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# Proposal for a Directive on Collective Rights Management and (some) Multi-territorial licensing. (Part II)

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On July 11 the European Commission published its first official draft of the Proposal for a Directive "on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market" (the "**Proposal**"). **This blog post is Part II of an analysis of the Proposal**. Part I addressed its background, overview, and looked at its general rules on subject matter, scope and Collective Management Organizations ("**CMOs**"). This Part II discusses multi-territorial licensing ("**MTL**") and enforcement measures.

**MTL of musical works to author's CMOs**

Title III of the draft Directive constitutes an "absolute novelty from a regulatory perspective", as no similar legislation can be found in any Member State. By definition, MTL requires at least 2 territories of Member States and relates to author's online rights in musical works, which include the rights of reproduction and communication to the public/making available, as set forth in arts. 2 and 3 of the Information Society Directive. This scope covers a wide range of online services, from music download and streaming services, to those "providing access to films or games where music is an important element", which require a license per online use of each right fragment.

When providing MTL services, authors rights' CMOs (or their subsidiaries created for this purpose) must fulfil a series of conditions detailed in the Proposal, which generally relate to their capacity to process these licenses (e.g. efficient and transparent electronic systems of identification, monitoring, invoicing, collecting and distributing amounts), to provide relevant and accurate updated information, reporting/invoicing and payment. Most these obligations come coupled with (internal) control and correction procedures.

In what concerns **payments**, it is not clear whether the art. 26 obligation to distribute amounts to rights holders "accurately and without delay after the actual use of the work is reported" translates into a real difference (read: a much shorter payment term) from the general "regular and diligent" standard of art. 12 (applying to all CMOs). The significant difference in wording seems to indicate so, but it is possible to envision alternative interpretations and business practices leading to similar payment terms, to the detriment of rights holders. In fact, Annex I (concerning information to be provided in the annual transparency report), when listing the "[f]inancial information on amounts

due to rightholders" only indicates the need to provide a comprehensive description of the reasons for the delay in carrying out the distribution and payments within the deadline in art. 12(1), there being no reference made to art. 26. In other words, no shorter deadline seems to be imposed. Some clarification on these provisions would therefore be welcomed.

One of the main issues identified in the above mentioned EU case law and official documents has been the artificial partitioning of markets on a territorial basis. MTL is envisioned as the solution to this problem, at least in what concerns the market for author's online rights in musical works. However, nothing in the Proposal prevents CMOs from concluding reciprocal representation agreements to grant national licenses, meaning that this **draft Directive does not really impose MTL but merely enables it**, facilitating the aggregation of repertoires.

**But how does it work**? For a CMO not wishing to engage directly in MTL, there are **2 alte**rnatives:

• The **first** is to **outsource** these services, which however will not affect its liability towards any of the parties involved in the licensing scheme.

• The **second** is to conclude a **representation agreement with another CMO** mandating it to conclude MTL agreements for the first's repertoire on a non-exclusive basis and on non-discriminatory management terms. It is also possible that CMOs not granting or offering MTL to request another CMO meeting the legal requirements to enter into such a representation agreement; if the **requested CMO** is already engaged in comparable MTL agreements with other CMOs it **will have an obligation to conclude such an agreement**. A requested CMO in this position would thus be a "**passport entity**" to which other non-MTL CMOs would have a "right to tag on repertoire" (see: Impact Assessment Executive Summary).

Whatever the scenario, *and unless the contracting CMOs agree otherwise*, **distribution of payments** to rights holders in made by the mandated/requested CMO, while the related information is provided to the mandating/requesting CMO, which will then pass it on to its members. This is intended to speed up the payment process, although it may give rise to significant difficulties in practice in cases of challenges by rights holders of amounts paid.

Perhaps the **most MTL-enabling provision** is **art. 30**, stating that if a CMO does not grant or offer MTL in its repertoire or concludes reciprocal MTL agreements until 1 year after the Directive's implementation, then rights holders that had previously authorized that CMO to manage the relevant uses shall be entitled to either (i) grant MTL licenses themselves, or (ii) allow another CMO or third party to do it on their behalf. This is without prejudice of the original CMO being able to license those uses for its national territory, unless the rights holder terminates the contractual relationship. In other words, this article allows for a **unilateral modification of the contract for MTL uses, preventing a national repertoire lock-in concerning these uses without the rights holders having to withdraw** their rights **from the CMO**.

One of the most **ambiguous provisions** in the Proposal can be found in **art. 32**, according to which CMOs providing MTL *"shall not be required to use as a precedent for other types of services licensing terms agreed with an online music service provider, when the online music service provider is providing a new type of service which has been **available to the public for less than three years**."*

The Explanatory Memorandum and Recital (34) clarify that this is intended to provide a degree of flexibility which will encourage granting of (more favourable) licenses to "**innovative online services**", without the licensing terms being considered as a precedent for other licenses. To put it differently, whatever terms are agreed in this context cannot be considered for the purposes of the objective criteria – such as the economic trade value – to be taken into account under art. 15 when establishing tariffs for exclusive rights. As for the three years threshold for considering a service innovative, neither the Proposal nor the Impact Assessment Analysis contain a clear justification for such timeframe.

Finally, the Proposal contains one **significant exception to the MTL regime (art. 33)**, applying to voluntary collective MTL of the online communication to the public or making available rights in **musical works used by broadcasters in their** radio and television **programmes**. The justification for this special treatment is set out in Recital (35) and seems to be connected with the standard offline practices of broadcasting organizations, which traditionally entail obtaining a license for musical works from CMOs limited to their own broadcasts of programs. Consequently, this provisions aims at facilitating the online licensing of music rights for "purposes of simultaneous and delayed transmission online of television and radio broadcasts".

With this objective in mind, this **exception covers interactive and non-interactive uses** (i.e. more than mere simulcasting), "as well as any online material produced by the broadcaster which is ancillary to the initial broadcast of its radio or television programme". Recital (35) clarifies:

• Ancillary materials are to be understood as limited to "material having a clear and subordinate relationship to the original broadcast produced for purposes such as supplementing, previewing or reviewing that television or radio programme".

• References to interactive uses and delayed transmission – which can (and indeed should) be construed as acts of making available (and thus distinguishable from the communication to the public nature of broadcasting and simulcasting) should be interpreted restrictively; this exception "should be limited to what is necessary to allow access to television or radio programmes online", and that it "should not operate so as to distort competition with other services…or lead to restrictive practices, such as market or customer sharing".

Despite this clarification, some doubts remain as to the Recital's interpretative value, given the broad wording of art. 33. To be sure, there is a potential for legal uncertainty here.

On the whole, the exception provided for in art. 33 narrows the scope of application of the MTL model, as it does not include broadcaster's use of musical works in their programmes (and ancillary materials). Furthermore, MTL agreements under this exception are to be subject to the external control of competition law (arts. 101 and 102 TFEU).

**Enforcement measures**

The Proposal contains a 3-pronged approach to dispute resolution involving CMOs: (i) disputes with members or rights holders are subject to an internal resolution mechanism; (ii) disputes with users are subject to either judicial control or an independent and impartial body; (iii) specific MTL disputes can be submitted to an independent and impartial body. In all cases decisions are subject to judicial control. Member States are directed to create complaints mechanisms and procedures vis-à-vis the obligations set forth in the Proposal, as well administrative sanctions. There are

several provisions demanding for the existence of supervising authorities in each Member State, for purposes of complaints procedures, sanctions and monitoring of MTL practices; however, the Proposal does not require that these are separate and independent authorities solely dedicated to CMO supervision.

**Concluding remarks**

The Proposal is, as often happens in EU legislation in the field of copyright, a result of compromise between many stakeholders, or at least those with lobbying capacity. The draft text is a consequence of the Commission's dual objective approach. Rules on governance and transparency are extensive, but seem to mostly reflect existing decisions and guidelines at EU level. These are welcome additions to the acquis, but doubts remain whether the vagueness of some provisions will not come back to haunt the EU legislator, especially in what concerns distribution of amounts. Arguably the crown jewel of the proposal – its provisions on MTL – is however open to some criticism: its scope seems too narrow, as it applies solely to the online licensing of author's rights in musical works, excluding any such rights in broadcaster's own programs; the justification and wording on licensing terms applying to "innovative" online service providers is questionable; and payment terms to rights holders in the MTL context are unclear.

On the political side, some commentators have expressed concerns that this proposed reform is "doomed" from the start, given the identity of one of the rapporteurs, responsible for some "strong" remarks on the ACTA debate and viewed as one of the responsible parties for the significant watering down of the Proposal for a Directive on Orphan Works. A few artists have already voiced their criticism, namely due to what they perceive are inadequate provisions to address the issue of timely and accurate distribution of amounts. Elsewhere in the Commission, Vice-President Neelie Kroes welcomed the Proposal with cautious optimism, pointing out the changes it might still suffer as a result of the legislative process and focusing instead on a "more general modernisation of copyright law", to include a review of the Information Society Directive this year and a proposal on copyright levies next year (a process currently under mediation).

Under the ordinary legislative procedure, the Proposal was submitted to the Parliament. The next step is for Parliament to deliver its position on first reading, which will be a result of discussions within the relevant parliamentary committee and a debate in plenary session, subject to simple majority.

**Follow this link for Part I** of this article: background, provide an overview of the Proposal.

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