

Kluwer Copyright Blog

The New Copyright Directive: Collective licensing as a way to strike a fair balance between creator and user interests in copyright legislation (Article 12)

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Introduction



On 17 April the new EU Directive on copyright and related rights in the [Digital Single Market](#) (the DSM Directive) was adopted, following intense [negotiations](#) in the Council and the European Parliament. The Directive builds on a [proposal](#) put forward by the European Commission in September 2016, which itself stemmed from several [studies](#) and [consultations](#) undertaken during the years 2013-2016. During the negotiations, the Directive garnered widespread media attention, both within and outside the EU.

The attention surrounding the DSM Directive can to a large extent be explained by the fact that it regulates a number of areas where technological change and market developments have set the stage for potential friction or conflict between the protection of copyright and the legal protection of other rights and interests. This is, for example, the case regarding trade-offs between copyright protection and the protection of freedom of expression and information, freedom to conduct a business and protection of personal data (privacy protection). Several of the Directive's provisions imply a new or more detailed regulation of the balance between these different rights and interests - hence the great [political](#) interest in the subject. A

fellow Kluwer Copyright Blogger has [discussed](#) in more detail the legislative process leading up to the adoption of the Directive.

This blog post will focus on article 12 in the new Directive, an article that provides a possibility – it is a “may” provision – for Member States to introduce certain provisions on measures to facilitate collective licensing.

Overview of Article 12

Article 12 of the Directive contains provisions on collective licensing with extended effect, provisions that are quite similar to and inspired by the models of so-called [extended collective licensing](#) (ECL) that have existed in Sweden and the other Nordic countries since the early 1960s. Similar models (to the Nordic ECL model) are in place in several other European countries (cf. recital 44 to the Directive), including [the United Kingdom](#), and are under consideration in the [United States](#).

Article 12.1 holds that Member States may provide that where a collective management organisation (CMO), in accordance with its mandates from rightholders, enters into a licensing agreement for the exploitation of works or other subject matter, such an agreement can be *extended* to apply to the rights of rightholders who have not authorised that CMO to represent them, or that the organisation has a *legal mandate* or is *presumed to represent* rightholders who have not authorised the organisation accordingly. In the following, I will refer only to “extended effect”, although the use of this expression here is intended to also cover the other mechanisms referred to in article 12.1 – “legal mandate” and “presumption of representation”.

“Collective Management Organisation”

A prerequisite for article 12 to apply is that the relevant organisation is a “collective management organisation” (CMO) that is subject to the national rules implementing Directive 2014/26/EU, i.e. the EU Directive on [collective rights management](#) (CRM Directive). The definition of a CMO in article 3(a) of that Directive is quite full of twists and turns, but one important criteria is that the organisation is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, *as its sole or main purpose*. Hence, organisations that manage rights collectively but have another activity as their main purpose – such as (labour) union activities – do not fall within the scope of the definition. Even though article 12.1 in the DSM Directive is only a “may” provision, the fact that it relates to “collective management organisations” may give rise to deliberations in some Member States during the implementation of the Directive. This may, for example, be the case in Sweden where it is not uncommon for ECL to also be carried out by organisations that are not deemed to be CMOs, for example because they are managing rights collectively as part of their trade union activities or in parallel to union activities. It is thus interesting to note that recital 49 to the Directive holds that the ability to operate a licence under ECL (and similar) mechanisms should “be limited to collective management organisations that are subject to national law implementing Directive 2014/26/EU.”

Representative of Rightholders

Another important prerequisite for the extended effect to come about according to article 12.1 is that the CMO is “representative”. This requirement is explained in article 12(3)(a), where it is held that “the collective management organisation is, on the basis of its mandates, sufficiently representative of rightholders in the relevant type of works or other subject matter and of the rights which are the subject of the licence, for the relevant Member State.” The requirement of representativeness is further elaborated on in recital 48 to the Directive, where it is held that Member States should determine the requirements to be satisfied for those organisations to be considered sufficiently representative, taking into account the category of rights managed by the organisation, the ability of the organisation to manage the rights effectively, the creative sector in which it operates, and whether the organisation covers a significant number of rightholders in the relevant type of works or other subject matter who have given a mandate allowing the licensing of the relevant type of use, in accordance with the CRM Directive.

The requirement of representativeness in article 12 is similar to existing requirements on representativeness in Sweden and the other Nordic countries, where this requirement is deemed to bring legitimacy to the ECL model. The argument is that licensing conditions that are accepted and have been approved by the members or rightholders represented by the organisation, should as a starting point be acceptable also for rightholders whose rights are covered by the extended effect.

Additional Safeguards

For the extended effect or legal presumption to apply, certain additional safeguards need to be in place. Rightholders whose rights are covered by the extended effect may at any time easily and effectively exclude their works or other subject matter from the licensing mechanism (“opt out”) (article 12.3.c) and all rightholders are to be treated equally, including in relation to the terms of the licence (article 12.3.b).

In addition, Member States shall make sure that appropriate publicity measures are taken to inform rightholders about the ability of the CMO to license works or other subject matter, about the licensing taking place in accordance with article 12 and about the options available to rightholders to opt out. Such publicity measures shall be effective without the need to inform each rightholder individually (article 12.3.d). It is further held in recital 48 to the Directive that publicity measures should be effective throughout the duration of the licence and should not involve imposing a disproportionate administrative burden on users, CMOs or rightholders. This obligation to inform builds on similar (but more far reaching) obligations to inform, following from the CJEU judgment in [Soulier and Doke](#), a case that dealt with a mechanism on legal presumption in French copyright legislation. In that case, the CJEU held that “every author must actually be informed of the future use of his work by a third party and the means at his disposal to prohibit it if he so wishes.”

The possibility to introduce provisions in national legislation on extended effect based in article 12.1 is not unrestricted. An important requirement is set out in article 12.2, where it is held that Member States shall ensure that the licensing mechanism

referred to in article 12.1 is only applied within well-defined areas of use, where obtaining authorisations from rightholders on an individual basis is typically onerous and impractical to a degree that makes the required licensing transaction unlikely, due to the nature of the use or of the types of works or other subject matter concerned. It is also held that Member States shall ensure that such licensing mechanism safeguards the legitimate interests of rightholders. Article 12.2 thus limits the possibility for Member States to introduce provisions on ECL to situations where individual licensing or collective licensing based on individual authorisation (mandates) is impossible or almost impossible. i.e. situations that can be described as market failure (cf. recitals 45 and 47 to the Directive). This requirement, together with the reference to the importance of safeguarding the legitimate interests of rightholders, can be understood as inexplicit references to the second (“do not conflict with a normal exploitation of the work”) and third step (“do not unreasonably prejudice the legitimate interests of the right holder”) of the [three-step test](#) (cf. recital 47 to the Directive).

However, the fact that article 12.2 does not explicitly relate the mechanism of ECL to the three-step test, means that the DSM directive does not take a clear stance on an aspect that has been widely discussed in the literature: whether mechanisms of ECL are [limitations to copyright protection](#), or whether they are (merely) “[arrangements concerning the management of rights](#)” (as indicated in recital 18 to directive 2001/29, the Infosoc Directive). That article 12.2 does not provide a clear answer to this question is further complicated by the wording of article 12.4, where it is held that article 12 “does not affect the application of collective licensing mechanisms with an extended effect in accordance with other provisions of Union law, including provisions that allow exceptions or limitations”. The references in article 12.4, combined with the fact that article 12.1 is a “may” provision, means that it is unclear to what extent article 12 *harmonises existing regimes* of ECL in the Member States (which I believe is the intention) or whether it *provides an additional option* for Member States (to introduce or shape such regimes) (cf. recital 46 to the Directive). As indicated above, it is common in some Member States, for example Sweden, that collective management is carried out by organisations that are not to be considered as “collective management organisations” and they would thus fall outside the scope of harmonisation set out in article 12. This is an aspect that probably will get some attention during the implementation of the Directive into national law, and work on this matter has already begun in [Sweden](#).

A potential solution to challenges of Article 17?

An article in the Directive that has received particular attention is Article 17 (Article 13 in the Commission’s proposal) on the use of protected content by online content-sharing service providers. Simply put, the Article holds that when the services of an online content-sharing service provider (intermediary) are used by internet users to upload images, sounds, videos and other material which infringes copyright, the intermediary may under certain conditions be considered (directly) liable for those infringements. This article has been discussed in more detail [here](#) and [here](#), but simply put, these paragraphs hold that if intermediaries cannot obtain licences for the legal provision of the material, they must take certain steps to ensure that infringing material is not made available.

A fundamental [criticism](#) directed against Article 17 concerns the obligation on the intermediary to enter into licensing agreements with rightholders to avoid liability for infringement. It has been submitted that, in practice, it can be difficult for the intermediary to obtain licenses that cover all the material that is made available via the platform. It is clear that the Directive highlights the need for flexible and broad licensing solutions for the material present on the platforms. I therefore believe that the ECL of Article 12 may provide an effective and balanced solution to some of the licensing challenges that Article 17 raises, which rightholders, intermediaries and the public (internet users) can all greatly benefit from.

Conclusion

The new Directive must be implemented in the legislation of the Member States by 7 June 2021 at the latest. For my own part, I am optimistic that national implementations of article 12 can provide an incentive for rightholders to organize themselves in representative organizations (which is already largely the case in Sweden and the other Nordic countries). This could, for example, provide a solution to some of the licensing challenges posed by article 17. In such a scenario, the new rules would fulfil their (copyright) purpose of providing remuneration to rightholders when their works, etc., are used online, while the public's (legitimate) interest and demand in getting access to copyright-protected material in the online environment would be met. The rules would thus also fulfil their basic (copyright) function: to give the public access to a wide range of films, music and other copyrighted material, while providing authors and other creators with a say in the use of their works and other protected works - and to stimulate future creativity and investments in such activities.

Of course, as with most provisions in copyright, Article 12 only applies on a territorial basis - an aspect that is stressed in the first paragraph of article 12 which includes the wording "as far as the use on their territory is concerned". Interestingly, another article in the Directive (Article 9) provides for a cross-border mechanism [related to ECL](#) regarding certain uses carried out by cultural institutions (Article 8), and article 12.6 (and recital 50) point to a possible need to provide a cross-border mechanism also for article 12. I will explore the possibility of also providing for a cross-border mechanism for Article 12 in a future blog post.

This post is part of a series on the new Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market (CDSM Directive):

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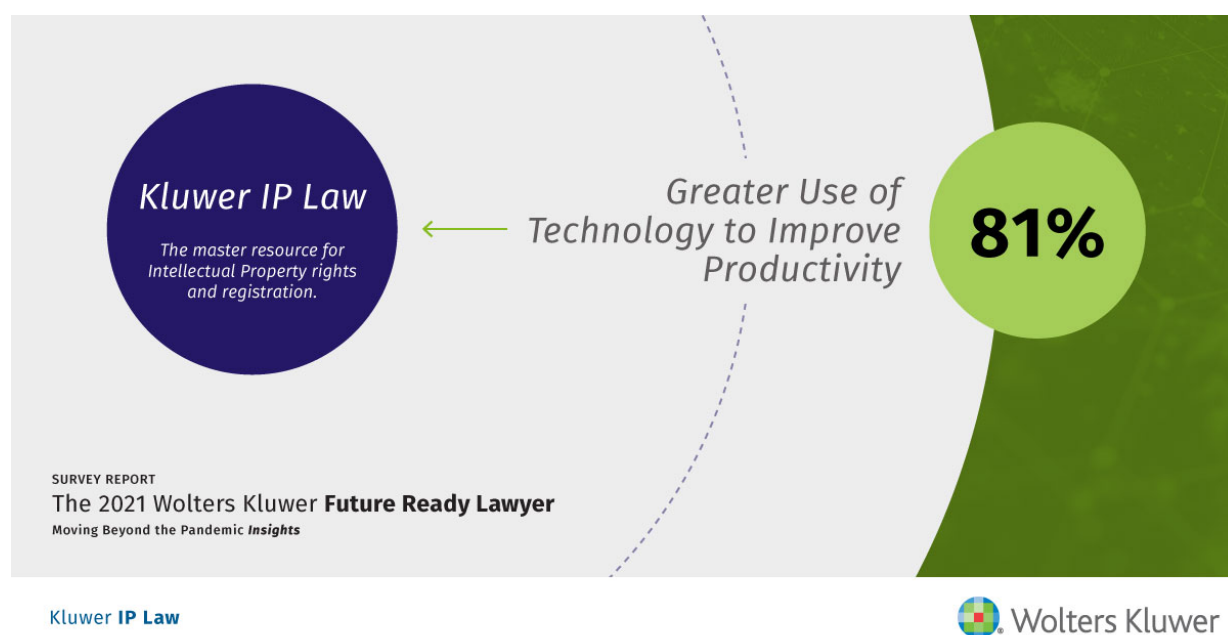
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