The challenges of collective management in the digital era

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Introduction

The article aims at presenting a spherical and synoptic description of the conditions under which collective management of copyright and related rights is exercised in the digital era. A brief introduction on function of collective management seems necessary since the paper was originally prepared to be presented in a non legal audience (1). The impact of Digital rights Management (hereinafter DRM) on collective management is then described (2). Clearing rights for online use is facilitated by the existence of one stop shops (3). Their expansion is one of the goals of the European policy in relation to the collective management. EU policy in this field has been made clear in the recommendation issued by the Commission in 2005 (4). The recommendation is questioned especially because of its consequences for cultural diversity in the EU level. Collective societies are also very preoccupied by the difficulties of enforcement in the digital environment (5) as well as by the open content licencing schemes which are more and more used (6). From the following analysis it becomes clear that collective management is absolutely necessary in order to ensure right holders receive their income and their rights are protected and therefore provide them with the incentive to continue creating.

1. Collective management basics

The basic reason for the existence of collective management as an institution is the practical impossibility of individual control over the work by the author alone – the «author's incapability for self protection», as it has been said [Kotsiris, 2005].

While collective management is optional, in some cases it is compulsory. The Greek copyright legislation provides for three such cases:

a) the collection of private copying levies (ar.18 law 2121/1993),

b) the collection of the equitable remuneration ought to performers and the producers of the sound recordings used for a radio or television broadcast by any means, such as wireless waves, satellite or cable, or for communication to the public (ar.49par.1 law 2121/1993) and

c) in cases of unaltered and unabridged secondary transmissions of radio and television programs by cable or other physical means (ar.54 par.2 law 2121/1993).

Through the signature of reciprocal agreements among collecting societies of different countries an international net of collective management is created.

2. The answer to the machine is the machine

The transition from the analogue to the digital environment led to the appearance of DRM. The prospect of revival of individual management with the help of DRM was soon refuted:

- individual management has a high cost;
- monitoring the works demands a special know-how from the individual author;
- Collective Management Organizations (hereinafter CMOs) dispose a strong bargaining power against the users of the work and they

exercise political pressure for the defense of the author's rights while they constitute the contact point for authors and users [Vagena, 2010].

Taking into consideration all these facts, the prospect of individual management seems more realistic for the companies producing the works which may have the know-how as well as the money and the time to spend on the monitoring of the works.

The transition of Collective management from the analogue to the digital environment was marked by the digital threats which transformed the convenience of collective management to a need. CMOs need to get modernized. They especially need to create electronic licensing platforms like ASPIDA, the online licensing platform recently presented by the Hellenic Collecting Society representing writers and authors (see at: http://aspida.osdel.gr/ERMS/). In this direction DRM are expected to enforce collective management in the digital environment.

3. One stop shops

The central management of rights in the digital environment takes the form of *one stop shops*. One stop shops are online services to which the users may be addressed for the clearing of all digital rights of a work. This way they avoid the time consuming transaction with all the right holders involved including different CMOs. They can be composed of all CMOs functioning under an umbrella and providing information and a single license for the use of each work. The danger of individualized negotiation for the licensing of each work exists. This is why the licensing of a work according to the tariff table of each CMO should be preserved in order to protect the works which are less commercially successful.

The need for adjustment of the traditional form of collective management is more intense in the EU where the users may need to ask for a license from 27 different CMOs for online use based on the member state where the work will be communicated. On the contrary in United States, the users need to ask for a license only from 3 CMOs (ASCAP, BMI, SESAC).

A series of EU funded projects for the creation of central rights clearance schemes for multimedia were realized in EU very early. They addressed:

- the networking of existing collectively managed multimedia rights clearance systems in six Member States (VERDI),
- the interoperability of digital content identification systems and rights metadata within multimedia e-commerce (INDECS),
- sector specific multimedia rights clearance systems for book publishing (EFRIS),
- audio-visual (TVFILES, PRISAM) and music (ORS) rights,
- the integration of electronic copyright management and multimedia rights clearance systems (BONAFIDE), and
- best clearance practices for educational multimedia (COMPAS) and protection of creative contributions in a collaborative networked multimedia title development environment (b©) [Gervais, 2006].

CMOs had already developed "one stop shop like" initiatives in the music sector before 2005. The "Simulcasting agreement" (2002) provided for pan European licensing by any CMO in EU for simultaneous transmission by radio and TV stations via the Internet of sound recordings included in their broadcasts of radio and/or TV signals for simulcast of a work. The "Santiago agreement" (2000-2004) provided for multi territorial licensing from the CMO who functions at the country where the user has his official seat. The "Barcelona agreement" (2001-2004) was similar to the Santiago agreement but for mechanical rights. Nevertheless due to the European

Commission's claims that these agreements were potentially in breach of European Union competition rules because they provided that the license could be asked for only by the CMO operating in the country the user had his official seat, the agreements were not renewed by the parties when they ended [Gillieron, 2006]

4. EU policy on collective cross-border management of copyright and related rights for legitimate online music services

In 2005 the Commission Recommendation 2005/737/EC of 18 October 2005 on collective cross-border management of copyright and related rights for legitimate online music services was issued. According to its provisions member states should ensure that the right holders have the possibility to entrust the management of any of the online rights (*reproduction right, making available right, distribution right)* on a territorial scope of their choice, to a collective rights manager of their choice, irrespective of the Member State of residence or the nationality of either the collective rights manager or the right-holder. They should also enjoy the right to withdraw any of the online rights and transfer the multi territorial management of those rights to another collective rights manager. The recommendation aimed to facilitate multi-territorial licensing for the online use of musical works.

The terms in reciprocal representation agreements were an obstacle to this direction until 2008. In particular, according to the territorial exclusivity clause users could only ask for a license regarding the repertoire of a foreign CMO from a national CMO. According to the membership clause a CMO could not accept as a member a right holder who was a member of another CMO. According to the European Commission decision of 16 July 2008 (CISAC decision) those clauses were found to be infringing rules on restrictive business practices (Article 81 of the EC Treaty and Article 53 of the EEA Agreement) concerning the exploitation of the works online, cable or satellite.

Following the recommendation of 2005, some new legal entities have appeared as non exclusive licensing agents of big music labels such as CELAS – Centralized European Licensing and Administrative Service which provides licenses for EMI music publishing's Anglo American repertoire for digital and mobile exploitation across Europe, (see at www.celas.eu). Also agreements have been signed between big music publishers and CMOs, so that the last ones operate as non exclusive licensing agents of the repertoire of the publishers, see for example the Pan-European Digital Licensing initiative (PEDL) for the repertoire of the Warner Company in co operation with 5 CMOs.

The criticism of the 2005 recommendation refers to the consequences for the preservation of cultural diversity because of the "monopolistic" concentration of the rights management by the strongest CMOs which administer the more commercial part of the universal music repertoire (the Anglo American). This criticism is expressed not only by the weakest CMOS but also by the European Parliament itself (see for example the European Parliament resolution of 13 March 2007). It is claimed that it constitutes a threat for the small and medium sized CMOs from the concentration and control of the rights by the biggest CMOs. A question which rises in this context is whether competition among CMOs will benefit culture more than solidarity. European policy should promote both elements so that collecting societies spent more time and energy in collaborating in order to face the common threats appearing in the digital era than in competing each other in order to survive as legal entities.

A very interesting study was prepared by the Hellenic Foundation for European and Foreign Policy (ELIAMEP) in June 2009 concerning the collecting

societies and cultural diversity in the music sector. Its basic findings were the following. The new licensing channels that have been established for the provision of EU-wide licences concern specific types of repertoire, primarily the Anglo-American repertoire. Most of the business models which have emerged in this direction have derived from major music publishers which have withdrawn the management of the mechanical rights of the most commercial part of their repertoire from the system of reciprocal representation in relation to digital licensing. Such rights have been entrusted to specific collecting societies or newly created collective rights management bodies for pan-European digital exploitation. Major publishers will continue to use the system of reciprocal representation through national CMOs for other rights influencing this way the function of CMOs especially by threatening that they will withdraw the management of the rest of their rights.

In the framework of the Online Commerce Roundtable which was set up by Commissioner Neelie Kroes some general principles for the online distribution of the work were adopted. They were expressed in a Joint statement from the Online Commerce Roundtable participants on "General principles for the online distribution of music" issued on 20.10.2009. The roundtable was composed of CMOs, producers, consumer unions, representatives of the IT sector. They all agreed to pursue the development of efficient licensing platforms offering pan-European/multi-territorial licences for the performing (public performance) and the mechanical (recording and reproduction) rights to commercial users. According to the statement such platforms should be non-exclusive and non-mandatory. The issues remaining to be solved as described in the statement are: a) the need to develop standardized rights management information so that interoperability & interconnection of the existing data bases is achieved (a special working group was set up), and b) the need to find a transparent and non discriminatory way of choosing the legal entities which will undertake the licencing of the online rights.

5. Enforcement in the digital environment

Collecting societies are also very preoccupied by the issue of the enforcement of copyright in the digital environment. They have developed surveillance systems in order to monitor illegal sites and file sharing. They often communicate directly with the website owners when a publication on their sites is infringing copyright. If the website owners refuse to withdraw the infringing publication, they communicate with the ISP (internet service provider) asking him to prevent access to the infringing content. The need to co-operate with ISPs was underlined in the memorandum of understanding which was signed between right holders representatives and representatives of the telecommunications' sector in France in 2004. In other policy reports it is also generally admitted that it would be especially useful to develop notice & take down systems following the example of the American Digital Millennium Copyright Act (DMCA).

Copyright enforcement is especially difficult in relation to P2P file sharing systems. Users who share files can only be identified by the IP address the computer they use is receiving at the moment of the exchange of the infringing content. The IP address is covered by the protection of personal data and the protection of secrecy of communications. There have been many legal discussions and some court decisions on whether or not the users' real identity should be revealed to the right holders in order t defend their rights.

CMOs are in general reluctant regarding aggressive actions against end users. Still, they support the graduated response system otherwise called 3 strike test: According to this system the first step is to contact the ISP, to inform him about the

suspected actions taking place through his services by a user identified by his IP address so that the ISP contacts him through email and warns him about the consequences of his actions. If another suspicious action takes place through the same IP address, a certified letter is sent to its owner with the same warnings. If the owner of this address does not comply or if he/she is again accused of repeating these offenses, then the ISP suspends the internet service for the internet connection, the object of the claim, for a period given. This system has been already adopted by the french law HADOPI and has been included in the British bill for Digital Economy.

A possible solution widely discussed for the issue of P2P would be the adoption of a form of compulsory license for the use of a work on internet. In France this solution was promulgated in the scheme of "licence globale" in order to make the non commercial peer-to-peer exchanges of audiovisual content legal in exchange for a fee on broadband Internet subscriptions. This fee would be proportionate to the actual online use of a work and would be distributed to the artists and authors. The major objection to all similar proposals is that they transform authors' exclusive rights to simple claims for damages depriving them from the absolute character of their rights. Still, since these rights are not effectively enforced in the digital environment, the question whether a bad solution could be better than a worse one remains.

Other forms of illegal file sharing also exist apart from P2P exchanges. Protected content could be shared without authorization from the right holders through instant messages, like email or sms messages or thought e- readers, like IpoD or MP3 players. Characteristic examples are included in an interesting survey of the Pew Internet & American Life Project (see at http://www.pewinternet.org/Reports/2005/Music-and-Video-Downloading.aspx). In these cases "licence globale" could not offer a solution. The only way to limit the extent of this unauthorized use of works would be the use of suitable technical measures of protection.

6. Open content movements

At the same time CMOs are trying to control the use of their works with more restrictive measures, they are also trying to adapt themselves to the reality of open content movements. The most characteristic of these movements is the Creative Commons (CC) movement. Creative commons licenses are based on the combination of four basic elements of the licenses, from which one, the credit to the original author, remains common in all the alternative forms of CC licenses. The four basic elements of the Creative Commons licenses are:

a) the credit to the original author of the work (attribution),

b) the distribution of derivative works only under a license identical to the license that governs the initial work (share-Alike),

c) the prohibition of making derivative works (Non Derivatives) and

d) the prohibition of the commercial use of the works (non Commercial).

If the right holder wants to license some of the works under creative commons licenses, although he has assigned the administration of his rights to a CMO, he cannot. The assignment contract covers all the existing works but also the future ones, usually for a period of no more than 3 years (term of duration of the assignment contract). Some efforts to compromise the logic of CC licenses and the provisions of the assignment contract have been made [Kapellakou, Markellou, Vagena, 2010]. The first one was Buma/Stemra which agreed with Creative Commons of Netherlands to start a pilot allowing its members to make their musical works available under non-commercial Creative Commons licenses. Composers and lyricists who until now released their work exclusively under Creative Commons licenses can also choose to

become members of Buma/Stemra, enabling that organization to collect the remunerations for commercial use of their work. This pilot is considered to bring to an end the “all-or-nothing” scenario regarding the repertoire of an author. Following Buma’s example KODA, the Danish Authors’ Society, has also started offering noncommercial Creative Commons licensing to its members – making it the second country worldwide to do so. Members must sign an agreement with the KODA in which they indicate which works they wish to license, and for the purpose of this arrangement, only Creative Commons licenses with the “non commercial” condition can be used. More recently STIM, the Swedish Performing Rights Society, started offering its members the opportunity to sign a so-called Creative Commons license (CC) for a trial two-year period. The license enables creators to release individual works for non-commercial use.

The role of CMOs in the digital environment seems to become more demanding. One may question the way of functioning of some CMOs. Still, it has been proven that in any case of mass use of the use of works (like in internet) collective management is the only system which can guarantee for right holders the payment they deserve and thereof the necessary motive and means for cultural creativity. Collective management will be unavoidably altered but hopefully not in essence.

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