

Creative Content, Copyright And Start-Ups - Facilitating Copyright Clearance



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Online media start-ups active within the creative industries need to procure the license to the creative works they wish to exploit. Within the European Union, the rights clearance of creative works, such as music or audio-visual content, can be arduous however, especially for ventures who wish to operate on a pan-European level. First, the territorial nature of the exclusive right requires start-ups to take into account the copyright laws of all Member States in which they wish to exploit a creative work. Second, due to licensing agreements, which are often granted on a territorial basis, the relevant rights to a single work can be scattered among various right holders across nations. Therefore the transaction costs related to rights clearance can be quite high. In addition, territoriality can make it difficult for European media start-ups to scale up in the digital environment. As a consequence, European start-ups are at an immediate disadvantage against undertakings based in the United States, such as Netflix, which due to their immediate, large audience base, can gain enough experience and revenue before they enter the fragmented European market.

Online media start-ups active in the creative industries must secure the license for the works they wish to exploit. Obtaining the relevant licenses can be an onerous task however, especially for media service providers who wish to operate on a multi-territorial basis. Copyright adheres to the principle of territoriality, which dictates that Member States have no competence to impose legal obligations on activities that occur outside their national borders.¹ As a consequence, media platforms need to take into account the laws of all Member States where the works will be made available. Additionally, start-ups face difficulties in tracing the relevant right holder, both on the national and pan-European level. The copyrights to a single work are often 'split up' among national and international rights holders and collective management organisations. In some sectors, rights are scattered even before the work is created as a result of pre-financing agreements, which are often also conditioned upon territorial exclusivity. Therefore, **the transaction costs involved in copyright clearance can be very high. This not only discourages new undertakings from starting their own digital media platforms, these difficulties also limit the dissemination of Europe's cultural heritage.**

Copyright complexity severely limits the position of the EU's creative economy and has put media service providers at a disadvantage against US competitors. US based undertakings only have to take into account one federal copyright law.² This

combined with the national US market having a large national audience, enables US media companies to reach a critical mass much faster. Although Spotify is a leading example of a global, European digital media platform, no EU alternative exists for Netflix.

I. Further promotion of identification standards

Recommendation 1: The use of identification standards and interoperability between identification standards should be further encouraged in order to enable fast discoverability of copyrighted works.

Creative works may contain many rights bearing components. This is particularly the case for audio-visual works where multiple authors are involved. Even though copyright laws try to remedy the issues related to co-authorship by automatically transferring the rights of audio-visual works to the producer, fragmentation continues to exist as a result of pre-financing, licensing or distribution agreements. **As a result, copyright users do not only need to identify the rights bearing components but also the relevant rights owners.**

Identification standards facilitate this search to some degree. Standard identifiers are numbering or metadata systems that allow the identification of a copyrighted work. In order to truly streamline copyright clearance it is necessary to adopt these standard identifiers where they exist. Although policymakers should not focus on mandating one identifier's use over the other, leaving the choice to organizations to use that identifier that best fits their business interests, it should encourage creators to at least implement these identifiers. Additionally, **the standards should be made interoperable.** The promotion of standard identifiers was also one of the pledges following the European Union's Licensing for Europe stakeholder dialogue.³ In order to simplify the discoverability and licensing of copyrighted works, the further advancement of standard identifiers must be encouraged.

Most identifiers nevertheless remain a 'dumb number'. They act purely as an identifier, without providing any information on who actually owns the copyright. **Therefore, the use of identification standards is best complemented with systems that do allow the accurate attribution of ownership.**

II. Copyright Databases and hubs

Recommendation 2: Further encourage the development of industry led data bases that enable the discovery of copyright ownership.

Recommendation 3: Further explore the possibility of a network of copyright data bases, in which licensing mechanisms are already present.

In order to truly facilitate licensing and decrease transaction costs of service providers, rights users must be able to rapidly and accurately track the copyright owners of creative works. **Industry efforts are needed in order to establish data bases concerning copyright ownership.**

Several EU-funded projects already strive towards easing the licensing process by creating databases of copyrighted works' metadata, including ownership, such as the UK Copyright Hub initiative.⁴ Databases could also be made interoperable. Primarily aimed at high volume, low monetary value transactions, the UK Copyright Hub would go one step beyond a mere ownership database however. The ultimate goal of the Copyright Hub would be to create a platform that also allows rights owners to license their works directly to the users of the platform. If implemented correctly, a network of copyright hubs would of course tremendously decrease transaction costs. Verification and dispute resolution procedures would increase their efficacy and ensure adequate right holder protection.

To stimulate the creation of metadata databases, Hugenholtz and Hargreaves argue that the EU could provide regulatory incentives to make metadata, such as copyright ownership available.² This motivation may consist of having collective management organisations making their metadata publicly available. According to Hugenholtz and Hargreaves another incentive could be to condition the legal protection of digital rights management upon the making available of metadata to a designated entity. Right holders could also have a formal obligation to submit metadata to a database or entity, which they argue wouldn't be too hard to do in a digital environment.

Nevertheless a balancing act will be required. The privacy and moral rights of authors must be considered as well. Therefore, copyright databases shouldn't be made mandatory, but rather exist on an **opt-in basis**.

III. Alternative Licensing Mechanisms

Recommendation 4: Further explore the possibility of alternative, multi-territorial licensing schemes. Special care should be given to the particularities of the different creative industries, especially with relation to financing. One should also respect the exclusive rights of the copyright holder, for instance by providing opt-out mechanisms.

The European Commission has explored the idea of implementing or encouraging alternatives to the traditional practice of granting licenses on a territorial basis. Some argue that the promotion of

multi-territorial licensing mechanisms would alleviate the problems currently faced service providers.

The European directive on collective management of copyright introduced a multi-territory licensing passport for the online use of musical works. Following this regime certain collective rights management organisations can now grant multi-territory licenses. However, the exact impact of the directive still remains undetermined. Another option would be to combine copyright with a country of origin principle, whereby the license would only have to be obtained in the place of establishment of the copyright user. With relation to the audiovisual sector, the Dutch government has argued in favour of a linguistic license. Rather than dividing the EU along national borders, the market could be divided by language. Languages cross borders and their speakers often find themselves outside their own linguistic area: language-based licenses would allow the distribution throughout the EU of an original or dubbed version of an audiovisual work. Of course, the ultimate licensing solution would be the introduction of a single EU copyright title or copyright code. Alternatively, the collective management of copyright could be further encouraged: collective management organisations can act as a one-stop-shop for transnational rights clearance.

Nevertheless, the efficacy of these alternate licensing schemes remains difficult to predict. Although it is necessary to further explore these alternatives, the rights of the copyright holder must be adequately protected and respected. Therefore, alternate licensing schemes should provide copyright owners with an opt-out mechanism - unless the lack thereof wouldn't infringe upon his exclusive rights. **Moreover, territorial licensing often seems part and parcel to the financing of many creative productions.** This is a reality that should be taken into account as well.

IV. Facilitate Portability

Recommendation 5: Introduce right clearance, licensing alternatives or copyright exceptions to enable the portability of media services.

As copyright must be cleared for all Member States where content will be offered to the public, **the territoriality of copyright currently disables consumers to listen, watch or read their content when travelling abroad.** Geo-blocking denies users access to their content. This also inhibits the establishment of true pan-European media services. Moreover, for consumers who have paid for a service, this is often perceived as an

unforgivable inconvenience. **Therefore, further initiatives must be taken to ensure portability of media services, for instance through the implementation of a copyright exception. For example, once it is established that consumers have paid a subscription fee, they could be allowed to watch the media they paid for in other countries.** As mentioned above, the introduction of copyright exceptions must be done with due care: policy makers should take into account the financing mechanisms of the industries involved.

The limits of copyright solutions

The difficulties that pan-European online media platforms face should not solely be ascribed to licensing and copyright clearance complexity. **Indeed, one of the main barriers inhibiting the success of pan-European service providers is the cultural and linguistic fragmentation present within Europe.** In the audiovisual sector for instance, it appears that many on-demand providers target the national audience, rather than aiming to provide one set of works on a cross-border basis. Addressing copyright complexity will not resolve cultural fragmentation.

iLINC Recommends

- The use of identification standards and interoperability between identification standards should be further encouraged in order to enable fast discoverability of copyrighted works.
- Further encourage the development of industry led data bases that enable the discovery of copyright ownership.
- Further explore the possibility of a network of copyright data bases, in which licensing mechanisms are already present.
- Further explore the possibility of alternative, multi-territorial licensing schemes. Special care should be given to the particularities of the different creative industries, especially with relation to financing. One should also respect the rights of the copyright holder, for instance by providing opt-out mechanisms.
- Introduce right clearance, licensing alternatives or copyright exceptions to enable the portability of media services.

References

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