Kluwer Copyright Blog

The New Copyright Directive: Out of commerce works (Articles 8 to 11): is it possible to untie the Gordian knot of mass digitisation and copyright law without cutting it off? – Part I

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Articles 8-11 of the Directive on Copyright in the Digital Single Market (CDSM) aim to establish a clear framework for the digitisation and dissemination, including across borders, of works or other subject matter that are considered to be out of commerce.

Mass digitisation and the making available online of copyright protected content brought new dimensions to the copyright existential inquiry to adapt to technological and societal evolutions. Mass digitisation projects undermine classic copyright principles and often necessitate alternative approaches in relation to the scope and the exercise of copyright protection. The conciliation of the effective safeguard of copyright protection with the goal of the democratisation of access to information has often been expressed as a Gordian knot.

This blogpost is divided in two parts. Part I provides an overview of the background of EU legislative responses to the challenges brought by mass digitisation and the concept of out of commerce works. Part II is dedicated to the analysis of the key

provisions of the mechanisms established by the Directive.

The precursors of the CDSM's "out of commerce" provisions

The emergence of an EU legal framework on out of commerce works did not come out of the blue. European copyright law was forced to deal with the legal conundrum of mass digitisation and the making available online of works protected by copyright as far back as 2004 when the Google Books saga started.

Legitimate mass digitisation and the making available online of copyright protected content presuppose either the authorisation of the rightholders or justification on the basis of a copyright exception. Every response to mass digitisation challenges must respect this fundamental copyright diptych, in order to avoid unjustified expropriation of intellectual property. In the case of orphan works (see Recital 7 of the Orphan Works Directive), where it is not possible to obtain the rightholders' prior consent to the carrying out of acts of reproduction or of making available to the public because the authors and rights holders are unknown or untraceable, the clear solution of the establishment of a new exception was chosen. On the other hand, for cases where it is not impossible, but very difficult to obtain prior authorisation (out of commerce works) a solution facilitating voluntary licensing between the interested parties was initially opted for in September 2011, when the Memorandum of Understanding on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works (MoU) was signed by associations representing publishers, authors, collecting societies and libraries, under the auspices of the EU Commission. The origin of Articles 8-11 is traced back to the key principles of this MoU, which even in 2011 was considered as an intermediary step which should be replaced by legislation which could provide a basis to ensure legal certainty. Furthermore, the Directive's provisions have been influenced by the aftermath of national solutions adopted by certain Member States, such as Germany (see here and here, s51,52) and France. In the meantime, the new provisions have partially taken into consideration the concerns expressed by the CJEU in the decision in the Soulier case, even though, in substance, they bypass Soulier's key findings.

Towards an EU conceptual framework of "out of commerce" works

The CDSM opts for a broad and elastic concept of out of commerce works. According to Article 8 par. 5, a work or other subject matter shall be deemed to be out of commerce when it can be presumed in good faith that the whole work or other subject matter is not available to the public through customary channels of commerce, after a reasonable effort has been made to determine whether it is available to the public. The commercial availability of the work is determined flexibly on the basis of fairness standards, while a significant advancement is that the status of out of commerce works is not restricted to specific types of works, such as only literary works, as was the case in the MoU or in national schemes for out of commerce works. As in the Orphan Works Directive (Article 3 par. 1), the concept of good faith is a key factor for the declaration of out of commerce status. The reasonable effort should not have to involve repeated action over time but it should involve taking account of any easily accessible evidence of upcoming availability of works or other subject matter in the customary channels of commerce (Recital 38 CDSM).

One of the questions raised has been whether or not the availability of the work in commerce shall be perceived holistically as covering every expression of the work in any form and language. Given that works may have different chronological cycles of commercialisation, it is important to avoid the neutralisation of the right to exploit the work in different ways and at different times. The criterion of commercial availability is constructed in a balanced way. Adaptations and translations are perceived as non-competitive distinct works which are destined for different markets. Accordingly, the commercial availability of adaptations or translations should not prevent a work from being deemed to be out of commerce in a given language. On the other hand, the commercial availability of a work in a different version – such as subsequent editions of literary works and alternate cuts of cinematographic works – or in a different format, precludes its qualification as out of commerce, since it is the same work in substance. It is also noteworthy that the provisions also cover works which were never intended for commercial use or have never been exploited commercially (Recital 30, CDSM) (such as posters, leaflets, trench journals or amateur audiovisual works) and even unpublished works, provided, however, that national rules on moral rights (mainly the *droit de divulgation*) are respected (Recital 37, CDSM). The definition priori offers a concrete frame for the conceptual building of an EU autonomous notion of out of commerce works. Nevertheless, the harmonised status of out of commerce works is undermined by the discretion left to Member States to be able to link the status of out of commerce work with different cut-off dates, such as was the case for the German and French national solutions, where the scope of the law was limited to works published before the years 1966 and 2001 respectively. Furthermore, different perceptions on the notion of customary channels of commerce may further fragment the EU status of out of commerce works. While it is clear that the availability of a book in a book shop is the mainstream customary channel of commerce, there might be cases whether it would be difficult to determine whether a channel of commerce is customary for a certain type of work. For example, is self-publication of a work through the author's site, which might generate revenue through advertising or paid subscriptions, a customary channel of commerce? Furthermore, the Directive does not expressly exclude, as was the case in the MoU, second hand shops and antiquarian shops from the notion of customary channels of commerce.

Part II of this blogpost is dedicated to the analysis of the legal mechanisms which provide a legal basis for the digitisation and the online dissemination of out of commerce works.

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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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The New Copyright Directive: A tour d'horizon – Part II (of press publishers, upload filters and the real value gap) by João Pedro Quintais

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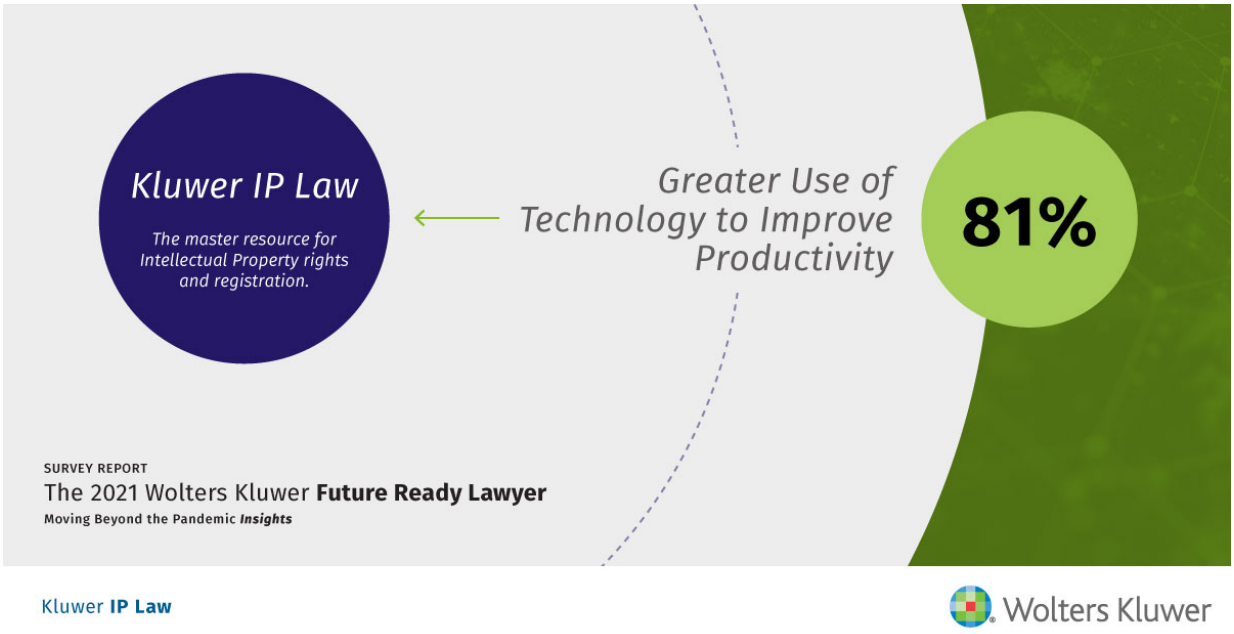

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