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Implementing Article 15 of the CDSMD into the Greek legal order: “creative” or further confirmation of the EU press market’s fragmentation?

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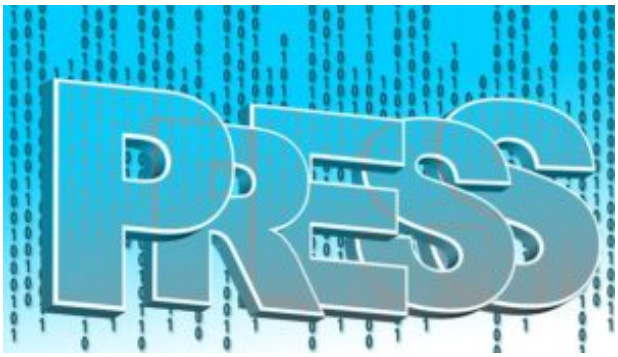
Introductory remarks



The Greek legislator transposed Directive (EU) 2019/790 (CDSMD) with considerable delay, enacting L. 4996/2022 in November 2022 (??? ?´ 2022/24.11.2022), which amended the basic Greek Copyright Law (L. 2121/1993 on “Copyright, Related Rights and Cultural Matters”) as well as L. 4481/2017 on “Collective Management of Copyright and Related Rights” (??? ?’ 100/20.7.2017). Among other modifications, special attention should be given to the enactment of the new Art. 51B, which transposes the much-debated Art. 15 of the CDSMD into the Greek legal order. As long as it introduces a new related/neighbouring right for press publishers (PPR), the provision has been placed in Section VII of L. 2121/1993 on “Related Rights”, just after Art. 51, which awards a special neighbouring right to publishers of printed matter in relation to the typesetting and pagination format of the works published by them, and Art. 51A, which provides for the protection of previously unpublished works.

Although until recently no provisions and/or case law or licensing schemes addressing news aggregation existed in Greece, and despite the fact that the new right granted to press publishers by the EU has attracted severe criticism (see e.g., Reto Hilty, Valentina Moscon et al., Modernisation of EU Copyright Rules – Position Statement of the MPI for Innovation and Competition; IViR, ‘Academics against Press Publishers’ Right’; statement by EPIP academics), the Greek legislator implemented it in a rather “creative” way, presumably expecting it has the potential to regulate effectively the “value gap” created by the relevant online market.

“Individual words or very short extracts” *á la grecque*

As to the actual content of the provision at issue here, it is worth mentioning that, in a number of crucial matters, e.g., defining the notion of "press publication" or setting the rights granted to press publishers, their term of protection or the exceptions & limitations applied to them, the Greek legislator does not significantly depart from the wording and spirit of Art. 15 of the CDSMD. However, in some other instances the legislator seems to be using the margin of discretion left by the EU text by considerably extending it.

This holds true regarding the exclusion of "individual words or very short extracts of a press publication" from the scope of the PPR, in relation to which the Greek implementation has adopted a rather innovative approach. In particular, the new rule does not stipulate a "quantitative" floor for permissible uses, since it makes no specific reference to the extent and/or the number of words or typographic characters under which the use of an extract/part of a press publication by an Information Society Service Provider (ISSP) should always be permitted. Likewise, no special treatment is reserved towards titles and/or headlines. On the contrary, but in compliance with Recital 58 *in fine*, Art. 51B (para. 2 *in fine*) provides that an extract shall be deemed as being "*very short"* when its use does not affect the effectiveness of the right granted to press publishers herewith. This, as further elaborated, will be the case "*in particular,* when the use of the extract replaces the press publication itself or prevents the interested party from reading it", presumably because her/his need for information has already been met.

The qualitative approach adopted here is obviously based on competition law justifications. At the same time, it runs risks in terms of fundamental rights' protection to the extent that even a very short extract, the use of which affects the effectiveness of the PPR because it "undermines the investments made by the publishers of press publications in the production of content" (Rec. 58 ab initio), may not qualify as "very short", meaning that its use will not be permissible. Moreover, such an approach makes algorithmic enforcement harder, whereas Greek courts may be driven to interpret "very short extracts" in a way that risks legal certainty and – in the long run – leads to fragmentation within the EU (see, Christina Angelopoulos, Comparative National implementation Report, p. 9-11).

Along similar lines, the restriction provided for in Recital 57, according to which the rights of reproduction and making available to the public, granted to press publishers under the CDSMD, should not extend to "mere facts reported in press publications", is not included in the text of Art. 51B L. 2121/1993, although the rule of Art. 2 para. 5 of the latter, that only excludes mere facts from copyright protection, cannot be regarded as being sufficient (see *Karmen Turk*). Unsurprisingly, the restriction of Art. 15 para. 2 of the Directive, stipulating that the above – mentioned rights shall not be invoked (by press publishers) to prohibit ISSPs from using works or other subject matter for which protection has expired, has been transposed slavishly into the Greek provision (para. 3 *in fine*) and is, thus, unable to place other elements of the public domain, such as news, information, mere facts or data, out of the reach of the PPR (see, Christina Angelopoulos, Comparative National implementation Report, p. 13).

Determining the press publishers' remuneration: a note-worthy *"graduated" procedure*

Furthermore, a "novelty" that deserves special attention relates to the Greek legislator's decision to *enact specific rules regarding the determination* of the *remuneration due to press publishers* for the use of their press publications by ISSPs, clearly inspired by the Italian implementation (see,

Caterina Sganga and Magali Contardi, The new Italian press publisher's right: creative, fairness-oriented… and invalid? (2022), 17 (5) JIPLP 421).

More specifically, Art. 51B para. 5 provides an *indicative list of criteria* to be taken into account in fixing the press publishers' remuneration. In this context, *the number of years* that both the ISSPs' and the press publishers' enterprises have been active in the relevant market and their respective market share, the online traffic of the press publications under protection, the number of journalists employed by each publisher and the financial benefits generated are mentioned, whereas the Hellenic Telecommunications & Post Authority (EETT) is given the power to issue a Regulation, in which the above criteria shall be further specified (in relation to the similar Italian implementation, see *Caterina Sganga & Magali Contradi*). Apart from questioning the relevance of the latter to the value of the news and the publishers' investments, that are the intended object of protection, it remains to be clarified, for the shake of parties' autonomy, whether they can actually use additional or other criteria in determining the remuneration due and what kind of impact these might have.

Although the Regulation hasn't been published yet, it should be noted that the role of the EETT does not stop here: para. 6 of the Greek provision offers to both parties, i.e., to press publishers and ISSPs alike, the possibility to request its intervention, if their negotiations, regarding the level of remuneration, do not reach an agreement within a period of 60 days. In such a case, each party has the right to submit a request – accompanied by its own economic proposal – within the next 30 days, asking the EETT to form a special Committee to decide on the matter. Having called the parties to submit their memorandums and present their opinions and arguments against each other, the Committee is entitled, even if one of the parties did not take part in the procedure, to issue a confidential opinion regarding the appropriate amount of the remuneration due, on the basis of the criteria set out in the Regulation. Additionally, by the means of a decision and under the threat of an administrative fine in case of non-compliance, it may request all the necessary financial information by any of the interested parties and secure the visibility of the press publisher's content on the ISSP's search results page, until its opinion is published. Nonetheless, even if the proper level of the remuneration due is determined by the Committee, the parties are still responsible for concluding the agreement; whereas, if they reach an agreement, the Committee (must) abstain(s) from any further action.

Arguably, the most "paternalistic" part of this graduated procedure lies in para. 7 of Art. 51B, according to which, absent an opinion by the EETT or an agreement as to the proper level of the press publisher's remuneration, any of the parties may "bring" the case to the civil courts, so that the amount due may be definitively decided. Taking into account the enforceability of court orders, one might reasonably wonder whether the result could be a court-mandated duty to contract (compare, in relation to Art. 43bis I.aut., *Caterina Sganga & Magali Contradi*, Christina Angelopoulos, Comparative National implementation Report, p. 19). However, the wording of the above provision, which thus deviates from its Italian "pattern", does not seem to substantiate such an interpretation – mainly because the decision to license the use of their press publication(s), for the amount determined by the court, is finally left to the publishers, whereas, on the other hand, it is up to their counterpart, i.e., the particular ISSP, to accept such an offer. In addition, the exploitation of exclusive (i.e., "preventive") rights, like the ones granted to press publishers by the provision in question, requires the prior consent of the right-holder; and this shouldn't be implied by her/his involvement in discussions or negotiations with an ISSP regarding the use of her/his press publication or a part thereof (in this context, see *Soulier and Doke* and *Spedidam*). In conclusion, the interpretation proposed here, considerably lowers the risk that the Greek provision,

implementing Art. 15 of the CDSMD, is incompatible with EU law, in general, and the Directive, in particular.

Regulating the "appropriate share" of the authors: lobbying v. equality

Last but not least, Greece hasn't remained silent on the issue of the "appropriate share" of the revenues owed to authors of works incorporated in press publications used by ISSPs, as well as the licensing of their relevant right.

The first "innovation" refers to the calculation of the above share, which is set either at 25% or 15% of the annual revenues that press publishers receive for the use of their press publications by ISSPs, depending on the percentage of authors/journalists employed by them under a contract of dependent labour. More precisely,if the latter exceeds 60%, then the financial "burden" falling on publishers is considerably less. The provision is obviously a result of journalistic lobbying, whereas the arbitrary character of the criterion used for determining the "appropriate share" for authors, as well as its incompatibility with the principle of equality, are striking. Sooner or later the provision will be challenged in courts, while hopefully, in the meanwhile, the CJEU will provide some guidance as to the interpretation of the notion "appropriate share" in the light of Art. 18 et seq of the CDSMD (see, Christina Angelopoulos, Comparative National Implementation Report, p. 21). In any case, the remuneration right awarded to authors/journalists, as above, cannot be waived, except from licensed to Collective Management Organizations (CMOs), and any contractual clause to the contrary is void.

In the light of the above, one might easily conclude that the way forward is going to be quite challenging for the exercise of the PPR within the EU. The "ambiguity" as well as the uncertainty, which are inherent in both the wording and the purpose of Art. 15 CDSMD, provide considerable "room for manoeuvre" to the implementing Member States and have led to quite divergent national implementations. And although the harmonisation process is still pending in some Member States, it seems that the more "creative" approaches to the new related right – like the one adopted by the Greek legislator – are not only appealing, but also disruptive as to the proper functioning of the digital single market for press content and possibly incompatible with the EU law of fundamental rights (see Christina Angelopoulos, op. cit, p. 1).

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