Kluwer Copyright Blog

Comparative Report on the National Implementations of Articles 15 & 17 of the Directive on Copyright in the Digital Single Market – Part 1

Christina Angelopoulos (CIPIL, University of Cambridge) · Tuesday, November 29th, 2022

Image by Clker-Free-Vector-Images from Pixabay

In 2019, the EU's Copyright in the Digital Single Market Directive (CDSMD) was adopted. This included the highly controversial ***Articles 15 and 17*** *on, respectively, the* ***new press publishers' right (PPR)*** *and the* ***new copyright liability scheme for "online content-sharing services providers" (OCSSPs)****. In a report published in September 2022, I undertook research into the* ***national implementations*** *of these two provisions in* ***11 Member States****: Austria, Denmark, Estonia, France, Germany, Hungary, Ireland, Italy, Malta, the Netherlands and Spain. Based on information gathered through a questionnaire distributed to national experts from each examined Member State, the report assesses the compliance of the national implementations with the internal market objective of the Directive and the EU's law of fundamental rights. The report was commissioned by C4C, but written in complete academic independence.*

*This is **Part 1** of a two-part contribution highlighting the report's most significant findings. After a brief word on the transposition options available to the Member States, it will focus on **Article 15 CDSMD**. **Part 2** will then consider **Article 17 CDSMD,** before offering some concluding remarks.*

Transposition framework: Member States' "room for manoeuvre"

According to Article 288 of the TFEU, directives are binding on Member States only as to the result to be achieved – the choice of form and methods is left to implementing national legislators. While "form" is less interesting for the purposes of this analysis, with regard to methods, Member States are presented with two important choices:

> a) between **literal ("copy-out") transposition** and an **"elaboration"** on the rules set out in the directive;

and

> b) between **minimalist transposition** and **non-minimalist transposition** (sometimes also called "gold-plating"). Minimalist transposition incorporates only to the minimum requirements of the directive, while non-minimalist transposition expands the reach of the relevant rules or adds further rules.

Depending on the circumstances, all these approaches can be acceptable, although they will not all always be available. Other things being equal, it is generally agreed that copy-out transpositions are preferable to elaboration, as they minimise the possibility of incorrect paraphrasing. However, not all directives are copiable – among other conditions, a directive has to be of sufficient legal quality for copy-out transposition to be appropriate.

Similarly, in recent years gold-plating has acquired a bad reputation as imposing unnecessary costs on business and public authorities. The European Commission has repeatedly urged Member States to avoid it. That said, gold-plating is not always incompatible with EU law and commentators have questioned the usefulness of this business-centric concept in discussions on policy-making and academic analyses. In many cases, Member States remain free to make their own law – this often being a deliberate choice of the EU legislator, particularly where political compromise is necessary. Moreover, it is not always easy to determine whether a national implementation is more or less burdensome than a directive.

Article 15 CDSMD: the new press publishers' right (PPR)

Although the transposition method applied by a national legislator will play a crucial role, compatibility or incompatibility with EU law will primarily depend on the content of the adopted national rules. With regard to Article 15 CDSMD, the analysis of national implementations

revealed a number of incompatibilities or otherwise interesting discrepancies. Below, a selection of the most relevant are discussed.

The PPR's subject matter exclusions

Article 15 CDSMD grants press publishers rights over their publications while eschewing – much to the consternation of commentators – any threshold condition for protection. Instead, the provision relies on a collection of exclusions. These have been met with various treatment in the Member States.

"Individual Words or Very Short Extracts"

According to Article 15(1), the PPR does not apply to "individual words or very short extracts of a press publication". While "individual words" seems clear, "very short extracts" is more ambiguous. The Directive offers little interpretative guidance.

Most of the examined Member States have taken a copy-out approach to the exclusion. France and Italy opted for elaboration. The French transposition clarifies that a "very short" extract must not be capable of replacing the press publication itself or exempting readers from referring to it. Likewise, the Italian implementation defines "very short extracts" as extracts that do not exempt users from the need to consult the entire article. As has already been argued on this blog, these requirements raise serious concerns. Disconcertingly, a report of the French National Assembly has put forward the idea that even snippets or titles may be protected, if they provide enough information to satisfy readers' informational needs. Such an interpretation would mean that only non-informationally relevant content would escape the PPR. This would restrict targeted providers from providing readers with sufficient information to navigate online news content, with detrimental effects for freedom of information and the media online. In her report, the French national expert (Valérie-Laure Benabou) notes that the quotation exception may provide some relief – but this is conditional and has been restrictively interpreted in France.

According to the national experts, no Member State has opted for a purely quantitative definition based on the number of, e.g., characters or words copied. While this may make algorithmic enforcement harder, focusing on the content of the extract copied and the necessity of its use by the targeted providers provides better guarantees in terms of fundamental rights.

"Mere facts"

According to Recital 57, the rights of press publishers should not extend to "mere facts reported in press publications". As this is not repeated in the text of Article 15, it is unsurprising that it is also absent from most national implementations – with the exceptions only of Germany and Malta. The logical conclusion is that, in the remaining Member States, mere facts are caught by the PPR. Assistance may be provided by general copyright principles that exclude mere facts from protection. However, attention is necessary: the PPR is a related right and its subject matter does not need to qualify as (a part of) a "work". From this perspective, it could be argued that it is those

Member States that exclude mere facts from the reach of the PPR that run the risk of incorrect implementation. That said, the disproportionate adverse effect this would entail for users' freedom of expression cannot be ignored. Instead, in Member States that do not explicitly implement the exclusion, it ought to be read into the national transposition to ensure a fair balance of fundamental rights.

Public domain material

Along similar lines, the restriction of Article 15(2), according to which the PPR cannot be invoked to control the use of works or other subject matter for which protection has expired, is absent from the Danish, Estonian, French and Hungarian transpositions.

The Estonian national expert (Karmen Turk) notes the Estonian Explanatory Memorandum's suggestion that the terms of protection specified elsewhere in the law for copyright and related rights mean that there is no need for additional protection for such content. This statement is indicative of the lack of understanding regarding the effects of the PPR that has accompanied it since it was first proposed.

It is also worth noting that, to the extent that the restriction makes reference to "subject matter for which protection has expired" and the PPR is a right that provides protection to subject matter, its wording is circular and accordingly unclear.

Press publishers: the owners of the PPR

Article 15 affords protection to publishers of press publications but does not define them. The French and Spanish implementations explicitly extend to news agencies. While the former requires that news agencies "publish" press publications to enjoy protection, in its decisions against Google, the French Competition Authority has concluded that press agencies can benefit when the content they produce is published by somebody else. Recital 55 explains that the right should cover "service providers, such as news publishers or news agencies, when they publish press publications". This suggests that involvement in the act of publication is necessary – but of course, one would expect a publisher to publish. The question, therefore, is what qualifies as publication. It seems that CJEU guidance will be necessary for a homogenous interpretation of this autonomous notion of EU law.

Acts restricted by the PPR

Article 15(1) grants press publishers the reproduction and making available rights over online uses of their publications. France replaces "online uses" with uses "in digital format", broadening the right's scope. Italy extends protections beyond "making available to the public" to "communication to the public". In other cases, problems arise from broader national definitions of the relevant rights compared to the equivalent EU terms. The result could be national implementations that extend to online radio or streaming services.

Targeted users

While copyright and related rights apply *erga omnes*, the PPR is targeted only at uses by information society service providers (ISSPs). Article 15 further stipulates that the PPR does not apply to private or non-commercial uses of press publications by individual users.

Particularly problematic in this regard is the French implementation, which omits the guarantee in favour of private or non-commercial uses by individuals. According to the French national expert, France considers that the same effect is achieved through its private copying exception – yet is not clear that the conditions of the two provisions match, as the private copying exception applies only to the reproduction right, requires fair compensation and is limited to private uses. This means that e.g., non-commercial bloggers (who could qualify as ISSPs under Article 2(5) CDSMD) are left unprotected in France.

Licensing the PPR

While the Directive does not include any provisions specific to licensing the PPR, a number of national implementations have ventured into this area. Among these, the Italian national implementation has attracted considerable criticism for instituting a complicated licensing system under which decisions on the fair compensation due to press publishers may be made by the Italian Communications Authority AGCOM. Commentators have expressed concern that this would amount to a court mandated duty to contract. As the Italian national expert (Caterina Sganga) observes, the Italian implementation could be seen as transforming exclusive rights into remuneration rights, something arguably frowned upon by previous CJEU case law.

Authors of incorporated works: revenue sharing

Article 15(5) establishes that authors of works incorporated in press publications must receive an "appropriate share" of the revenues collected by press publishers for the use of their press publications by ISSPs. A number of countries have transposed these provisions without elaboration, but others have introduced guidance. Italy sets the authors' share at between 2% and 5% of the "fair compensation" owners receive, while the German equivalent is one third of the income generated. The disparity represents a striking fragmentation of the Single Digital Market. Although notion of an "appropriate share" should be viewed as an autonomous notion of EU law, without CJEU guidance it is hard to determine which approach hits closer to the mark.

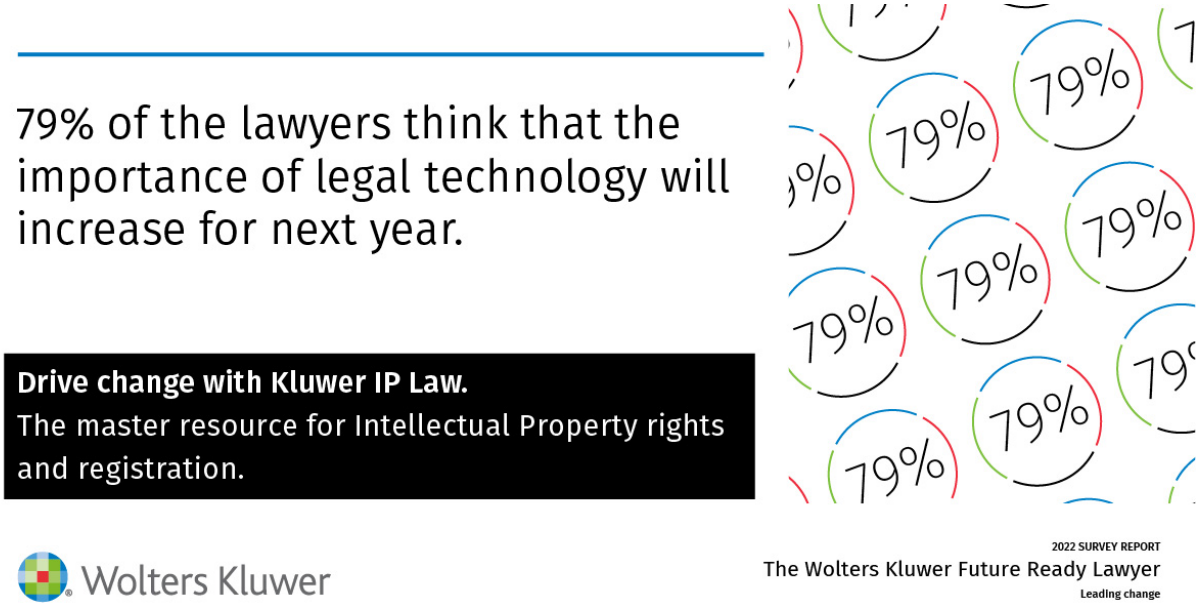
Part 2 of this analysis will proceed with examining the national implementations of Article 17 CDSMD.

To make sure you do not miss out on regular updates from the Kluwer Copyright Blog, please subscribe here.

Kluwer IP Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers think that the importance of legal technology will increase for next year. With Kluwer IP Law you can navigate the increasingly global practice of IP law with specialized, local and cross-border information and tools from every preferred location. Are you, as an IP professional, ready for the future?

Learn how **Kluwer IP Law** can support you.



This entry was posted on Tuesday, November 29th, 2022 at 12:50 pm and is filed under CDSM Directive, Digital Single Market, European Union, Legislative process, Press Publishers ' Right
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.