Support to Kosovo institutions on SAA implementation

Training on the implementation of EU acquis in the area of copyright and related rights

Part 3 – Collective management of copyright

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Gap analysis
(September – October 2017)

Gap assessment report
(finalized in December 2017; open for comments until February 2018)

Adoption plan
(copyright part finalized in June 2018)

Training needs assessment
(April – June 2018)

Trainings
(beginning in December 2018)
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MAIN PRINCIPLES OF THE COLLECTIVE MANAGEMENT DIRECTIVE
CONTENTS OF THE DIRECTIVE

Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market

Title I – General provisions

Title II – Collective management organizations

Title III – Multi-territorial licensing of online rights in musical works by collective management organizations

Title IV – Enforcement measures

Title V – Reporting and final provisions

- Application to CMOs established in the EU – Article 2 (1) and (2)
- Application to subsidiaries – Article 2(3)
- Provisions of Title II are minimum harmonization – MS may maintain or impose more stringent standards in relation to CMOs established in their territories, provided that they are compatible with Union law (recital 9)
“(…) Management of copyright and related rights includes granting of licences to users, auditing of users, monitoring of the use of rights, enforcement of copyright and related rights, collection of rights revenue derived from the exploitation of rights and the distribution of the amounts due to rightholders. Collective management organisations enable rightholders to be remunerated for uses which they would not be in a position to control or enforce themselves, including in non-domestic markets” (recital 2)
Article 3(a):

“Collective management organisation [CMO] means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which fulfils one or both of the following criteria:

(i) it is owned or controlled by its members;
(ii) it is organised on a non-for-profit basis.”

- The Directive does not require any specific legal form of CMOs (recital 14)
- Social, cultural and educational services are part of CMOs’ tasks (recital 3)
“(...) This Directive should remain neutral as regards the prior authorisation and supervision regimes in the Member States, including a requirement for the representativeness of the collective management organisation, in so far as those regimes are compatible with Union law and do not create an obstacle to the full application of this Directive” (recital 50)

“(…) Article 16 of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, and Articles 56 TFEU and 102 TFEU must be interpreted as not precluding national legislation (...) which reserves the exercise of collective management of copyright in respect of certain protected works in the territory of the Member State concerned to a single copyright collecting society and thereby prevents users of such works (...) from benefiting from the services provided by another collecting society established in another Member State. (…)” (CJEU judgement in case C-351/12 OSA)
Article 3(b):

“Independent management entity means any organisation which is authorised by law or by way of assignment, licence or any other contractual arrangement to manage copyright or rights related to copyright on behalf of more than one rightholder, for the collective benefit of those rightholders, as its sole or main purpose, and which is:

(i) neither owned nor controlled, directly or indirectly, wholly or in part, by rightholders; and

(ii) organised for a for-profit basis.”

• Not covering producers and broadcasters (recital 16)
• Only certain provisions of the Directive apply: general rule on negotiations with users, certain transparency requirements and monitoring obligation (Article 2(4))
OTHER IMPORTANT DEFINITIONS

Article 3(c) and (k):

“Rightholder means any person or entity, other than a collective management organisation, that holds a copyright or related right or, under an agreement for the exploitation of rights or by law, is entitled to a share of the rights revenue”

“User means any person or entity that is carrying out acts subject to the authorisation of rightholders, remuneration of rightholders or payment of compensation to rightholders and is not acting in the capacity of a consumer”
OTHER IMPORTANT DEFINITIONS

Article 3(h) and (j):

“Rights revenue means income collected by a collective management organisation on behalf of rightholders, whether deriving from an exclusive right, a right to remuneration or a right to compensation”

“Management fees means the amounts charged, deducted or offset by a collective management organisation from rights revenue or from any income arising from the investment of rights revenue in order to cover the costs of its management of copyright or related rights”
GENERAL PRINCIPLES

• Acting in the best interests of the rightholders and not imposing on them any obligations which are not objectively necessary

• Freedom of rightholders to authorise CMOs

• Non-discrimination of rightholders (in direct relations and through representation agreements)

• Appropriate and effective participation of CMO members in the decision making process

• Sound, prudent and appropriate management

• Regular, diligent and accurate distribution of rights revenue

• Transparency
1) By contract with rightholders (Article 5):

- Rightholders’ right to authorise a CMO of their choice to manage the rights, categories of rights or types of works and other subject-matter of their choice, under a non-discrimination principle
- CMO’s obligation to manage rights if it falls within the scope of the CMO’s activity, unless objectively justified reasons
- Rightholders’ right to grant individual non-commercial licenses
- Rightholders’ right to terminate the authorisation

How to understand the terminology (according to the Commission):

- rights - e.g. communication to the public, reproduction
- categories of rights – e.g. rights within communication to the public (remuneration/exclusive right, making available, broadcasting, direct public performance, indirect public performance), reproduction, distribution, reprography, private copying, resale right, rental/lending right
2) Through representation agreements (Article 14)

3) By law (recital 12):

“The Directive (…) does not interfere with arrangements concerning the management of rights in the Member States such as individual management, the extended effect of an agreement between a representative collective management organisation and a user, i.e. extended collective licensing, mandatory collective management, legal presumptions of representation and transfer of rights to collective management organisations.”
MEMBERSHIP

Membership requirements (Article 6):

• adopted by the general assembly
• based on objective, transparent and non-discriminatory criteria
• if fulfilled – rightholders and entities representing rightholders, including other collective management organisations and associations of rightholders must be accepted as members

Obligations of CMOs towards members (Article 6):

• ensuring their participation in the decision-making process
• obligation to keep and update records of members

Members & non-members (Article 7):

• communication by electronic means
• access to the complaints procedure
Article 8:

- Convened at least once a year
- Decides on the statute and its amendments
- Exclusive competence:
  - appointment and dismissal of directors, approving their remuneration and other benefits
  - adopting general policies on distribution, investments, deductions and non-distributable amounts
  - appointment and removal of the auditor and approving the annual transparency report
- Non-exclusive competence (may be delegated to supervisory body):
  - risk management policy
  - approval of decisions on immovable property
  - approval of decisions on mergers, alliances, subsidiaries, acquisitions
  - approval of decisions on loans and security
- All members shall have the right to participate and vote (may be restricted by a CMO) and appoint a proxy (may be restricted by a MS)
- May be replaced by an assembly of delegates (or in a certain case by supervisory function)
Directors – members of the administrative board (unitary board) or the management board and the supervisory board (dual board) (Article 3 (g))

Persons who manage the business of CMO (Article 10):
• sound, prudent and appropriate management
• procedures to avoid conflicts of interests (i.a. through annual statements to the general assembly)

Supervisory function (Article 9):
• continuous monitoring of the activities and the performance of the duties of the persons who manage the business of the organisation
• fair and balanced representation of different categories of members
• procedures to avoid conflicts of interests
• annual reporting to the general assembly
Separate accounts (Article 11):
• rights revenue and income from its investment
• any own assets of the CMO, including income from management fees

Rights revenue may be used only for the purpose of (Article 12):
• distribution to rightholders (may be invested before payment)
• deduction of management fees or other deductions to cover CMO’s costs:
  o consent of the rightholders required
  o shall not exceed the justified and documented costs incurred by the CMO in managing rights
• deductions for social, cultural or educational services of the CMO
  o consent of the rightholders required
  o services provided on fair criteria, in particular as regards access and scope of those services
Distribution to rightholders (Article 13)

Deadline for distribution – 9 months from the end of financial year in which the rights revenue was collected

Exceptions:

• objective reasons relating in particular to reporting by users, identification of rights, rightholders or matching of information on works and other subject-matter with rightholders

• the relevant rightholders cannot be identified and located and the first exception does not apply:
  o amounts should be kept in the separate accounts (after the deadline)
  o CMO should take all necessary measures to identify and locate the rightholders (must refer to rightholders, other CMOs, own and other records; if not sufficient - information made available to the public)
  o after 3 years – amounts deemed non-distributable (the general assembly decides on their use; may be restricted by MS)
Management of rights under representation agreements (Articles 14 and 15):

- Principle of non-discrimination
- Only deductions agreed between the CMOs
- Similar rules on distribution (6-months deadline)
RELATIONS WITH USERS

Licensing (Article 16)

Joint obligation of CMOs and users:
• conducting negotiations with good faith

Obligations of CMOs:
• objective and non-discriminatory licensing terms (special rule for new online services)
• replying to users’ requests without undue delay
• refusal to grant a license must be reasoned
• allowing users to communicate with CMOs by electronic means
RELATIONS WITH USERS

Tariffs (Article 16):

- tariffs should be reasonable in relation to, inter alia, the economic value of the use of the rights in trade, taking into account the nature and scope of the use of the work and other subject-matter, as well as in relation to the economic value of the service provided by the collective management organisation

- CMOs shall inform users of the criteria used

Users’ obligations (Article 17):

- providing relevant information at their disposal (agreed or pre-established) on use of rights, as necessary for collection, distribution and payment

“(…) The Directive is without prejudice to the possibility for Member States to require collective management organisations established in their territory to issue joint invoices” (recital 33)
Different scope of **transparency obligations** in relation with:

- rightholders – information on management of their rights (at least once a year) – Article 18
- other CMOs – information on management of rights under representation agreements (at least once a year) – Article 19
- rightholders, other CMOs and users – information on the repertoire managed by the CMO (on request) – Article 20
- the public – general information about the CMO (published and kept up to date) – Article 21
The annual transparency report (Article 22 and the Annex):

- Includes the accounting information and the ‘special report’ on the use of amounts deducted for the purposes of social, cultural and educational services (Article 22 and the Annex)

- Subject to the approval by the general assembly

- Certain information on rights revenue, cost of management, deductions and distribution (attribution/payment) should be indicated with a breakdown per category of rights and/or type of use

Type of use (according to the Commission): e.g. TV, radio, public performance by playing music in premises, online streaming, online making available etc.
• **Complaints** procedures – within a CMO (Article 33)

• Resolution of *disputes* between CMOs and users – by court or another independent and impartial dispute resolution body with expertise in intellectual property law (Article 35)

• **Alternative dispute resolution** procedures – mandatory only for multi-territorial licensing (Article 34)
Obligations of a Member State (Article 36 and 37):

- appointing competent authorities
- introducing procedures to notify these authorities about a possible breach of the law
- ensuring the power of these authorities to impose appropriate sanctions or to take appropriate measures (effective, proportionate, dissuasive)
- notifying the Commission of the competent authorities
- exchange the information between competent authorities from different MS (if a CMO acting in one MS is established in another MS)

“(….sanctions or measures may include orders to dismiss directors who have acted negligently, inspections at the premises of a collective management organisation or, in cases where an authorisation is issued for an organisation to operate, the withdrawal of such authorisation. (…)” (recital 50)
COLLECTIVE MANAGEMENT IN PRACTICE
In Poland an authorization for collective management can only be granted to an association of authors, performers, producers, publishers of printed works or broadcasters, which:

1) is able to prove the need for collective management in relation to each right for which it applies for authorization

2) guarantees appropriate collective management of rights, in particular through:
   • technical and administrative capacity for managing the rights independently and appropriately
   • employees sufficiently qualified to cover legal and financial activities of a CMO
   • own financial resources, sufficient for the appropriate management of rights

3) in case where another CMO already covers the same scope of rights – agrees with that CMO on the joint licensing rules

4) did not have its authorization revoked during the previous 5 years
ESTABLISHING A CMO (EXAMPLE)

The association applies for the authorization to the Minister of Culture and National Heritage. In the application it must submit evidence that it fulfills the above criteria, in particular by including:

1) a current statute of the association as well as the draft new statue as required by the Act on Collective Management
2) draft internal regulations on distribution, deductions and investments, social, cultural and educational activities and complaints procedure, as well as the risk management strategy
3) description of the planned collective management activities

After reviewing the application, the authorization may be granted or refused in the form of administrative decision, which can be appealed before an administrative court.
Competent authority in Poland – the Minister of Culture and National Heritage

Competences:

• Monitoring the functioning of CMOs
• Requesting to submit information
• Issuing recommendations to particular or all CMOs
• Mediating between CMOs
• Requesting to cease unlawful practice
• Applying sanctions in case the request is not effective (dismissal of a board member, financial sanctions, revoking the authorization)
• Measures and sanctions are subject to a review before the administrative court
Different levels of intervention to be considered:

- no intervention – individual negotiations between CMOs and users based on certain criteria (Directive 2014/26/EU)
- dispute resolution / mediation in individual cases (cable retransmission – Directive 93/83/EEC)
- dispute resolution with the ’precedent effect’
- possibility to adopt tariffs
- obligation to adopt tariffs
- character of tariffs: minimum/maximum/fixed
EU harmonization so far (Article 3 of Directive 93/83/EEC):

A collective agreement between a CMO and a broadcasting organization concerning the acquisition of satellite broadcasting rights to a given category of works may be extended to rightholders of the same category who are not represented by the CMO, provided that:

• The communication to the public by satellite simulcasts a terrestrial broadcast by the same broadcaster, and

• The unrepresented rightholder shall, at any time, have the possibility of excluding the extension of the collective agreement to his works and of exercising his rights either individually or collectively.
**Possible EU harmonization of the ECL conditions** (proposed by the Council in the draft DSM Directive):

- Applicable only within well-defined areas where individual management is onerous and impractical
- A CMO is sufficiently representative
- Equal treatment of rightholders is guaranteed
- Rightholders may at any time exclude their work or other subject-matter from the ECL mechanism
- Publicity measures are taken to raise awareness of rightholders regarding the ECL and the possibility of opting-out
EU harmonization so far (Articles 9 and 10 of Directive 93/83/EEC):

- Copyright owners and holders of related rights may exercised their cable retransmission rights only through a CMO
- Where a rightholder has not transferred the management of his rights to a CMO, the CMO which manages rights of the same category shall be deemed to be managed his rights
- If more that one CMO – the rightholder shall be free to choose
- The rightholder has the same rights and obligations as the rightholders who have mandated that CMO
- Compulsory collective management does not apply to the rights exercised by a broadcasting organization in respect of its own transmissions, irrespective of whether the rights concerned are its own or have been transferred to it by other copyright owners and/or holders of related rights
Also required for the payment of:

- Performers’ annual supplementary remuneration from the phonogram producer in the extended term of protection (Article 3(2d) of Directive 2006/116/EC)

Allowed when:

- An exclusive right under the EU law can be limited to the remuneration right
- The EU law explicitly provides for the optional collective management (equitable remuneration for rental; exercise of the resale right)
- Payment of the fair compensation or the remuneration for public lending
Thank you for your attention!

Questions? Comments?

Warsaw, 18 September 2018