

# The many metamorphoses of related rights in EU copyright law: unintended consequences or inevitable developments?

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**Abstract** – Neighboring rights have always been neglected by copyright scholars, despite their economic relevance and market role have steadily increased across the decades. The situation has changed in the past two decades when, in response to the epochal shifts such entitlements have been subject to, commentators have shifted their focus to their legislative and judicial evolutions of neighboring rights. These changes, in fact, have had a substantial impact on the texture of EU copyright law and of the common core of EU Member States laws, which may – or may not – represent the beginning of a new era for the relationship between copyright and related rights. To grasp drivers and sense of the various legislative reforms and CJEU’s responses in the field, and to understand the challenges they have posed to the consistency and internal balance of the EU copyright system, it is essential to analyze their roots and key features. To this end, this article will offer a brief overview of the legislative path that led from the Rome Convention to the debate preceding the CDSMD, with a focus on the introduction of *sui generis* rights and ancillary copyright (§2). Then, it will comment on nature and features of the new press publisher right under Article 15 CDSMD, focusing on its strengths and pitfalls (§3). The statutory analysis will be coupled with a comment on the four “waves” of the CJEU case law (§4), leading to a brief assessment and conclusions on the way forward (§5).

**Keywords** – neighboring rights, sui generis right, press publishers right, ancillary copyright, CJEU, harmonization

## I. Introduction

Despite their substantial economic relevance and key role played in the market, neighboring rights have traditionally represented a Cinderella for copyright academics. However, the epochal shifts such entitlements have been subject to in the past decades made scholars rethink their role, focusing more and more on their legislative and judicial evolutions and their implications.

Related rights, in fact, have witnessed a pervasive harmonization, first through international sources and later by the EU legislator.<sup>1</sup> The multi-level push towards a minimum standardization of rights of performers, producers of phonograms and broadcasters has partially closed the gap between the Anglo-Saxon model of overarching, all-comprehensive copyright and the continental distinction between author’s rights and neighboring rights, which was deeply rooted in the different genetic codes of the two systems.<sup>2</sup> In the past two decades, this convergence of national solutions has been topped by the legislative introduction of

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<sup>1</sup> For a comprehensive historical overview of the early stages, see Joseph Straus, ‘Recent international and European developments in the field of neighbouring rights protection’ [1993] 2 AIDA 187; Wilhelm Nordemann, Lai Vinck, Paul Hertin, Gerald Meyer, *International Copyright and Neighbouring Rights* (Wiley, 1990), pp.127 ff.

<sup>2</sup> The nature of Anglo-Saxon copyright, characterized by the absence of moral rights, an utilitarian inspiration and the influence of the sweat-of-the-brow doctrine allows it incorporating more easily subject matters that are not purely linked to authorship, and thus to apply the same category of exclusive rights to authors, performers, producers of phonograms and the like. On the contrary, the personality-based, author-centered structure of the continental model of *droit d’auteur* could not embed entitlements not related to authorship – thus the development of the category of neighboring rights. On this point see the similar observations of Paul Goldstein, P. Bernt Hugenholtz, *International Copyright: Principles, Law and Practice*, Oxford University Press, 2019, pp.48-49; Sam Ricketson, Jane Ginsburg, *International Copyright and Neighbouring Rights: the Berne Convention and Beyond*, 2<sup>nd</sup> ed. Oxford: Oxford University Press, 2006, p.142.

various *sui generis* rights and, more recently, of the so-called “ancillary copyright”.<sup>3</sup> In response to the systemic confusion created by these new additions, the CJEU have furthered the harmonization process with landmark interventions, which impressed “waves” of changes in the contextual interpretation of related rights and their nature and role within EU copyright law.<sup>4</sup> Last, the Directive on Copyright in the Digital Single Market (2019/720/EU, CDSMD) has introduced a new neighboring right for press publishers, reinforcing the perception of related rights as the most practical solution to stretch the borders of copyright law in response to new market needs.<sup>5</sup>

Such fundamental steps have inevitably caused changes in the texture of EU copyright law and of the common core of EU Member States laws, which may – or may not – represent the beginning of a new era for the relationship between copyright and related rights. Analyzing the roots and key features of this process may help understanding drivers and sense of the various legislative reforms and CJEU’s responses, and shed light on the opportunities and challenges they both have raised for the consistency, coherence and internal balance of the EU copyright system.

To this end, the following pages will provide a brief overview of the multi-level legislative background that led from the Rome Convention to the debate that preceded the CDSMD, with a focus on the advent of *sui generis* rights and ancillary copyright (§2). Then, they will analyze and comment on nature and features of the new press publisher right under Article 15 CDSMD, focusing on its strengths and pitfalls (§3). The statutory analysis will be coupled with a comment on the four “waves” of the CJEU case law (§4), leading to a brief assessment and conclusions on the way forward (§5).

## **II. A multi-level legislative background: from the Rome Convention to the Digital Single Market Agenda**

The history of neighboring rights is a relatively recent one. For how short it may be, however, it still offers significant hints to understand the genetic code of such “new” entitlements, the needs they were conceived to answer to, and the coherence and divergences they show vis-à-vis copyright.

The first national statutes introducing rights related to copyright date back to the 1920s and 1930s – two decades when the technological progress raised the necessity to protect not only the creativity of authors, but also the work of performers and the investments of phonogram producers.<sup>6</sup> In fact, while the Berne Convention impressed a push towards the amelioration of the conditions for the protection of authored works in many countries, creators of works such as photographs and artifacts of applied art encountered much greater resistance against their claims, particularly in legal systems belonging to the *droit d’auteur* tradition, which put a stronger emphasis on personal creativity and originality.<sup>7</sup> The same was the case for other actors in the cultural and creative value chain, such as producers and distributors. Since copyright laws could not host their requests, *ad hoc* acts were enacted to introduce new categories of rights, in this way avoiding contaminating the integrity of authors’ rights.<sup>8</sup>

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<sup>3</sup> The term “ancillary copyright” has first been introduced by the German legislator to distinguish the press publisher right from other neighboring rights provided by the German Copyright Act (Leistungsschutzrecht für Presseverleger). See more *infra*, section III.

<sup>4</sup> See *infra*, para 4.

<sup>5</sup> 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, OJ L-130/92 of 17 May 2019.

<sup>6</sup> An attentive reconstruction of the historical path that led from the Berne Convention to the Rome Convention is offered by Sam Ricketson, ‘Rights on the Border: the Berne Convention and Neighbouring Rights’, in Ruth L. Okediji (ed), *Copyright Law in an Age of Limitations and Exceptions*, Cambridge: Cambridge University Press, 2017, pp.341-374.

<sup>7</sup> On this point see Goldstein-Hughenoltz (n 2), p.50.

<sup>8</sup> *Ibid*, p. 346.

By the same token, discussions on the introduction of neighboring rights at the international level took place outside the Berne Union.<sup>9</sup> More than three decades of negotiations led to the adoption of the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961),<sup>10</sup> which represents the first international IP treaty that was conceived and entered into force having only a handful of its signatories already protecting the rights recognized therein.<sup>11</sup> The Rome Convention introduced a set of minimum rights, lasting 20 years from fixation, performance or broadcasting. Rights were differentiated according to rightholder (performer, producer of phonogram, broadcaster) and subject matter, and were limited by narrow exceptions, offering the possibility for contracting parties to apply also their copyright exceptions and limitations should they find it appropriate.<sup>12</sup> The Convention also specified that neighboring rights should not prejudice exclusive rights of copyright holders, in this way implicitly creating an internal hierarchy within the copyright system, and holding author's rights at a highest rank.<sup>13</sup> Thirty years later, the WIPO Performance and Phonograms Treaty (WPPT, 1996)<sup>14</sup> adapted the Rome text to digital challenges. In line with the WIPO Copyright Treaty (WCT, 1996), it added the rights of rental and of making available, and prolonged the duration of neighboring rights to fifty years. While it recalled the Rome Convention, the WPPT significantly excluded broadcasters and limited its provisions to performers, protecting producers only against unauthorized reproductions of their phonograms.<sup>15</sup>

The Rome Convention marked the debut of neighboring rights in several States. For most of them this entailed the introduction of a new category of rights within the realm of copyright law. Others – a minority belonging to the copyright tradition – brought the rights of performers, producers of phonograms and broadcasting organizations under the umbrella of copyright, albeit with caveats and distinctions.<sup>16</sup> While national rules shared minimum standards of protection and their functional effects were substantially harmonized, their different qualification could not but having an impact on their interpretation and judicial evolution within the copyright system, leading to a weaker supranational harmonization of neighboring rights.<sup>17</sup> At the same time, and as all international treaties belonging to the first two phases of international harmonization,<sup>18</sup> the Rome Convention provided only for basic exclusive rights and a minimum duration.

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<sup>9</sup> Ibid, p.352. Several entities were involved in the discussion, such as the precursors of UNESCO, the UNIDROIT, the ILO. A committee of experts met at Samedan (Switzerland) in 1939 to discuss several draft instruments, introducing protection for performers, phonogram producers, broadcasters, news publishers and the droit de suite. The work of the Samedan Committee constituted the starting point for the debate that led to the drafting of the Rome Convention.

<sup>10</sup> International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Oct 26, 1961; 496 U.N.T.S. 43 (1961).

<sup>11</sup> As noted by Ricketson-Ginsburg (n 2), p.141, and by Claude Masouyé, Guide to the Rome Convention and to the Phonograms Convention, Geneva: WIPO, 1981, pp.2-5.

<sup>12</sup> Exceptions are limited to private use, use of short excerpts in connection with the reporting of current events, the ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts, and the use solely for the purposes of teaching and scientific research (Article 15). For a comment see Ricketson-Ginsburg (n 2), pp.144, and Nordemann et al (n 1), p. 128.

<sup>13</sup> Rome Convention, Article 1. This interpretation is shared also by Goldstein-Hugenholz (n 2), p.54 and Masouyé (n 11), p.59.

<sup>14</sup> WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. Treaty Doc. No. 105-17 (1997); 2186 U.N.T.S. 203; 36 I.L.M. 76 (1997).

<sup>15</sup> For a more detailed analysis of the negotiation process that led to the approval of the WPPT and the reasons underlying its partial departure from the text of the Rome Convention, see Mihaly Ficsor, *The Law of Copyright and the Internet: the 1996 WIPO Treaties, Their Interpretation and Implementation*, Oxford: Oxford University Press (2002), pp.591 et seq.

<sup>16</sup> Ibid at 670-671. See also the implementation assessments provided periodically by the Intergovernmental Committee ILO-UNESCO-WIPO, ICR Sub-Committee on the Implementation of the Rome Convention, available at [https://www.wipo.int/meetings/en/topic.jsp?group\\_id=36](https://www.wipo.int/meetings/en/topic.jsp?group_id=36) <accessed 5 February 2021>.

<sup>17</sup> In this sense see also Ricketson-Ginsburg (n 2), p.140.

<sup>18</sup> According to the classification made by Daniel Gervais, *The Internationalization of Intellectual Property: Challenges from the Very Old and the Very New*, 12 *Fordham Intellectual Property, Media and Entertainment Law Journal* 929 (2002).

Thus, when the then European Communities decided to remove the barriers to the internal market by harmonizing rental and lending rights across Member States, it came quite natural to also add rental to the exclusive rights of performers and producers of phonograms, which were as impacted by the rental market as the rights of main authors were.<sup>19</sup> However, since not all Member States were also signatories of the Rome Convention, and they generally presented discrepancies in the regulation of neighboring rights, the European legislator decided to intervene with a broader harmonization of the field. Directive 92/100/EEC<sup>20</sup> introduced a catalogue of “related rights”, so labelled to use a neutral terminology that did not take a stance between the copyright and *droit d’auteur* traditions,<sup>21</sup> making such entitlements the second area of EC intervention on copyright matters after the protection of software programs.<sup>22</sup> The Rental Directive included in the Rome list of rightholders film producers, offering them the rights of reproduction and distribution on the original and copies of their films, and using otherwise the same structure of exclusive rights and exceptions of the Rome Convention, save for an increase of the term of protection from twenty to fifty years.<sup>23</sup> While some rights were clearly subject to maximum harmonization, others were to a greater extent left to Member States’ regulatory discretion.<sup>24</sup>

In 1993, the Term Directive<sup>25</sup> introduced two additional related rights, again remitting their introduction to the discretion of national legislators.<sup>26</sup> Their adoption rate was, in fact, quite low. Yet, their introduction contributed to increase the fragmentation of types of exclusive rights granted across the Union, hinting at the same time to the possibility that also under EU law related rights could be used as a valid alternative to copyright, to respond to the needs of various market actors without altering copyright nature and structure. The same approach featured the introduction of a *sui generis right* for database producers, based on different requirements than copyright (investment made in obtaining, verifying, and presenting data instead of originality), entailing different rights (extraction and reutilization), and having different duration (15 years), potentially perpetual.<sup>27</sup> Directive 96/9/EC kept this new entitlement distinct from the copyright granted over the original structure of the database, which is closer to the protection offered to collections by traditional copyright laws. Still, the *sui generis* right marked yet another move towards a new paradigm, where the copyright system could embed a plethora of different rights which share several traits and the same

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<sup>19</sup> On this point see also Silke von Lewinski, Michel M. Walter, *EU Copyright Law. A Commentary* (OUP, 2010), para 6.0.3 ff. and reported in preparatory works. See, eg, European Commission, Green Paper on Copyright and the Challenge of Technology - Copyright Issues Requiring Immediate Action. COM (88) 172 final, 7 June 1988, pp.83 ff. See also Margret Möller, ‘Author’s Rights or Copyright?’, in Franz Gotzen (ed), *Copyright and the European Community. The Green Paper on Copyright and the challenge of new technology* (Story Scientia, 1989), pp.9 ff.

<sup>20</sup> Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L-346/61 of 27 November 1992 [hereinafter Rental Directive or Rental I].

<sup>21</sup> As in von Lewinski-Walter (n 19), para 6.0.12.

<sup>22</sup> Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs, OJ L-122/42 of 17 May 1991.

<sup>23</sup> Rental Directive, Article 12, which recites “without prejudice to further harmonization”.

<sup>24</sup> In this sense see the Explanatory Memorandum to the Proposal for a Directive of the European Parliament and of the Council on rental right, lending right, and on certain rights related to copyright, 24 January 1991 COM (90) 585 final, para 5.2, p.55, and also the comments of Silke von Lewinski, *International Copyright Law and Policy* (OUP, 2008) para 3.68.

<sup>25</sup> Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights, OJ L-290/9 of 24 November 1993, Articles 4 and 5, providing, respectively, the protection of previously unpublished work (attributing for 25 years the same economic rights granted to authors, upon the first lawful publication or communication to the public after the expiry of copyright protection), and the protection of critical and scientific publications of works in public domain (30 years from the time of lawful publication).

<sup>26</sup> On this point see Valerie-Laure Benabou, *Droits d’auteur, droits voisins et Droit Communautaire* (Bruylant, 1997) pp.377 ff, who also provides a thorough historical overview of the national origins of the two rights and an analysis of their legal nature.

<sup>27</sup> Directive 96/9/EC of 11 March 1996 on the legal protection of databases, OJ L.77/20 of 27 March 1996.

object with copyright, but respond to different rationales, pursue different functions and goals, and thus call for a different balancing rules and different interpretations.<sup>28</sup>

In this context, while greater granularity in the system may allow answering more efficiently and fairly to different needs, the contextual presence of different definitions of rights and exceptions and the improper horizontal application of general principles and doctrines may create substantial interpretative short-circuits. This process was possibly triggered, *inter alia*, by the decision of the EU legislator to offer a horizontal definition of reproduction right covering all rightholders, and to extend the making available right also to related rights, respectively in Articles 2 and 3 of the Information Society Directive (2001/29/EC).<sup>29</sup> The codification of the Rental Directive in 2006 did not tackle the matter with any reordering effort, leaving to courts the task to make sense out of the web of general and sector-specific rights and exceptions and to decide on the opportunity – or not - to generalize concepts and principles across the whole spectrum of copyright and related rights.<sup>30</sup>

The implementation of EU Directives led Member States to reorder their provisions and increase the level of protection for related rights.<sup>31</sup> Some Member States have maintained their catalogue of neighboring rights, while others have added new ones, in some instances going beyond the scope of the Rental and Term Directives, with the paradoxical result of an increase in the fragmentation of national solutions.<sup>32</sup> Not unexpectedly, national courts soon started facing difficulties in handling new concepts, managing the interplay between general rules and specific provisions, and drawing the borders between areas that could be subject to general principles and doctrines and areas which required a narrowed-down *lex specialis* interpretation. And although the distinction between copyright and related rights remained clear in the eyes of judges and scholars, the use of similar labels and definitions for exclusive rights of authors and related-rightholders could not but engender questions and confusion in national court practices.<sup>33</sup>

Against this background, one of the first questions commentators felt the need to address concerned the degree of freedom left to Member States in introducing new related rights beyond the catalogue provided by EU copyright law.<sup>34</sup> Opinions are fragmented and contradictory, also due to the non-linear approach of

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<sup>28</sup> This consideration features in a number of scholarly contributions. See, among the most comprehensive or recent studies, including the CJEU case law, Estelle Derclaye, *The Legal Protection of Databases: a Comparative Analysis* (Edward Elgar, 2008), esp. pp.44-50; Id., ‘Database rights: success or failure? The chequered yet exciting journey of database protection in Europe’, in Christophe Geiger (ed), *Constructing European Intellectual Property. Achievements and New Perspectives* (Edward Elgar, 2013), pp.340-354; Tatiana Eleni Synodinou, ‘Database producer protection: between rights and liabilities’, in Tanya Aplin (ed), *Research Handbook on Intellectual Property and Digital Technologies* (Edward Elgar, 2020), pp. 81-106; Mark J. Davison, *The Legal Protection of Databases* (CUP, 2002), pp. 237 ff. Similar *ex post* assessments can be found in the Study in support of the evaluation of Directive 96/9/EC on the legal protection of databases (2018), available at <https://ec.europa.eu/digital-single-market/en/news/study-support-evaluation-database-directive> <accessed 5 February 2021>, and in the related Commission Staff Working Document, Evaluation of Directive 96/9/EC on the legal protection of databases, SWD(2018) 146 final.

<sup>29</sup> Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L-167/10 of 22 June 2001.

<sup>30</sup> For a critical comment see Ansgar Ohly, ‘Economic rights’, in Estelle Derclaye (ed), *Research Handbook on the Future of EU Copyright* (Edward Elgar, 2008), pp.215, 219. See also Stefan Bechtold, ‘Directive 2001/29/EC’, in Thomas Dreier and Bernt Hugenholtz, *Concise European Copyright Law* (OUP, 2016) p.357.

<sup>31</sup> See, eg, the assessment performed in IViR, *The Recasting of Copyright and Related Rights for the Knowledge Economy – Final Report*, European Commission DG Internal Market Study, pp.91-103.

<sup>32</sup> This is reported by von Lewinski-Walter (n 2), pp.356 ff. See also Mireille van Eechoud et al, *Harmonizing European Copyright Law: The Challenges of Better Lawmaking* (Kluwer, 2009), pp.33-34 and 303.

<sup>33</sup> In the field of database rights, for instance, see the thorough analysis of Estelle Derclaye, *Recent French Decisions on Database Protection: Towards a More Consistent and Compliant Approach with the Court of Justice’s Case Law?* [2012] 3(2) European Journal of Law and Technology 1.

<sup>34</sup> See, eg, with regard to the press publisher right, Eleonora Rosati, *Neighbouring Rights for Publishers: Are National and (Possible) EU Initiatives Lawful?* [2016] 47 IIC 579. More generally, on the competence of the EU in the field, see Ana Ramalho, *Beyond the Cover Story – An Enquiry into the EU Competence to Introduce a Right for Publishers* [2017] 48 IIC 71.

the Rental Directive, which also after the 2006 codification contains provisions that are both of maximum and minimum harmonization. On its side, the CJEU has provided only a few hints. In *C More v Sandberg* (2015),<sup>35</sup> the CJEU has indicated that Member States cannot broaden the scope of InfoSoc exclusive rights, a doctrine confirmed also in the more recent and landmark trio of the Grand Chamber of July 2019 (*Funke Medien*,<sup>36</sup> *Pelham*<sup>37</sup> and *Spiegel Online*<sup>38</sup>), which emphasized the difference between exceptions and exclusive rights, ruling that Articles 2 to 4 InfoSoc should be understood as provisions of maximum harmonization. Along the same lines, in *HP v Reprobel* (2015)<sup>39</sup> the Court indicated that the list of rightholders included in the InfoSoc Directive should be understood as exhaustive, thus excluding that Member States may extend copyright and related rights beyond the catalogue provided by EU law. Beyond that, however, the CJEU has not provided any general guidance yet.

The fact that the question remained open has no little implications, for it is not a purely theoretical inquiry. Very recently, in fact, two Member States made it to the headlines for the introduction of a new right for press publishers. The first attempt was made in 2013 by Germany, which introduced a right of making available newspapers, magazines or part of them to the public, for commercial purposes, lasting one year from publication and not opposable to authors, who remained entitled to receive an equitable remuneration as a share from publishers' revenues.<sup>40</sup> Spain followed suit in 2015, opting instead for an unwaivable remuneration right, subject to mandatory collective management but broader than the German counterpart, for it covered also blogs and RSS.<sup>41</sup> The two interventions raised several criticisms for their allegedly proven ineffectiveness, the lack of balance between exclusivity and access, and the presence of strong evidence from economic studies demonstrating that neighboring rights are becoming obsolete<sup>42</sup> and lacking justification, particularly in light of the decrease in the investments needed to produce and distribute content, and of the variety of alternative instruments available to combat piracy and stimulate the licensing market.<sup>43</sup> Commentators also highlighted how Germany and Spain were setting an example that could have

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<sup>35</sup> Case C-379/13 *C More Entertainment AB v Linus Sandberg* [2015] EU:C:2015:199.

<sup>36</sup> Case C-479/17 *Funke Medien NRW GmbH v Bundesrepublik Deutschland* [2019] EU:C:2019:623.

<sup>37</sup> Case C-476/17 *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* [2019] EU:C:2019:624.

<sup>38</sup> Case C-516/17 *Spiegel Online GmbH v Volker Beck* [2019] EU:C:2019:625.

<sup>39</sup> Case C-572/13 *Hewlett-Packard Belgium SPRL v Reprobel SCRL* [2015] EU:C:2015:750.

<sup>40</sup> Sections 87f to 87h of the German Copyright Act, UrhG, as amended by Law of 1 October 2013, [2013] Bundesgesetzblatt (Federal Official Journal) Vol. I, 3728.

<sup>41</sup> Article 32(2) of the Spanish Copyright Law (Texto Refundido de la Ley de Propiedad Intelectual [TRLPI]) introduced a statutory limitation for providers of digital services of content aggregation coupled with the unwaivable right to equitable remuneration for press publishers, which allows the making available to the public of "non-significant fragments of content" previously published on news websites and having "informative purpose of creation of public opinion or of entertainment". The provision excludes images, photography and "isolated words", when the use of the latter is non-commercial and necessary to provide search results with a link to the original source. For an initial assessment see Raquel Xalabarder, 'The Remunerated Statutory Limitation for News Aggregation and Search Engines Proposed by the Spanish Government; Its compliance with international and EU law' (2014), IN3, Working Paper Series WP14-004.

<sup>42</sup> More generally on this point see P.B.Hugenholtz, *Neighbouring Rights are Obsolete* [2019] 50 IIC 1006, who points out how also traditional neighbouring rights are losing their original justification, which grounded them on the need to protect the technological investments of phonogram producers and broadcasters against piracy and by favouring licensing. In fact, the digital revolution caused a decrease in costs of recording, producing and distributing phonograms. The most successful contemporary music genres (e.g. hip-hop and electronic) no longer require expensive recording studios. Operating an internet broadcasting is enormously cheaper than operating a radio or television, while also the investments needed to operate a traditional radio or television have decreased thanks to digitization. "Absent an alternative economic justification" – the article concludes – "these rights should be abolished or, at the very least, thoroughly reduced" (ibid at 1008). At the same time, also the additional policy argument, which supported the introduction of neighbouring rights to "purify" copyright and protect authors by discouraging intermediaries from "wresting the rights from the authors and artists" have been proven wrong by current producers' and broadcasters' practices (ibid at 1009).

<sup>43</sup> In Germany opt-in moved to the opt-in access to Google News for newspapers. This caused a radical drop in traffic on newspaper websites, which convinced publishers to negotiate royalty-free licenses. The same drop happened in Spain after Google News pulled out. On the decline of traffic on news websites, see Nera Consulting, 'Impact of the New Article 32.2 of the Spanish Intellectual Property Act' (9 July 2015),

led to a mushrooming of national solutions, with a consequent fragmentation of the internal market – a circumstance that deserved an even stronger criticism if one considered the challenges already raised by related rights to the systematic interpretation of copyright principles, doctrines and concepts.<sup>44</sup> More generally, these national initiatives, and particularly the German solution, triggered a systemic perturbation in the common core of European copyright law, for they created for the first time a partial convergence between exclusive rights granted to authors and related rightholders.

For reasons unrelated to such critiques, in *VG Media v Google*<sup>45</sup> the CJEU declared the German act inapplicable between private individuals, for the German legislator did not comply with the requirement set by Article 8 of the Service Directive, which requires Member States to notify the European Commission before the enactment of “technical regulations” impacting on information society services. In *VG Media*, in fact, the Court classified the German press publisher right, which prohibited only search engines from making press products available to the public and thus aimed at regulating information society services in a targeted manner, as a rule on services, which Article 8 listed as one of the four categories of technical regulations subject to the notification requirement.<sup>46</sup> Despite the struck down, which was anyway based on formal grounds only, the path towards the introduction of ancillary copyright for press publishers in an EU text was inevitably traced.

The proposal emerged for the first time in the Communication “Towards a modern, more European copyright framework” (2015).<sup>47</sup> Here the Commission pointed to national laws introducing press publisher rights as causes of fragmentation in the Digital Single Market, and found the root of the problem in the fact that EU copyright law had not managed to correctly attribute the value generated online by the press publishing industry.<sup>48</sup> A year later, in the Communication accompanying the Proposal for a CDSM Directive,<sup>49</sup> the press publishers right was introduced as a measure necessary to increase legal certainty and to give publishers a stronger bargaining power against internet service providers. The measure envisioned was a related right, justified by the need to protect publishers’ investment and the contribution they make in creating quality journalistic content.<sup>50</sup> This conclusion was supported by the result of the public consultation on the role of publishers in the copyright value chain, ran by the Commission in the first half of 2016.<sup>51</sup> The synopsis of the responses to the consultation offers quite an accurate picture of the variety of positions which animated the legislative debate. The majority of press publishers, as expected, requested the enactment of a neighboring right, with only a minority (interestingly from Spain) criticizing the Spanish and German solutions for their negative impact on the traffic on newspaper websites. Book publishers, scientific publishers and music publishers only wanted the overturn of the *Reprobel* decision (on which more *infra*, §4). Journalists and authors showcased fears that their rights, bargaining power and revenues could be negatively impacted by stronger publishers’ rights. End users complained that the new neighboring right could decrease access to content and increase prices, while institutional users like libraries highlighted the

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<https://www.nera.com/publications/archive/2015/impact-of-the-new-article-322-of-the-spanish-intellectual-property.html> <accessed 5 February 2020>. See also the observations moved by Martin Kretschmer, Séverine Dusollier, Christophe Geiger and P. Bernt Hugenholtz “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.

<sup>44</sup> See, eg, the comments of Rosati (n 34), pp.75-76.

<sup>45</sup> Case C-299/17 *VG Media Gesellschaft zur Verwertung der Urheber- und Leistungsschutzrechte von Medienunternehmen mbH v Google LLC* [2019] EU:C:2019:716.

<sup>46</sup> *Ibid.*

<sup>47</sup> European Commission, Communication “Towards a modern, more European copyright framework”, COM (2015) 626 final, 9 December 2015.

<sup>48</sup> *Ibid.* at 10.

<sup>49</sup> European Commission, Communication “Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market”, COM (2016) 592 final.

<sup>50</sup> *Ibid.* at 8.

<sup>51</sup> Public consultation on the role of publishers in the copyright value chain and on the “panorama exception”, available at <https://ec.europa.eu/digital-single-market/en/news/public-consultation-role-publishers-copyright-value-chain-and-panorama-exception> <accessed 5 February 2021>. For an academic perspective, see Kretschmer-Dusollier-Geiger-Hughenoltz (n 42).

risk of restriction of open access to good quality journalistic contents. Providers were obviously the strongest opponents of a press publisher right. They argued that there was no evidence of market failure to justify a legislative intervention, and that the new right would have raised transaction costs and create high barriers to entry for newcomers and increased legal uncertainty.<sup>52</sup>

Despite these criticisms, broadly underlined also by scholars, the press publisher right made it to the final text of the CDSM Directive, which was finally approved in March 2019 and should now be implemented by all Member States by June 2021.

### **III. The new press publisher right in the CDSM Directive: the beginning of a new era for related rights?**

In its final version, amended several times, Article 15 CDSMD comprises five articulated paragraphs. The long provision requires Member States to provide press publishers with the InfoSoc rights of reproduction and making available to the public on the online use of their publications, and excludes from the scope of the rights (i) private, non-commercial uses by individual users; (ii) hyperlinking, and (iii) use of individual words or very short extracts. At the same time, Article 15 CDSMD introduces the principle of primacy of the rights of authors and other rightholders in respect of the works incorporated in a press publication, stating that the rights provided under para 1 cannot be invoked against them, nor can they be deprived from their exploitation rights. The same applies to works incorporated in the press publication on the basis of a non-exclusive license, or in the public domain. The term of protection is fixed to two years from the 1<sup>st</sup> of January of the year following the date on which the press publication is published, applicable to all pieces published after 6 June 2019. With the same approach adopted for other related rights in the InfoSoc Directive, Article 15(3) CDSMD requires the adaptation to press publisher rights of the exceptions provided by Article 5 InfoSoc and by the Orphan Works and Marrakesh Directives.<sup>53</sup> Last, and in line with the care towards authors showed by the CDSM Directive,<sup>54</sup> the provision demands Member States to ensure that authors of works incorporated in a press publication receive an “appropriate” share of the revenues collected by publishers from online service providers.

Some additional aspects are clarified in the Preamble. Recital 55, for instance, states that the goals of the new right are to recognize and encourage the organizational and financial contribution of press publishers, and to ensure the sustainability of the industry, as a tool to foster availability of reliable information. Recital 56 clarifies that only journalistic publications are covered, while Recital 59 gives prevalence to national provisions on work-for-hire against the rule of revenue sharing set by paragraph 5.

Up to date, only a few States have implemented the CDSM Directive, with less than four months to the June 2021 deadline.<sup>55</sup> Several States are in the consultation phase, while some of them have either already reached or have directly jumped to the approval process.<sup>56</sup> France adopted a different approach, splitting

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<sup>52</sup> The consultation period ran from 23 March to 15 June 2016. The synopsis of the responses, divided per stakeholders, is available at <https://ec.europa.eu/digital-single-market/en/news/synopsis-reports-and-contributions-public-consultation-role-publishers-copyright-value-chain> <accessed 5 February 2021>.

<sup>53</sup> The reference goes to the exception provided by Article 6 of Directive 2012/28/EU of 25 October 2012 on certain permitted uses of orphan works, OJ L-299/5 of 27 October 2012, and the exception introduced by Directive (EU) 2017/1564 of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L-242/6 of 29 September 2017. And the application of the InfoSoc provisions on technological measures of protection and sanctions and remedies

<sup>54</sup> See Articles 18-22 CDSMD, which introduce the principle of fair remuneration for authors and mechanisms to ensure a re-balancing of bargaining power between authors and industrial rightholders. On the point see Giulia Priora, ‘Catching sight of a glimmer of light. Fair remuneration and the emerging distributive rationale in the reform of EU copyright law’ [2019] 10 JIPITEC 330.

<sup>55</sup> A constantly updated mapping of the implementation process country by country is available here <https://www.create.ac.uk/cdsm-implementation-resource-page/> <accessed 5 February 2021>.

<sup>56</sup> Ibid.

the implementation of the Directive in subsequent phases. In this way, it already transposed Article 15 CDSMD in October 2019, following very closely the EU text.<sup>57</sup> Immediately afterwards, the Competition Authority adopted interim measures against Google for its refusal to pay remuneration to publishers, a decision upheld by the Paris Court of Appeal, which brought Google to agree with some publishers on licensing terms.<sup>58</sup> Very recently, and following observations made by some national policy-makers, MEP Vondra submitted a question to the Commission related to the possibility for Member States to establish mandatory collective management schemes of press publishers' rights for the collection of remuneration from online platforms.<sup>59</sup> Very interestingly, the Commission answered to the negative, arguing that this would lead to the transformation of an exclusive right into a remuneration right<sup>60</sup> – a statement very close to the position taken, as we will see shortly, by the CJEU in *Spedidam v INA*<sup>61</sup> on performers' rights.

A few years will need to pass to be able to assess the impact of Article 15 CDSMD. Yet, it is already possible to highlight the most evident strengths and pitfalls of the provision, as emphasized also by the vast majority of academic commentators.<sup>62</sup>

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<sup>57</sup> LOI n° 2019-775 du 24 juillet 2019 tendant à créer un droit voisin au profit des agences de presse et des éditeurs de presse, in JORF 172 of 26 July 2019, modifying the French Intellectual Property Code.

<sup>58</sup> Autorité de la Concurrence, Décision n° 20-MC-01 du 9 avril 2020 relative à des demandes de mesures conservatoires pré sentées par le Syndicat des éditeurs de la presse magazine, l'Alliance de la presse d'information générale e.a. et l'Agence France-Presse, available at [https://www.autoritedelaconcurrence.fr/sites/default/files/integral\\_texts/2020-04/20mc01.pdf](https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2020-04/20mc01.pdf) <accessed 5 February 2021>.

<sup>59</sup> The question recited “Does Article 12 of Directive 2019/790, Article 5 of Directive 2001/29/EC, Directive 2014/26/EU or any other EU law prevent the Member States from establishing either a mandatory collective management of the right of internet search engines to display a press publication in the results of an online search (i.e. not only single words or very short extracts), or a mandatory collective management of the right of press publishers to remuneration for the use and display of the content of a press publication in the results of an online search (i.e. not only single words or very short extracts), without affecting the other aspects of the exclusive right of press publishers to their press publications (this second option should not be understood to mean that the exclusive right is reduced to the right to remuneration)?” Question for written answer E-004603/2020 to the Commission, MEP Vondra, Rule 138, 24 August 2020.

<sup>60</sup> Answer given by Mr Breton on behalf of the European Commission, Question reference: E-004603/2020, 9 November 2020: “The Commission considers that Member States are not allowed to implement Article 15 of Directive (EU) 2019/790 on copyright in the digital single market (the ‘DSM Directive’) through a mechanism of mandatory collective management. Article 15 grants publishers of press publications the exclusive rights to authorise or prohibit the distribution and the making available of their publications by information society services. Imposing mandatory collective management would deprive publishers of this exclusive right by precluding publishers’ choice to authorise or prohibit the use of their publication”.

<sup>61</sup> Case C-484/18 *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* [2019] EU:C:2019:970, on which more infra, section IV.5.

<sup>62</sup> See, eg, Thomas Hoppner, Martin Kretschmer, Raquel Xalabarder, ‘CREATe public lectures on the proposed EU right for press publishers’ [2017] 39(10) EIPR 607; Lionel Bently et al, ‘Response to Article 11 of the Proposal for a Directive on Copyright in the Digital Single Market, entitled ‘Protection of Press Publications concerning Digital Uses’ on behalf of 37 Professors and Leading Scholars of Intellectual Property’, 5 December 2016, available at [https://www.civil.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.civil.law.cam.ac.uk/documents/ipo\\_modernisingippresponsepresspublishers.pdf](https://www.civil.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.civil.law.cam.ac.uk/documents/ipo_modernisingippresponsepresspublishers.pdf) <accessed 5 February 2021>; Christophe Geiger, Oleksandr Bulayenko and Giancarlo F. Frosio, ‘The Introduction of a Neighbouring Right for Press Publisher at EU Level: the Unneeded (and Unwanted) Reform’ [2017] 39(4) EIPR 202; Reto M. Hilty, Valentina Moscon et al., ‘Modernisation of the EU Copyright Rules. Position Statement of the Max Planck Institute for Innovation and Competition’, Max Planck Institute for Innovation and Competition Research Paper No. 17-12, available at <http://pubman.mpdl.mpg.de/pubman/item/escidoc:2470998:11/component/escidoc:2479390/E-Book%20-%20Hilty%20-%20Moscon%20-%202018.09.2017.pdf> <accessed 5 February 2021>; Alexander Peukert, ‘An EU related right for press publishers concerning digital uses. A legal analysis’, Research Paper of the Faculty of Law, Goethe University Frankfurt am Main, No 22/2016; Ana Ramalho, ‘Beyond the cover story - an enquiry into the EU competence to introduce a right for publishers’ [2017] 48 IIC 71; Mireille van Eechoud, ‘A publisher’s intellectual property right: Implications for freedom of expression, authors and open content policies’ [2017] OpenForum Europe, 32.

As to the strengths, the press publisher right may give a boost to legal certainty, offer clearer legal grounds for collective management organizations and their scheme - although the recent Commission's answer may point to the opposite direction -, and support in this way the development of new business models.<sup>63</sup> The pitfalls, unfortunately, are much greater in number. First, it is not clear whether Article 15 CDSMD introduces a rule of maximum harmonization, as it happened for the InfoSoc exclusive rights. The provision looks not conditional, but the answer is not straightforward.<sup>64</sup> Second, the exceptions and limitations recalled by Article 15(3) CDSMD remain optional and overridable by contract – a circumstance that may lead to additional national fragmentation.<sup>65</sup> Third, the scope of the provision is still too broad. In fact, by not providing any threshold apart from the reference to private use and short excerpts, uncertainties on the breadth of the protection remain, and so do chilling effects on freedom of expression.<sup>66</sup> Even when considering a purely market perspective, splitting the pie between a larger number of stakeholders make the slices smaller. In addition, depending on the type of employment contract signed by journalists, publishers may enjoy double-dipping, *id est* they may get a remuneration from private copying, if authors assigned or licensed to them their reproduction rights, plus a remuneration from the exploitation of their own neighboring right.<sup>67</sup> Last, from a systemic perspective, it should not be underestimated that Article 15 CDSMD may have negative effects on the EU copyright law architecture. The provision, in fact, introduces similar rights than those granted by the InfoSoc Directive to authors, but without any threshold of originality. The process of convergence between copyright and related rights is completed, yet without the implementation of careful balancing techniques as in traditional copyright law. This creates a clear risk of overprotection, which is not tackled well enough by optional exceptions.<sup>68</sup> And even in the unlikely event that the overlap of rights will not cause short-circuits and will be efficiently solved by the market, national courts will still need to face substantial challenges when called to adapt InfoSoc exclusive rights and exceptions to the press publisher's entitlement.

Similar challenges, indeed, have already landed on the table of the CJEU, which had the opportunity to “remodel” the relationship between copyright and related rights several time in the past decade.

#### **IV. Related rights in the CJEU case law: four waves and an intermezzo**

At a closer look, this “remodeling” can be structured in four waves and an intermezzo.

##### **1. Wave #1 - Reordering the puzzle pieces**

The first wave, where the CJEU was called to start reordering the confused patchwork of definitions and rules drawn by the EU legislator, begins with *SCF v Del Corso*<sup>69</sup> in March 2012.

*SCF*, an Italian collecting society for phonogram producers, long tried to negotiate with the Association of Italian Dentist a collective agreement quantifying the equitable remuneration due to rightholders for the communication to the public of phonograms in private dental practices. When negotiations failed, it brought a symbolic action against a dentist, Marco del Corso, seeking a declaration that the dentist's broadcasting of protected phonograms by way of background music in his private practice constituted a communication to the public that gave rise to the obligation

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<sup>63</sup> These arguments were all raised in Commission Staff Working Document, Impact Assessment on the Modernisation of EU Copyright Rules, SWD (2016) 301 final, pp.155-172.

<sup>64</sup> As highlighted by Hilty-Moscon (n 61), p.4.

<sup>65</sup> In this sense especially Geiger et al (n 61) p.206.

<sup>66</sup> As in van Eechoud (n 61), p.36.

<sup>67</sup> Similar economic considerations are highlighted in Hoppner-Kretschmer-Xalabarder (n 61), pp.607 ff. Along the same lines, Martin Senftleben, Maximilian Kerk, Miriam Buiten, Klaus Heine, ‘New Rights or New Business Models? An Inquiry into the Future of Publishing in the Digital Era’ [2017] 48 IIC 538, who believe that press publishers rights will act as a brake and not as an incentive for digital publishing and the development of new business models.

<sup>68</sup> See Geiger et al (n 61), p.208; van Eechoud (n 61), p.37; Hilty-Moscon (n 61), p.7.

<sup>69</sup> Case C-135/10 *Società Consortile Fonografici (SCF) v Marco Del Corso* [2012] EU:C:2012:140.

to pay equitable remuneration. The solution of the case revolved, eventually, around the definition of the notion of “communication to the public” of phonograms under Article 8(2) Rental and in international treaties such as the TRIPs Agreement, the Rome Convention and the WPPT and, particularly, around whether or not it was necessary to read such notion in line with the horizontal definition of communication to the public developed under Article 3 InfoSoc.

To answer the question, the Court first defined the TRIPs Agreement and the WPPT as parts of the EU legal order, and the Rome Convention only indirectly through the reference made by art. 1(1) WPPT.<sup>70</sup> Then, it stated that the interpretation of the notion of communication to the public has to align with the definitions provided by the respective international treaties, which implies that the Court deemed possible a convergence of the definitions provided by the Directives only if the corresponding treaties’ definitions were found to be converging.<sup>71</sup> To better approach the problem, the CJEU reformulated the question posed by the referring court, framing it under Article 8(2) Rental I (broadcasting and communication to the public of a phonogram) instead of under Article 3 InfoSoc.<sup>72</sup> On this basis, it made a clear distinction between the two provisions, highlighting that while the InfoSoc exclusive rights are preventive in nature, the right under Article 8(2) of the Rental Directive is compensatory and financial in nature, and that such divergences required the two rights to be interpreted differently.<sup>73</sup> This consideration led the Court to use the same interpretative criteria developed to define “communication to the public” under the InfoSoc Directive,<sup>74</sup> but to adapt them to the financial nature of the right to equitable remuneration under Article 8(2) Rental, thus restricting them to those variables that matter to assess the impact of the infringing communication on rightholder’s economic interests (i.e. the degree of intervention of the dentist on the communication, the profit-making nature of the broadcasting, and the number of users targeted by the communication).<sup>75</sup>

Almost contemporarily to *SCF*, the *Luksan* decision operated, instead, an almost complete convergence of Rental and InfoSoc Directives.<sup>76</sup> Luksan was the scriptwriter and principal director of a documentary, who assigned all his copyright and related rights to the defendant, Petrus van der Let, excluding nevertheless certain methods of exploitation, such as the making available to the public of the work on digital networks and broadcast by pay TV. The agreement made no express provision on the attribution of the statutory rights to remuneration, such as, *exempli gratia*, for reproduction made on recording material. When van Der Let made the documentary available on the internet on a pay-per-view platform and Luksan sued him, the former argued that Austrian law (§38 UrhG) vested all exclusive exploitation rights in him as the producer, making all contrary contractual provisions void.<sup>77</sup> The main question raised to the CJEU was, then, whether the automatic vesting of copyright on the film producer under Austrian copyright law was compatible with EU law, and particularly with Articles 1 and 2 of the Term Directive, which vest copyright by operation of law, directly and originally, in the principal director, in his capacity of author of that work. The Court answered to the negative, striking down the Austrian provision.<sup>78</sup> Against this

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<sup>70</sup> Ibid, paras 37-42.

<sup>71</sup> Ibid, para 55.

<sup>72</sup> Ibid, para 70.

<sup>73</sup> Ibid, paras 75-77.

<sup>74</sup> Ibid, paras 81-88, listing the concept and nature of the public (indeterminate, fairly large number of people, cumulative effects of making works available, indispensable role of the users etc).

<sup>75</sup> Ibid, paras 94-99.

<sup>76</sup> Case C-277/10 *Martin Luksan v Petrus van der Let* [2012] EU:C:2012:65.

<sup>77</sup> Ibid, paras 23-30.

<sup>78</sup> Ibid, paras 71-72. On the importance of the Luksan decision in the context of the CJEU copyright case law see Jonathan Griffiths, Taking power tools to the *acquis*—the Court of Justice, the Charter of Fundamental Rights and

background, however, the CJEU was also asked to clarify whether the presumption of transfer of rental right from the film director to the film producer, introduced by the Rental Directive, could be extended to other InfoSoc exclusive rights by national legislators.<sup>79</sup> The question required the Court to go back, once again, to the interplay between general and sector-specific rules.

Interestingly, the CJEU answered to the positive. The decision justified this conclusion by arguing that also in the InfoSoc context the presumption of transfer would be based on the same rationale of protection of investment and balance of interests,<sup>80</sup> and that the InfoSoc Directive has maintained the key concepts of IP protection present in previous directives.<sup>81</sup> Along the same lines, the Court denied the possibility for the film director to waive his right to equitable remuneration, by drawing a parallelism between the impossibility for rightholders to waive their right to fair compensation in case of private copying exception under the InfoSoc Directive (Art.5(2)(b)), and the unwaivable nature of the remuneration due to authors in case of transfer of rental right.<sup>82</sup> With this move, in fact, the CJEU equated the notion of compensation with that of remuneration, and confirmed that the two provisions shared the very same rationale, thus requiring the same interpretation.

Again in an attempt to streamline the reading of the various directives, in *ITV v TVCatchup*<sup>83</sup> the Court used provisions of the SatCab Directive to justify an interpretation of Article 3 InfoSoc that broadened the notion of communication to the public to cover also rebroadcasting of programs containing protected works, even if already received in the same geographical space by other technical means.<sup>84</sup> TVCatchup offered internet live streams of free-to-air television broadcasts, but gave access only to content which users were already legally entitled to watch in the United Kingdom by virtue of their television license. TCV's terms of use, in fact, required users to declare the possession of a valid license, and the website used technical filters to authenticate the user's location. In order to stretch the notion of new public beyond its general scope, supporting the coverage of any new technical mean used even if directed to the same audience, the CJEU argued that "those findings are, moreover, supported by Articles 2 and 8 of Directive 93/83, which require fresh authorisation for a simultaneous, unaltered and unabridged retransmission by satellite or cable of an initial transmission of television or radio programmes containing protected works, even though those programmes may already be received in their catchment area by other technical means, such as by wireless means or terrestrial networks".<sup>85</sup>

The process of convergence in the interpretation of general and sector-specific rules in the field of related rights was completed in 2016 by *Reha Training*.<sup>86</sup> The fact pattern in the case was very similar to *SCF*, for it referred to a claim that GEMA, the main German collecting society, moved towards Reha Training, a private rehabilitation center, to pay the fair compensation allegedly due for Reha's showing to its patients television programs in its training and waiting rooms. Although the decision confirmed the different nature of Articles 3 InfoSoc and 8 Rental, the CJEU partially

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European Union copyright law, in Christophe Geiger, Craig A. Nard and Xavier Seuba (ed), *Intellectual Property and the Judiciary* (Edward Elgar, 2018), pp.144-174.

<sup>79</sup> As reformulated in *Luksan*, para 76.

<sup>80</sup> *Ibid*, para 82.

<sup>81</sup> *Ibid*, para 85.

<sup>82</sup> *Ibid*, paras 102-104.

<sup>83</sup> Case C-607/11 *ITV Broadcasting Ltd and Others v TVCatchUp Ltd* [2013] EU:C:2013:147.

<sup>84</sup> *Ibid*, paras 24-26.

<sup>85</sup> *Ibid*, para 25.

<sup>86</sup> Case C-117/15 *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte eV* (GEMA) [2016] EU:C:2016:379.

overruled *SCF v Del Corso* by concluding that since the two rights involve the same rightholders and refer to the same fact pattern, they should be interpreted using the same criteria, in order to avoid conflicting readings.<sup>87</sup> For this reason, the Court merged the *SCF* doctrine with the case law on Article 3 InfoSoc, and it used the notion of the profit-making nature of the activity not to determine whether or not there was communication to the public under Article 8 Rental, as in *SCF*, but only to calculate the remuneration due to rightholders.<sup>88</sup>

## 2. Wave #2 - A and B class citizens? The *Reprobel* era

The second wave, in partial contradiction with the first wave, circumscribed the degree of freedom left to Member States in the field of related rights, and created a sharp distinction between different categories of rightholders. The leading decision in this sense was *HP v Reprobel*.<sup>89</sup> The case revolved around the features of the private levy scheme under which HP was due to correspond to Reprobel, a Belgian collecting society, a certain fair compensation amount for the sale of its multifunction printers. More specifically, the questions concerned the legitimacy of a specific type of remuneration scheme and related calculation criteria, and the identification of the potential beneficiaries of the scheme.

*Reprobel* clearly denied the possibility for Member States to allocate part of the fair compensation due to rightholders in case of reprography and private copying under Article 5(2)(b) InfoSoc to publishers. The basis for this conclusion was that publishers are not listed among the holders of the reproduction right under Article 2 InfoSoc and, since the provision should be understood as a measure of maximum harmonization, national legislators cannot stretch the list of rightholders beyond what provided by the Directive.<sup>90</sup> If publishers are not granted the right of reproduction, they do not suffer any harm from the exercise of an exception to the latter, as in the case of reprography or private copy, and thus they cannot be beneficiary of a share in the compensation paid for the exercise of such exceptions.<sup>91</sup> In addition, the Court specified also that no compensation should be due to them, because this would deprive real Article 2 rightholders of part of their fair compensation, against the EU legislative will.<sup>92</sup>

The *Reprobel* decision was harshly criticized from several sides. A wide range of stakeholders responded to the EC's public consultation on the press publisher right by noting that the *Reprobel* doctrine should have been overruled by law. This was particularly the case of scientific and music publishers and, more generally, of collecting societies, which complained that the CJEU precedent raised their transaction and operation costs and weakened their bargaining position, by questioning the legitimacy of several national distribution schemes in which publishers received a share of the fair compensation collected from private levy mechanisms and the like, especially in cases where the author's reproduction right has been transferred to publishers.<sup>93</sup>

## 3. Intermezzo - The European Commission strikes back

The EU legislator accepted the complaints advanced in the public consultation and overruled the principle expressed in *Reprobel*. Article 16 CDSMD now states that the transfer or license to publishers of the right of reproduction represent a sufficient legal basis for them to receive a share

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<sup>87</sup> Ibid, para 28.

<sup>88</sup> Ibid., para 64.

<sup>89</sup> (n 39).

<sup>90</sup> As it can be implicitly derived from *ibid*, paras 47-48.

<sup>91</sup> Ibid, para 48.

<sup>92</sup> Ibid, paras 45 and 48.

<sup>93</sup> Synopsis (n 51), pp.4-5.

of fair compensation under Articles 5(2)(a) and (b), putting an end to the uncertainties raised by the CJEU and its strict reading of the nature of maximum harmonization rule of Article 2 InfoSoc. The Preamble (Recital 60) clarifies that this provision was needed to protect publishers' investments against the doubts triggered by *Reprobel*, and that for the sake of legal certainties it should apply also retrospectively to schemes in place before the date of the decision. At the same time, the EU legislator deemed necessary to specify that Article 16 CDSMD should not be interpreted as a push towards the introduction of compensation-sharing mechanisms between different categories of rightholders - a matter of national cultural policies with which the Directive does not want to interfere.<sup>94</sup>

Although this was not the first time that the EU legislator intervened to tackle the effects of a CJEU's decision and correct its outcome, Article 16 CDSMD appears to carry a different meaning. While, in fact, the CDSM Directive reinforces with some of its provisions the Court's repeated attempt to put back authors at the center of the stage, privileging their position *vis-à-vis* other rightholders, Article 16 CDMSD counterbalances this attitude, halting the CJEU's try to straitjacket freedom of contract and Member States' legislative discretion in the identification of rightholders and in the definition of their status, rank and interplay.

The contemporary presence of such apparently opposite legislative choices mirrors the wavering attitude of the Court of Justice in the definition of the relationship between author's rights and related rights – an oscillation that kept on also in the most recent times.

#### 4. Wave #3 - United in diversity: *Pelham*

A clear shift in the CJEU's approach comes with the third wave, marked by the long-awaited decision in the *Metall auf Metall* case, which since its referral to the highest EU court promised to untie the interpretative knot on the treatment of sound sampling in copyright as opposed to related rights.<sup>95</sup> In *Pelham*, one of the three cases of the famous Grand Chamber's trio of 29 July 2019,<sup>96</sup> the Court distinguished the interpretation of apparently similar rights on the basis of their different

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<sup>94</sup> CDSMD, Recital 60: "While this Directive should apply in a non-discriminatory way to all Member States, it should respect the traditions in this area and not oblige Member States that do not currently have such compensation-sharing schemes to introduce them. (...) It should also leave national arrangements relating to the management of rights and to remuneration rights unaffected, provided that they are in compliance with Union law. All Member States should be allowed but not obliged to provide that, where authors have transferred or licensed their rights to a publisher or otherwise contribute with their works to a publication, and there are systems in place to compensate for the harm caused to them by an exception or limitation, including through collective management organisations that jointly represent authors and publishers, publishers are entitled to a share of such compensation. Member States should remain free to determine how publishers are to substantiate their claims for compensation or remuneration, and to lay down the conditions for the sharing of such compensation or remuneration between authors and publishers in accordance with their national systems."

<sup>95</sup> Several commentators were putting high expectations on the impact of the decision. See, eg., Christophe Geiger, Elena Izumenko, 'Freedom of expression as an external limitation to copyright law in the EU: the Advocate General of the CJEU shows the way' [2019] 41(3) EIPR 131; Jonathan Griffiths, 'European Union copyright law and the Charter of Fundamental Rights—Advocate General Szpunar's Opinions in (C-469/17) Funke Medien, (C-476/17) Pelham GmbH and (C-516/17) Spiegel Online' [2019] 20 ERA Forum 35; Lionel Bently, Séverine Dusollier, Christophe Geiger, Jonathan Griffiths, Axel Metzger, Alexander Peukert & Martin Senftleben, 'Sound Sampling, a Permitted Use Under EU Copyright Law? Opinion of the European Copyright Society in Relation to the Pending Reference before the CJEU in Case C-476/17, Pelham GmbH v. Hütter' [2019] 50 IIC 467. For comments on the German saga see, inter alia, Mathias Leistner, 'Die „Metall auf Metall“ - Entscheidung des BVerfG. Oder: Warum das Urheberrecht in Karlsruhe in guten Händen ist' [2016] 118(8) GRUR 772; Bernt Justine Jütte, Henricke Maier, 'A Human Right to Sample – Will the CJEU Dance to the BGH-Beat' [2017] 12(9) Journal of Intellectual Property 784-796; Peter Mezei, 'Thou Shalt (Not) Sample? New Drifts in the Ocean of Sampling' [2019] 11(2) Zeitschrift für Geistiges Eigentum 170.

<sup>96</sup> Case C-476/17 *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* [2019] EU:C:2019:624.

teleological background and of fundamental right-based arguments, with a “united in diversity” approach that clearly departed from the previous two case-law waves in the field.

Pelham originated from an almost two-decade long German judicial saga. The plaintiffs, Hütter and others were members of the group Kraftwerk, which authored in 1977 a phonogram containing the song “Metall auf Metall”. Twenty years later the defendants, Pelham and Haas composed and published the song “Nur mir”, which used in a loop approximately two seconds of a rhythm sequence of “Metall auf Metall”, using a technique known as “sampling”. As phonogram producers, the plaintiffs claimed that Pelham infringed their related rights, and chiefly their right of reproduction under Article 2(c) Infosoc and their right of distribution under Article 9 Rental, and related German law implementations. The case centered, on the one hand, on the qualification of sampling as an infringement of one or more related rights of phonogram producers, and on the other hand on the applicability of the “right to free use” laid down in §24(1) of the German copyright act (UrhG), according to which an independent work created in the free use of another person’s work may be published or exploited without the consent of the latter. After the last rejection of his appeal before the German Federal Supreme Court (BGH),<sup>97</sup> Pelham decided to refer his case to the Federal Constitutional Court (BVerfG), arguing that the BGH’s restrictive interpretation of the exception under §24(1) UrhG violated his constitutionally protected freedom of artistic creation. The BVerfG upheld the constitutional complaint, sending back the case to the BHG for correction.<sup>98</sup> Due to the multiple uncertainties regarding the interpretation of EU sources, and particularly of the implications of the horizontal application of fundamental rights on EU copyright law, the BGH referred the case to the CJEU. Both the referral and the answers provided by the Court are long and articulated. For the purpose of this analysis, however, it will suffice to focus on the two key questions concerning the definition of the scope of phonogram producers’ exclusive rights of reproduction and distribution.<sup>99</sup>

In the first question, the referring court asked whether Article 2(c) InfoSoc, on the right of reproduction of phonogram producers, allows the latter to prevent sound sampling, even if very short.<sup>100</sup> The CJEU admitted that this was theoretically a reproduction in part, in line with a literal interpretation of existing sources, the objectives of the InfoSoc Directive, and the goal of protecting investments underlying the producer’s right.<sup>101</sup> At the same time, however, it noted that the fair balance between copyright and fundamental rights requires to take into account the effect of such an interpretation on the enjoyment of the freedom of art, protected under Art. 13 CFREU and exercised when using a sample to create a new work.<sup>102</sup> On this basis, the Court concluded that Article 2(c) InfoSoc cannot cover samples unrecognizable to the ear and used for a new

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<sup>97</sup> BGH, Judgment of 13. December 2012, I ZR 182/1 (Metall auf Metall II), preceded by BGH, Judgment of 20 November 2008, I ZR 112/06 (Metall auf Metall I).

<sup>98</sup> BVerfG, Judgment of 31 May 2016, 1 BvR 1585/13, DE:BVerfG:2016:rs20160531.1bvr158513.

<sup>99</sup> For a broader analysis of the *Pelham* decision, ex se and in the context of *Funke Medien* and *Spiegel Online*, see Caterina Sganga, ‘A Decade of Fair Balance Doctrine, and How to Fix It: Copyright Versus Fundamental Rights Before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online’ [2019] 41 EIPR 672; Christophe Geiger, Elena Izyumenko, ‘The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, but Still Some Way to Go!’ [2020] 51 IIC 282; Thom Snijders, Stijn van Deursen, ‘The Road Not Taken – the CJEU Sheds Light on the Role of Fundamental Rights in the European Copyright Framework – a Case Note on the Pelham, Spiegel Online and Funke Medien Decisions’ [2019] 50 IIC 1176; Daniel Jongmsma, ‘Fundamental Rights as External Constraints on Copyright Law: Horizontal Effect of the EU Charter after Funke Medien and Spiegel Online’ [2020] 15 JIPLP 1003; Bernd Justin Jütte, João Quintais, ‘The Pelham Chronicles: Sampling, Copyright and Fundamental Rights’ [2021].

<sup>100</sup> Pelham, para 26.

<sup>101</sup> Ibid para 29.

<sup>102</sup> Ibid paras 34-35.

creation, as this would be against the ordinary meaning of reproduction, against the fair balance, and not needed for the producer to realize a satisfactory return on investment.<sup>103</sup>

In the second question, the referring court asked whether Article 9 Rental on distribution right of “copies” applies also to works containing samples.<sup>104</sup> The Court started also in this case from an analysis of the goal of the provision – again the protection of the return on investments against piracy threats -, and argued that to reach it, it is enough to forbid the reproduction of all or substantial part of sounds fixed in phonograms, which may replace lawful copies, while there is no need to cover creations that include only limited samples.<sup>105</sup> Despite this clarification, the Court did not address the key point of the definition of the threshold for protection. Not by chance this was, in fact, at the core of the argument raised by AG Szpunar who suggested in his Opinion, not followed by the Court, that each fragment of a phonogram should be considered a copy, since “there is no requirement for originality because a phonogram, unlike a work, is protected, not by virtue of its creativeness, *but rather on account of the financial and organizational investments*”.<sup>106</sup>

The only threshold set by *Pelham* is, instead, that the sample should not be recognizable to ears, with a conclusion that seems to suggest that Article 2(c) InfoSoc does not cover modification, differently than the general right of reproduction under Article 2(a) InfoSoc. The distinction between the two rights, in fact, is in line with the different rationale of copyright and related rights: since the latter only protect investments, the scope of their exclusivity should reasonably be limited to reproductions that enter in direct competition with the original, and not cover each fragment that carries the personal touch of the author and can be understood in itself as the author’s own intellectual creation.<sup>107</sup> The CJEU adopted the same restrictive approach in *British Horseracing Board (BHB)*,<sup>108</sup> where it offered a narrow reading of the notion of qualitative or quantitative substantial part of a database which, if extracted or reused, amounted to a violation of the sui generis right protected by Article 7 Database. The Court, in fact, excluded that the intrinsic value of data or the money invested in generating the data could constitute relevant criteria to assess substantiality.<sup>109</sup> On the contrary, it underlined that the evaluation should be carried out by looking at the seriousness of the impact of the given extraction or re-use on the investment made by the database maker, particularly in terms of competition with the original work.<sup>110</sup> In both instances, the difference with *Infopaq*,<sup>111</sup> where the Court used the notion of originality to distinguish partial reproductions from unprotected extracts under Article 2(a) InfoSoc, could have not been broader.

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<sup>103</sup> Ibid para 39.

<sup>104</sup> Ibid para 40.

<sup>105</sup> Ibid para 47.

<sup>106</sup> Opinion of AG Szpunar in Case C-476/17 *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben* [2019] EU:C:2018:1002, para 30 (emphasis added).

<sup>107</sup> On the notion of partial reproduction and its link with the concept of originality, see Caterina Sganga, ‘The right of reproduction’, in Eleonora Rosati (ed), *Research Handbook on EU Copyright Law* (Routledge, 2021), Ch 6, forthcoming. Along the same lines, analyzing the CJEU case law from *Infopaq* on, see Eleonora Rosati, ‘Copyright and the Court of Justice of the European Union (OUP 2019) 88-93; see also Tatiana E Synodinou, ‘The foundations of the concept of work in European copyright law’, in Tatiana E Synodinou (ed), *Codification of European Copyright Law. Challenges and Perspectives* (Kluwer, 2012), 99 and Tito Rendas, ‘Copyright protection of designs in the EU: how many originality standards is too many?’ (2018) 13(6) *JIPLP* 439, 442.

<sup>108</sup> Case C-203/02, *The British Horseracing Board Ltd and Others v William Hill Organization Ltd* [2004] ECR I-10415

<sup>109</sup> *Ibid*, para 78.

<sup>110</sup> *Ibid*, para 91.

<sup>111</sup> Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening* [2009] ECR I-6569.

## 5. Wave #4 – Are we all equal? *Spedidam v INA*

The last and most recent act in the CJEU saga on related rights is marked by *Spedidam v Ina*,<sup>112</sup> where the Court seems to rule in favor of a complete equivalence between copyright and related rights.

In *Spedidam* the heirs of a musician, died in 1985, sued INA for marketing without their consent phonograms and videos of the musician's performances, which were produced and broadcasted by the national television. INA commercialized them on the basis of Article 49 on the French law on freedom of communication, which derogates from the French Intellectual Property Code and allows INA to exercise the exploitation rights of performers providing the remuneration and according to terms fixed in agreements between INA and performers (or their organizations).

In the first and second instance, French courts ruled in favor of the heirs, arguing that the agreement between INA and the performers' associations only determined the remuneration due for new exploitations, while the first authorization from performers was still needed. The *Cour de Cassation* denied, instead, that the letter of the law required INA to prove the first authorization, but asked the CJEU whether this solution was compatible with Articles 2, 3 and 5 InfoSoc.

Interestingly, the arguments raised by the Court to solve the case are the same used in *Soulier and Doke* in the field of author's exclusive rights.<sup>113</sup>

*Soulier and Doke* originated from the request of two French authors of literary works, Mark Soulier and Sara Doke, to the *Conseil d'État* to annul Decree No 2013-182, which introduced within the French Intellectual Property Code an extended licensing scheme to increase the availability of out-of-commerce books.<sup>114</sup> According to the Decree, the National Library was in charge of managing a database that every year enlisted new books published in France before 1 January 2001, no longer commercially distributed by a publisher and not currently published in print or in digital form.<sup>115</sup> Six months after the enlisting, the right to authorize the reproduction and communication to the public of the books in digital format was transferred to a collecting society approved by the Ministry of Culture. The society was obliged to offer a license back to the original publisher, which in case of acceptance would have received it in exclusivity for ten years, with the possibility of tacit renewal and the obligation to commercialize the title within three years. In case of refusal or no response, the collecting society was free to put the license on the market. Stringent safeguards were provided to ensure the fairness of the scheme, from the equal representation of authors and publishers in the society's governance bodies to fair rules of income distribution, and two possibilities to opt-out from the scheme.<sup>116</sup> First, rightholders had six months to oppose the enlisting of their works in the database. If they were publishers, they had the obligation to commercialize the book within two years. Second, authors could still withdraw their titles if they proved that the publication would have harmed their honor or reputation. Aside from that, they could opt out only upon demonstrating that they were the sole holders of exclusive rights of digital

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<sup>112</sup> Case C-484/18 *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* [2019] EU:C:2019:970.

<sup>113</sup> Case C-301/15 *Marc Soulier and Sara Doke v Premier ministre and Ministre de la Culture et de la Communication* [2016] EU:C:2016:878.

<sup>114</sup> JORF No 51, 1 March 2013, p.3835.

<sup>115</sup> As in Article L.134-2 of the Code de la Propriété Intellectuelle. 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, p.54.

<sup>116</sup> As in Article L.134-3-6 CPI.

exploitation. Were this not the case, the law admitted only a joint author-publisher withdrawal, with an obligation of the latter to commercialize the book within eighteen months. No withdrawal was possible, instead, after another publisher acquired and begun exploiting a license from the collecting society.<sup>117</sup>

Soulier and Doke complained that the Decree constituted an unconstitutional violation of their property rights, and that the scheme was incompatible with the ban against formalities provided by Article 2(5) of the Berne Convention, and with the provisions of Articles 2 to 5 InfoSoc. The *Conseil d'Etat* rejected the claim of unconstitutionality,<sup>118</sup> and ruled in favor of the compatibility of the scheme with the Berne Convention, arguing that the opt-out mechanism did not interfere with the existence of copyright but only with its exercise.<sup>119</sup> The question of admissibility of the scheme *vis-à-vis* the InfoSoc Directive, instead, was referred to the CJEU.

With a decision that was foreseeable but dangerous in its potentially far-fetched implications,<sup>120</sup> the Court struck down the French scheme, declaring it incompatible with Articles 2 to 5 InfoSoc. Most of the arguments used in *Soulier* can be found, *mutatis mutandis*, in *Spedidam*, which cited the precedent in multiple passages.

As in *Soulier*, the exclusive rights of reproduction and making available were given a broad scope to ensure legal certainty.<sup>121</sup> The protection offered by Articles 2 and 3 InfoSoc, “in the same way as the protection conferred by copyright”, covers not only their enjoyment but also their exercise.<sup>122</sup> Both rights were defined as preventive in nature, which means that any act of reproduction or communication to the public requires the prior consent of the rightholder or should be covered by an exception to be legitimate, otherwise it represents an infringement.<sup>123</sup> The CJEU considered this interpretation as being in line with the high level of protection requested under Recital 9 InfoSoc and with the need to obtain an appropriate remuneration for the use of the phonogram.<sup>124</sup>

Again like in *Soulier*, the Court admitted that the rightholder’s consent could also be expressed implicitly, to the extent that conditions are clearly defined, and do not fully frustrate the principle of prior consent.<sup>125</sup> However, and this time differently than in the previous decision, the French

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<sup>117</sup> On the pitfalls and criticisms raised against the scheme, and particularly against its weak withdrawal rules and the favour towards commercial publishers, see Emmanuel Derieux, ‘Le régime juridique de l’exploitation numérique des livres indisponibles du XXe siècle: Cheval de Troie de Google?’ (2012) 87 *Revue Lamy droit de l’immatériel* (RLDI) pp.65- 68, and 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. Similarly Bulayenko (n 111) p.143; Ginsburg (n 111), p.1429, who maintains that “the law expropriate authors”; see also Emmanuel Emile-Zola-Place, ‘L’exploitation numérique des livres indisponibles du XXe siècle: une gestion collective d’un genre nouveau’ (2012) 295 *Légipresse* 35.

<sup>118</sup> On this claim it also consulted the *Conseil Constitutionnel*, which also rejected it. Marc S and another, *Conseil Constitutionnel*, Decision no 2013-370, QPC (*question prioritaire de constitutionnalité*), 28 February 2014. The decision was severely criticized for its industry-oriented interpretation of the concept of public interest. See eg Nérisson (n 113) p.1429, and Emmanuel Derieux, ‘Exploitation numérique des livres indisponibles: déclaration de conformité à la Constitution des dispositions des articles L.134-1 à L.134-9 du Code de la propriété intellectuelle’ (2014) RLDI 103.

<sup>119</sup> *Conseil d’Etat*, Decision No 368208, 6 May 2015, M.S., MMme D. The ECLI FR:CESSR:2015:368208.20150506.

<sup>120</sup> 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.

<sup>121</sup> *Spedidam*, para 36, as in *Soulier and Doke*, para 30, and the case law cited therein.

<sup>122</sup> *Spedidam*, para 37, as in *Soulier and Doke*, para 31.

<sup>123</sup> *Spedidam*, para 38, as in *Soulier and Doke*, paras 33-34, later confirmed in case C-161/17 *Land Nordrhein-Westfalen v Dirk Renckhoff* [2018] EU:C.2018:634, para 29

<sup>124</sup> *Spedidam*, para 39.

<sup>125</sup> *Spedidam*, para 40, as in *Soulier and Doke*, para 35.

scheme was held compatible with EU law, for the Court believed that it can be presumed that performers authorized the fixation of their work, and this presumption was considered legitimate since it may be rebutted at any time, and intervenes on a requirement - the written authorization of performers – which is not part of EU law but only of the French Intellectual Property Code.<sup>126</sup> As a complement to the main argument, the CJEU also underlined that the scheme is in line with EU law, since it enables a fair balance to be struck between conflicting fundamental rights, for two parallel reasons. On the one hand, if INA could not exploit fully its collections, a number of rightholders would perceive less or no remuneration; on the other hand, the legal presumption does not affect performers’ right to obtain an appropriate remuneration.<sup>127</sup>

The latter is, probably, the most important sentence of the entire decision, and the one which puts in doubt the possibility of drawing a full analogy between *Spedidam* and *Soulier*. In *Spedidam*, in fact, the CJEU puts the greatest emphasis on remuneration, and the safeguards requested for implied consent and rebuttal are subject to a very light scrutiny. In *Soulier*, instead, the importance of consent explicitly prevails over remuneration, since the author’s right to control the use of the work is the most important value to be preserved. This differentiates, once again, traditional author’s rights from “industrial” related rights, even if granted to performers, who are the closest category to authors among all holders of neighboring rights.

## V. Conclusions: sketching the way forward

With an acceleration in the past decade, the room left to and role played by related rights within EU copyright law have steadily increased along the path towards harmonization. Their range and scope have been progressively broadened. Then, the EU legislator has moved towards a standardization and merge of the definitions of key exclusive rights conferred to performers, phonogram producers, film producers and broadcasting organizations (eg the right of reproduction and the making available right) with the definitions of the same rights as granted to authors, hinting to a trend of equalization of the status and treatment of all categories of rightholders. More recently, both national laws and EU Directives have remarked the intention to use related rights as a practical tool to answer to specific market needs within the framework of copyright law. The instrument appears to be the preferred and swiftest regulatory option every time the features of the new position to be protected shows weak compatibility with the foundations of author’s rights, and would thus contaminate their content and structure if put under their umbrella, and/or encounter stronger resistance against its introduction within the paradigm of author’s rights. Such a legislative evolution, which presents clear drivers, engendered also a number of unintended consequences, which at the same time constituted the inevitable development of the harmonization path in the field.

First, the mix between provisions of minimum and maximum harmonization left enshrouded in clouds the borders between EU and national competences in the field, clouds which the CJEU could not fully clear up despite its remarkable interventions. Second, the use of similar labels and definitions for author’s and related exclusive rights, the introduction of new entitlements (see, eg, the *sui generis* database right and the more recent ancillary copyright), and the indiscriminate application of general principles and doctrines across the entire copyright law spectrum have created substantial interpretative problems, initially for national courts and later for the Court of Justice. This has triggered – not unexpectedly – waves of conflicting decisions, contamination of

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<sup>126</sup> *Spedidam*, para 43.

<sup>127</sup> *Ibid* para 44.

the copyright model and distortion in the interpretation of some of its foundational principles, still far from being resolved.

Against this background, the main endeavor the CJEU committed itself to was to draw the scope of application of general and sector-specific rules, and to clarify whether and to what extent similar definitions and concepts from author's rights should or could have been used in the field of neighboring rights. In the past decade, in fact, the Court engaged in the construction of a judge-made model of related rights, featuring four "waves" of changes and leading to a clearer definition of the role and place for related rights in EU copyright law, particularly *vis-à-vis* more traditional entitlements. The process is yet to be over. However, the main direction seems to be traced.

The principle of consistency in the interpretation of similar terms and notions and the principle of autonomous concept in EU law led for a while the CJEU to drive towards a convergence the interpretation of similar exclusive rights and specific provisions in the fields of author's rights and related rights. This was particularly the case in the first "wave" of case law, culminating in *Luksan* and *Reba Training*. Already with *Reprobel*, however, the Court showed a much greater caution in treating all rightholders equally, and interpreted very rigidly Articles 2 and 5(2)(b) InfoSoc with the chief aim to protect the interest of authors. Then, the most recent decisions put stronger emphasis on the different goals and rationales of author's rights and related rights, justifying on teleological basis the use of diverging concepts, principles and definitions in their interpretation. This "distinguishing" approach appears particularly evident in *Pelham* with regard to the notion of partial reproduction of phonograms (as opposed to the *Infopaq* doctrine on the general notion of partial reproduction), and in *Spedidam* with regard to the importance and protection attributed to rightholders' consent (as opposed to the *Soulier and Doke* doctrine in the field of author's rights).

The CJEU's effort in providing a more careful systematic interpretation of author's and related rights should be welcomed as a much-needed intervention in a field that was in a deep need for reordering and clarification. To a certain extent, the Court's contribution may reduce the risks entailed in the legislative trend of over-use of the instrument of related rights to tackle market needs that copyright cannot answer to. Yet, this does not and should not exempt policy makers from the need to ponder on the broader picture, and on the pros and cons of abusing of neighboring rights as a handy regulatory solution to all market evils.