



## **COMMUNIA policy paper on the Directive proposal on Collective Management of Copyright**

The mission of the Communia Association is to foster, strengthen, and enrich the Public Domain in the Digital Environment. As part of this mission, the Communia Association is advocating for a modern, flexible and transparent exercise and management of copyright and related rights. The Communia Association welcomes the European Commission's efforts to modernise collective management in Europe by providing rules for multi-territorial licensing of rights in musical works for online uses, and more generally by increasing the standards for transparency and accountability of Collective Rights Management Organizations (CMOs) operating in Europe.

This policy paper aims at providing an analysis on the Commission's 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 (COM(2012) 372/2) in light of the issues defended by the Communia Association on the Digital Public Domain.

Copyright management plays a central role in determining legal certainty for the digitisation of the European cultural heritage and for enabling an accessible and reusable digital Public Domain. This draft legislation intervenes at a crucial moment in the evolution of the information society and in the history of the European copyright system, where innovation and access to knowledge should be a priority of policy-making.

While large parts of the proposed directive can be seen as intra-industry regulation that is relevant to a limited number of stakeholders, these provisions impact the overall copyright framework. It is therefore extremely important that the proposal also reflects the interests of the general public. Given the increasing technological possibilities for individual rights management, we need a well functioning, transparent and flexible collective rights management system that neither hinders rights licensing and innovation, nor needlessly limits the exercise of rights by individual rights holders.

In the remainder of this document, we want to highlight two specific issues that the proposed directive fails to address (sufficiently). The first one concerns the transparency of information about the members of CMOs and the repertoires represented by them. The second one addresses the incompatibility between collective management of rights and individual licensing arrangements (such as open content licenses) existing in some sectors.



## Transparency

Our number one concern with the draft directive is that the proposed measures to increase transparency are not sufficient. This concern is primarily aimed at the measures intended to increase the transparency with regards to the information about CMOs membership and the repertoire. The relevant article of the proposal is Article 18 ('Information provided to rightholders, members, other collecting societies and users on request').

One of the key problems of the current copyright system is the lack of easily identifiable information about the rights status of works protected by copyright and related rights. In the absence of general rights registries<sup>1</sup>, it becomes essential that information about rights holders can be accessed efficiently.

Article 18 (1) of the proposed directive deals with access to this type of information:

Member States shall ensure that a collecting society makes the following information available at the request of *any rightholder whose rights it represents, any collecting society on whose behalf it manages rights under a representation agreement or any user*, by electronic means, without undue delay:

- (a) standard licensing contracts and applicable tariffs;
- (b) the repertoire[TM1] and rights [PK2] it manages and the Member States covered;
- (c) a list of representation agreements it has entered into, including information on other collecting societies involved, the repertoire represented and the territorial scope covered by any such agreement.

In addition, a collecting society shall make available at the request of any rightholder or any collecting society, any information on works for which one or more rightholders have not been identified including, where available, the title of the work, the name of the author, the name of the publisher and any other relevant information available which could be necessary to identify the rightholders.

In fact, the group of parties that stand to benefit from access to this information is much wider than those listed in Article 18. It includes anyone wishing to provide services or to work with material protected by copyright or related rights. In many cases, such users will not have an existing business relationship with the CMOs in question (and thus not qualify as 'users' in the traditional sense).

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<sup>1</sup> As part of our policy recommendations, COMMUNIA advocates for the introduction of a registration requirement in order to obtain full copyright protection for a work: "In order to prevent unnecessary and unwanted protection of works of authorship, full copyright protection should only be granted to works that have been registered by their authors. Non-registered works should only get moral rights protection." ([COMMUNIA Policy recommendation #8](#))

Examples of this include developers of new content delivery platforms and services who shall be able to determine how many and what type of rights holders they need to interact with in order to secure permission for such services. Obtaining this information under clear rules of transparency is thus essential for innovation, and namely for wide-scale digitisation initiatives (like Europeana).

Another example are publicly funded memory institutions. For memory institutions that want to provide online access to their collections, it is essential to be able to discern if whether works in their collections are administered by one or more collecting societies or are not part of the CMOs' repertoire. Based on this information, they can then develop a strategy for clearing rights that may or may not<sup>2</sup> involve obtaining a license for the repertoire under collective management.

It should be noted that opening up this sort of information is not only good for new innovation, but is in the express interest of supporting the underlying rights holders in getting their content discovered, viewed, distributed (and potentially paid for).

Under the current proposal, CMOs would have no obligation to provide such essential information to these users (Art. 18.2), thereby keeping them outside the existing system and placing them at disadvantage vis-à-vis other parties and when negotiating with CMOs.

More generally, the legislator should give incentives for CMOs to provide accurate repertory information. In particular, CMOs shall ensure that the information in respect of the works whose term of protection terminates - thus "falling" into the Public Domain - is accurate and regularly updated, so that Public Domain works are duly exempted from licensing. CMOs should not be able to enforce claims if they cannot show that the underlying works are registered in their databases as protected works belonging to their repertoire.

The exclusion of potential users from the obligation of CMOs to provide this type of information also seems to contradict another recent policy instrument adopted by the European Union. The *Directive on certain permitted uses of orphan works (2012/28/EU)* contains an annex that lists the sources that need to be consulted by an organization carrying out an 'diligent search'. This annex makes frequent references to 'the databases of relevant collecting societies'. While acknowledging the need for tools listing works and the corresponding rights, it is surprising that the Commission does not follow up on these provisions in an instrument aimed at improving collective management. It seems that the opportunity to outline the responsibility of CMOs for

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<sup>2</sup> It should be noted that such clearance of rights is not similarly necessary for making works available. However, in situations where only small parts of a collection are covered by rights under collective management licensing, it may be preferable for the legal security of the institutions concerned not to make these available.



the administration of such information tools for the benefit of all kinds of stakeholders has been overlooked.

Given these shortcomings, the directive proposal needs to be amended so that CMOs have the obligation to provide access to the information specified in Article 18.2 to anyone (or at least to any potential users). At the same time, we propose that the language with regards to the means of access (Art. 18.1: 'by electronic means, without undue delay') be modified to require access via publicly accessible and searchable interfaces .

From COMMUNIA's perspective, the general availability of information about membership and represented repertoire is not only essential in the (very real) examples outlined above, but should also be seen as a step in the direction of a more transparent rights registry infrastructure is that should be considered as an essential mean of a well functioning trans-national copyright system, at the European level and worldwide.

Digital uses of copyrighted resources need simplified authorisation models that should be enabled through transparent information mechanisms like works registries and common information technology infrastructures administered by CMOs. This purpose of simplification should also be achieved through collective rights management models offering the greatest level of flexibility and legal certainty. The increase of wide-scale digital uses calls for "blanket licenses" having the largest and most stable CMOs repertoire, which can be supported by extended collective licensing models. The directive proposal fails to duly address these issues, although they were raised in the impact assessment (notably Option B4).

Nevertheless, the provisions of the draft Directive on multi-territorial licensing and the "passport" option chosen by the Commission go into the right direction towards the simplification of copyright management and licensing. However, in the absence of satisfactory transparency rules, it remains to be seen how the "passport entities" will effectively enable multi-territory licenses with a sufficient level of legal certainty.

## **Collective Management and Open Content Licenses**

Our second concern with the proposed directive is that it fails to address existing incompatibilities between the collective management of rights and open content licensing. While collective management tends to oppose to individual licensing approaches, there are some sectors where CMOs can effectively prevent their members from using open content licenses such as Creative Commons licenses. With a small number of exceptions<sup>3</sup>, collecting societies

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<sup>3</sup> There are currently pilot projects by BUMA, KODA, STIM and SACEM that enable members of these societies to make available works under some of the Creative Commons licenses. See [http://wiki.creativecommons.org/Collecting\\_Society\\_Projects](http://wiki.creativecommons.org/Collecting_Society_Projects) for more information.



representing authors of musical works prevent their members from making works available under open content licenses. They are in a position to do so because their members are required to exclusively assign all of their rights on all of their works rights to them.

Open content licenses are a relatively new way of exercising exclusive rights with upfront authorisation of certain uses of the licensed works. They provide rightholders with powerful tools promoting access, collaboration and free distribution. Open content licenses are instrumental in massive collaborative projects (such as Wikipedia<sup>4</sup>), open access publishing, as well as for open educational resources, while contributing to enrich the digital Public Domain with content subject to more flexible licensing terms.

From the perspective of COMMUNIA, it is therefore desirable that collecting societies allow their members to make available some of their works under open content licenses. All authors should be free to opt for alternative rights licensing schemes, including the use of open content licenses. In so far as CMOs are in a monopolistic position thereby limiting the choice for rightholders membership, the latter shall not be limited in their freedom to opt for what they deem best for the management of their own rights.

The existence of four pilot projects between European collecting societies and Creative Commons and the fact that members of the US societies ASCAP and BMI are free to make use of open content licenses underlines that there is no fundamental incompatibility between the two systems. The proposed directive presents a timely opportunity to ensure that all European authors can make use of open content licenses in compliance with their membership to collecting societies.

While there are many possible strategies to achieve this goal, the most relevant one with respect to the existing proposal would be to modify Article 5. This provision currently gives right holders the right to authorise (and terminate such authorisation) the management of 'rights, categories of rights or types of works and other subject matter of their choice'. By changing this language into 'rights or categories of rights or works or types of works and other subject matter of their choice', authors would be effectively enabled to remove some works from the collective management system. This would allow them to make these works available under an open content license of their choice, which in turn would provide CMOs with an incentive to offer more flexibility to their members that can be exercised without necessarily opting out from the collective management system.

The exclusive exercise of copyright also includes the freedom of rightholders to willfully relinquish their rights or to dedicate their works to the Public Domain (see the Creative

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<sup>4</sup> All contributions to Wikipedia are licensed under the terms of a Creative Commons Attribution ShareAlike license.



Commons CC0 Public Domain Dedication devoted to the 'voluntary public domain'). These voluntary relinquishments - or dedications - of rights should be taken into account in the mandates of CMOs with their members.

While some may argue that these opt-out mechanisms, allowing rightholders to choose open content licensing or to dedicate their rights to the Public Domain, could affect the aggregation and stability of the CMOs repertoire, this is precisely one more reason to outline the significance of works registration tools enabling the listing of works and of their corresponding rights.

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The [COMMUNIA Association on the Digital Public Domain](#) is built on the eponymous Thematic Network, funded by the European Commission from 2007 to 2011, which issued the [Public Domain Manifesto](#). The mission of COMMUNIA Association is to raise awareness in, educate about, advocate for, offer expertise on and research about the Public Domain in the digital age within society and with policy-makers, at the EU level and worldwide.

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