



The statement of the Centrum Cyfrowe Projekt:Polska on the Proposal for a directive of the European Commission on collective management of copyright and related rights

Centrum Cyfrowe Projekt:Polska (**Centrum Cyfrowe**) welcomes the European Commission's (**Commission or EC**) Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market (**Directive or Project**).

GENERAL REMARKS

The Project keeps in line with Centrum Cyfrowe's goal to reform the copyright for the needs of information society. It applies indirectly to the most important issue of the copyright system which lies at the meeting point of new technologies and copyright itself: non-commercial file-sharing. It is essential to underline that effective and transparent collective management is the basis for many (if not all) of proposed models of regulating the file-sharing. Commission raises that: "technology, the fast-changing character of digital bussiness models and the rising autonomy of Internet users require constant evaluation of current copyright regulations to assure that those entitled, users and consumers are given proper incentives to use opportunities that modern technologies provide and that they are able to use every one of them". In summary: the Commission once again agrees that technology requires copyright changes and those changes are vital. At the same time, which gives hope that further changes will take place, it shows that the Project is just one of the many steps that the EC is willing to undertake to harmonize the problem of internal market licensing.

We believe that a directive regulating the way European collecting societies function and setting a framework for pan-European licensing of musical works is an important, however small, step towards tailoring the copyright of member states for modern technologies. We have no doubt that in the Internet era collective management must evolve towards multi-territorialism, ideally towards global range. However a complex accommodation of European law to function in the Internet era, including regulating the issue of non-commercial file sharing over the web, is needed. Collective management reform is just one of essential actions.

In this light we are happy that the presented Directive states that the Commission considers taking action to make license granting more efficient in general and is willing to update or further harmonize exceptions and limitations of copyright and related rights stated in the 2001/29/WE directive (“**InfoSoc Directive**”).

Besides the issues raised above we need to stress the need to consider exhaustion of rights when it comes to Internet dissemination of copies of digital works.

Within the general remarks we cannot overlook the fact that the Directive only regulates Internet multi-territorial licensing in regard to musical works and their copyright. This means that the Project does not concern related rights or any other works’ copyright.

The Commission notes that the need to regulate other rights is not as pressing. But it is quite the opposite. Centrum Cyfrowe reminds that for years now it has been raised that there is a need for complex licensing regulation of all copyright and related rights subjects on the Internet. We assess that the Commission’s actions are much too slow and fragmented.

We would also like to remind of the fact that we cannot lose sight of the interest of those, who should be in the center of attention of the collective management system - the individual artists and performing artists. In the Digital Era the European collective management system should be built in a way that will also take the works of individual Internet users into account. The Directive should propose a mechanism that will allow such users-creators actual participation in the system and being able to acquire financial gains from the works created on the Internet.

DETAILED REMARKS

Functioning of collective management societies

We welcome the Directive’s regulations with respect to the transparency standards of collective societies. The Project codifies the current rules based on rulings of the European Court of Justice and the Commission in regard to anti-monopoly cases and introduces universal collective society financial transparency and management rules.

It is worth noticing that most of the regulations within chapters I and II of the Directive that are centered around the functioning and financial transparency of all of the collective societies already have been implemented into the Polish law, especially the requirement to publish financial reports. In this area the introduction of the Directive into the Polish law should not pose any problems. The Polish legislator has implemented collective society transparency standards faster than his European counterpart.

The current year is the first one for Polish collective societies to publish their financial reports which are subject to scrutiny of expert auditors. Centrum Cyfrowe has acquired information that - upon supplementation- they will be subject to detailed assessment by the Ministry of Culture and National Heritage. Centrum Cyfrowe anxiously awaits the results of the audit.

Furthermore it is worth noticing that despite great coherence between Polish law and the regulations, proposed the Directive contains provisions relating to the European single market, especially in the subject of transparency of financial flows between collective societies in different EU member states which are impossible to introduce on the national level.

The regulations in regard to the information requirements between local collective societies and those entitled in other EU states are especially important and essential. Introducing such requirements only on the national level is impossible.

We take into account that the Polish collective societies may encounter problems with accommodating to the Directive's requirements for CMOs offering pan-European musical licenses that are described in chapter III of the Project. In regard to this type of CMOs the Directive introduces detailed information requirements, completion of which requires attaining, updating and maintaining technologically advanced databases. However Centrum Cyfrowe does not agree that the technological problems of local entities should ban the introduction of modern management and reporting standards for collective societies into the Polish legal framework.

Multi-territorial licenses for online uses of musical works

In the extent of granting European licenses the Commission proposes the European Licensing Passport (a mechanism and name introduced by the Directive) explaining that that mechanism is the most beneficial as it will allow the aggregation of musical repertoire on the European level while improving the environment for competition of the collective societies. Consequently the alternative, the extended collective licensing (ECL) mechanism, has been declined on the basis of not stimulating competition between collective societies and the possibility of leading to the fragmentation of the repertoire.

It may come as a surprise that the Commission decided not to introduce on the European level the ECL which has worked efficiently for years now in the Scandinavian states and instead has decided to carry on with the original European Licensing Passport (ELP).

It is our view that the ELP mechanism has been constructed from the perspective of the collective society and not the commercial users or individual “end-users”. The societies may, but are not required to, offer multi-territorial licenses for online uses of musical works. This may raise valid questions about a proper society that should be contacted to obtain such licenses. It also means that the Directive does not address the basic problem of pan-European licensing that was raised multiple times during consultations initiated by the Commission and on various other forums.

Meanwhile the ECL does not raise such doubts. A license can be granted by the collective society that has a representative character over the territory in question. The Commission rejects ECL explaining that that system favours fragmentarization of the repertoire because it allows right holders to opt-out and not be represented by a collective society. This argument comes as vague when confronted with analogous opt-out mechanisms within the Commission’s proposal which allows for opting-out if a society does not offer multi territorial licenses and has not signed a representation agreement with one that offers such licenses.

The Project’s proposed regulations that allow making the repertoire available between collective societies are raising doubts of the Centrum Cyfrowe. Article 29 point 3 allows a CMO to be entitled to charge “a reasonable margin of profit” when requested to represent another collective society’s repertoire. This underlines a commercial nature of the collective societies’ functioning whereas in the opinion of the Centrum Cyfrowe the collective societies should serve not as an entrepreneur seeking profit but rather a guardian for associated creators and a intermediary between them and their audiences. We would also like to notice that from the perspective of the right holders - such “reasonable margin of profit” is in fact reducing their incomes. If we take into account the fact that about 50% of the quotas cashed by the collective societies are being spent on management costs then increasing those sums by adding extra margin may lead to creators’ payouts being insignificant.

Furthermore, doubts are raised by Article 30 which allows a right holder to use the services of another collecting society if the society of which he or she is a member does not offer multi-territorial licenses. If such situation takes place the right holder may confer the rights to multi-territorial licensing to another organization but the “parent” collective society retains the rights to grant licenses within the state it has been entitled to do so. It is not clear from this article whether the organization granting multi-territorial licenses is also entitled to grant them within the state in question or is this particular territory excluded. We

strongly believe that parallel license-granting should be allowed, otherwise the rights would be fragmented between organizations which is in direct contradiction of the Commission's goal to aggregate them. To make sure that the regulations are clear we call for specifying the article.

Collective management and Creative Commons licenses

As a partner of the Creative Commons organization Centrum Cyfrowe would also like to point out the following questions in relation to Creative Commons licenses and collective management regulations.

Creative Commons licenses are granted directly by the author. Passing a Creative Commons-licensed work between users along the way means granting a license directly by the creator to each and every one of them. However the collective management system works based on the principle of intermediation which means that the licenses are granted by the collective societies. Current copyright regulations and the collective societies' practice often makes direct contracting with the right holder very difficult or impossible. This means that collective management in its current framework is not fully compatible with Creative Commons licensing.

To place the problem within the legal framework we would like to point to the issue of compulsory contracting with the collective societies required by the law which was introduced in the case of re-emissions and partially in the case of broadcasting. This requires payment of royalties even if the right holder herself allowed for free use of her works.

On the other hand there is a practice of the collective societies that makes the use of Creative Commons licenses difficult; it questions a possibility for parallel licensing and managing of works by an author. There is a lack of a standardized agreement to entrust the rights to an organization. A large number of collective societies have a policy of acquiring a very broad range of rights which leads to depriving an author of a possibility to license independently or endangering them with possible litigation for contacting their audiences directly.

The problems described above cannot be fully resolved within the current legal framework. They should be resolved in regulations and a pursuit towards a harmonized resolution for the whole EU is an argument for applying a directive.

Therefore the obligation for the collective societies to act as an intermediary should not apply to situations in which an author has granted a license to a user directly. Since

Creative Commons licenses can be granted in any form regulations should not require any specific form of such license to be able to eliminate the intermediacy of the collective societies.

A legal framework should also be implemented to regulate the way rights are entrusted to organizations to ensure that such actions will not bar the authors' rights to grant independent licenses in a free manner.

This not only about regulations that will allow the exchange of the collective management system with Creative Commons licensing but about clearly allowing parallel use of both systems. This model may be appealing to creators that use the CC licenses with a Non-Commercial condition. It might be applied in a situation in which they allow free non-commercial use of their works and at the same time are interested in the traditional way that commercial use works within the collective management system. Clear regulations should be implemented to allow such right holders to receive a share in the sums administered by the collective societies.

Since none of the issues above has been addressed by the Project we consider it insufficient and call for amendments.

With the reservation above we are happy to note that the Directive does have resolutions that allow to understand that an author should be able to individually manage different types of rights. It is in our understanding a step in a good direction - of respecting the author's will to use Creative Commons licenses.