Kluwer Copyright Blog

Taking freedom of information seriously: the 'very short extracts' limitation in Article 15 CDSM Directive and how not to implement it – Part 1

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By now, Article 15 of Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (CDSM Directive) needs no wordy introductions. Put briefly, the provision requires Member States to introduce a related (or neighbouring) right for press publishers, applicable to online uses of their publications. By extending the rights of reproduction and making available laid down in Articles 2 and 3(2) of the InfoSoc Directive to such uses, Article 15 imposes new duties on service providers like media monitoring companies and news aggregators.

As any other right, the press publishers' right has its own substantive limits, apart from territorial and temporal ones. The Directive expressly states that the right does not apply to a number of uses, namely private and non-commercial uses by individual users (Article 15(1)(ii)), acts of hyperlinking (Article 15(1)(iii)), uses of individual words and very short extracts (Article 15(1)(iv)), and uses of works in the public domain (Article 15(2)) or of mere facts (Recital 57). Moreover, Article 15 subjects the right to the exceptions in Article 5 of the InfoSoc Directive (Article 15(3)).

This two-part post focuses on the 'very shorts extracts' (VSE) exclusion and its ongoing implementation into Member State laws. In order to understand the challenges raised by this carve-out to the press publishers' right, we will first need to examine its legal nature and rationale. That is the task I take up in this first part of the post. Tedious as it may sound, this is a vital first step for us to understand what Member States should and should not do when implementing Article 15. That, in turn, will be the subject of the post's second part.

Is the exclusion of VSEs an exception or a limitation?

Exceptions and limitations are two different types of creatures. What may seem a largely theoretical and sterile discussion has important practical implications. First, while the concrete application of exceptions is subject to the scrutiny of the three-step test, that is not the case with limitations. Second, some scholars claim that exceptions are to be interpreted strictly (a claim I disagree with), but no such canon is said to apply to limitations. And third, procedurally speaking, exceptions must be demonstrated by users, whereas limitations are part of the rightholders' claim.

Exceptions are a well-established category in legal dogmatics: they are provisions that derogate from the content of another rule with a general character, working as defeating conditions of that rule. Thus, in order to be properly classified as an exception, a provision must cut out a subset of situations from the general rule and give that subset a different legal treatment, by offering a solution that is contrary to the one provided by the general rule.

As I have argued, the permitted uses described in provisions like Article 5 of the InfoSoc Directive or Articles 3 to 6 of the CDSM Directive qualify as exceptions: they cut out certain uses that are *prima facie* prohibited by exclusive rights and deem them non-infringing, in spite of the absence of rightholders' authorization. They are norms that *defeat* exclusive rights, removing what would otherwise be liability for infringement.

Exceptions should not be equated with limitations to the scope of specific rights. Unlike exceptions, these limitations do not subtract a portion of the right that falls within its *prima facie* coverage. Instead, they aprioristically outline the right's perimeter. While exceptions are external to and distinct from the applicable right, limitations are inherent requirements for the right's applicability, arising from its very definition. They are integral parts of the right. A pertinent example of a limitation in EU copyright law is the concept of 'public' within the right of communication to the public. The 'public' element helps to delineate the scope of the right: had it not been included, the right would cover, for instance, acts of communication directed at the user's circle of family and friends.

As the foregoing description makes clear, the VSE exclusion is not an exception to the press publishers' right, but a *limitation* to its scope. According to Article 15, the use of VSEs, like the use of individual words, is not even included in the *prima facie* scope of the right. The VSE rule therefore delimits the very breadth of the press publishers' right, functioning as a minimum threshold of protectability. This much is made clear by the wording used in Article 15(1)(iv): whenever the part of the press publication that is being used amounts to a VSE, the right *shall not even apply*. Analogously, in the realm of copyright, when a part of a work that is too short to be considered original is used, no exclusive right will be triggered in the first place.

From a procedural perspective, the qualification of the VSE carve-out as a limitation entails that press publishers have the onus of pleading and substantiating its non-applicability in concrete cases. In other words, press publishers, when asserting the right laid down in Article 15, bear the burden of showing that the part of their publication that was used by an online service provider went beyond a VSE.

The rationale of the VSE limitation

To understand the origins and rationale of the VSE limitation, we must first consider the purpose that is (supposedly) served by the press publishers' right.

Article 15 is the product of lobbying efforts by groups of press publishers for rights against the aggregation of their content by online service providers. Facing difficulties in licensing the reuse of their publications to these service providers, leading publishers pushed heavily for the introduction of such rights, first in selected Member States, like Germany and Spain, and later in the EU. Their aim was to strengthen their bargaining position in licensing negotiations for the online use of journalistic content. The larger goal of Article 15 has always been to improve the declining financial situation of legacy news organisations, by allowing them to charge certain online service providers for aggregating their content and making it easier to recoup the investments made in its production.

Initially referred to by critics as the 'link tax', the press publishers' right set forth in the Commission's Proposal (then-Article 11) evolved significantly during the legislative process. In particular, the calls made by academics and public interest advocates seem to have been partly heard, as the overbroad scope of the proposed right was restricted in many ways. A compromise text leaked during the Trilogue stage introduced a number of qualifications to the right that made it through to the final version, including the exclusion of hyperlinks, individual words and VSEs. The latter draw clearly on the wording used in the original German press publishers' right introduced in the UrhG in 2013, which exempted "individual words and very short text excerpts" from the scope of protection.

The carve-out for hyperlinks is consistent with the CJEU's copyright case law. In 2014, in the Svensson case, the Court clarified that linking to content that is freely available online does not qualify as a restricted act of communication to the public. The exclusion of individual words raises no particularly thorny questions either. Single, isolated words, however short or long, should not be subject to exclusive appropriation, even if "only" by a related right.

Moreover, it was also understood that a limitation should be provided for short fragments of news articles, the so-called "snippets". As scholars and the civil society kept stressing throughout the legislative process, the free availability of such fragments is essential for Internet users to be able to locate information and decide whether it is relevant for them. If the use of snippets is restricted, it will be much harder for individual users to understand what content hyperlinks lead to and whether that content is what they are looking for – with obvious negative effects for their freedom to access information online.

Despite this apparent fundamental rights-based justification for the VSE limitation, the rationale offered in the CDSM Directive is a purely economic one. Recital 58 states that the exclusion of individual words and VSEs is warranted because their use is not capable of undermining the investments made by publishers in the production of news content. Put differently, the protection of the publishers' investment does not require extending exclusivity to single words and VSEs.

But Recital 58 does not end here – and, as is almost always the case, the devil is in the details. The Recital adds that "it is important that the exclusion of very short extracts be interpreted in such a way as not to affect the effectiveness of the rights provided for in this Directive". This dubious statement raises important interpretative challenges, to which I shall turn in Part II.

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