

SPECIAL REGIME FOR NEW ONLINE
CONTENT SERVICES AS A RESPONSE TO
LACK OF INNOVATION IN THE ONLINE
CONTENT SECTOR IN EUROPE?

Lucius Klobučník

Early Stage Researcher

Centre for Commercial Law Studies

Queen Mary University of London

EIPIN Innovation Society

<https://www.eipin-innovationsociety.org/research/allocation-of-rights-actors-and-institutions/esr-15/>

ABSTRACT

While Europe has witnessed the rise of pioneering online on-demand music streaming services, these services have struggled to become profitable and have failed to compete with digital service providers (DSPs) worldwide. Even when it comes to online music streaming services, European market performs below its potential concerning the amount and variety of such services. The European Union decided to promote innovation in this area by legislative measures, more precisely by providing a "special regime" for new online content services. Two legislative documents are of particular relevance.

The newly adopted Digital Single Market (DSM) Directive establishes a special liability regime for small, new online content sharing service providers, under which these services have to comply with fewer conditions compared to other services in order to avoid copyright infringement. This special liability regime applies to DSPs which have been active in the market for less than 3 years, have their annual turnover below 10 million euros and the number of their monthly unique visitors does not exceed 5 million. These services have to comply with take-down obligations, but, unlike bigger DSPs, do not have stay-down obligations. However, these "small and new services" are subject to obligation to obtain licences before they start operation. The EU has on numerous occasions referred to high transaction costs when acquiring these multi-territorial (EU-wide) and multi-repertoire licences.

Legislative framework for multi-territorial online licensing (of musical works) is embodied in the Collective Rights Management (CRM) Directive, which calls for collective management organisations (CMOs) to provide preferential treatment for "new type of online services" active in the market for 3 years. However, the CRM Directive fails to define the meaning of "new type" of online service. It can be assumed that unlike the DSM Directive, which grants special liability to any new service (regardless of whether the same type of services already exist in the market), the CRM Directive's preferential treatment appeal extends only to new category of services that have not been offered in the market yet.

However, the language of the CRM Directive has a character of a soft obligation, an appeal to licensors to provide special treatment to new types of online services. Research shows that CMO and CMO joint ventures treat new services the same way as other online services, i. e. provide the same licensing conditions and tariffs as for other services. Regarding the type of services, licensors would typically categorise services or set up new categories with

pre-determined licensing conditions and tariffs. Despite these conditions and tariffs being subject to negotiation, new services would not hold much negotiation power as opposed to licensing entities controlling large repertoire. Moreover, the CRM Directive only applies to some licensors. Option-3-publishers, holding large repertoires necessary for new online services, license their rights to users directly. Hence, the goal of the CRM Directive to provide individualized licences to innovative online services is not easy to achieve in practice and licensing burdens of these services are not likely to lighten after the implementation of the DSM Directive.

1 Boosting Innovation by Legislative Intervention

1. 1 Realizing the Lack of Innovation in the Area of Content Provision Services

Although some of the pioneering and ever more popular online on-demand music streaming services were born in Europe, the European Union (EU) has been facing difficulties to stay competitive in the global market when it comes to online content provision services in general and online music streaming services in particular. Innovative new business models in this area struggle to thrive in the EU¹. While Europe is lagging behind other regions of the world (especially North America), opportunity is missed to create markets for European creators, innovators and entrepreneurs and to provide European consumers with digital products and services². While the current situation is caused by numerous legal and economic aspects, this paper focuses solely on two of the legislative solutions recently introduced in 2 different legislative instruments – namely the Collective Rights Management Directive (CRM Directive)³ and the Directive on Copyright in the Digital Single Market (DSM Directive)⁴ – providing a special liability and individualised licensing regime, respectively, for new online content services. In several soft law documents, leading to the adoption of the two directives, the EU recognized a lack of innovation in the area of music streaming services. The Collective Rights Management Directive Proposal from 2012 (Proposal) suggested that services provided by collective management organisations (CMOs) to users need to adapt since insufficient modernisation negatively impacts on the availability of new offerings for consumers and service providers as innovative services in the online environment are being hampered and CMOs should be led to adapt their services for the benefit of, inter alia, service providers⁵.

¹ 'Online Platforms, Economic Integration and Europe's Rent-Seeking Society: Why Online Platforms Deliver on What EU Governments Fail to Achieve |' <<https://ecipe.org/publications/online-platforms-economic-integration-europes-rent-seeking-society/>> accessed 23 April 2019.

² European Parliament, Directorate-General for Internal Policies, 'Streaming and Online Access to Content and Services' 50.

³ DIRECTIVE 2014/26/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84/72 2014.

⁴ DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130/92 2019.

⁵ European Commission, '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 COM/2012/0372 Final - 2012/0180 (COD)' 2.

Before the CRM Directive's adoption, the European Commission emphasized the need to (legislatively) provide for specific measures to foster the development of new online services in the music sector and to facilitate multi-territory licensing of musical works for online services⁶. However, as we saw later, the final text of the CRM Directive was limited to dubious recommendations as opposed to "specific measures".

1. 2 Rationale for legislative solutions

While Europe has witnessed a rise of new entities facilitating multi-territorial licencing solutions for online use, the amount and versatility of new online content services has not reached desired levels. The EU tried to fix this problem by offering a special legal regime to "small and new services", which would result in some benefits compared to incumbent services and/ or services generating a turnover above certain threshold. Two specific legislative measures tailor-made for "small and new services" can be found in the recent pieces of EU copyright legislation – the DSM Directive and the CRM Directive adopted in 2019 and 2014, respectively.

2 Special Liability Regime of Small and New Services in Art. 17 (6) of the DSM Directive

2. 1 Primary Liability For Copyright Infringement and Limitation of Liability

The DSM Directive seeks to adapt copyright rules to the current dynamic systems of digital information flows in the EU and its adoption was widely expected. However, the final text's adoption by the EU Parliament and Council was preceded by huge lobbying efforts of various stakeholders⁷ and a heated debate had gone far beyond the gates of EU institutions. One of the most contested issues crystallized in one of the biggest changes the DSM Directive introduced - subjecting digital service providers (or, as the DSM Directive refers to them "online content sharing service providers - OCSSPs") to primary liability for copyright

⁶ European Commission, 'Commission Staff Working Document, IMPACT ASSESSMENT Accompanying the Document 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' 8 <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52012SC0204>>.

⁷ 'Copyright Directive: How Competing Big Business Lobbies Drowned out Critical Voices | Corporate Europe Observatory' <<https://corporateeurope.org/en/2018/12/copyright-directive-how-competing-big-business-lobbies-drowned-out-critical-voices>> accessed 21 June 2019.

infringement. However, the DSM Directive provides three cumulative conditions a meeting of which absolves OCSSPs from liability for copyright infringement. OCSSPs have to make best efforts to obtain authorisation, ensure the unavailability of specific works and other subject matter for which the rightholders provided the service providers with the relevant and necessary information (so called “take-down” obligation) and to act expeditiously, upon receiving a sufficiently substantiated notice from the rightholders to disable access to or remove from their websites the notified works and make best efforts to prevent their future uploads (stay-down obligation)⁸.

2. 2 OCSSPs as Primary Infringers

It has to be noted that the DSM Directive is not aimed at digital service providers in a broad sense, but only at the so-called user-upload content platforms (UGC platforms), or, as the Directive refers to them – Online Content Sharing Service Providers (OCSSPs). In order for a service to be defined as an OCSSP, a couple of cumulative conditions must be met: the main or one of the main purposes of the service is to store and give the public access to a large amount of works uploaded by users, it has to organize or promote content and has to do so for profit⁹. The definition of an OCSSPs has evolved in the process leading to the DSM Directive adoption. In the draft versions, OCSSPs were understood as services with the main purpose to store and enable users to upload copyright protected content. The current definition is more aligned with Article 17 (1) which labels OCSSPs as primary infringers by stating that OCSSPs perform an act of communication to the public and therefore require licence from rightholders¹⁰.

2. 3 Liability of Start-ups Different from Other Services

Essentially, any OCSSP can avoid copyright infringement liability (if strict cumulative conditions mentioned above are met), but OCSSPs that are “small and new” have to comply with fewer conditions, since the Article 17 (6) DSM Directive affords a special regime to these services. Several conditions must be met for a DSP to be labelled “small and new”. Firstly, their

⁸ DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130/92 para 17 (4).

⁹ *ibid* Article 2 (6).

¹⁰ *ibid* Article 17 (1).

annual turnover cannot transgress the threshold of 10 million euros. This figure is in accordance with the European Commission’s definition of small enterprises¹¹. Secondly, exemption from liability is only applied to services which have been active in the market for less than 3 years. This provision, which was added to the DSM Directive’s wording at a later stage of the legislative process, created a “start – up exception” as opposed to an “SME exception”. Unlike other OCSSPs, “small and new” services are not subject to “stay-down” obligation, meaning they do not have to prevent future uploads of works for which rightholders had provided notification (thus, they do not have to monitor content). The reason for absolving “small and new” services from stay-down obligations is that creating and maintaining a system preventing future uploads might be too costly and burdensome for small services with low turnover. It has to be noted that as soon as the average number of unique monthly visitors of small and new services reaches 5 million (calculated on the basis of previous calendar year), they shall demonstrate that they have made best efforts to prevent further uploads of notified works for which rightholders have provided relevant and necessary information¹². When it comes to take-down obligations of small and new services, the liability standard is different as compared to other services. While small and new services have an obligation to act expeditiously to remove infringing content after receiving a notice from rightholders, unlike other (bigger) OCSSPs, they do not have to follow “high industry standards of professional diligence” when disabling access to notified works. It can be assumed that in the case of potential copyright infringement dispute, bigger services will have to prove compliance with high industry standards, while small and new services might be exempt from liability without adherence to high industry standards.

2. 4 Determining Liability’s Limits - “Best Efforts” in Explaining Vague Terms by Vague Terms

While small and new services do not have to follow high industry standards, they still have to comply with the standard of “best efforts” in order to be exempt from copyright infringement liability. Best efforts should be exercised by all OCSSPs in order to obtain

¹¹ European Commission, ‘Commission Recommendation of 6 May 2003 Concerning the Definition of Micro, Small and Medium-Sized Enterprises, OJ L 124/ 36, 2003/31/EC’.

¹² DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130/92 Article 17 (6).

authorisation from rightholders and in the case of small and new services with over 5 million unique monthly visitors to prevent further upload of works notified by rightholders. However, the term “best efforts”, such as some other terms in the DSM Directive (e. g. professional diligence, high industry standards), includes a certain level of ambiguity which might later require interpretation by courts and will lead to further discussions¹³. To avoid the need for further interpretations, the DSM Directive provides which criteria should be taken into account when assessing best efforts. These criteria include steps taken by a diligent operator, best industry practices in light of all relevant factors and developments as well as principle of proportionality¹⁴. When assessing proportionality, type of content in the particular case should be taken into account. In some cases, unavailability of content can only be avoided upon notification of rightholders. Adherence to best efforts in accordance with high industry standards and professional diligence can in certain circumstances absolve OCSSPs (and not only small and new services) from liability. If providers are able to demonstrate that they had made best efforts to prevent infringing content from re-appearing on their website, they will not be liable even if the works re-appeared had been notified by rightholders. This, however, only applies to services which cooperate with rightholders in identifying infringing content.

The requirement of “best efforts” can thus be crucial in determining liability. The DSM Directive seems to recognize two types of best efforts – with or without the meeting of high industry standards of professional diligence. Arguably only future infringement disputes will reveal whether there are 2 standards when judging best efforts. Although the Recital 66 of the CRM Directive aims to clarify “best efforts”, it does so by referring to further vague criteria, e.g. diligent operator, best industry practices, developments and principle of proportionality. National legislators and courts of EU Member States are thus given a substantial degree of manoeuvrability in further shaping these terms.

¹³ Dirk Visser, ‘Trying to Understand Article 13’, SSRN Electronic Journal, 2019, 19, 6.

¹⁴ DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130/92 Rec 66.

3 Individualized Licences for New Type of Online Services

3.1 Individualized Licences as Market Entry Facilitators

In order to boost innovation and emergence of online content provision services, the DSM Directive gives certain concessions from liability for small and new services. It has to be noted that these services have to obtain authorisation for all copyright protected content available on their website, regardless of the amount of content accessible or size of these services¹⁵. They can only be absolved from liability under specific conditions, provided they made best efforts to obtain authorisation. While the special liability regime benefits services already active in the market, online services face difficulties to enter the market. This is particularly due to fragmented licensing market and high transaction costs¹⁶. The CRM Directive aimed at facilitating licensing process for online services by appealing to licensors to offer individualized licences for “new type “ of online services¹⁷. Recital 67 of the DSM Directive provides that the specific liability regime for “small and new services” together with the appeal for individualized licences should benefit start-up companies and result in development of new business models on the content provision side. However, only a negligible amount of online services will be able to benefit from the regime of individualized licences, let alone both individualized licences and special liability regime.

3.2 Which Services Can Benefit from Individualized Licences?

Art 16 (2) of the CRM Directive provides that “When licensing rights, collective management organisations shall not be required to use, as a precedent for other online services, licensing terms agreed with a user where the user is providing a new type of online service which has been available to the public in the Union for less than 3 years.”¹⁸ However,

¹⁵ *ibid* Art 17 (1).

¹⁶ Heritiana Ranaivoson, ‘Fragmentation of the Single Market for On-Line Video-on-Demand Services: Point of View of Content Providers’ [2014] SSRN Electronic Journal <<http://www.ssrn.com/abstract=2472978>> accessed 10 July 2018; *ibid*; European Commission, ‘Commission Staff Working Document, IMPACT ASSESSMENT Accompanying the Document 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’ (n 6); Vrije Universiteit Brussel KEA European Affairs, ‘Licensing Music Works and Transaction Costs in Europe’.

¹⁷ DIRECTIVE 2014/26/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84/72 Art 16 (2).

¹⁸ *ibid*.

it remains questionable whether this provision has any positive impact on new online services from several reasons.

Firstly, CMOs have to abide by the principle of non-discrimination in the grant of licences to commercial users.¹⁹ Although there is a room to negotiate tailor-made conditions and ad-hoc tariffs, such decisions would in the case of most European CMOs have to be approved by rightholder members of CMOs. Therefore, providing tailor-made licences could be a difficult task for CMOs.

Secondly, individualised licences according to Art 16 (2) are envisaged to be offered only by CMOs, since the CRM Directive does not apply to other licensing entities, such as multi-territorial mono-repertoire licensing entities²⁰. In order to clear all rights to start their service, online services have to obtain licences also from other licensing entities than CMOs. It is unclear why the EU legislator decided not to address other licensing entities in the CRM Directive²¹, especially since one of the main aims of the CRM Directive was to facilitate multi-territory licensing of musical works for online services²². In any case, the appeal to provide individualised licences only applies to some licensors new services have to obtain licences from.

Thirdly, individualised licences are supposed to be offered only to “new type” of services. It remains unclear which services would be considered sufficiently new and by which standards. Since no explanation can be found in either the CRM Directive or the soft law documents leading to its adoption, it will remain CMOs’ task to determine whether a certain service can be considered a “new type” or be subsumed under some existing categories of users set up by CMOs. New services would arguably not have enough negotiation power to

¹⁹ Lucie Guibault and Stef van Gompel, ‘Collective Management in the European Union’ in Daniel Gervais (ed), *Collective Management of Copyright and Related Rights* (Third Edition, Wolters Kluwer 2016) 147.

²⁰ DIRECTIVE 2014/26/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84/72 Rec 16. Mono-repertoire multi-territorial licensing entities are e. g. entities holding mechanical rights of anglo-american publishers in Europe, such as SOLAR or ARESA.

²¹ Felix Sebastian Schwemer, ‘Emerging Models for Cross-Border Online Licensing and User-Generated Law’ in Thomas Riis (ed), *User-Generated Law: Re-constructing Intellectual Property Law in the Knowledge Society* (Edward Elgar Publishing 2015).

²² European Commission, ‘Commission Staff Working Document, IMPACT ASSESSMENT Accompanying the Document 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’ (n 6) 8.

contest CMOs' decision to be subsumed under an existing category and might thus not be able to avail themselves of the benefit of individualised licence.

Lastly, the provision on individualised licences does not have a character of obligation but constitutes a mere appeal to provide favourable treatment for new type of services active in the market for less than 3 years. The availability of individualized licences is fully within CMOs' discretion.

It remains questionable whether the Art 16 (2) brings any benefits for new services or whether this provision is obsolete. Especially in the light of a lack of “new type” definition and no actual obligation to use individualised licenced, only a negligible number of services can benefit from this provision. Especially if a “new type” is interpreted strictly as a type of services not yet present in the market. The DSM Directive provides that individualised licences as well as special liability system are designed for online start-ups services²³. Can some new services actually avail themselves of both benefits?

4 New Services Potentially Benefiting from both Special Liability Regime and Individualised Licences

4. 1 Commonalities and Differences Between the Two Regimes

A common feature of special liability regime and individualised licences²⁴ is that they both apply to start-ups, since only new services available in the market for less than 3 years can take advantage of them. But can a single service benefit from both provisions and which one of the two provisions has bigger impact?

While they both apply to start-ups, it should be noted that provisions on individualised licences do not apply to all start-ups, but only to those that differ from others present in the market, since they have to bring a “new type” of service. On the contrary, the special liability regime applies to all start-ups (provided that they comply with conditions set out in the DSM Directive) regardless whether the same or similar type exists in the market.

²³ DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ L 130/92 Rec 67.

²⁴ A comparison between the analysed provision can be seen in the attached Table 1.

It has to be noted that special liability regime applies only to services meeting all characteristics of an OCSSPs – offering large amount of user uploads, organising and promoting content for profit-making services. Appeal for individualised licences is open for larger variety of services, thus not limited to user uploads or large amount of works. Therefore, subscription services where content is not uploaded by users (e. g. Spotify – or Deezer-like) can benefit from individualised licences but not from special liability regime.

When it comes to advantages offered to new services by these provisions, perhaps the biggest one is that small and new OCSSPs do not have to monitor content on their websites, since they do not have a “stay-down” obligation. Potentially the biggest advantage of individualised licences is that they facilitate entry of new innovative services into the market, although this claim might be disputed.

Special liability regime has a stronger impact since it provides clear shield from liability when conditions are met. The impact of individualized licences is questionable, especially since the provision constitutes a mere appeal to CMOs as opposed to a real obligation.

4. 2 Services Potentially Benefiting from both Regimes

While the special liability regime can be applied to a potentially larger amount of services, the appeal for individualized licences can be used with potentially smaller amount of services (because they have to be a “new type”) but larger variety of services as compared to special liability regime. A service benefiting from both provisions has to be an OCSSP (i. e. giving access to large amount of user uploads and complying with conditions of Art. 2 (6) DSM Directive) and at the same time be a new type of service distinguishing itself from other services active in the market. There would have to be a substantive innovative feature of user-upload content services. It can therefore be assumed that it will be extremely difficult for any service to reap benefits of both provisions.

Conclusion

Innovative online content provision services have to be provided with an environment in which they can flourish. The entry into the market has been hampered due to existing fragmentation of rights and rightholders leading to prohibitively high transaction costs²⁵, especially for start-ups. Moreover, some soft law documents²⁶ and subsequent market development led to establishment of new licensors and consequently to even further fragmentation. The European Commission decided to take legislative measures to boost innovation in online content provision services sector while avoiding encroachment on rightholders' freedom to withdraw their rights from collective management. Although the special liability regime allows small and new services to escape primary liability infringement under certain circumstances, it remains questionable whether this provision will have a positive impact on innovation in the area of online content provision services. Despite the possibility to eventually avoid liability, small and new services are under the same obligation as more established services to obtain licences from rightholders. Therefore, the EU legislator could have introduced some more concrete provisions to facilitate licensing for new services. Instead of using vague terms (such as "new type") and mere appeals, it could have clarified conditions under which certain services can be perceived as "new type" or could have included some obligations for CMOs to give preferential treatment or offer special assistance (or services) to new services. It remains to be seen whether incumbent as well as emerging licensing entities will be providing individualised licences to new online services.

We have been currently witnessing the emergence of innovative licensing entities capable of bringing new licensing solutions to music streaming services (particularly by faster and more accurate data processing). National authorities crack down on incumbent licensors who prevent new licensing entities from entering the online music licensing market²⁷. However, the proliferation of new licensing entities is arguably a result of market development and does not necessarily lead to emergence of new online services. Further as

²⁵ KEA European Affairs (n 16).

²⁶ Most notably: European Commission, 'European Commission Recommendation of 18 May 2005 on Collective Cross-Border Management of Copyright and Related Rights for Legitimate Online Music Services (2005/737/EC), OJ L 276/ 54'.

²⁷ 'Spanish Collecting Society SGAE Fined 2.95 Million Euros for Anti-Competitive Conduct | Complete Music Update' <<https://completemusicupdate.com/article/spanish-collecting-society-sgae-fined-2-95-million-euros-for-anti-competitive-conduct/>> accessed 3 June 2019.

well as more concrete and cogent legislative measures are needed to facilitate emergence and market entry of new online content provision services.

APPENDIX – TABLE 1

SPECIAL LIABILITY V INDIVIDUALIZED LICENCES

	Special liability of small and new services – DSM Directive Art 17 (6)	Individualised licences for new type of online services – CRM Directive Art 16 (2)
Impact of provision	Strong – shield from liability when conditions are met	Mere demand/ soft obligation
Aim	Start-ups	(Small amount of) start-ups
Number of services to benefit	Possibly high	Negligible, if they have to be “new type”
Extent of application	3 years	3 years
Benefits	No need to monitor content – stay down obligations	Possibility for innovation in the market
Online services beneficiaries -	Only OCSSPs if they are new, content uploaded by users	Larger variety, but has to be a new business model