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 II

Tatiana Synodinou (University of Cyprus) · Monday, August 5th, 2019

Part I of this blogpost was dedicated to the background which led to Articles 8-11 of the CDSM and to the concept of out of commerce works. Part II critically overviews the core of the mechanisms established by the Directive.

The dual regime of the Directive

The crux of the provisions certainly lies in the dual regime established, which consists of a combination of a new licensing mechanism and a mandatory copyright exception. Public interest is the driving force for the provisions, since Cultural Heritage Institutions (CHI) which have out of commerce works permanently in their collections (and not private entities) are beneficiaries of both schemes.

When a collective management organisation (CMO) concludes a non-exclusive licence for non-commercial purposes with a CHI, this licence may be extended to other unrepresented rightholders, while the specific type of licensing mechanism, such as extended collective licensing or presumptions of representation, can be decided by each Member State in accordance with its legal tradition (Recital 33 CDSM).

Two conditions have to be met for this licensing system to be legitimate: the CMO shall be sufficiently representative of rightholders of the relevant type of works or other subject matter and of the rights that are the subject of the licence and all rightholders shall be guaranteed equal treatment in relation to the terms of the licence. The Directive covers the use by CHI for exclusively noncommercial purposes. However, this does not necessarily mean that the licences are free. Accordingly, any licences granted should not prevent CHI from covering the costs of the licence and the costs of digitising and disseminating the works or other subject matter covered by the licence (Recital 40 CDSM).

Representativeness is to be assessed in relation to the country where the CHI is established. Even though sufficient representativeness of the CMO is a key concept for the legitimacy of the licensing mechanism, the Directive does not establish uniform precise criteria for the assessment of the representativeness but instead leaves the determination of the requirements to be satisfied for CMOs to be considered sufficiently representative to the discretion of the Member States. The assessment should not be simply numerical. Member States should take 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 who have given a mandate allowing the licensing of the relevant type of use (Recital 48, CDSM). This licensing system lowers transaction costs by facilitating mass rights clearance, since it is not required that the CHI conducts a diligent search on a work by work basis, as is the case in the Orphan Works Directive.

Furthermore, acknowledging that the licence-based solution might not be possible (such as where there is no CMO for a certain type of work or where the relevant CMO is not sufficiently representative), the Directive includes a “fall-back” exception which enables CHI to make available online out of commerce works for non-commercial purposes, on condition that the name of the author or any other identifiable rightholder is indicated, unless this turns out to be impossible.

Both the licensing scheme and the exception are based on the use of the works without the author’s prior consent. While this is typical for an exception, bypassing the author’s authorisation in a collective licensing mechanism necessarily requires that the voice of the natural owner of copyright is able to be effectively heard even at a later stage. In this context, the Directive provides a mechanism which enables authors to opt out from the licensing scheme. It is noteworthy that the right to opt out is also established where the making available of the work is based on the exception. By doing so, the Directive takes distance from the restrictive stance of the CJEU in Soulier, where the preventive nature of copyright was emphasised in order to rule out the opt-out mechanism of the French law on out of print works. The Directive builds on the line of reasoning of the CJEU in relation to the implicit consent of the author as a possible legal basis for a use of a work by a third party. As the CJEU held in Soulier, the circumstances in which implicit consent can be admitted must be strictly defined in order not to deprive of effect the very principle of the author’s prior consent. In particular, 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 (par. 38 of Soulier). The Directive’s provisions adopt a less rigid approach however in relation to

how this information shall be provided. It departs from the conjunctive requirements of providing actual and individual information to each author and opts for the more flexible mechanism of publicity measures. This is a pragmatic approach since the need for providing individualised information to each author makes problematic the implementation of an extended collective management licensing scheme.

From prior consent to opting out

Publicity measures are defined in Article 10. Information for the purposes of the identification of the out-of-commerce works covered by a licence or used under the exception, as well as information about the opt-out mechanism and the parties to the licence, the territories covered and the uses shall be made permanently, easily and effectively accessible on a public single online portal that will be established and managed by the European Union Intellectual Property Office (EUIPO). The CDSM is much more explicit than Article 5 of the Orphan Works Directive on the modalities of how to end the out of commerce status. This is also a significant recognition of the legitimacy of extended collective licensing mechanisms as a proper legal basis for the use of copyright protected works at an EU copyright level, even though it provides scant harmonisation and only in relation to the specific category of out of commerce works.[1]

Authors' interests are safeguarded through the requirement that a broad range of information has to be provided to authors, and through the power given to authors to withdraw from the out of commerce status without burdensome formalities, in line with Soulier's findings (par. 51). Rightholders shall be able to withdraw at any time, easily and effectively, either in general or in specific cases, including after the conclusion of a licence or after the beginning of the use concerned. Accordingly, in the Directive's approach, a sophisticated opt-out mechanism which consists of the author's right to withdraw from the out of commerce status freely and unconditionally, upon receiving appropriate and detailed information, is not considered as a Berne forbidden formality that interferes with the effective enjoyment of copyright. This breach of the prevailing rule of the preventive nature of copyright is justified on public interest grounds. It is also important that the exercise of the right to exclude does not preclude the rightholders' claims to remuneration for the actual use of the work or other subject matter under the licence.

The substitution of the prior consent by the opt-out mechanism is a symbolic shift which alters the nature of copyright protection in order to respond to the challenges of mass digitisation. Contrary to other fields of Internet law, such as personal data protection, where the mechanism of opting out from the processing has been gradually replaced by stringent explicit consent requirements, the supple regulatory model of rightholders' opting out from certain uses of their works by third parties has been gradually established as a solution for certain massive digital uses of copyright protected works regardless of whether the legal basis for such uses is extended collective licensing (Article 8 par. 1 of CDSM) or an exception (as in both the Orphan Works Directive and Article 8 par. 2 of CDSM)). Certainly, the assessment of the legitimacy and the compatibility of such mechanisms with international copyright law principles is a fragile exercise, which strongly depends on their details, especially as regards the strong guarantee that the author's power to oppose and to withdraw is

limitless. It should also be noted that those mechanisms are justified on robust public interest grounds and apply in specific fields.

The need to ensure the compliance of the new EU regime on out of commerce works with international copyright law principles is also reflected in the Directive's choice to exclude its application to foreign works. Specifically, was also the case for the Orphan Works Directive, it does not apply to sets of out-of-commerce works if there is evidence that such sets predominantly consist of works of non-EU nationals (works first published or first broadcast in a third country and cinematographic or audiovisual works of which the producers have their headquarters or habitual residence in a third country). However, the Directive's provisions shall apply where the CMO is sufficiently representative of rightholders of the relevant third country.

The territorial scope of both mechanisms is defined in Article 9. Licences granted in accordance with Article 8 may cover uses in any EU country. For uses of works under the exception, the Directive establishes the legal fiction that they shall be deemed to occur solely in the Member State where the CHI undertaking that use is established.

Cutting, instead of untying, a Gordian knot should not always be seen as a failure to solve its mystery, but also as a bringing a fresh approach to a daunting problem. The Directive's new provisions on out of commerce works try to achieve a trailblazing, albeit fragile, balance between the interests of the authors and the public by achieving a compromise between well established and novel approaches in European copyright law. The legal mechanism established by Articles 8-11 departs from the Orphan Works Directive's burdensome instrument of diligent search on a work by work basis in order to promote collective licensing tools which would facilitate the making available online of sets of out of commerce works by CHI. In this context, it could serve as a prototype for future evolutions in EU Copyright law, since it is an official consecration of an alternative regulatory model implementing a separation between ownership and exercise of copyright. At the same time, the unveiling of its full potential is left to the discretion of the Member States.

[1] For the non-interference of previous Directives with the extended collective licensing mechanisms at the national level, see: Recital 18 of the Directive 2001/29, Recital 12 of the Collective Management Directive, Recitals 4 and 24 of the Orphan Works Directive.

———————————————————————————-

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):

The New Copyright Directive: A *tour d'horizon* – Part I by João Pedro Quintais

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

The New Copyright Directive: Digital and Cross-border Teaching Exception (Article 5) by Bernd Justin Jütte

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

The New Copyright Directive: Article 14 or when the Public Domain Enters the New Copyright Directive by Alexandra Giannopoulou

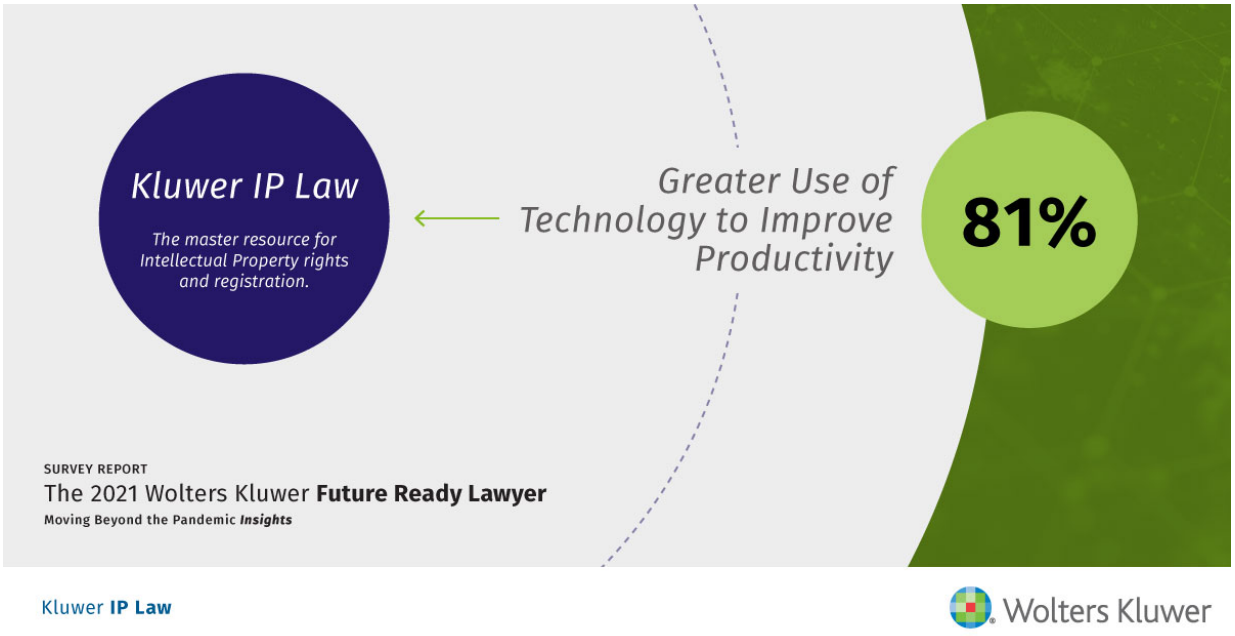
The New Copyright Directive: Fair remuneration in exploitation contracts of authors and performers – Part 1, Articles 18 and 19 by Ananay Aguilar

The New Copyright Directive: Text and Data Mining (Articles 3 and 4) by Bernt Hugenholtz

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 by Tatiana Synodinou

---

To make sure you do not miss out on regular updates from the Kluwer Copyright Blog, please subscribe here.



This entry was posted on Monday, August 5th, 2019 at 8:59 am and is filed under Copyright, European Union, Legislative process
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.