

Stockholm, SFU meeting

Emerging issues on collective licensing practices in the digital environment



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Study on emerging issues on collective licensing practices in the digital environment

Final Report

legal & economic: IViR, Ecorys, Erasmus Un. Rotterdam

Content of my talk today

- two key components of the study
 - multi-territorial licensing of online rights in musical works (Title III CRM-Directive)
 - collective licensing with an extended effect (art. 12 CDSM-Directive)
- other current developments that matter
 - collective licensing for AI training
 - collective licensing for press publishers

Multi-territorial licensing of online rights in musical works (Title III CRM-Directive)



Objectives of multi-territorial licensing

- rules to improve multi-territorial licensing (MTL) by CMOs of online rights in musical works aim to:
 - support the creation of a DSM for online music services
 - enhance consumer access to cross-border music services
 - contribute to the fight against online copyright infringements
- for this purpose, Title III CRM-Directive imposes two additional sets of rules on MTL entities:
 - technical and operational requirements and **additional standards of good governance** to ensure a necessary minimum quality of MTL licensing, in particular about capacity to electronically process data for MTL licensing
 - a so-called ‘**passport construction**’ allowing CMOs to tag on to other MTL entities

'Passport'-construction

- a CMO may request another CMO, on a non-exclusive basis, to represent its repertoire on a multi-territorial basis where it is not willing or not able to grant MTL licences directly in its own music repertoire (art. 29)
 - idea: to reduce the number of licences required to operate a multi-territory, multi-repertoire online music service
- the other CMO must accept the request if it already offers or grants MTL licences (“must carry”-rule; art. 30)
 - the requesting CMO must provide information on its own music repertoire in a form that is apt for the requested CMO to meet the requirements of Title III

How does this play out in practice? (1)

- virtually all musical repertoires mandated to EEA-based CMOs and licensing entities are currently available for MTL in the EEA
 - either unilaterally by national CMOs (incl. STIM) or through joint ventures/licensing hubs (e.g. ICE, Polaris hub, SOLAR)
- much of the EEA market for recorded music has ventured online
 - large online music services each operate under appr. 25 separate licences in the EEA (even if services are offered in only a few EEA Member States)
 - licensed uses and repertoires are adjusted to users' needs

How does this play out in practice? (2)

- a complex nexus of licences and licensing entities in the EEA, even if services offered in only a few states
 - many significant withdrawals by (major) publishers before the adoption of the CRM Directive: creating licensing hubs like ICE (Warner/Chappell a.o.), Aresa (BMG), Solar (Sony/ATV)
 - aggregation of popular (Anglo-American) repertoire
 - most national repertoire has remained with national CMO
 - no noticeable effect of “must carry” rule: few CMOs have tagged on to others
 - however, too early to draw strong conclusions from this: Directive is in force only since 10 April 2017

Some obstacles and challenges

- fragmentation of repertoires
 - uncertainty due to withdrawals and migration of catalogues
- rightholders are satisfied with MTL, but online music services complain about increasing licensing fees
- costly for music services to conclude a large number of licensing deals and fulfil different MTL terms
 - trade-off: bundling rights v. competition
- licensing terms for MTL are not transparent
 - large v. small online music services (CMOs: less bargaining power in relation to large platforms)
 - trade-off: standardized v. tailored MTL terms

Collective licensing with an extended effect (art. 12 CDSM-Directive)



Art. 12 CDSMD: general CLEE clause

- optional provision allowing Member States to introduce CLEE within well-defined areas of use
 - the law extending the scope of collective licenses / mandate of a CMO to also include ‘rightholders non-members’
 - only when outsider-effect can be justified
- law can give extended effect to collective licensing agreements, provided that:
 - the relevant CMO is sufficiently representative
 - all rightholders are guaranteed equal treatment
 - rightholders have the possibility to opt out at any time
 - appropriate publicity measures are taken

CLEE is a broader concept than ECL

Collective licensing mechanisms with an extended effect

Extended collective licensing

Statutory mandate of representation

Legal presumption of representation

(any licensing mechanism under which rightholders can also exercise their rights individually (e.g., through a “right to opt-out”, possibility of parallel individual exercise or otherwise))

Mandatory collective management of rights

(any licensing mechanism under which rights can be exercised only collectively without the possibility for individual exercise of rights (e.g., through a “right to opt-out”, possibility of parallel individual exercise or otherwise))

Typology of CLEE as used in the study

Mapping national CLEE mechanisms

- a broad patchwork of different CLEE mechanisms
- in practice also applied in a wide variety of domains
 - often CLEE is applied to specific domains, e.g. broadcasting, private copying, lending, reprography, etc.
 - sometimes: general clause on CLEE for unspecified uses
- variations in the scope of the extended effect
 - works covered
 - sometimes exclusion of types of works; cut-off date
 - rightholders affected
 - users concerned

National application of safeguards (1)

- assessing ‘representativeness’ of CMOs
 - different language in MS to refer to representative CMOs, including a mixture of qualitative (and quantitative) criteria
 - the number of rightholders and works represented, incl. foreign ones;
 - the capacity to conclude licensing agreements based on the mandate;
 - the managerial ability to collect and distribute licensing fees;
 - the licensing experience of the CMO, also in other fields;
 - the knowledge that the CMO has of the market; etc.
 - to engage in CLEE, CMOs must typically be authorized by a national authority or designated by a legislative act
 - information issue for establishing representativeness
- CMOs generally treat equally all rightholders whom they represent, members and non-members

National application of safeguards (2)

– right to opt-out

- important: the reported number of opt-outs is very low
- CMOs: opt-outs had zero / very low impact on their business
- from social welfare perspective, CLEE with opt-out appears more efficient than purely voluntary collective licensing
 - CLEE: near complete market coverage, reduces number of transactions and search costs, possible increase of license fees, economies of scale in enforcement of rights

– publicity measures

- few Member States require publicity measures beyond the transparency obligations in the CRM Directive
- some CMOs carry out publicity measures without an explicit legislative requirement to do so

CLEE with cross border effect?

- under Art. 12 CDSM Directive, CLEE applies only to use on the Member State's own national territory
 - different: CLEE for out-of-commerce works (art. 8-11 CDSMD)
- reason to introduce cross-border CLEE in the future?
 - perhaps in domains where there is an interest for MTL
 - online use; shared market (cultural/geographical/linguistic)
 - where there is consensus between Member States about the appropriateness of subjecting the particular use to CLEE
 - no divide between primary exploitation and secondary use
 - appropriate level of harmonization (legally and in practice)
 - if CMO is sufficiently representative for multiple territories
 - through cooperation or legal fiction (country-of-origin rule)

Collective licensing for AI training



Some considerations & observations

- AI may impact the existence security of creators
 - direct competition with creations; implications on livelihood
- what is legal basis for compensation for AI training?
 - (collective) opt-out from art. 4 CDSMD + collective licensing?
 - licensing: risk of serpent eating its own tail?
 - establishing a new legal basis (akin to art. 17 CDSMD)?
- who must pay? and who has right to compensation?
 - AI-bots crawled entire internet; not only professional creators
- why compensation only for creators?
 - other professions also risk being ‘replaced’ by AI, but training there occurs on general ‘know-how’, not creative works

Collective licensing for press publishers



Some considerations & observations

- several countries move towards collective licensing solutions (Scandinavian countries, Netherlands, a.o.)
 - makes sense: collectively press publishers stand stronger
- scaling of efforts enough (economies of scale)?
 - per national territory (as developed now) or pan-European?
 - bargaining power of large online platforms (Google, Meta, etc.) versus that of national CMOs
- ‘appropriate share’ to journalists/photographers?
 - huge variety between Member States: from small percentage (Italy: 2 to 5%) to larger share (Germany: 1/3 of revenues)
 - striking fragmentation
 - missed opportunity for harmonization

Questions?



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