Kluwer Copyright Blog

Mandatory collective management of copyright: when the road to deadlock is paved with good intentions

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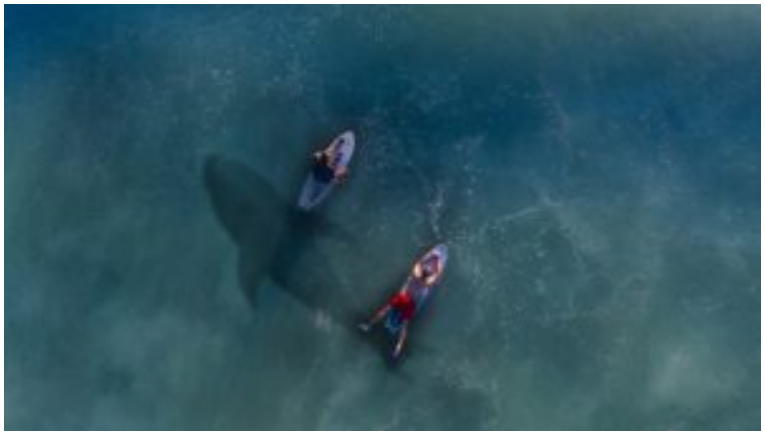

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As a matter of principle, the exercise of the exclusive rights under copyright is the author's individual prerogative: it is the author who decides whether they wish to authorize the reproduction or communication to the public of their works (the same goes for the performer, the producers, the broadcaster or the news publisher). Exceptionally, copyright accommodates other forms of licensing that restrict the author's individual exercise of rights. For instance, in the 2019 copyright reform, the European legislator used the mechanism of mandatory collective management of the retransmission right (art. 4 Retransmission Directive) and extended collective licensing (with opt-out possibility) for out-of-commerce works (art. 8 DSM Directive), in addition to providing a general framework for collective licensing with an extended effect (art. 12 DSM Directive).

Generally, the distinction between collective licensing with extended effect and mandatory collective management of rights is important (see Study on emerging issues on collective licensing practices, p. 134). Collective licensing with extended effect covers various mechanisms in national

copyright law to fill the gaps in the repertoire of the collective management organization ("CMO"), which can then conclude licences for works of right holders who are not affiliated to the CMO. The collective management of rights is mandatory where the individual right holder does not have the possibility to "opt-out" of the collective management by the designated CMO in order to exercise their rights on an individual basis or to join another CMO.

This mechanism of mandatory collective management is not new in copyright. Earlier directives impose the mandatory management of rights, most notably for the cable retransmission right in art. 9 of the SatCab Directive (with an exception for broadcasters in art. 10 SatCab Directive) or they allow the Member States to impose the collective management of rights, such as the resale right (art. 6.2 Resale Directive) or the equitable remuneration for the rental of phonograms or films (art. 5 Rental Directive). Member States, of course, have their own tradition with collective management (as amply demonstrated in the rich 2021 Study on emerging issues on collective licensing practices), which they have adopted as a mandatory tool for exercising the rights of authors and other right holders in a wide variety of situations (as acknowledged under rec. 12 of the Collective Rights Management (CRM) Directive). The resulting lack of harmonization may of course have an impact on the (digital) single market and the position of authors and users alike.

While the collective management of exclusive or remuneration rights may make the licensing process more efficient (and reduce transaction costs) and, at least in theory, provide legal certainty for users of protected works, performances and recordings, the national legislators should keep in mind that the mandatory collective management of exclusive rights is subject to important provisos (such as the Austrian government that intends to subject the new publisher's right to mandatory collective management).

Firstly, the mandatory collective management of rights prevents the author, performer, producer and, since the DSM Directive, publisher from individually exercising their exclusive rights under copyright or related rights. Yet, the exclusive nature of the rights of reproduction, communication to the public (including the right of making available) and the distribution rights implies that, as a matter of principle, the authors, performers, producers and publishers should be able to authorize the use on their own terms (depending on their own revenue model). Mandatory collective licensing is in that sense an important restriction of the exercise of the exclusive rights (which are moreover protected as fundamental rights under art. 17 of the Charter). Commissioner Breton's statement in 2020 to the effect that the publisher's right may not be subject to mandatory collective management should be understood in this sense (see also a 2006 ALAI statement on the exclusive right).

The mandatory collective management should consequently only be imposed if there is a specific use case, when it is obvious that the individual management of the right or even voluntary collective management with the opt-out out of an extended effect create a serious risk of blackouts or jeopardise the exploitation of other works (given the specific circumstances and professional customs of each sector). Such a use case is more likely to exist for the collection of statutory

remuneration rights, which are meant to compensate the potential prejudice triggered by exceptions or limitations but which cannot block the exploitation of the protected work. Where efficient voluntary licensing mechanisms exist, the mandatory collective management of rights ought to be avoided.

Moreover, national legislators are not free to adopt mandatory collective management provisions as they please. They must remain within the confines of European copyright law. In Soulier, the CJEU reminded the Member States that authors are not only protected in the enjoyment but also in the exercise of their exclusive rights. The restrictive modalities of the French system of collective management of rights on out-of-commerce books (based on the implicit consent of the author but without proper prior information) were then placed "within the confines of the derogations provided for the EU legislature", i.e. subject to a check with EU law (see also here and here at p. 60).

From a (digital) single market perspective, the uncoordinated use of licensing mechanisms at the national level entails the risk of more fragmentation (pan-European licences will be more difficult to conclude) – whereas the purpose of each and every copyright initiative at the European level is of course to further the harmonisation and integration at the EU level (in this sense: Study collective licensing…, p. 168).

Finally, mandatory collective licensing schemes do not always deliver the legal certainty to which the national legislators aspire. Especially where several right holders have concurrent rights to the same "content" (authors, performers, producers), where several CMOs manage the same categories of rights or where authors or performers can contractually transfer their rights to other right holders (mostly producers or publishers), the repertoire of each CMO is inevitably opaque and the rights each CMO may actually exercise are bound to be highly contentious (see here). The Retransmission Directive (partially) addresses this point where it requires the Member States to decide which CMO can exercise the retransmission rights where several CMOs manage the same category of rights but it does not solve all conflicts, as apparent from the longstanding litigation on the cable retransmission rights in Belgium, The Netherlands and Norway (e.g. here, p. 218 et s.).

In conclusion, although the CRM Directive may seem to respect the national legislatures' autonomy to impose the collective management of copyrights or neighbouring rights, in practice, the Member States' wiggle room is limited by the protection of copyright as a fundamental right, by the principles of the single market and by the past practice of mandatory collective management, which has demonstrated that the intended legal certainty and licensing efficiency are mostly illusory (see e.g. Annex 1 of the EC evaluation of the SatCab Directive).

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