827, submitting instead that, under related rights, there would be no meaningful threshold to protection.

[48] See further Rosati, *Copyright in the Digital Single Market*, pp. 266–267.

[49] Ibid., pp. 275–276.

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17.3.2 *Exclusions of 'Very Short Extracts' in Selected National Laws*

At the time of writing, all EU Member States have transposed Article 15 CDSMD into their domestic laws.[50] Insofar as the exclusion for very short extracts is concerned, three groups of transposition approaches may be identified.

There is a first group of Member States that, correctly, have adopted a minimalistic approach – in the sense of using the same or substantially the same language that can be found in Article 15(3). For example, the Belgian, German, Irish, and Swedish transpositions refer, respectively, to 'très courts extraits', 'sehr kurzer Auszüge', 'very short extracts', and 'mycket korta utdrag'.[51] Then there is a second group of Member States that have decided to provide guidance on what is to be intended as 'very short' extract. The Italian transposition considers extracts of press publications 'very short' when what has been taken is 'any part of such a publication which does not dispensate from the need to consult press article as a whole' ('qualsiasi porzione di tale pubblicazione che non dispensi dalla necessità di consultazione dell'articolo giornalistico nella sua integrità').[52] The French transposition, which pre-dated and inspired the subsequent Italian approach, also refers the notion of 'very short extracts' to the need to preserve the effectiveness of the right. In turn, said effectiveness is impaired when 'the use of very short extracts replaces the press publication itself or exempts the reader from referring to it' ('l'utilisation de très courts extraits se substitue à la publication de presse elle-même ou dispense le lecteur de s'y référer').[53] Finally, there is a third group of Member States that have opted for quantitative thresholds. The Lithuanian transposition is telling: the law states that any extract of under 125 characters (without spaces) shall be regarded as 'very short'.[54]

In light of this, there are no issues of compatibility insofar as the minimalistic approach of the first group of Member States is concerned. A quantitative approach such as that of the third group of Member States is, by contrast, highly problematic from an EU law perspective. The position of Member States that have opted to provide guidance as to what is regarded as 'very short' (second group) also has the potential to give rise to uncertainties and fragmentation.

As stated, the CDSMD does not define the notion of 'very short' extract. This, however, is not unusual in EU copyright legislation. Further examples can be found in the CDSMD itself. For instance, the EU legislature refrained from fixing the notion of 'large amount' of copyright works or other protected subject matter that is relevant to define the notion of 'online content-sharing service provider' in accordance

[50] See https://eur-lex.europa.eu/legal-content/en/NIM/?uri=CELEX:32019L0790&qid=1690107668545.

[51] Art. XI.216/2. §4 N°2 Code de Droit Economique; Section 87g Urheberrechtsgesetz – UrhG; Section 13(1)(c) S.I. No 567 of 2021 European Union (Copyright and Related Rights in the Digital Single Market) Regulations 2021; 48 b §(3), SFS 2022:1712.

[52] Art. 43-*bis*(6)-(7) of Law 633/1941.

[53] Art. L.211-3-1 2° Code Propriete Intellectuelle.

[54] Art. 57[1] No 3 30/03/2022 No. XIV-970.

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with Article 2(6) CDSMD and therefore the application of Article 17. Arguably, this omission is intentional. The objective is that of mandating a case-by-case assessment. The goal is 'to avoid legal fragmentation through a potentially different scope … in different Member States'.[55] Such an approach is yet not possible under the law of a Member State that has opted for an inflexible, quantitative threshold.

Turning to national laws that seek to clarify what is to be meant by 'very short', the rationale of Article 15 CDSMD is not necessarily to incentivize the *consultation in full* of a press publication, but rather to allow press publishers to authorize or not the use of their press publications – in other words, to issue licences if they want to. It follows that a corrected reading of the guidance provided under, for example, French and Italian laws is needed: an extract of a press publication should be deemed 'very short' when an ISSP is disincentivized from seeking a licence from the concerned press publishers, and that is the case if the extract at issue dispenses from the consultation of the press publication at issue or part thereof.

17.4 CONSEQUENCES OF INCORRECT TRANSPOSITIONS OF ARTICLE 15 CDSMD

As discussed here, there are provisions in EU directives that are drafted in such a way that EU Member States enjoy limited or virtually no freedom when transposing them into national legal systems. What happens when a Member State has not transposed a directive or a mandatory provision therein by the relevant deadline or has done so incorrectly?

Under EU law, directives do not produce any horizontal direct effect. This means that they cannot be relied upon in private-party proceedings and do not impose obligations on individuals.[56] Nevertheless, EU directives may produce – under certain conditions – a vertical direct effect. In cases in which EU law imposes upon Member States 'the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts and if the latter were prevented from taking it into consideration as an element of [EU] law'.[57] All this means that when a provision in an EU directive imposes on EU Member States, in unequivocal terms, well-defined obligations as to the result to be achieved that is not coupled with any condition regarding application of the rule laid down in them, then that provision may be

[55] European Commission, 'Communication from the Commission to the European Parliament and the Council, guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market', COM(2021) 288 final, para. III.

[56] Case 152/84, *M. H. Marshall v Southampton and South-West Hampshire Area Health Authority (Teaching)* [1986] ECLI:EU:C:1986:84, para. 48.

[57] Case 41–74, *Yvonne van Duyn v Home Office* [1974] ECLI:EU:C:1974:133, para. 12. On the requirements for direct effect, see the seminal decision in Case 26–62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* [1963] ECLI:EU:C:1963:1.

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directly relied upon before the courts of a Member State that has failed to implement it correctly or even altogether.[58]

17.4.1 *Direct Effect in CJEU Copyright Case Law*

The issue of the direct effect of EU directives has been specifically tackled in a copyright context in OSA. That reference for a preliminary ruling asked the CJEU, among other things, whether Articles 3(1) ISD is unconditional enough and sufficiently precise for an individual or organization (a copyright-collecting society in that case) to rely on it in a dispute between individuals before a national court in case of incorrect transposition of that directive by a certain EU Member State. The CJEU answered in the negative due to the described lack of direct horizontal effect of directives. It is true that a national court, when hearing a case between individuals, is required, when applying the provisions of domestic law, to consider the whole body of rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the directive in order to achieve an outcome consistent with the objective pursued by the directive. However, this cannot serve as the basis for an interpretation of national law *contra legem*.[59]

The conclusion of the CJEU in OSA differs from the view that AG Sharpston had taken in her opinion in the same case. The AG observed that, first, when national courts apply domestic law, they are bound to interpret it, so far as possible, in the light of the wording and purpose of any relevant directive, in order to achieve the result sought by the directive (*Marleasing* principle[60]). That obligation is inherent to the Treaty system and enables national courts to ensure the full effectiveness of EU law when they determine disputes within their jurisdiction. Only if such an approach is not possible, for example because it would lead to an interpretation *contra legem*, is it necessary to consider whether a relevant provision of a directive has direct effect and, if so, whether that direct effect may be relied on against a party to the national dispute. The AG also stressed that it is for national courts to do whatever lies within their jurisdiction, for example taking the whole body of domestic law into consideration and applying the interpretative methods recognized by it, to ensure that the ISD is fully effective and thus to achieve outcomes consistent with the objectives pursued by it. She concluded that an interpretation of national law that would be inconsistent with the ISD would not be permissible.[61] The AG did not

[58] See *inter alia* Case C-282/10 *Dominguez* [2012] ECLI:EU:C:2012:33, para. 34.

[59] Case C-351/12, *OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.* [2014] ECLI:EU:C:2014:110, paras. 42–48.

[60] Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA.* [1990] ECLI:EU:C:1990:395, para. 7.

[61] Case C-351/12, *OSA – Ochranný svaz autorský pro práva k dílům hudebním o.s. v Léčebné lázně Mariánské Lázně a.s.*, Opinion of Advocate General Sharpston [2013] ECLI:EU:C:2013:749, paras. 44–47.

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state expressly what the legal consequences of incorrect ISD implementations would be. Nevertheless, she appeared to agree with the OSA's suggestion that this would be disapplication of incorrect national provisions.[62]

The position advanced by AG Sharpston is correct if it is intended as meaning that the provision at hand is suitably clear, precise, and unconditional *and* that the disapplication by the concerned national court does not result in an additional obligation being imposed upon an individual. The latter condition serves to comply with the mandate of Article 288 TFEU and the aforementioned lack of a horizontal direct effect of directives. Vice versa, an obligation to disapply a provision of national law that is contrary to a directive does arise when someone relies on that directive against a Member State, the organs of its administration, or organizations or bodies that are subject to the authority or control of the State or which a Member State requires to perform a task in the public interest and, for that purpose, possesses special powers beyond those that result from the normal rules applicable to relations between individuals.[63]

After all, it has been clear as early as *Simmenthal*[64] that – in order to comply with the principles of supremacy of EU law and sincere cooperation, as well as to ensure the full application of any provision of EU law with a direct effect – a national court called upon to apply a provision of EU law that produces such an effect is required to disapply any national rule of practice that is contrary to such a provision, where it is unable to interpret national law in compliance with the requirements of EU law and when the conditions detailed here are satisfied. Of course, the disapplication does not entail the automatic invalidation of the national legislation at hand. Nevertheless, it means that a court should disapply the provision at hand without having to request or await the prior setting aside of that national rule or practice by legislative or other constitutional means.[65]

17.4.2 *What Should a National Court Do with an Incorrect Transposition of Article 15 and the Exclusion of 'Very Short Extracts'?*

In light of what precedes, can we consider the fourth sub-paragraph in Article 15(1) as a provision with direct effect? The answer appears to be in the affirmative, as the wording is suitably clear, precise, and unconditional. Does it also confer a right on ISSPs? The answer is also in the affirmative, as the exclusion for 'very short' extracts is an *exclusion* from the scope of the related right, not an exception or

[62] Ibid., paras. 38 and 43.
[63] See recently Case C-260/22 (AG Collins Opinion), paras. 38–39.
[64] Case C-106/77, *Amministrazione delle Finanze dello Stato v Simmenthal SpA.* [1978] ECLI:EU:C:1978:49.
[65] Recently, Case C-430/21, *RS* [2022] ECLI:EU:C:2022:99, paras. 53–59. See further the discussion in Schütze, *European Union Law*, pp. 126–130.

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limitation to it:[66] put differently, the right simply does not cover the unauthorized use of extracts that are very short.

In practice, this means that an ISSP is entitled to request the disapplication of a national transposition of that part of the provision in front of a national court in cases in which the counterpart is not a private press publisher but – for example – a press publisher that falls under one of the situations discussed here. All this is without prejudice to the right of an ISSP also to seek damages from a concerned Member State for failure to transpose Article 15 correctly into national law.

17.5 CONCLUSION: HARMONIZATION HAS FAILED IF THE END RESULT IS EVEN MORE FRAGMENTATION

The degree of discretion enjoyed by Member States when transposing provisions of EU directives into national law is not always the same and, when it comes to provisions that require a minimalistic transposition approach, then that obligation must be complied with and the national implementation must not depart from the wording provided in the harmonized copyright acquis. Failure by a Member State to correctly transpose a provision of EU law not only exposes that country to infraction proceedings and damage requests, but also puts national courts in a position where they may have to disapply national provisions that are not fully aligned with EU law.

[66] Currently, a substantial academic debate is ongoing regarding the correct qualification of exceptions and limitations. For view supporting the qualification of exceptions and limitations as rights of users see, e.g., T. Rendas, 'Are copyright-permitted uses 'exceptions', 'limitations' or 'user rights'? The special case of Article 17 CDSM Directive' (2022) 17(1) *Journal of Intellectual Property Law & Practice* 54–64 at 61–63; J. P. Quintais, 'The new copyright in the Digital Single Market Directive: A critical look' (2020) 42(1) *European Intellectual Property Review* 28 at 39; J. P. Quintais et al., 'Safeguarding user freedoms in implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European academics' (2019) 10(3) *JIPITEC*, para. 12; A. Metzger and M. Senftleben (on behalf of the European Copyright Society), 'Comment of the European Copyright Society on selected aspects of implementing Article 17 of the Directive on Copyright in the Digital Single Market into national law', 2020, 10, available at: https://tinyurl.com/25bzm6am; S. Karapapa, 'The quotation exception under EU copyright: Paving the way for user rights', in E. Rosati (ed.), *The Routledge Handbook of EU Copyright Law* (London: Routledge, 2021), p. 257; M. Borghi, 'Exceptions as users' rights?', in E. Rosati (ed.), *The Routledge Handbook of EU Copyright Law* (London: Routledge, 2021), pp. 263–280. *Contra*: E. Rosati, 'Copyright reformed: The narrative of flexibility and its pitfalls in policy and legislative initiatives (2011–2021)' (2023) 31(1) *Asia Pacific Law Review* 33–54 at 41–45; Rosati, *Copyright in the Digital Single Market*, pp. 344–348; Association Littéraire et Artistique Internationale, 'Opinion on certain aspects of the implementation of Article 17 of Directive (EU) 2019/790 of 17 April 2019 on Copyright and Related Rights in the Digital Single Market', para. 4, 30 March 2020, available at: https://tinyurl.com/2bnb5p9v. See also T. E. Synodinou, 'Reflections on the CJEU's judgment in the Spiegel Online case' (2020) 42(2) *European Intellectual Property Review* 129–134 at 132, considering legislative intervention necessary to upgrade exceptions and limitations to the status of enforceable rights, and S. F. Schwemer and J. Schovsbo, 'What is left of user rights: Algorithmic copyright enforcement and free speech in the light of the Article 17 regime', in P. L. C. Torremans (ed.), *Intellectual Property Law and Human Rights*, 4th ed. (Amsterdam: Kluwer Law International, 2020), pp. 74–75, reflecting on the lack of any substantial enforcement system for enforcing user 'rights' under Article 17 CDSMD.

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This analysis has focused specifically on Article 15 CDSMD and the transposition of the exclusion of 'very short extracts' into national law. As seen, while that part of the provision requires a minimalistic transposition approach, several Member States have instead opted for a different wording if not scope of the exclusions. Besides the problems highlighted here, a fundamental question is the one concerning the quality of legislation and whether the underlying goals may be ultimately achieved. The related right for press publishers was adopted due to the stated existence of a fragmentation that was seen as negatively affecting the proper functioning of the EU's internal market. However, the image given by available national transpositions more than two years after the expiry of the relevant implementation deadline is one of fragmentation or even more fragmentation than prior to the adoption of the CDMSD. All this warrants a final, twofold question: Is the instrument of directives still appropriate when seeking to harmonize aspects of the law with an online and digital component? And who is to blame for the often incoherent legislative framework that relevant stakeholders have to operate within – the EU or its Member States?

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