

Generic comments on the review of the ODRL Action vocabulary by the law firm OLSWANG in May/July 2014

Document history				(This is not an official document)
Revision	Issue Date	Pages	Author (revised by)	Remark
1	2014-07-07	3	OLSWANG	
2	2014-07-16	3	OLSWANG	

*Note: these generic comments below were sent by email to the IPTC office on **4 July 2014** and the document of the ODRL Action vocabulary with specific comments by OLSWANG lawyers (17534479_4_ODRL - Action - Vocabulary_review Olswang) was attached to it.*

*This document includes a few comments by **IPTC** on OLSWANG's view on some facets of ODRL.*

Dear Mr. Steidl,

As discussed, we amended the provided vocabulary based on our conversation and the additional clarifying comments we received. We attach the revised Action Terms, and have the following additional comments:

1. We understand that there is no specific reason for using the phrase "to execute the act of...". We therefore deleted the phrase and updated the language accordingly.
2. There were still a number of uncertainties which we have marked in the comments-section of the document. We think that, if any clarification is required, this can be done by your colleagues based on our comments. If not, obviously, please let us know.
3. As discussed, it might entail a risk to use a system under which certain uses are either permitted or prohibited. We assume that there will be a catalogue, and the Assigner has to tick every single action and has to decide if the particular action shall be "permitted" or "prohibited".

This system bears certain risks especially with regard to overlapping actions. It may therefore be worthwhile to consider to define the action vocabulary in a different way. For instance, to express a prohibition, it would be possible to add a 'no' to the action item in case of a prohibition.

Example:

Aggregate - The Assigner permits the Assignee(s) to use the Asset or parts of it as part of a composite collection.

noAggregate – The Assigner prohibits the Assignee(s) to use the Asset or parts of it as part of a composite collection.

IPTC comment: *we feel that the considerations from "This system bears ..." on do not comply with the ODRL design of Permission vs Prohibition. We think that it can be expressed in an unambiguous way if it taking an action is permitted or prohibited*

4. Based on the constraints, we also inserted two new duties: (i) limitPeriod and (ii) limitTerritory to express whether the licensing term and the covered territories are limited in scope.

IPTC comment: *we've checked the proposals of a limitPeriod and limitTerritory duty in the original OLSWANG paper but we feel that both could be expressed in a fully equivalent way be constraints.*

5. For the sake of consistency, we used the term "consideration" which appears to be the broadest term to cover any form of remuneration.

6. We also would like to point out again that using general, pre-defined license terms like the ODRL Action Vocabulary, bears the risk that the Assigner licenses certain actions but does not actually and fully own the rights pertaining to such action. It is not entirely clear if and to which extent the use of a Policy has binding character, but clearly, this is a likely possibility. If a right owner checks the box and permits “distribute” but has actually and for example by means of an ordinary contract, already granted exclusive distribution rights to another party, then the Assigner will be liable for damages suffered by the Assignee relying upon, and action in accordance with, the actions permitted. Similarly, if for example no territorial constraints are being expressed but in reality the Assigner has only acquired rights for the territory of, for instance, France, then this will equally result in liability.
7. As discussed, it would be desirable and even reasonable to make the action terms part of a proper contract between the parties. At least for the majority of situations in which we understand the Action Vocabulary will be used, there will actually be something like a (written) underlying contract. It would therefore be possible to include a clause in such underlying contract that includes the use of the Action Vocabulary into the contract and sets a framework regulation for such use. Obviously, it would not be possible to draft such clause as brief and concise as the Action Vocabulary itself, but if this is useful, we can of course draft a model clause or model set of clauses to be included in framework agreements.
8. Finally, we would like to answer your question regarding the enforceability of excluding certain territories. We researched the question and found judgments under German, US, Spanish and Dutch law. While there is no final case law, the judgments we found regarded the licensing terms under the Creative Commons License as enforceable. Therefore, in light of these judgments, limiting the geographic scope of a license by using REL should also be enforceable, provided this legal view would be upheld on appeal. However, the enforceability of such terms also depends on other circumstances, such as the framework licensing agreement. For instance, if the parties have agreed in a framework licensing agreement to the use of REL for an individual asset, there seems to be little risk that the terms expressed in the REL would not be held enforceable.

Please let us know if you have any questions.

Thank you, and kind regards

Hanna Steinbach

Dr. Hanna Steinbach, LL.M. (Berkeley)

Associate

Olswang Germany LLP

Potsdamer Platz 1

D-10785 Berlin

www.olswang.com

=== END of document ===