

Collective Rights Management and Extended Collective Licensing - a prerequisite for mass usage of Audio-visual Works?

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A Digital Single Market

- New technology and business models enable mass usage of copyright protected works.
- The answer is in many cases collective rights management.
- But works by so called Outsiders (non members and Orphan Works) can not be licensed the traditional way. You need a licensing solution which solves the problem with the Outsiders - Extended Collective Licensing.
- Much of the discussions have focused on Books - the mass digitisation by Google is the primary reason.
- Audio-visual works though by tradition are much more complex and Outsiders are in abundance
 - A television broadcaster could have as many as 70 000 contracts a year.
 - A national library could have tenth of millions of hours of audio-visual works.
- If the problem is the same should the remedy be the same?

Background

- Growth incentives
 - Digital Economy growing seven times the rate of the rest of the economy
 - Potential held back by a patchy pan-European policy framework
- EU's digital libraries initiative
 - All Europe's cultural resources and scientific records accessible to all
 - Europeana - a single access point
- How to reach the objective – Collective licensing
- Collective licensing would have to include outsiders [non members as well as Orphan Works]
- Digital Agenda for Europe 2010: Commission said it would convene a stakeholder dialogue on the interactive making available of out-of-print works <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0245:FIN:EN:PDF>

Background

- **Digital "to-do" list: new digital priorities for 2013-2014 (all in all 7) e.g.:**
 - **New public digital service infrastructures through** Connecting Europe Facility - proposed budget of up to €50 billion between 2014-2020 and e.g. cultural platforms such as Europeana.
 - **Update EU's Copyright Framework e.g.:**
 - Modernising copyright key to achieve Digital Single Market.
 - Where rapid progress is needed stakeholder dialogue in 2013 – “Licences for Europe”.

Licences for Europe

•"Licences For Europe" – jointly led by Michel Barnier, Neelie Kroes and Androulla Vassiliou:

- WG No. 1 - Cross border access
- WG No. 2 - User generated content.
- ***WG No. 3 - Digitization and making available of Out of Distribution AV-Works***
- WG No. 4 - Text and Data mining

•Notable: for WG No. 1 – 3 above collective licensing will ultimately be the solution.

MoU on Out of Commerce Books & Learned Journals

- The stakeholder dialogue on the interactive making available of out-of-print works resulted in a MoU on Out of Commerce Books & Learned Journals
- The MoU recognised that Collective licensing would have to include outsiders (non members as well as Orphan Works)
- MoU directly referred to in the OW Directive
- COM has issued recommendation - the MoU to be implemented.
- Mr. Barnier wrote to MS in early 2013 for an update regarding the implementation of the MoU.

MoU on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works

The best way to adapt the making availability of the Digital Library is for the Parties to:

- negotiate an agreement [MoU] and
- modulate such an agreement when needed
- Heads Up / Early Warning

MoU on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works

- MoU prerequisites in law:
 - Collective Management Organization representative
 - Agreement on the basis of free negotiations.
 - Both exclusivity and contractual freedom are respected
 - Equal treatment
 - The agreement is by law made binding on non-represented rights holders. **But** non represented right holders have a right to:
 - *prohibition against the use of their works (Opt Out)*
 - *individual remuneration on the basis of the law*
- As a consequence a library can use digitized books not running the risk facing individual claims from "outsiders" or having to face criminal sanctions – i.e. legal certainty

MoU on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works

- Recognising legislation might be required to create a legal basis to ensure legal certainty when the CMO:s represent Outsiders
- Recommending that MS give effect to the key principles in accordance with:
 - national legal mechanisms and
 - collective licensing traditions

From a Copyright perspective are Audio-visual Works different from Books & Learned Journals?

- No – the problem with the Outsiders is the same. So is the solution – a license extended to Outsiders
- How right holders are organised [authors, performers, producers etc] is different from Books and Learned Journals – CMO must be representative
- Business models are different – but the business interest will always be protected – free negotiations.

Recent Developments in MS

- MoU alike licence agreement between the Sveriges Television (SVT) and Copyswede effective as of January 1st 2013 – Archive License
- Sveriges Television (SVT) is the Swedish public service television company
- Copyswede is an umbrella collecting society for coordinated negotiations and agreements in certain copyright areas – a One Stop Shop.
- Copyswede´s represent Swedish authors and performers.
- Copyswede has established partnership agreements with TV and radio corporations and organizations that represent film and phonogram producers
- The Swedish Film & TV-producers not party to the agreement by choice – hence film excluded
- Same kind of licence in place in Denmark for Public Broadcaster (TV & Radio)

Loose Ends – Implications

- ECL no risk facing claims from "outsiders" or to face criminal sanctions - MoU Risk Management?
- A MoU on AV-Works must be underpinned by national legislation.
- Cross-border availability – the need for EU legislation?
- Regulation on EU level of CMOs – Good governance - framework Directive on collective rights management?
- If MS does not implement a MoU – EU legislation [compare MoU on OW]?