Editorial

Are directives good for the EU internal market? The case of the Copyright DSM Directive and its national transpositions

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Over the past 30 years or so, copyright reform in Europe has encompassed different areas and has been based on the following 'pillars': harmonization and modernization. Besides occasional considerations relating to the overall competitiveness and appropriateness of the EC/EU copyright regime, policy and legislative efforts have been mostly prompted by internal market concerns. Even prior to the beginning of the harmonization process, it was apparent that differences in copyright protection across individual Member States had a direct relevance for the EC/EU integration project. As early as in *EMI Electrola*, C-341/87, the then European Court of Justice stressed how—problematically—EC law at the time was characterized by lack of harmonization or approximation of national copyright legislations.[1]

Since 1991, that is the year when the first copyright directive (the Software Directive 1991/250[2]) was adopted, several directives have thus been introduced at the EC/EU level to reduce or remove certain differences in the copyright laws of Member States, as well as a limited number of regulations that touch upon (very) specific aspects of copyright law. The much-debated 2019 Copyright DSM Directive[3] represents, in this sense, the zenith of an intense (and challenging) period of harmonization efforts. Like its predecessors, it is *inter alia* supported by an internal market rationale.[4]

Individual Member States had—in principle—until 7 June 2021 to transpose the Copyright DSM Directive into their own laws. With very few exceptions[5] and because of a number of reasons—ranging from the ongoing COVID-19 pandemic to the delayed release of the Commission's Guidance on Article 17,[6] as well as some important rulings of the Court of Justice of the European Union (CJEU) that were pending at that time,[7] the majority of EU Member States missed this deadline.

Based on what is already available, it is however apparent that the provisions that the EU legislature adopted in 2019 to establish a 'Digital Single Market' will be implemented in different—if not altogether creative—ways across the EU. It is true that there are provisions in the Directive that leave significant discretion to Member States. Such discretion ranges from the very option to do something in the first place (eg, Article 12 and the possibility to provide for collective licences with an extended effect) to shaping the actual content of rights and rules (eg, Articles 18–23 in relation to contracts of authors and performers). This said, there are also provisions in the Directive that do not openly envisage such broad discretion. Yet, where draft or adopted transposition laws have been issued, also in respect of those, Member States have been moving in different directions (eg, Articles 15 and 17). This, in part, is due to the objective ambiguity of some of the Directive's provisions or part thereof. In more significant part, however, this attitude is linked

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1 *EMI Electrola*, C-341/87, EU:C:1989:30, at [11].

2 Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs [1991] OJ L 122, 42–46.

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 [2019] OJ L 130, 92–125.

4 See further E Rosati, *Copyright in the Digital Single Market. Article-by-Article Commentary to the Provisions of Directive 2019/790* (OUP 2021) 14–15.

5 See the tracker developed by Communia. Available at https://www.notion.so/DSM-Directive-Implementation-Tracker-361cfae48e814440b353b32692bba879 (accessed 3 September 2021).

6 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*, Brussels, 4 June 2021, COM(2021) 288 final.

7 *YouTube*, C-682/18 and *Cyando*, C-683/18, EU:C:2021:503 (decided on 22 June 2021) and Poland v *Parliament and Council*, C-401/19 (in progress).

doi:https://doi.org/10.1093/jiplp/jpab142
Advance Access Publication 25 November 2021

to a misplaced idea of great freedom enjoyed by national legislatures.[8]

Overall, as it has occurred throughout the entire history of copyright harmonization, national legislatures have been finding themselves under pressure from both national stakeholder groups and political parties to reshape—if not re-write *tout court*—the content and scope of rules agreed upon at the EU level. Various techniques have been employed to this end, ranging from the addition of layers that do not exist at the EU level (and are likely to be contrary to what EU law allows Member States to do) to the use of language that diverges from that of the same language version of a directive, from the alteration of the content to even the lack of transposition of substantial parts of an EU provision.

One question that arises is whether national legislatures are *entirely* to blame for what may be (bluntly, yet correctly) labelled as messiness. The answer is that, in fairness, they cannot. After all, it is the very instrument chosen at the EU level to realize a single market (a digital one, in the case of the Copyright DSM Directive) for copyright and related rights—that is an EU directive instead of a regulation—that lends its side to these tricks, threats and opportunities during the national transposition phase.

We already know what has happened in the past: the CJEU has had to tackle the (numerous) transposition inconsistencies when prompted to do so by national courts.[9] This will be also the fate of the national rules adopted to implement the Copyright DSM Directive into the Member States' own legal systems One cannot help but wonder if this is how EU and national copyright policy and law-making should continue developing going forward and whether the Court should be the one called upon continuously correcting national legislatures' (rarely innocent) errors.

8 I have discussed the (then) draft German and Italian transpositions of the Directive as examples of the latter elsewhere: see E Rosati, 'The Legal Nature of Article 17 of the Copyright DSM Directive, the (Lack of) Freedom of Member States and Why the German Implementation Proposal Is Not Compatible With EU Law' (2020) 15 JIPLP 874; E Rosati, 'Towards the National Transpositions of the DSM Directive: Various Techniques to … Do as You Please' (2021) The IPKat. Available at https://ipkitten.blogspot.com/2021/08/towards-national-transpositions-of-dsm.html (accessed 3 September 2021).

9 See the discussion in E Rosati, *Copyright and the Court of Justice of the European Union* (OUP 2019) 73–85.