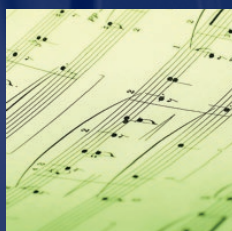


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Bulgaria falls into all the traps set by Article 5 of the CDSM Directive

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The new Italian press publishers' right: creative, fairness-oriented... and invalid?

Caterina Sganga* and Magali Contardi *

Introduction

One of the most heatedly debated provisions during the process of approval of the Directive on Copyright in the Digital Single Market (CDSMD)¹ has been, without a doubt, the new related right for press publishers (Article 15 CDSMD). Commentators and activists have harshly contested the validity of the 'value gap' argument advanced by stakeholders and put forward by the EU legislature.² They argued that the introduction of a new right would create risks of overprotection, information monopolies and related harms to freedom of expression, still without solving the crisis of the press industry, which instead needs to be tackled through other incentives and a reform in business models.³ Doubts were also grounded on the ambiguous results, and to a certain extent the failure of the German and Spanish versions of the press

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- 1 Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L-130/92 [CDSMD].
- 2 For a detailed analysis see Taina Pihlajarinne and Juha Vesala, 'Proposed Right of Press Publishers: A Workable Solution?' (2018) 13(3) *JIPLP* 220.
- 3 See, eg, Martin Kretschmer et al., 'The European Commission's Public Consultation on the Role of Publishers in the Copyright Value Chain: A Response by the European Copyright Society' (2016) 38(10) *EIPR* 591; Reto Hilty et al., 'Modernisation of EU Copyright Rules—Position Statement of the MPI for Innovation and Competition. Available at https://pure.mpg.de/rest/items/item_2470998_12/component/file_2479390/content (accessed 18 March 2022); IViR, 'Academics against Press Publishers' Right'. Available at <https://www.ivir.nl/academics-against-press-publishers-right/> (accessed 18 March 2022); Statement by EPIP academics. Available at <https://www.create.ac.uk/wp-content/uploads/2018/09/Statement-by-EPIP-Academics.pdf> (accessed 18 March 2022); Lionel Bently et al. 'Strengthening the Position of Press Publishers and Authors and Performers in the Copyright Directive' (2017). Available at http://www.europarl.europa.eu/RegData/etudes/STUD/2017/596810/IPOL_STU%282017%29596810_EN.pdf (accessed 18 March 2022).

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Abstract

- Article 15 CDSMD introduces a new related right in favour of press publishers, covering the online reproduction and making available of press publications by information society service providers. The final wording of the provision pervasively harmonizes some aspects of the new right, but leaves sensitive matters in the discretion of national legislatures, such as the notion of short extracts, the devise of specific licensing and/or distributing schemes and the related possibility to interfere with parties' freedom to contract.
- Halfway down the road of the transposition process, divergences on key points are already emerging: some Member States have adopted solutions that present controversial features, which characterize them as cases in point of the side effects that an act of imperfect harmonization such as Article 15 CDSMD may engender.
- As a paradigmatic example of this trend, this article focuses on the Italian transposition of the press publisher's right, offering a critical assessment of its most salient features and testing its validity under EU law on the basis of the indications provided so far by the European Commission and the CJEU. The result of this exercise will also be useful to draw the margin of discretion left to other Member States in the implementation of Article 15 CDSMD.

publishers' rights,⁴ which anticipated the introduction of the EU proposal by a few years.

Despite the criticisms, Article 15 CDSMD was eventually adopted. Some of its most evident distortions were corrected in the final version, but a number of problematic elements remain. Furthermore, the definition of key aspects such as the provision of licensing schemes, the notion of short extracts and the interplay with competition rules is left to national legislatures to address.⁵ This has opened the door to the possibility of diverging national transpositions, with the risk of greater fragmentation, uncertainties related to potentially conflicting judicial interpretations and, eventually, solutions that are not consistent with the goals and principles of the Directive and of general EU copyright law.

Two years down the road of national transpositions, divergences on key points are already apparent.⁶ Some Member States have adopted solutions that present controversial features, which characterize them as cases in point of the side effects that an act of imperfect harmonization such as Article 15 CDSMD may engender.⁷ Italy represents one of the best examples. With its reference to 'fair compensation' to define the amount to be paid to publishers, a strongly paternalistic intervention on the negotiation process between publishers and providers, and the attribution of regulatory, arbitrage and enforcement power to the Italian Communications Authority (*Autorità per le Garanzie nelle Comunicazioni*, AGCOM), Article 43bis of the Italian Copyright Act has already raised questions of invalidity, and promises to offer a wealth of materials to discuss in the years to come.

Due to its relevance for the current debate on the flaws affecting the EU copyright harmonization efforts after and due to the CDSMD, this article focuses on the Italian version of the press publisher's right, offering a critical assessment of its most salient features (§1) and testing its

validity under EU law (§3) on the basis of the indications provided so far by the European Commission and the Court of Justice of the European Union (CJEU) (§2). The result of this exercise will also be useful to draw the margin of discretion left to Member States in general when implementing Article 15 CDSMD.

1. The Italian press publishers' right

The CDSMD was transposed in Italy through Legislative Decree (*Decreto Legislativo, D.Lgs.*) no.177/2021, based on a delegation law from the Parliament, as an amendment of the *Legge sul diritto d'autore* (l.aut.).⁸ The new Article 43bis l.aut. regulates the press publishers' right.

Online publishers of press content are granted the rights of reproduction and communication to the public (arts. 13 and 16 l.aut.), in full accordance with the text of the Directive. The same applies to the definition of press content and the exclusion from the scope of the provision of private non-commercial uses, hyperlinks and uses of single words or very short excerpts. Greater originality features in the definition of 'information society service providers', as the Italian legislature also includes media monitoring and press review companies (Article 43bis(1)), and the notion of publisher, which covers any entity that, in the context of a business activity, independently or in a consortium, even if established in another Member State, publishes press content (Article 43bis(3)).⁹ During the drafting phase, two Parliamentary Committees suggested providing further requirements in the definition of press publisher, but the government rejected the proposal, arguing that this would create barriers to entry for foreign entities, which may be subject to different rules and admissibility conditions.¹⁰ The definition remained thus plain and simple, as it is in the CDSMD.

Article 43bis l.aut. exercises more creativity and discretion in the definition of the notion of short extracts, since they consist of 'any part of a press publication that does not exempt readers from the need to consult the article in its integrity' (Article 43bis(7)). It took long for the government to reach a compromise text. At the onset of

4 On the German press publisher's right and the case law that ensued, see Eleonora Rosati, 'Neighbouring Rights for Publishers: Are National and (possible) EU Initiatives Lawful?' (2016) 47(5) IIC 569, and Till Kreutzer, 'Das Leistungsschutzrecht für Presseverleger—Ein gescheiterter Ansatz!' (2017) 1 ZUM 127. On the Spanish solution see Raquel Xalabarder, 'The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government' (2014), IN3 Working Paper Series, Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2504596 (accessed 18 March 2022).

5 See, in more detail, Eleonora Rosati, 'Article 15' in Id., *Copyright in the Digital Single Market: Article-by-Article Commentary to the Provisions of Directive 2019/790* (OUP, Oxford-New York 2021), 262 ff.

6 On the national implementations of Article 15 CDSMD, see Ula Furgal, 'The EU Press Publishers' Right: Where do Member States stand?' (2021) 16(8) JIPLP 887.

7 As also noted in Caterina Sganga and Magali Contardi, 'When Harmonization Leads to Fragmentation (and Potential Invalidity Claims): Snapshots from the Implementation of the New Press Publishers' Right' forthcoming in EIPR 2022.

8 Decreto Legislativo 8 novembre 2021, n. 177, Attuazione della direttiva (UE) 2019/790 sul diritto d'autore e sui diritti connessi nel mercato unico digitale, GU n.283/2021, amending Law no.633/41.

9 Giusella Finocchiaro and Oreste Pollicino, 'Il Recepimento della Direttiva Copyright. Il Caso Italiano in una Prospettiva Comparata ed Europea. Position Paper', 16 February 2022. Available at <https://www.media.laws.eu/il-recepimento-della-direttiva-copyright-il-caso-italiano-in-una-prospettiva-comparata-ed-europea/> (accessed 18 March 2022).

10 Relazione Illustrativa (Explanatory Memorandum) al D.Lgs. n.177/2021. Available at https://documenti.camera.it/leg18/dossier/testi/D21077.htm?_1626459605478 (accessed 18 March 2022), 4.

the debate, stakeholders and some Parliamentary Committees showed concerns against vague qualitative definitions, out of fear that this could increase uncertainties, weaken the protection and ultimately trigger litigation. Instead, they proposed quantitative definitions, which could also be verified through algorithms¹¹ This solution, however, was criticized due to its perceived rigidity, the excessive threats it would pose to other rights and the risk it would create for press publishers, who could well be denied protection in case the extract at hand did not reach the quantitative benchmark, regardless of whether it would be long enough to make it unnecessary for users to reach their websites.¹² For all these reasons, the drafters eventually opted for a qualitative definition of very short extract.

The development of the criterion and the impact it will have on litigation and on the behaviours of market actors will become clearer in going forward. Possibly, licensing agreements between publishers and providers will provide more detailed definitions. Still, this might not be enough to offer guidance to other users, who will still navigate through uncertainties and thus suffer from chilling effects.¹³ Moreover, the definition provided by Article 43bis(7) l.aut. appears to roots its assessment within the value and preservation of the expressive core of the work—an approach that very much resembles the emphasis put on originality in constructing the qualitative definition of partial reproduction under Article 2 InfoSoc. This symmetry may lead to interpretative overlaps between journalists' (authors') rights and related (press publishers') rights, with obvious consequences in terms of judicial short-circuits, as it has already happened in the context of other related rights.¹⁴

The most original contribution of the Italian legislature, however, remains the negotiation and licensing scheme envisioned by Article 43bis(8)-(9) l.aut.

With quite a telling opening and a particular lexical choice, Article 43bis(8) l.aut. explains that 'for the online use of press publications, information society providers recognize to [press publishers] a *fair* compensation', using the word 'compensation' which is typical of exceptions and mandatory licensing settings, when exclusive rights turn into remuneration rights.¹⁵ This semantic

choice is contextually and systematically suggestive. At a closer look, in fact, the negotiation and licensing mechanism described by the provision features hybrid elements, some of them making it resemble to forms of assisted or collective negotiations, others to mandatory licensing, collective licensing or private levy schemes.

The AGCOM was invested of the power and duty to issue a decree elaborating on the criteria to be used when determining the amount of fair compensation due to press publishers, which had to be published within 60 days from the entry into force of the new provision, but is yet to be drafted. Article 43bis(8) l.aut. requests the Authority to take into account a wide range of variables, such as the number of online consultations of the work, the number of journalists employed, the investments made by publisher and provider in infrastructures and technologies, the publisher's years of activity and market share, and the economic benefit derived by each party from the work, in terms both of visibility and of advertising revenues.

It is not fully clear what the interplay between these criteria and the parties' freedom of contract is. Article 43bis(9) l.aut. clarifies that 'the negotiation to conclude the contract regulating the exercise of the rights (...) is conducted by taking into account also the criteria set by the [AGCOM] Regulation'. Article 43bis(10) l.aut., however, states that if no agreement is reached on the compensation amount within 30 days from the start of the negotiations, each party may request the Authority to set it. AGCOM has then 30 days to decide which of the parties' proposals is more in line with the Regulation; if none aligns to those criteria, the Authority may determine *ex officio* the final amount. Providers should cooperate with the assessment process by providing all data necessary to calculate the compensation. A breach of this duty may result in an administrative sanction up to 1 per cent of the provider's yearly gross profit (Article 43bis(12) l.aut.).

The scheme seems to attribute the Authority the role third parties usually play in contractual arbitrages. In fact, after the final amount is determined, publishers and providers are still responsible of the conclusion of the licensing agreement, as suggested by Article 43bis(11) l.aut., which states that 'when, after AGCOM has determined the fair compensation, parties fail to stipulate the contract, each party may refer the case to the competent first instance court (...), *also* to introduce the proceedings under Article 9, law 18 June 1998, no.192' (emphasis added), which regulates claims related to abuse of economic dependence. Two elements stand out due

11 Ibid at 5.

12 Ibidem.

13 Similarly Silvia Scalzini, 'The New Related right for Press Publishers: What Way Forward?' in Eleonora Rosati (ed) *Handbook of European Copyright Law* (Routledge, Abingdon-New York 2021), 112.

14 As also in Caterina Sganga, 'The Many Metamorphoses of Related Rights in EU Copyright Law: Unintended Consequences or Inevitable Developments' (2021) 10 GRUR Int 821, 826.

15 See, eg, Article 46bis l.aut. on the compensation due by broadcasting organizations to authors who assigned their exploitation rights to

producers, or Article 68 l.aut. on the compensation due in case of exercise of the private copy exception.

to their controversial nature.¹⁶ On the one hand, the provision attributes the right to revert to courts in case of failed negotiations not only to publishers but also to providers, equalizing their positions in a manner that is not fully compatible with the rationale underlying Article 15 CDSMD. On the other hand, Article 43bis(11) l.aut. does not distinguish between judicial claims that may or may not be introduced by each or both parties. This entails the risk that courts may issue not only compensatory but also interim and permanent remedies such as specific performance and duty to contract, and also against rightholders. Such a conclusion is confirmed by the reference to Article 9, law no.192/98 (abuse of economic dependence), where one of the key remedies is the imposition of a duty to contract, potentially issuable against both providers and publishers.¹⁷ As a result, the press publishers' freedom of contract may be completely eliminated—a circumstance that would run against the principle of prior consent, which, according to the CJEU's case law,¹⁸ lies at the heart of the distinction between preventive rights and remuneration rights. To make things possibly worse, while in the field of competition law judicial interventions such as *Magill* have circumscribed to 'exceptional circumstances' the instances where a copyright holder may be censured in her refusal to license for abuse of dominant position, and eventually exposed to remedies that limit her freedom of contract,¹⁹ this is not the case in the field of abuse of economic dependence, which is not harmonized within the EU and does not feature any guideline on what may constitute an abuse of IP rights.²⁰

It is clear that the introduction of guided negotiation processes, potentially compulsory licenses and pervasive arbitrage power by AGCOM is inspired by the goal

of creating a level playing field for all publishers *vis-à-vis* platforms, regardless of their size and bargaining power, in order to avoid market distortions and more favourable conditions for centralized/agglomerated publishing hubs.²¹ Good intentions, however, do not always lead to good results, particularly when they are channelled into solutions that are not fully in line with the guidelines provided by higher legislative sources. This seems to be the case of Article 43bis l.aut., which substantially departs from the approach of Article 15 CDSMD, and rather resembles the solution adopted by the Australian legislature which, however, follows a *sui generis* approach that moves outside copyright law and aims at rebalancing the bargaining power of all parties through pervasively regulated contractual schemes.²²

The Italian solution, in this sense, is not only a patent example of how an incomplete harmonization may lead to national fragmentations also with regard to exclusive rights, but also represents a testbed to draw the boundaries of Member States' discretion in the transposition of Article 15 CDSMD. Article 43bis l.aut., in fact, presents traits that may well be subject to invalidity claims, particularly if tested against the guidelines provided by the Commission during the implementation phase, and by landmark CJEU precedents on the distinction between preventive and remuneration rights and the limits to Member States' freedom to intervene on the principle of prior consent and its exercise.

2. What do the Commission and the CJEU tell us on Member States' discretion *vis-à-vis* Article 15 CDSMD?

An issue that was not regulated in detail by Article 15 CDSMD and triggered an intense debate during the early phases of the transposition process was the margin of discretion left to Member States in devising collection and distribution schemes for the licensing fees due to publishers. National legislatures repeatedly raised their concerns and doubts, until MEP Vondra asked the Commission whether implementation laws could introduce a mandatory collective management of press publishers' rights.²³ The Commission rejected this option by arguing that the mandatory nature of the scheme would transform

16 Giuseppe Colangelo, *L'Italia stravolge la Direttiva Copyright*, in Formiche, 31 July 2021. Available at <https://formiche.net/2021/07/italia-stravolge-direttiva-copyright-colangelo/> (accessed 18 March 2022); Marco Scialdone, *Il governo dà l'ok al decreto sulla Direttiva Copyright. Cosa non funziona*, in Formiche, 5 August 2021. Available at <https://formiche.net/2021/08/cdm-direttiva-copyright-scialdone/> (accessed 18 March 2022).

17 See, eg, Vincenzo Meli, *'Diritto antitrust e libertà contrattuale: l'obbligo di contrarre e il problema dell'eterodeterminazione del prezzo'* in Gustavo Olivieri-Andrea Zoppini (ed) *Diritto antitrust e libertà contrattuale* (Laterza, Roma-Bari 2008), 1000; Michele Bertani, *Proprietà intellettuale, antitrust e rifiuto di licenze* (Giuffrè, Milano 2004) 52 ff.

18 As we will see below, §2.

19 Judgement of 6 April 1995, *Radio Telefis Eirean (RTE) and Independent Television Publication Ltd (ITP) v Commission*, C-241/91 and 242/91 P, ECLI:EU:C:1995:98, on which see inter alia Estelle Derclaye, 'Abuses of Dominant Position and Intellectual Property Rights: A Suggestion to Reconcile the Community Courts Case Law [2003] 26(4) World Competition 685.

20 For a comparative overview, see Andrea Renda et al., 'The Impact of National Rules on Unilateral Conduct that Diverge from Article 102 TFEU', Study for the European Commission, DG COMP (2012).

21 Relazione Illustrativa (n 5) at 6.

22 News Media and Digital Platforms Mandatory Bargaining Code, Parliament of Australia, 17 February 2021, on which see Giuseppe Colangelo, 'Enforcing copyright through antitrust? The strange case of news publishers against digital platforms' (2021) *Journal of Antitrust Enforcement*, online first at <https://doi.org/10.1093/jaenfo/jnab009>, at 22.

23 Question for written answer E-004603/2020 to the Commission, MEP Vondra, Rule 138, 24 August 2020.

the exclusive and preventive right introduced by Article 15 CDSMD into a remuneration right,²⁴ consistently with the arguments advanced by the CJEU in a landmark case on performers' rights decided a few months before—*Spedidam v INA*.²⁵

Spedidam revolved around the complaint of a musician's estate, that had sued INA (*Institut national de l'audiovisuel*) for distributing without authorization videos and phonograms embedding relevant performances, which were recorded and broadcasted by national television channels. INA derived its freedom to operate without the rightholder's permission from Article 49 on the French law on freedom of communication, which grants the Institute the possibility to exercise performers' rights according to conditions and upon a remuneration set in agreements stipulated between INA and performers and/or their organizations. After two decisions in favour of the estate, the *Cour de Cassation* rebutted their arguments and stated that INA was not requested to prove the performer's consent before distribution. Yet, in light of earlier CJEU case law, the *Cour* preferred to stay the proceedings and ask the CJEU whether the French provision at stake would be compatible with Articles 2, 3 and 5 InfoSoc Directive.

The answer of the CJEU was in the positive. What matters for this analysis, however, are the arguments that supported the decisions, which significantly recalled the reasoning that featured a few years before in *Soulier and Doke*,²⁶ a case similar to *Spedidam* but in the field of authors' rights.

Soulier and Doke called upon the CJEU to decide on the validity of the French Decree No 2013–182, which introduced an extended licensing scheme for out-of-commerce books.²⁷ The decree attributed to the National Library the task to manage a database enlisting books that were published in France before 1 January 2001 and were no longer distributed and published in print or digital format.²⁸ Six months after their inclusion into the database, the rights of digital reproduction and communication to

the public on those titles were attributed to a collecting society appointed by the Ministry of Culture, which had first to attempt licensing the rights back to the original publishers and, in case of rejection or no response, could offer the licence on the market. The decree gave rightholders 6 months to oppose the enlisting, upon the obligation to commercialize the titles within 2 years. An author could always block the publication by proving that it would have harmed their honour or reputation. In any other case, they could opt out of the mechanism only by proving that they were the sole holder of digital exploitation rights, but only until the licence was transferred to another publisher and the latter started commercializing the book.²⁹

Soulier and Doke, two French authors, challenged the scheme before the *Conseil d'Etat*, arguing that it represented an unconstitutional compression of their property rights, a blatant breach of the prohibition against formalities under Article 2(5) of the Berne Convention, and a violation of Articles 2 to 5 InfoSoc. While the *Conseil* rejected the first two claims,³⁰ arguing that the opt-out system related only to the exercise and not to the existence of the right,³¹ it still preferred to refer the question of the compatibility of the decree with the InfoSoc Directive to the CJEU. The EU court denied the validity of the French law *vis-à-vis* Articles 2 to 5 InfoSoc Directive, using arguments that were severely criticized for the risks and uncertainties they created for other national mandatory and extended collecting management schemes, which were solved only with the adoption of Article 8 CDSMD.³² In doing so, it followed a reasoning that was subsequently used almost slavishly in *Spedidam*.

First, in both decisions the CJEU maintained that Articles 2 and 3 InfoSoc cover not only the enjoyment but also the exercise of the rights of reproduction and communication to the public,³³ with no distinction between copyright and related rights.³⁴ Since the two rights are preventive in nature, any act covered by their scope requires the rightholder's prior consent to be legitimate, unless

24 Answer given by Mr Breton on behalf of the European Commission, Question reference: E-004603/2020, 9 November 2020.

25 Judgement of 14 November 2019, *Société de perception et de distribution des droits des artistes-interprètes de la musique et de la danse (Spedidam) and Others v Institut national de l'audiovisuel*, C-484/18, ECLI:EU:C:2019:970.

26 Judgement of 16 November 2016, *Marc Soulier and Sara Doke v Premier ministre and Ministre de la Culture et de la Communication*, C-301/15, ECLI:EU:C:2016:878.

27 JORF No 51, 1 March 2013, p.3835.

28 As in Article L.134-2 CPI. See Jane Ginsburg, 'Fair Use for Free, or Permitted but-Paid' (2014) 29 Berkeley Tech LJ 1382, 1426 and Oleksandr Bulayenko, 'Permissibility of Non-Voluntary Collective Management of Copyright Under EU Law. The Case of the French Law on Out-of-Commerce Books' (2016) 1 JIPITEC 52, 54.

29 On the criticisms raised against the scheme, see Sylvie Nerisson, 'La gestion collective des droits numériques des "livres indisponibles du XXe siècle" renvoyée à la CJEU, le Conseil d'Etat face aux fondamentaux du droit d'auteur' (2015) 24 Recueil Dalloz 1428.

30 On this claim it also consulted the *Conseil Constitutionnel*, which similarly rejected it. *Marc S and another*, Conseil Constitutionnel, Decision no 2013–370, QPC, 28 February 2014.

31 Conseil d'Etat, Decision No 368208, 6 May 2015, M.S., MMme D. The ECLI FR:CESSR:2015:368208.20150506.

32 See, more extensively, Caterina Sganga, 'The Eloquent Silence of Soulier and Doke and its Critical Implications for EU Copyright Law' (2017) 12(4) JIPLP 321.

33 *Spedidam*, §36, as in *Soulier and Doke*, §30, and the case law cited therein.

34 *Spedidam*, §37, as in *Soulier and Doke*, §31.

an exception or limitation applies.³⁵ Implied authorizations are admitted, but only if their conditions are clearly specified. Significantly, however, this led the CJEU to declare the French scheme contrary to EU law in *Soulier*, while in *Spedidam* it led to the opposite outcome, for the CJEU argued that the performers' authorization to fix their works was presumed, and the presumption would be legitimate because it could be rebutted at any time and referred to a requirement (the performer's written consent) which was not covered by EU law.³⁶

To back up its conclusion in *Spedidam*, the CJEU added another important consideration, maintaining that the French scheme should be held valid also because it makes it possible to strike a fair balance between conflicting fundamental rights. The presumption introduced by the French provision, in fact, allowed INA to fully exploit its collection and grant an adequate remuneration to all and not just some rightholders, and this without minimally affecting the performers' ability to get appropriately compensated for the use of their rights.³⁷ Here lies, at a closer look, the main difference between *Soulier* and *Spedidam*. In *Spedidam*, the central importance attributed to remuneration results in a lighter scrutiny on the characteristics of the French scheme and its compatibility with the principle of prior consent. In *Soulier*, the CJEU attributed the greatest value to the author's right to control the use of their work, with no relevance given to the opportunities the French mechanism offered to more authors to be remunerated against the inactivity of their publishers. The different approach to authors' rights and related rights could not be clearer, and it might impact, as we will see below, on the assessment of validity of Article 43bis I.aut.

All the above said, there is no difference in the treatment of authors' rights and related rights, and of preventive and remuneration rights under Article 17(2) CFREU. The CJEU has several times confirmed that the provision does not attribute to IP rights an absolute nature and that, contrary to the fears raised by several commentators after the enactment of the Charter,³⁸ they can still be limited in the public interest or balanced against other fundamental rights.³⁹ This doctrine clearly refers

to limitations to the exercise of exclusive rights, while it is less straightforward whether it could be applied also to interventions related to their creation and attribution (existence).⁴⁰ Scholars agree—and the CJEU seems to concur—that Article 17(2) CFREU cannot be read as an obligation for the EU legislature to introduce IPRs,⁴¹ but the provision has nevertheless been used to expand the scope of EU copyright harmonization to the detriment of Member States' discretion every time an exclusive right harmonized by EU law was at stake. *Luksan*⁴² in the field of preventive rights and *RAAP*⁴³ in the field of related remuneration rights, sharing the same conclusion, are two perfect cases in point.

It is clear that the creation or attribution of an exclusive right to a specific rightholder by EU law cannot be disregarded by national legislators. Still, the CJEU has never explicitly clarified whether Article 17(2) CFREU should be understood as granting to any EU intervention on IP rights the nature of act of maximum harmonization, thus eliminating any Member States' discretion, or should instead be simply interpreted as preventing national legislature to violate the essence of the right granted, in line with Article 52 CFREU.⁴⁴ *Soulier* and *Spedidam* suggest that a preventive right cannot be transformed into a remuneration right by national laws. If read together with the CJEU's case law on Article 17(2) CFREU, it may be argued that the rightholder's control over the use of their work may be understood as expression of their preventive right. As such, any intervention stripping it away would be forbidden under Article 52 CFREU. This does not imply that other policy considerations may change the outcome of the decision, as it happened in *Spedidam*.

Netlog NV, C-360/10, ECLI:EU:C:2012:85, §41; Judgement of 27 March 2014, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH*, C-314/12, ECLI:EU:C:2014:192, and ultimately in the Grand Chamber's trio case Judgement of 29 July 2019, *Funke Medien NRW GmbH v Bundesrepublik Deutschland*, C-469/17, ECLI:EU:C:2019:623, §72; Judgement of 29 July 2019 C-476/17 *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben*, C-476/17, ECLI:EU:C:2019:624, §33; Judgement of 29 July 2019 C-516/17 *Spiegel Online GmbH v Volker Beck*, C-516/17, ECLI:EU:C:2019:625, §56.

35 *Spedidam*, §38, as in *Soulier and Doke*, §§33–34, later confirmed in Judgement of 7 August 2018, *Land Nordrhein-Westfalen v Dirk Renckhoff*, C-161/17, ECLI:EU:C:2018:634, §29.

36 *Spedidam*, §40–43, as in *Soulier and Doke*, §35.

37 *Ibid* §44.

38 See, eg, Alexander Peukert, 'Intellectual Property as an End in Itself' (2011) 33(2) EIPR 67, 69; Christophe Geiger, 'Intellectual Property shall be Protected!?'—Article 17(2) of the Charter of Fundamental Rights of the European Union: A Mysterious Provision with an Unclear Scope' (2009) 31(3) EIPR 113, 117.

39 Judgement of 24 November 2011 *Scarlet Extended SA v SABAM*, C-70/10, ECLI:EU:C:2011:771, §43; Judgement of 16 February 2012, *SABAM v*

40 For a more detailed analysis of the matter, see Martin Husovec, 'The Fundamental Right to Property and the Protection of Investment: How Difficult Is It to Repeal New Intellectual Property Rights?' in Christophe Geiger (ed) *Research Handbook of Intellectual Property and Investment Law* (EE, Cheltenham-Northampton 2020) 385.

41 *Ibid* at 391.

42 Judgement of 9 February 2012, *Martin Luksan v Petrus van der Let*, Case C-277/10, ECLI:EU:C:2012:65, §§68–70.

43 Judgement of 8 September 2020, *Recorded Artists Actors Performers Ltd v Phonographic Performance (Ireland) Ltd*, Case C-265/19, ECLI:EU:C:2020:677.

44 Broadly on this see Jonathan Griffiths, 'Constitutionalising or Harmonizing? The Court of Justice, the Right to Property and European Copyright Law' (2013) 38 ELR 65, 75, and Martin Husovec, 'The Essence of Intellectual Property Rights Under Article 17(2) of the EU Charter' (2019) 20(6) German Law Journal 840, 853.

Still, Article 17(2) CFREU and its implications should be taken into account when assessing the validity of Article 43bis l.aut.

3. Forecasts and implications

Depending on how much Article 43bis l.aut. will actually trigger litigation, it might not take much for the new provision to land on the table of the CJEU.⁴⁵ And while it is true that Article 15 CDSMD provides little or no guidance on the matters on which the Italian provision stands out for its original approach, it is also true that the guidelines offered by the Commission and the CJEU offer sufficient hints to foresee what the outcome of an invalidity claim *vis-à-vis* EU law against Article 43bis l.aut. would be.

The Italian version of Article 15 CDSMD classifies the amount due to press publishers as 'fair compensation' (*equo compenso*), instead of remuneration, giving the undue impression that the sum stems from the exercise of an exception or from a mandatory collective management scheme instead that from a voluntary license agreement. This semantic twist was probably originated by the similarities between the calculation system provided by Article 43bis l.aut. and the levy scheme used for the private copying exception (Article 68 l.aut.). The two mechanisms diverge only with regard to the source determining the amount due to rightholders. While, in fact, the decree issued under Article 68 l.aut. directly indicates the sums due as levies, the decree issued under Article 43bis l.aut. only dictates the criteria that should guide the negotiation of the fees or its determination by the AGCOM. Analogies and semantic confusion notwithstanding, however, the use of the word 'compensation' is not enough to transform the Italian press publisher's right into a remuneration right.

Still, the criterion indicated by Article 43bis l.aut. as guidelines for the future AGCOM Regulation are not without problems. They include, in fact, variables that have nothing to do with the value of the news and the publisher's investments, bringing in also, for example, the size of the publisher's company and the years the latter was active on the market. Such factors may heavily impact on the final amount due, yet they are alien to the rationale of Article 15 CDSMD and its subject-matter. In this sense, they may be well construed as incompatible with EU law on the basis of arguments similar to those that led the Court's assessment in relation to levy schemes under the InfoSoc private copy exceptions, and particularly the

fact that they improperly use calculation criteria that were not linked to the prejudice suffered by rightholders, as requested by the InfoSoc Directive's own preamble.⁴⁶

The most controversial aspect of Article 43bis l.aut., however, is represented by the features of the negotiation scheme it envisages. The circumstance that not only the publisher but also the provider may revert to AGCOM and trigger the administrative determination of the remuneration represents a massive limit to the publisher's contractual freedom, which is the primary form of exercise of its exploitation rights. Despite it being formally different, the functional effects of the mechanism described by Article 43bis(8) l.aut. are very similar to those characterizing mandatory collective management schemes, where rightholders cannot negotiate individually with users, not even when they find the conditions bargained for by the collecting society unsatisfactory for their needs. This makes the Italian solution clash with the guidance provided by the Commission during the implementation process, which crossed out the possibility to introduce mandatory collective management under Article 15 CDSMD.

In all this, the feature that raises more concerns as to its potential invalidity is contained in Article 43bis(11) l.aut., which attributes again to both parties the right to sue if no contract is concluded after the AGCOM has fixed the price, without limitation as to the remedies available. This means that both providers and publishers will be able not only to claim compensation in tort, but also to request the granting of positive and negative injunctions, including the imposition of a duty to contract. As a result, the publisher's freedom of contract may be completely stripped away, with a clear compression of the principle of prior consent, and the potential transformation of the preventive right of Article 15 CDSMD into a remuneration right. Since Article 43bis l.aut. does not grant any opt-out possibilities nor any presumption of publisher's consent based on reasonable grounds, the CJEU may well dictate that, in order not to be held invalid, the provision has to be interpreted as not allowing the judicial imposition of a duty to contract on publishers, as this would run counter the doctrine developed in *Spedidam*, and possibly fail the 'essence check' under Articles 17(2) and 52(1) CFREU.

45 Some scholars (Finocchiaro-Pollicino, n 3) have also hinted at the possibility that Article 43bis l.aut. constitutes an excess of delegated regulatory power by the Government, for its content would go beyond the guidelines provided by the Parliament in its delegation law.

46 Landmark examples are Judgement of 21 October 2010, *Padawan SL v Sociedad General de Autores y Editores de España*, C 467/08, ECLI:EU:C:2010:620; Judgement of 5 March 2015, *Copydan Båndkopi v Nokia Danmark A/S*, C-463/12, ECLI:EU:C:2015:144; Judgement of 12 November 2015, *Hewlett-Packard Belgium SPRL v Reprobel SCRL*, C-572/13, ECLI: EU:C:2015:750.

Conclusion

Nearly a year after the expiry of the transposition deadline and after the implementation by more than half of the Member States, contrary to its stated goals, Article 15 CDSMD seems to be fulfilling all the promises of further national fragmentation, harmonization problems and distortions. This will likely cause hiccups in the proper functioning of the market for press content across the Union, with an obvious impact on the strategies of global platforms. At the same time, the creative

solutions adopted by some Member States are bound to create even more uncertainties on the overall effects of the new provision. In this sense, Article 43bis l.aut. presents a number of characteristics which, if not carefully interpreted, may expose it to invalidity claims. In any event, it is already clear that the flawed drafting of the provision will prevent it from fully reaching its goals, and possibly engender more negative consequences than the problems it was originally called to tackle, when it was introduced despite all the criticisms.