

European Copyright Society's (ECS) Comments on the implementation of the CDSM Directive in Member States - Part I (ECL and Works of Visual Art in the Public Domain)

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Almost a year has passed since the adoption of the Directive on Copyright in the Digital Single Market (CDSM) Directive on the 6th of July 2019. This marked the end of a controversial legislative process at EU level, but also the beginning of a highly demanding process of national implementation. While the Directive has to be implemented in the laws of the Member States by the 7th of June 2021, the implementation process, public consultation and relevant debates have already started in the majority of EU Member States (for the current status of the implementation process, see: [CREATe, An EU Copyright Reform Resource](#)).

Due to the length of the text (one of the longest in the copyright acquis, with 86 recitals and 32 articles), the interplay with previous EU copyright Directives and, most importantly, the leeway left to Member States on a number of issues, the implementation of the Directive in the laws of the Member States raises significant challenges for national lawmakers.

The European Copyright Society (ECS) has issued a series of insightful Comments on the implementation of the Directive's provisions, which aim to serve as guidelines for policy options for the implementation of the Directive in the Member States. Four Comments have already been published on Articles 8 and 12, 14, 17 and 18-22 of the Directive.



The key points of the first two Comments are briefly presented in Part 1 of this post, while Part 2 covers the third and fourth Comments. The full text of the Comments can be found [here](#).

Comment on the Implementation of ECL rules (Articles 8 and 12) of the CDSM Directive

The ECS first notes that Articles 8 and 12 of the CDSM Directive provide the first explicit legal basis for extended collective licences (ECL) in the EU copyright acquis. Article 8 is a mandatory rule on the use of out-of-commerce works and other subject matter by cultural heritage institutions, whereas Article 12 is an optional rule that applies to all kinds of works or other subject matter and all forms of use. Although Article 12 is optional, it harmonises national rules on ECLs and leaves some, limited, freedom to the Member States. Accordingly, national rules on ECLs must comply with the safeguards in Article 12(3) and the stipulations in Article 12(2).

In regard to the representativeness requirement of the collective management organization (CMO), the ECS suggests that it should not be construed too rigidly, for instance as a requirement that a majority of rightholders in the relevant field must be members of the mandated CMO. The representativeness requirement should be a flexible tool that safeguards the interests of rightholders and enables effective collective licensing.

The Directive is silent on further conditions for providing the CMO with the legal mandate to enter into collective agreements with extended effect. Hence, it is to be presumed that Member States are at liberty regarding such conditions. The ECS recommends that an administrative authorisation scheme covering CMOs mandated to manage ECLs and the individual collective agreements with extended effect is implemented in each Member State. Such a scheme will provide for the highest degree of predictability and transparency for the process of determining which agreements will trigger the extension effect.

Furthermore, the ECS Comment highlights that ECLs are only applicable in well-defined areas of use. This means that the area shall be clearly defined and must not be overly broad. Accordingly, the ECL agreement cannot be general in nature and comprise all kinds of works and all kinds of uses, but must do the job of specifying the uses subject to the ECL. For all kinds of ECL, it is a condition that unrepresented right holders should have the possibility of opting out of the ECL scheme easily and effectively and, in this way, regain the exclusivity of their copyright. Member States that implement an ECL scheme shall, according to Article 12(3)(d), ensure that appropriate publicity measures are taken to inform rightholders about ECLs and Article 12's safeguards. According to the provision, publicity measures shall be effective without the need to inform each rightholder individually. In addition, opting out must not be so complicated and onerous as to discourage authors from doing so.

Comment on the Implementation of Article 14 of the CDSM Directive ("Works of visual art in the public domain")

As regards Article 14 and its meaning, the ECS emphasises that what is meant is that once the copyright in a work of visual art has expired, it may not only be reproduced, communicated or used without the author's consent since it is in the public domain, but that in addition, no exclusive rights shall attach to any copy of a public domain work of art, unless the reproduction constitutes its author's own intellectual creation.

Although the wording of Article 14 appears to be rather straightforward, it gives rise to a number of questions that need to be answered at the stage of implementation.

First, with regard to the objects covered by Article 14 (works of visual art), the ECS is of the opinion that rather than adopting a narrow understanding of "works of visual art", a broader understanding should be opted for. According to such an understanding, which focuses on the "faithfulness" of the reproduction laid down in Recital 53, Article 14 would also apply to faithful - in other words, non-creative - reproductions of public domain photographic works, design works (works of applied art) and maps. To conclude otherwise would grant greater derivative protection to such works than to works of visual art.

Another question is *which rights* are affected by the operation of Article 14. Article 14 mainly, if not exclusively, affects related rights in relation to certain protected subject matter. This includes the related right in non-original photographs - and eventually non-original film stills - provided for by some Member States' national laws. Another important issue is what is to be understood by "reproductions". The ECS supports an understanding of the term "reproduction" deriving from Recital 53's reference to "faithful" reproduction. In other words, Article 14 should also cover faithful reproductions of 3D objects (e.g. by plaster casts, 3D-reproductions and prints) which are in the public domain, provided their purpose is merely to reproduce the original object in question faithfully and not to transform it in any creative way. Furthermore, not only digital but also analogue reproductions shall be covered, while the ECS supports a reading of Article 14 which exempts all acts of use undertaken regarding faithful, non-original reproductions after the term of the work reproduced has expired, irrespective of the date on which the reproduction in question was made.

Part II of this post will cover the ECS Comments on the implementation of Articles 17 and 18-22 of the CDSM Directive.