From the early days of harmonization to the DSM Directive 2019/790: continuity and complexity of the EU copyright framework

Eleonora Rosati*

1. Introduction.........................................................................................................................1
2. The pursuit of copyright harmonization objectives................................................................2
3. A short history of EU copyright harmonization................................................................4
4. From the DSMS to the DSM Directive..............................................................................7
5. Concluding remarks and the future ahead.........................................................................11

Introduction

Since the signing of the Treaty of Rome in 1957, the process of European integration has been linked to the creation of an internal market, where a number of basic freedoms – including freedom of movement of goods and services – would be guaranteed. Throughout the 1980s, it became apparent that also harmonization of intellectual property (IP) laws would be necessary to achieve this goal. During the following decades, the harmonization discourse has touched upon all the main IP rights: besides copyright, also trade marks, design rights, geographic indications, trade secrets and patents have been subjected to approximation initiatives. For some of them (though not copyright), this process has led to the introduction of EU-wide rights that subsist in parallel to and independently of national forms of protection.

Today, the EU copyright acquis consists of thirteen directives and two regulations harmonizing a range of issues within the field of copyright and related rights. Overall, the process of approximation of national copyright laws has been supported by a variety of justifications, the primary one being the building of an internal market for copyright content and copyright-based services. Such a rationale has been nonetheless accompanied by the emergence of further objectives and justifications for EU initiatives. Three in particular stand out:

- The first has been to ensure a high level of protection of copyright and authors/rightsholders. This has been the case, amongst others, of the InfoSoc Directive 2001/29 and the Enforcement Directive 2004/48;
- The second has been the idea that copyright reform could serve competitiveness goals and make the EU system more attractive to certain stakeholders for undertaking their own activities. During the early 2010s, this was for example the main driver supporting the adoption of EU legislation in the field of orphan works (Orphan Works Directive 2012/28);
- The final objective has been to link copyright reform to the goal of ensuring greater fairness and remedying certain market imbalances and failures. This is particularly visible insofar as the DSM Directive 2019/790 (‘DSM Directive’) is concerned.

In parallel to legislative initiatives, the Court of Justice of the European Union (‘CJEU’) has also played a substantial – if not truly foundational – role. Through the system of referrals for a preliminary ruling, the Court has oftentimes not limited itself to interpreting copyright legislation: it has also pushed the

* Professor of Intellectual Property Law and Director of the Institute for Intellectual Property and Market Law (Stockholm University). This contribution is in part based on the initial chapter of the recently published Copyright in the Digital Single Market. Article-by-Article Commentary to the Provisions of Directive 2019/790 (Oxford University Press, 2021). All internet sources were last accessed on 9 March 2022. Email: eleonora.rosati@juridicum.su.se.

boundaries of harmonization further, in some instances even beyond the letter of the law. The CJEU has identified and shaped the very requirements for copyright protection, including the notions of ‘originality’ and ‘work’. It has defined the constitutive elements of and scope of exclusive rights like reproduction, communication to the public and distribution, and related exceptions and limitations. It has also defined the room left for national initiatives and ruled on the compatibility of some of them with EU law, including in the field of private copying and exploitation of out-of-commerce works.

It is precisely within this rich (and complex) environment that the DSM Directive came to be and finds its place.

1. The pursuit of copyright harmonization objectives

EC/EU intervention in the area of copyright has been traditionally – though not exclusively – linked to internal market concerns, on belief that certain differences in the laws of Member States would raise barriers to the free movement of goods and services based on or incorporating copyright works and other protected subject matter.

The legislative basis for initiatives in the copyright field has thus been mostly what are currently the provisions contained in Articles 26 and 114 of the Treaty on the Functioning of the European Union (‘TFEU’). The former clarifies EU competence to adopt measures with the aim of establishing or ensuring the functioning of the internal market, in accordance with the relevant provisions of the EU Treaties. The first paragraph of the latter stipulates that the Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.

As it has been correctly observed, rooting EC/EU competence in the area of copyright within the internal market building process has had the effect of not posing any particular limitations to the types of issues upon which the EC/EU could intervene. The result has been a heterogeneous set of initiatives supported by the overarching goal of ensuring the free movement of goods and services based on, or incorporating, copyright or other protected content. Overall, EU competence in the field of copyright based on Article 114 TFEU does not say much about how such competence is to be exercised, in that such provision has no specific normative content.

Calls for greater harmonization of national rules on copyright and related rights have been made with increasing insistence over time. They have been also linked to the objective of establishing a more modern legislative framework. In his Opinion in Amazon.com International Sales and Others, C-521/11, Advocate General Mengozzi noted that:

\[
\text{a large number of problems relating to the application of Directive 2001/29 arise from the insufficient level of harmonisation of copyright law within the Union [...] This demonstrates that although it is important to respect the [...] legal traditions and views which exist in that regard in the Member States, for the purpose of developing a modern legal framework for copyright in Europe which, having regard to the various interests at stake, makes it possible to safeguard the existence of a genuine single market in that sector, by promoting creativity, innovation and the emergence of new business models, it is necessary to move towards pursuing a much greater level of harmonisation of national law than that attained by Directive 2001/29.}
\]

\[^2\] For an overview, see A Ramalho, ‘Copyright law-making in the EU: what lies under the ‘internal market’ mask?’ (2014) 9(3) JIPLP 208.


\[^4\] Opinion of Advocate General Mengozzi in Amazon.com, C-521/11, EU:C:2013:145, [6].
The discourse around EC/EU copyright and related rights harmonization would be in any case incomplete if one overlooked to also consider the following aspects:

- First, the realization of the internal market is not a goal per se and the TFEU permits derogations from free movement rules. In accordance with Article 36 TFEU, Member States may set prohibitions or restrictions on imports, exports or goods in transit justified, inter alia, to protect industrial and commercial property, insofar as such prohibitions or restrictions do not constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States. In addition, at the level of secondary sources, the freedom to provide services within Article 16 of the Services Directive 2006/123 does not apply, among other things, to copyright and related rights;

- Secondly, besides internal market building objectives, other objectives have also supported EC/EU intervention in the area of copyright, including ensuring a high level of protection and favouring competitiveness of the EC/EU as a whole;

- Thirdly, as it happens in all situations of shared competence, such as copyright and – more generally – IP, legislative intervention must comply with the requirements of subsidiarity (Article 2(2) TFEU) and proportionality (Article 5 of the Treaty on the European Union);

- Fourthly, there are other primary sources that inform copyright law-making, aside from those mentioned above. Yet – until the adoption of the DSM Directive – these have not always been visible in the language of legislative proposals, though they have been relied upon by the CJEU in its copyright case law with increasing frequency. Reference needs to be made to the EU Charter of Fundamental Rights which, since the 2007 Treaty of Lisbon, has had the status of primary source of EU law. Of particular relevance are the Charter provisions concerning copyright protection within the right to property (Article 17(2)), freedom of expression/information (Article 11), and freedom to conduct a business (Article 16).

In addition to the above, it should be recalled that the Treaty of Lisbon introduced a provision, Article 118(1) TFEU, which could provide – though not necessarily without problems – the legal basis for a more ambitious harmonization than what has been the case so far, including the establishment of an EU-wide copyright title. The creation of a EU-wide copyright title has been discussed for a long time.

---

5 Striking an appropriate balance between the need to respect national property rules, on the one hand, and internal market and undistorted competition goals, on the other, has not always been easy. In any case, it seems to have been a task undertaken also by the CJEU, at least since the seminal decision in Deutsche Grammophon, C-78/70, EU:C:1971:59 (see in particular [11]).

6 Member States may exercise their competence to the extent that the Union has not exercised its competence. The Member States shall exercise their competence again to the extent that the Union has decided to cease exercising its competence. In any case, action by the EU should not go beyond what is necessary to achieve the objectives of the EU Treaties.


8 As early as 1998, in the context of the 1997 proposal of what would eventually become the InfoSoc Directive 2001/29, Dietz wondered “whether sooner or later we must arrive at a point where we should leave the process of step by step harmonisation behind and begin to start a more systematic approach, which would eventually result in a community copyright in the same way as such a community right exists already in the trademark field and--mutatis mutandis --at least in draft form also in the patent field” (A Dietz, ‘The protection of intellectual property in the information age - the draft E.U. Copyright Directive of November 1997’ (1998) 1998/4 IPQ 335, p. 336 (emphasis in the original)).
Shortly before the release of the Commission’s Proposal, the Commission called unification of copyright laws a long-term target, but also highlighted the difficulties that such a project would face.9

2. A short history of EU copyright harmonization

Over the past thirty years or so, copyright reform in Europe has touched upon different areas and has been based on two ‘pillars’: harmonization at the EU level and modernization at the EU (but also national) national level. EU harmonization has been prompted by internal market concerns, but also by concerns regarding the overall competitiveness and appropriateness of the EU copyright regime (see above at §2).

Since the beginning of the harmonization process, several directives have been adopted at the EC/EU level, which have sought to reduce or remove certain differences in the copyright laws of Member States, as well as a limited number of regulations that touch upon specific aspects of copyright law. Overall, in the field of copyright, the process of Europeanization of national laws has resulted in their rapprochement to and convergence with EU law. As a former Advocate General and current CJEU judge aptly stated:

This process has placed national courts and authorities in a novel situation. The "law" they are obliged to apply in many fields is no longer purely national, but a mix of EU law and national law. The same has occurred in academic commentaries. Describing the valid law of the Member States, for example, in fields as diverse as competition, copyright, environment, VAT, immigration and asylum, and family law is no longer a purely domestic affair.10

Policy discourse around EC harmonization of copyright laws began in the late 1970s.11 Before any initiative was undertaken, it became apparent – also through litigation reaching the then European Court of Justice (‘ECJ’)12 – that copyright protection and differences in the laws of individual Member States had an internal market relevance.13

The 1988 Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action4 (‘1988 Green Paper’) by the then Commission of the European Communities (now, the ‘Commission’) signals the start of a more concrete discourse around copyright harmonization in light of the internal market-building objective. The first EC directives touched upon specific areas of copyright, by harmonizing the conditions for and scope of protection of computer programs (Software Directive 91/250), related rights (Rental and Lending Rights Directive 92/100), satellite and cable (SatCab Directive 93/83), term (Council Directive 93/98), and databases (Database Directive 96/9). In parallel with these

---


11 For instance, in 1978 Adolf Dietz published a study on copyright harmonization which he had prepared at the request of the then Commission of the European Communities: A Dietz, Copyright law in the European Community (Sijthoff & Noordhoff:1978).


13 In its decision in EMI Electrola, C-341/87, the then ECJ stressed how – problematically – EC law at the time was characterized by lack of harmonization or approximation of national copyright legislations: see EMI Electrola, C-341/87, EU:C:1989:30, at [11].

14 Commission of the European Communities, Green Paper on Copyright and the Challenge of Technology – Copyright Issues Requiring Immediate Action, COM (88) 172 final.
ad hoc initiatives, the policy agenda gradually became more ambitious and increasingly stressed the relationship between copyright and the competitiveness of the then EC economic system as a whole.\footnote{European Commission, White Paper on Growth, Competitiveness, Employment. The Challenges and Ways Forward into the 21st Century, COM (93) 700, Bulletin of the European Communities, Supplement 6/93, p. 21.}

In its 1995 Green Paper on Copyright and Related Rights in the Information Society (‘1995 Green Paper’), which tackled specific issues, the Commission referred to the need of deepening harmonization of Member States’ copyright laws, considering that a wide variation in the level of protection of copyright works and other subject matter would likely create obstacles to the development of the information society (a term first used in the 1993 White Paper\footnote{European Commission, Growth, Competitiveness and Employment. White Paper Follow-Up, Europe and the Global Information Society. Recommendations of the High-Level Group on the Information Society to the Corfu European Council (Bangemann Group), Bulletin of the European Union, Supplement 2/94, p. 21.} and negatively affect the functioning of the internal market.\footnote{European Commission, Green Paper of 27 July 1995 on Copyright and Related Rights in the Information Society, COM (95) 382 final, p. 4.} It was in the follow-up activity to the 1995 Green Paper that the seeds that would eventually lead to the adoption of the InfoSoc Directive 2001/29 were sown. In its 1996 Communication\footnote{European Commission, Communication from the Commission, Follow-up to the Green Paper on Copyright and Related Rights in the Information Society, COM (96) 568 final.}, the Commission identified four areas of priority for legislative action: the rights of reproduction, communication to the public and distribution, and the legal protection of anti-copying systems. In that document the Commission also noted how an intervention of the then EC alone in these areas would be insufficient, and that impetus at the international level would be also necessary. It was indeed in that year that the WIPO Internet Treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty) were adopted. These were signed by the Member States, as well as by the EC, which became thus committed to implementing the new international instruments and ensuring harmonized transpositions into Member States’ laws.


databases. In 2004, the Commission was of the idea that no further harmonization measures were necessary besides those already included in the acquis. This was, among other things, the case of the originality requirement and ownership of copyright, definition of the term ‘public’, exhaustion, and moral rights.

Equally unambitious appeared the 2008 Green Paper on Copyright in the Knowledge Economy23 (‘2008 Green Paper’), which sought to commence a debate on how knowledge for research, science and education would be best disseminated in the online environment. While focusing, among other things, on exceptions and limitations that are most relevant for the dissemination of knowledge (including those for libraries and archives, teaching and research purposes, for the benefit of people with a disability) and discussing the possibility of introducing a specific user-generated content exception, this document did not result in any substantial follow-up initiatives. This is apparent from the 2009 Communication on Copyright in the Knowledge Economy24, which recommended a structured dialogue between relevant stakeholders, facilitated by services of the Commission to help tackling the issues raised in the 2008 Green Paper.

In 2009, the EU Commission also issued a cautious25 Reflection Document aimed at initiating a discussion of possible responses of the EU to the challenges facing dematerialization of content, in particular by considering a framework that would accommodate user creativity and issues facing rights management. The Reflection Document nonetheless contains what is arguably the first mention in a Commission’s document of a project of full harmonization of EU copyright laws. Article 118(1) TFEU could be the legislative basis for an EU regulation to establish a “European Copyright Law”26. Although the introduction of an EU-wide copyright title was discussed alongside other options (including alternative forms of remuneration), the Reflection Document deemed it advantageous from an internal market perspective in that it would also overcome issues of territoriality.27

In parallel with the growing activity and activism of the CJEU, including its understanding and application of the EU principle of pre-emption to the field of copyright28, policy attention towards copyright increased in the 2010s. In 2010, Mario Monti prepared a report at the request of the then President of the Commission, José Manuel Barroso, in which he made a number of recommendations to re-launch the internal market project. Among other things, he expressly referred to copyright, highlighting the need for EU-wide copyright rules, including a framework for digital rights management and cross-border online transactions, which take place at the location of supply, and extended collective licences.29

28 See E Rosati, Copyright and the Court of Justice of the European Union (OUP:2019), pp.73-85.
Following the Monti Report and a set of fifty proposals that were the subject of a public consultation, in 2011 the EU Commission issued its Single Market Act. Among other things, the blueprint also referred to the possibility of harmonizing copyright fully at the EU level, indicating how this objective might be achieved. In particular, the Commission explained that full harmonization might be realized through two distinct and alternative routes: either a codification of the current acquis, or the adoption of an ad hoc regulation that would establish an optional EU copyright title.

Despite the ambitious tone used in the blueprint, follow-up initiatives were not particularly remarkable. Besides areas in which no real reform has ever occurred (examples being private copying levies or a reopening of the InfoSoc Directive 2001/29) also other initiatives did not develop successfully, an example being the stakeholder-led dialogue on licensing under the umbrella of Licences for Europe. Following the adoption of the Orphan Works Directive 2012/28 and the Collective Rights Management Directive 2014/26, it would be necessary to wait until 2015 before a renewed policy impetus around copyright would emerge, in the context of the Digital Single Market Strategy (‘DSM’) of the Commission led by its then President Jean-Claude Juncker.

3. From the DSM to the DSM Directive

Further to the 2014 Public Consultation on the Review of EU Copyright Rules, in 2015 the Commission led by its then President Jean-Claude Juncker unveiled its DSM. This inter alia led to the release of a Proposal for a DSM Directive in 2016 (‘Proposal’). The DSM Directive was eventually adopted in 2019.

The Digital Single Market (‘DSM’) is intended as an area “in which the free movement of goods, persons, services and capital is ensured and where individuals and businesses can seamlessly access and exercise online activities under conditions of fair competition, and a high level of consumer and personal data protection, irrespective of their nationality or place of residence.” Achieving it would allow the EU to maintain its leading position in the digital economy and favour the growth of European companies on a

---


34 European Commission, Communication from the Commission On Content in the Digital Single Market, /* COM/2012/0789 final */.

35 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, /* COM/2015/0192 final */.


global scale. To realize a DSM in Europe, a number of initiatives would need to be undertaken across a range of sectors.

These would include: implementing cross-border ecommerce rules that consumers and business can trust; making available affordable high-quality cross-border parcel delivery services; contrasting unjustified geo-blocking practices used for commercial reasons by online sellers that result in the denial of access to websites based in other Member States; reducing VAT-related burdens and obstacles when selling across borders; reforming telecom rules and the legislative framework for audiovisual media services; tackling the role and responsibilities of online platforms in combatting illegal content on the internet; reinforcing trust and security in digital services and in the handling of personal data; maximizing the growth potential by focusing on Big Data, cloud services and the Internet of Things, as well as interoperability and standardization, and investing in creating digital skills and expertise; and reforming the EU copyright framework.

With regard to the proposed reform of EU copyright rules, the Commission indicated that initiatives would be launched to modernize copyright, reduce the differences between national regimes, and allow for wider online access to works by users across the EU, including through further harmonization measures. Such proposals would include ensuring: the portability of legally acquired content; cross-border access to legally purchased online services while respecting the value of rights in the audiovisual sector; greater legal certainty for the cross-border use of content for specific purposes (e.g., research, education, text and data mining (‘TDM’), etc.) through harmonized exceptions; greater clarity on the rules on the activities of intermediaries in relation to copyright-protected content; and a better and more modern enforcement of IP rights, focusing on commercial-scale infringements (the 'follow the money' approach) as well as its cross-border applicability.

The DSM Directive only touches upon some of the areas of intervention indicated above. Other legislative instruments were adopted or revised in the context of the Juncker Commission’s term of office that would deal with some other of those areas and also transpose into the EU legal order the then recently adopted Marrakesh Treaty. Such new instruments include: the Marrakesh Directive 2017/1564, the Marrakesh Regulation 2017/1563, and the Portability Regulation 2017/1128. Revised legislative instruments include: the AVMSD Directive 2010/13, which was amended through the AVSMD Directive 2018/1808, and the SatCab Directive 93/83, which was amended through the NetCab Directive 2019/789.

The subsequent Communication Towards a Modern, More European Copyright Framework (also referred to in recital 3 of the DSM Directive) elaborated further on the previously announced areas of intervention, by noting the need to “inject more single market and, where warranted, a higher level of harmonisation into the current EU copyright rules, particularly by addressing aspects related to the territoriality of copyright” and, “where required, adapt copyright rules to new technological realities so that the rules continue to meet their objectives.” It also announced that legislative proposals would be considered in other areas, examples being private copying and reprography levies and freedom of panorama (also known as the

---


41 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Towards a Modern, More European Copyright Framework (2015), COM/2015/0626 final, §1.
‘panorama exception’: Article 5(3)(h) of the InfoSoc Directive 2001/29.\textsuperscript{42} Nevertheless, like other areas of intervention that the Juncker Commission had announced in 2015, the latter did not result in legislative proposals during that Commission’s term of office.

The Proposal was unveiled on 14 September 2016 and was accompanied by an Explanatory Memorandum and an Impact Assessment detailing the reasons for the Commission’s chosen approach in the areas touched upon by the Proposal. Following its release, the discussion moved to the Council and to the Parliament. Following a number of compromise proposals drafted by the then Estonian and Bulgarian presidencies, on 25 May 2018 the Council’s permanent representatives committee (Coreper) agreed a common position on the text of the Proposal, which served as a basis for negotiation with the Parliament (Council text\textsuperscript{43}). Turning to the Parliament, after a series of delays, in June 2018 the Committee on Legal Affairs (JURI) of the Parliament adopted the text of the Report on the Proposal as drafted by its Rapporteur, MEP Voss.\textsuperscript{44} This text would serve as a basis for the Parliament to begin trilogue negotiations. In early July 2018, the Parliament (plenary) voted against the JURI text, postponing to September 2018 a decision on whether the trilogue negotiations – on the basis of the JURI text or an amended version thereof – might begin. The negotiating mandate of the Parliament was eventually adopted on 12 September 2018 (Parliament text\textsuperscript{45}).


The DSM Directive is longer and significantly more detailed and complex than the original Proposal. While the latter consisted of forty-seven recitals and twenty-four articles, the directive is composed of eighty-six recitals and thirty-two articles. In terms of substantive provisions, the DSM Directive lays down measures to:

- Adapt exceptions and limitations to the digital and cross-border environment. To this end, it introduces mandatory exceptions or limitations for: TDM; use of works and other subject matter in digital and cross-border teaching activities; and preservation of cultural heritage. In respect of such exceptions or limitations, there is \textit{inter alia} a prohibition of contractual override (but note that Article 4 allows rightholders to reserve the undertaking of TDM for the purpose of that provision);
- Improve licensing practices and ensure wider access to content. To this end, it provides: a framework for the use, by cultural heritage institutions, of out-of-commerce works; measures to facilitate collective licensing; access to and availability of audiovisual works on video-on-demand platforms; and a provision on works of visual art in the public domain;
- Achieve a well-functioning marketplace for copyright. To this end, it introduces a related right in favour of press publishers for the online use of press publications and allows Member States to provide that publishers are entitled to receive a share of the compensation due for uses of third-party works under available exceptions or limitations. It also establishes a framework governing

\textsuperscript{42} European Commission, \textit{Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Towards a Modern, More European Copyright Framework} (2015), COM/2015/0626 final, §3.


certain uses of protected content by online services, and mandates fair remuneration in exploitation contracts of authors and performers.

As mentioned (see above at §2), EC/EU intervention in the area of copyright has been traditionally – though not exclusively – linked to internal market concerns, on belief that certain differences in the laws of Member States would raise barriers to the free movement of goods and services based on or incorporating copyright works and other protected subject matter. The legislative basis for initiatives in this area of the law has thus been mostly what are now the provisions contained in Articles 26 and 114 TFEU. Despite the odd reference to Articles 53(1) and 62 TFEU, the inclusion of which was proposed in the Council text (the original Proposal only referred to Article 114 TFEU), like other EU legislation in the copyright field, the DSM Directive is premised on an internal market-building rationale (Article 114 TFEU and recital 1).

Overall, the DSM Directive pursues the same objectives as the pre-existing acquis (recital 2), including to: guarantee a high level of protection for rightholders (e.g., InfoSoc Directive 2001/29); streamline rights clearance (Collective Rights Management Directive 2014/26); and create a level playing field for the exploitation of works and other protected subject matter. In turn, recital 2 links such objectives to the establishment and functioning of the EU internal market, as well as to both an incentive-based view of copyright (as a stimulus to innovation, creativity, investment and production of new content) and the Union’s objective to respect and promote culture (including by bringing European common cultural heritage to the fore) and cultural diversity, in accordance with Article 167(4) TFEU. Recital 3 adds to all this the need to: remedy the interpretative uncertainties raised by technological advancement and the emergence of new business models and actors, as well as the objective of ensuring that the former is not unduly restricted as a result of such uncertainties; and guarantee a well-functioning and fair marketplace for goods incorporating and services based on copyright works and other protected subject matter.

In conclusion, legislative intervention in the areas identified in Article 1(2) of the directive is supported by multiple, interlinked rationales, which can be summarized as follows:

- Internal-market building and functioning through the establishment of a level playing field for copyright works and other protected subject matter and related services;
- High level of protection for rightholders (recital 2) and of copyright and related rights (recital 3), finalized at stimulating innovation, creativity, investment in and production of new content;
- Pursuit of cultural objectives, including safeguarding cultural diversity, whilst bringing European common cultural heritage to the fore;
- Addressing the interpretative uncertainties caused by technological advancement and ensuring that copyright legislation does not unduly repress it;
- Guaranteeing the good functioning of and fairness in the marketplaces for copyright works and other protected subject matter; and
- Modernizing certain aspects of the EU copyright acquis to take account of technological developments and new channels of distribution of protected content in the internal market.

With regard to specific provisions, some of the rationales listed above are more relevant and/or prominent than others in justifying EU legislative intervention. In all this, some of them have been receiving significant attention and have been the subject of intense scrutiny.

Insofar as exceptions and limitations are concerned, those relating to TDM (Articles 3 and 4) are particularly deserving of mention as they are functional to the development of machine learning and Artificial Intelligence in Europe. The European Commission considered that lack of legal certainty regarding the undertaking of TDM processes harmed the EU’s competitiveness and scientific leadership. In its proposal, the European Commission only envisaged a TDM exception for the benefit of research

---

46 The principle that protection must be at a high level is stated explicitly in both the InfoSoc Directive 2001/29 (recitals 4 and 9) and the Enforcement Directive 2004/48 (recital 10), and is also implied in recital 5 of the Rental and Lending Rights Directive 2006/115.
organizations. Through the process eventually leading to the adoption of the DSM Directive, that exception was broadened and a further exception or limitation without restrictions in terms of beneficiaries was included.

The DSM Directive also introduces a new related right (Article 15) for EU-based press publishers concerning the online use of their press publications by information society services like online news aggregators. The EU initiative follows some earlier national experiences (Germany and Spain), which had sought to tackle – without much success – the problem of declining revenues in the press sector and the alleged substitution effect caused by the advent of certain online services.

Finally, Article 17 of the DSM Directive seeks to remedy the ‘value gap’ – a notion that refers to a mismatch between the value that some digital user-uploaded content platforms are claimed to obtain from the exploitation of protected content and the revenue returned to relevant rightholders – by introducing a complex liability framework. Article 17 moves from a twofold assumption: first, that certain online services directly perform copyright-restricted acts; secondly, that the Directive needs to remedy the legal uncertainty surrounding the responsibility and liability regime of these services.

4. Concluding remarks and the future ahead

At the time of writing, less than half of the EU Member States have completed the transposition of the DSM Directive into their own laws and thus met the 7 June 2021 deadline for national transpositions. Delays have been caused by a number of reasons, ranging from the ongoing COVID-19 pandemic to the delayed release of the Commission’s Guidance on Article 17, as well as some important CJEU rulings, including YouTube/Cyando (C-682/18 and C-683/18, decided in June 2021) and the Polish challenge to Article 17 (C-401/19, which was decided on 26 April 2022).

Based on what is already available, it is apparent that the provisions that the EU legislature adopted in 2019 to establish a digital single market are likely to be implemented in different 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 (e.g., Article 12 and the possibility to provide for collective licences with an extended effect) to shaping the actual content of rights and rules (e.g., 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 freedom. Yet, where draft or adopted transposition laws have been issued, also in respect of those, Member States have been moving already in different directions (e.g., Articles 15 and 17).

The history of the DSM Directive is a complex one, as is the history of EU copyright harmonization in general (see above at §2). In all this, it is evident that the own ‘story’ of this piece of legislation did not end when it was adopted: it has just begun.

The discussion surrounding forthcoming (at the time of writing) EU legislation will also have, without doubt, an influence on the application of the DSM Directive. In late 2020, the Commission unveiled its Proposal for a Digital Services Act (DSA). Whilst being expressly without prejudice to Union law in the field of copyright and related rights, including the DSM Directive, it is evident that the finalization of the DSA will be also relevant to the interpretation and application of inter alia Article 17 of the DSM

---

49 YouTube, C-682/18 and Cyando, C-683/18, EU:C:2021:503.
Directive, including having regard to *inter alia* safe harbour availability and the prohibition of general monitoring, as well as trusted flaggers, transparency and notice-and-action mechanisms.\(^{32}\)

In the years to come, the application of the national provisions transposing the DSM Directive will give rise to litigation and, with that, several referrals for a preliminary ruling to the CJEU. As it has happened in the past with other EU copyright directives, the CJEU will also have to tackle the various transposition inconsistencies and errors. This is not a bad thing, nor is it something that casts shadows on the merits and quality of the EU copyright law-making process. Rather, it is testimony to the complexity of copyright, the variety of (contrasting) interests underlying policy- and law-making in this area, and the growing realization that the incremental dialogue between legislature and courts – on both the EU and national level – is both unavoidable and welcome. Going forward, things will not get any easier. Hopefully, however, they will become clearer ... though likely in the very end.

---