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 2

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This post is the second instalment of an analysis of the 'very short extracts' (VSE) carve-out to the press publishers' right set forth in Article 15 of the CDSM Directive. The first part examined the legal nature of the VSE rule, concluding that it ought to be qualified not as an 'exception', but as a 'limitation' to the scope of the right. It was also highlighted that even though the Directive justifies the limitation on economic grounds, its freedom of information undertone should not be overlooked.

This second part will delve on the limitation's transposition. The post will start by describing a worrying trend across Member States: that of constraining the limitation's coverage, namely by drawing on the final part of Recital 58 of the CDSM Directive. It will then explain why this implementation approach runs counter to the fundamental freedom of information and to basic principles of copyright law.

How have Member States been implementing the VSE limitation?

The short answer is "inconsistently". This inconsistency is to a certain extent understandable, as the EU legislature refrained from defining the vague notion of 'very short extracts', leaving it to Member States and eventually the CJEU to clarify important issues like the length of such extracts and whether non-literary content (such as thumbnails and video stills) is covered. At the same time, this inconsistency is distressing, especially since the grand purpose of the Directive is to foster a digital *single* market.

Some Member States have preferred to implement the limitation in a cautious, essentially verbatim manner, implicitly delegating to the judiciary the task of developing its meaning. This was the case, for instance, of the Dutch and German transpositions. Both Article 7b(2)(c) of the Dutch Neighbouring Rights Act and Section 87g(2)(4) of the German Copyright and Related Rights Act

very much stick to the wording of Article 15(1) of the CDSM Directive.

This approach stands in contrast with that of other Member States, who have opted to make use of some implementation elbowroom to adopt more expansive versions of the press publishers' right, by constraining the scope of the VSE limitation.

Consider the case of France, the first Member State to implement Article 15. The provision has been transposed into French law through a separate instrument, which added a new chapter to the French IP Code. The relevant provision – the new Article L211-3-1(2) – clarifies that the limitation will only apply if it does not "affect the effectiveness" of the press publishers' right, clearly borrowing Recital 58's formula. The French legislature went one step further, though, stating that "the effectiveness is particularly affected when the use of very short extracts replaces the press publication itself or exempts the reader from referring to it". The purpose, it appears, is to confine even further the VSE limitation to avoid any (alleged) substitution effect between the snippet used and the source content.

In a report of the National Assembly, the lower house of the French Parliament, a similarly restrictive view of the VSE limitation was put forward. Concerned with ensuring the "effectiveness of the right", the rapporteurs say that hyperlinks, associated with summaries or quotations of press publications, may in themselves provide information that is sufficient to satisfy the readers' informational needs, discouraging them from clicking on the link and visiting the publishers' website. For this reason, they say, snippets – and in some cases even titles (!), depending on their length and informative content – may be covered by the press publishers' right. If this interpretation is to hold sway, online providers will only be allowed to display clickbait-kind of titles and excerpts that provide insufficient context to the reader – a paradoxical outcome, to say the least.

In Spain, the implementation of the right was analogously broad. Article 129bis(6)(c) of the Spanish Intellectual Property Act starts by stating that the press publishers' right does not apply to the use of extracts that are deemed to be "very short" or "insignificant", both from a quantitative and qualitative point of view. However, it introduced not one, but two restrictive (and cumulative) conditions based on Recital 58 of the Directive: the limitation only applies if the use (i) does not harm the investments made by publishers and news agencies and (ii) does not affect the effectiveness of the right.

More recently, and even more worryingly from a fundamental rights perspective, the Finnish legislature tabled an implementation proposal that fails to expressly include the VSE limitation. Instead, the draft bill posits that the right covers the use of entire press publications, as well as of "a qualitatively or quantitatively substantial part of it" (in wording that clearly borrows from the Database Directive), thus only implicitly excluding insubstantial parts. What's more, the Explanatory Memorandum to the proposal clarifies that the "repeated" and "systematic" use of such insubstantial parts may fall within the scope of the right, regardless of the length of the individual extracts used by online providers – a nuance which is said to flow from Recital 58.

The three foregoing approaches have one thing in common: they misuse a recital of the Directive to redesign the scope of the press publishers' right, undermining the fundamental purpose behind the VSE limitation. As is known, however, recitals should not perform a normative role. This much has been acknowledged by the CJEU: "the preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in

question" (C-162/97, *Nilsson*, para. 54). Logically, then, the preamble to a Directive cannot be used to restrict the scope of one of its operative provisions, especially one that is rooted in fundamental rights.

Taking freedom of information seriously

Like exceptions, or perhaps even more than them, limitations are of fundamental importance in copyright's overall design. They prevent copyright from extending to all types of human behaviour involving literary and artistic works, providing the legendary 'breathing space' for users. If copyright exceptions must be interpreted so as to ensure their effectiveness and the observance of their purpose (*see, e.g.*, Joined Cases C-403/08 and C-429/08, *Premier League*, para. 163), then all the more so with limitations.

In line with this understanding, the CJEU has been resorting to the fundamental freedoms of users to delineate the contours of specific economic rights. This is what happened in *GS Media*, where the freedom of expression and information was invoked to avoid qualifying all acts of hyperlinking to works made freely available without the rightholder's permission as infringing (paras. 44-45); and in *Pelham*, where the exclusion of the use of modified and unrecognisable sound samples from the scope of the reproduction right was justified on the basis of the freedom of the arts (paras. 26-37).

On top of all this, the Court has repeatedly mentioned that national legislatures are bound by fundamental rights when implementing EU copyright directives (*see*, *e.g.*, *Funke Medien*, paras. 31 and 53). More generally, Article 51(1) of the Charter states that its provisions are addressed to the Member States when they are implementing EU law.

The overly restrictive implementations of the VSE limitation described above are doubtfully compatible with these mandates, as they conflict with the fundamental freedom of information enshrined in Article 11 of the Charter and Article 10 of the ECHR.

First, limiting the reach of the VSE carve-out opens the door to the inclusion of facts and news of the day in the scope of the press publishers' right. It should be borne in mind that, in the field of related rights, there is no originality requirement to inhibit the appropriation of non-original material. Therefore, the narrower the scope of the VSE limitation, the lower the threshold for the right to kick in. And the lower such threshold, the higher the likelihood that simple facts and news will be caught in the net. More than contradicting another recital of the Directive (Recital 57), this would openly clash with a fundamental principle of copyright and related rights law that is expressed in Article 2(8) of the Berne Convention: that news of the day and miscellaneous facts are off-limits to exclusive protection.

Also, any transposition of the VSE limitation should keep in mind the benefits of having short, yet sufficiently descriptive snippets of news content displayed on online services. These snippets, coupled with hyperlinked headlines, are essential to the practical realisation of freedom of information. They enable individual users not only to find news content, but also to swiftly understand its relevance. Excluding from the scope of the limitation snippets that are necessary to recognise what lies behind a hyperlink would only make it harder for users to exercise this fundamental freedom. The less context users are given, the more clicks they will need to find the content they are actually searching for.

Now, you may of course argue that the purpose of Article 15 is exactly to have online providers pay for those snippets. But that simply cannot be the case: it cannot be that the EU legislature intended to restrict uses that communicate raw informative content and whose purpose is simply to have online readers understand the relevance of news articles.

Most certainly, the EU legislature could not have intended Recital 58 to be used as a mechanism to monopolise the dissemination of mere facts and news, sidestepping the most basic principles of intellectual property law. Facts and news, as the metaphor has it, must remain free as the air to breathe. In designing their VSE limitation, the Member States that are still to implement the Directive should not lose sight of such principles.

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