Kluwer Copyright Blog

European MoU on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works

Johan Axhamn (Department of Business Law, Lund University) · Thursday, September 22nd, 2011

In the presence of Michel Barnier, European Commissioner for the Internal Market and Services, a Memorandum of Understanding (MoU) was signed yesterday between European libraries, publishers, authors, and their collecting societies. The MoU comprises a set of key principles that will give European libraries and similar cultural institutions the possibility to digitize and make available on line out-of-commerce books and learned journals which are part of their collections. The principles are not legally binding but rather operate as a facilitator to encourage and underpin voluntary licensing agreements between the said parties.

The MoU stems from the Commission's Digital Agenda for Europe and the more recent Communication on a Single Market for Intellectual Property Rights. It is complementary to the Commission's recently adopted legislative proposal on orphan works (i.e. the rightholder in the work is not identified or, even if identified, is not located after a diligent search for the rightholder has been carried out). In contrast to the latter, the MoU is focused on "mass digitization" – for instance of parts of a library's collection. The principles in the MoU focus on "Voluntary agreements on out-of-commerce works", "Practical implementation of collective agreements" and "Cross border access to digital libraries".

According to a working definition for the purpose of the stakeholder dialogue leading up to the MoU a work is out of commerce "when the whole work, in all its versions and manifestations is no longer commercially available in customary channels of commerce, regardless of the existence of tangible copies of the work in libraries and among the public (including through second hand bookshops or antiquarian bookshops)." However, this definition is not necessarily appropriate for the licensing agreements based on the MoU. Therefore, principle 1.3 of the MoU states that it is up to the right holders and the cultural institutions to define the term "out-of-commerce" in each licensing agreement in accordance with customary practices in the country of first publication of the work. Needless to say, the presence of "long tail" distribution of demand for cultural content over the Internet may pose a challenge for establishing a definition of "out-of-commerce."

The MoU includes a provision trying to solve the problem with so called "outsiders", i.e. right holders who are not members of the eligible collecting society and/or right holders of orphan works. According to principle 2.4, where a right holder whose work was first published in a particular Member State has not transferred the management of his rights to a collective management organization, the collective management organization which manages rights of the same category in that Member State shall be *presumed to manage* the rights in respect of such

work. To provide some safeguards to outsiders, the same principle holds that right holders shall have the right to *opt out* of and to *withdraw* all or parts of their works from the licence scheme derived from any such agreement.

As the MoU is not a legally binding instrument providing rights and obligations, the MoU or any licensing agreement based on it will arguably not provide enough or adequate legal certainty to the cultural institutions for use of works belonging to "outsiders". For his reason, recital 9 states that legislation might be required to create a legal basis for the presumption of management of outsiders' rights. The Copyright Acts of some Member States already provide for such legal certainty. One example is the Extended Collective Licensing model as developed in the Nordic countries.

The MoU identifies rights-clearance problems related to cross-border dissemination of copyright protected content. These challenges emanate from the fact that the current European copyright system is (still) based on the principle of territoriality. From this follows that even if a statutory provision is introduced in one Member State to give "true extension" or "presumption" effect to a collective agreement to also encompass outsiders' rights, this legislative measure would have no effect in other territories (i.e. Member States). For this reason, principle 3.3 holds that the presumption on representation laid down in principle 2.4 shall apply also to acts of use of the work covered by the licence which occur in a Member State which is not the Member State in which the licence was agreed. However, as with the principle on presumption, this principle (being legally non-binding) would possibly not provide the cultural institutions with sufficient legal certainty. For this reason, recital 11 calls upon the Commission should consider the type of legislation necessary to ensure legal certainty in a cross-border context.

The MoU is a major step forward in establishing consensus between cultural institutions and right holders and political support for practical solution to rights-clearance challenges in mass-digitisation projects. However, the MoU stops short of providing the cultural institutions with adequate legal certainty. In addition, the MoU is a *sector-specific* stakeholder-driven agreement. As pointed out by the Commission, it can therefore not be seen as a solution that can be automatically extended to other print material, other types of works or other uses. The copyright challenges highlighted in the MoU are however of a general nature. For example, similar rights-clearance challenges as regards audiovisual content have been highlighted by the Commission in a recent Green Paper.

In conclusion, the MoU will probably need to be followed up with complementary voluntary and legislative measures covering all areas of copyright. A recent report on Cross-border extended collective licensing elaborates on these questions.

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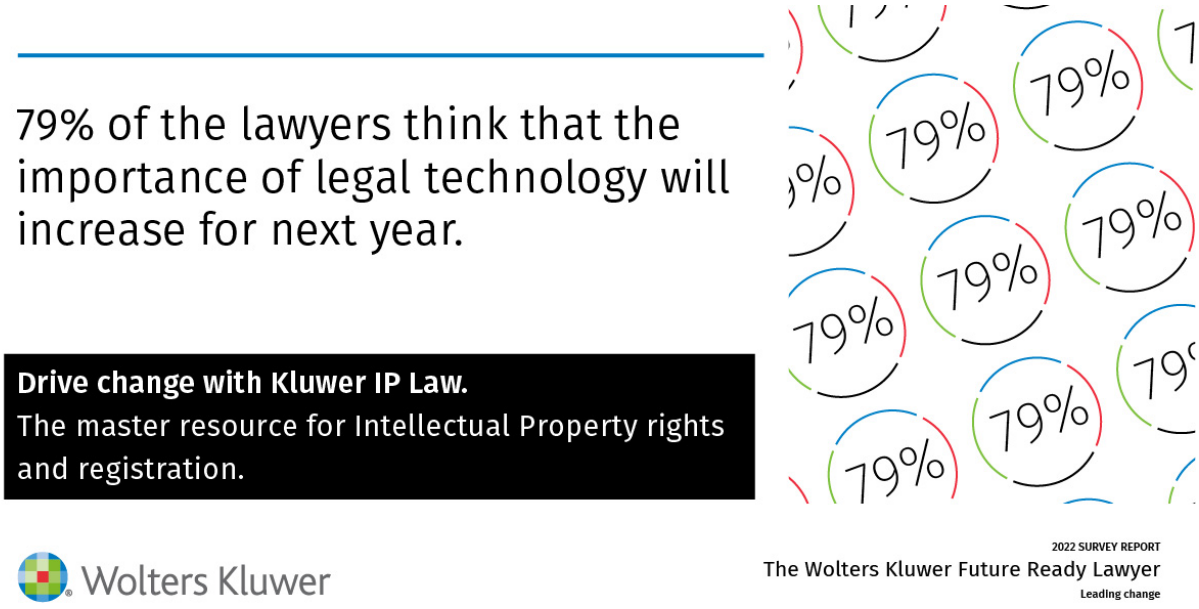

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