Anna Vuopala

EXTENDED COLLECTIVE LICENSING

- A solution for facilitating licensing of works through Europeana, including orphans?

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FINNISH COPYRIGHT SOCIETY Finnish Copyright Institute

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1. Introduction

The goal of the digital libraries' initiative[1] of the European Union is to provide for Europe's cultural and scientific riches to the European public at "a click of a mouse". It sets out to make all Europe's cultural resources and scientific records – books, journals, films, maps, photographs, music, etc. – accessible to all, and preserve them for future generations. The idea behind the European digital library portal Europeana[2] is that it would work as a single reliable access point to our common European heritage. It offers an alternative to the global search engines on the market and would have broad coverage of content in good quality.

The European Commission has been encouraging online accessibility of works throughout the EU, not just in respective (if any) Member States. This is best done via an EU -wide portal such as the Europeana. The digital library portal entails now more than 23million objects. The digitisation of European cultural heritage has been considered very important in the Council of the European Union. In October 2011 the Council adopted a recommendation among others on the indicative targets per Member State on content to the Europeana by 2015. The indicative targets are calculated on the basis of the size of the population and of the GDP. For Finland the target for 2015 is around one million items.

Digitisation projects, undertaken by European cultural institutions, which entail digitisation and online accessibility of copyright protected works in mass scale - potentially millions of works - put pressure on the functioning of the current copyright system. Here, the extended collective license system, the Nordic ECL system, could be a solution.

Whether run by libraries or public service broadcasters - these projects involve, depending on the type of works, the seeking of permission from one to potentially hundreds of authors and other rightholders for each work.

The EU copyright system is not prepared for this. The digitisation and online accessibility of works could not be envisaged even a few years ago and much less let's say 50 years ago. There has never been a need to licence mass use of works for entire collections in this way and to this extent before. The rightholders have neither been facing the challenge of the changing business opportunities in quite the same way before.

It has been established that in many occasions the issue of "orphan works", *i.e.* works whose rightholders cannot be identified or located, is relevant in the digitisation projects around Europe.

The clearing of rights may be very cumbersome due to orphan works, if not impossible altogether. The transaction costs for licensing of digitisation exceed the costs of the digitisation itself, which makes the endeavour in many cases not worth the effort. This is true especially for historically interesting materials. Similar problems are connected to works that are no longer commercially available, *i.e.* so called out-of-print works.

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[1] Digital Agenda for Europe: Digital Libraries Initiative, 2011, http://ec.europa.eu/information_society/activities/digital_libraries/index_en.htm

[2] www.europeana.org.

Also the environment has changed considerably. The internet is inherently borderless and a very natural element in the digital era. In the online environment the borders of countries and their laws and even languages are of less importance. Unless the accessibility of a work is restricted somehow, technically or otherwise (*e.g.* to only allow access from IP addresses of a particular country), the work is accessible from everywhere in the world. The territoriality of the copyright regime is hence challenged. On the other hand, safeguarding cultural diversity is increasingly important in order to allow for even smaller cultures and languages to survive and develop in the digital age.

The discussion of EU-wide licensing has been going on actively since the EU Commission music online recommendation was given in 2005. This recommendation had a significant impact on the collective licensing schemes of music as the recommendation affected greatly on the competition issues involved in the licensing schemes.

During recent years the discussion has spread to film and other content online, and now solutions are sought for EU-wide licensing of online access to works of our common cultural heritage.

Several EU Commission documents[3] have addressed the need to develop the copyright licensing system to better suit the digital era and the building of a European digital single market.

The Commission introduced its proposal for a directive regarding certain permitted uses of orphan works in May 2011(COM(2011) 289) which seek to facilitate the cross-border use of orphan works by certain cultural institutions for their public interest missions. This directive was adopted in October 2012.

As expected in the Communication from the Commission on a Single Market for Intellectual Property Rights (COM(2011)287) a proposal on collecting societies and multi-territorial licensing for music was published by the Commission in July 2012.[4] This proposed directive is now examined by the Council working group in Brussels, and is expected to move forward during the Irish Presidency in the first half of 2013.[5]

In May 2012 the Council has also adopted new conclusions as regards digitisation and online accessibility of works through Europeana.[6] The Council stresses that digitised cultural material is an important resource for European cultural and creative industries. It considers also that digitisation and online accessibility of Member States' cultural heritage, both in a national and cross-border context, contributes to economic growth and job creation and to the achievement of the digital single market through the increasing offer of new and innovative online products and services.

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[3] A Digital Agenda for Europe, Brussels, 26.8.2010, COM(2010) 245 final/2, Copyright in the Knowledge Economy, Brussels, 19.10.2009, COM(2009) 532 final, http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20091019_532_en.pdf

[4] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions: A Single Market for Intellectual Property Rights Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe (COM (2011) 287).

[5] The proposal is very technical in nature. It has, however, some effects on the ECL system and therefore it will be presented in more detail under the heading "The approval of a CMO, a supporting element of the system".

[6] Council conclusions on the digitization and online accessibility of cultural material and digital preservation, 3164th Education, Youth, Culture and Sport Council meeting, Brussels, 10 and 11 May 2012, http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/educ/130120.pdf

The Council also underlines the need to actively promote voluntary agreements on the large scale digitisation and especially on the online availability of out-of-commerce works and to take the necessary measures to provide for the required legal certainty in a national and cross-border context. All of this should be done in full respect of intellectual property rights.

Making the collections of European cultural institutions accessible online requires a method for collective licensing of those works that are protected by copyright. The Nordic solution to this type of licensing is the extended collective licensing system (ECL)[7]. It has been developed in order to facilitate the exercise of the exclusive rights in mass use situations where individual licensing is not possible in practice.

There are a few essential and intrinsic elements that make the Nordic ECL different from other types of collective management. This article presents the Nordic ECL system in its essence and reflects on how it is applied in the specific question of *digitisation and online accessibility of works* by libraries and other non-commercial cultural institutions, especially as regards access across borders, *through the Europeana*.[8]

In order to focus on the main issue, the cross-border perspective, the essential elements of the ECL are presented in the light of the development of the digital environment, and a digital single market.

This analysis is very topical as all various available systems for facilitated rights clearance of works are now broadly scrutinised nationally and also by the Commission. The ECL has been analysed as regards its applicability in the digital environment and for use across territorial borders of countries, in the quest for a solution for EU-wide licensing in this field. This paper will also touch upon how the Nordic system covers the so called "orphan works issue".

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[7] Nordic copyright laws from 1960-1961 have been prepared in co-operation. The details of the provisions vary, however, to some extent from one country to another. This is why most examples in this paper are based on provisions in the Finnish copyright law and from the practices of the ECL system as applied in Finland, unless otherwise indicated.

[8] The writer works as a Senior Legal Advisor at the Ministry of Education and Culture in Finland. The views expressed in this article are the writer's own and do not necessarily reflect the views of the Ministry.

2. The ECL system

2.1 What it is – what it is not

The licensing of works for digitisation and online accessibility of European cultural heritage is done both individually and collectively. The individual licensing is normally, especially in Central European legal tradition the most preferable way of licensing, although some situations dating from the 1960's have required also collective licensing schemes to develop.

The ECL is developed especially for the licensing of mass use of works in cases where it is in practice not possible to license individually. The system allows for a very streamlined and functioning way for rights clearance of mass use[9] of works in certain situations, including orphan and out-of-commerce works. The system is not suited for single or sporadic uses of works, as the procedural parts of it could become too heavy.

All five Nordic countries, Denmark, Finland, Iceland, Norway and Sweden have corresponding legislation about extended collective licensing and apply the system essentially in the same way. The ECL is available in at least in Norway and Finland also for making works available to the public on the Internet, *i.e.* a system that allows for online accessibility of works and for users within the non-commercial sector, such as libraries, archives and museums.

The extended collective licensing system is therefore highly applicable for the job of making the European cultural heritage accessible from all EU-countries, at least in theory. It does cover also cross-border licensing, as explained further down.

The overall purpose of the ECL system is to create favourable conditions for the use of protected materials from the viewpoint of the rightholders, the users and the public at large.

The basic requirements of the ECL system build essentially on two basic pillars; 1) the appropriate legal framework and 2) the surrounding circumstances of great practical importance such as the existence of representative collective management organisations (CMOs).

The ECL systems rely on specific provisions in the law, which extend the effect of the agreements concluded between specified parties in a way that allows the user to use, on conditions laid down in the agreement, also works by authors whom the organisation does not represent.

Through this arrangement the rightholders' are able to negotiate about the use foreseen and receive remuneration while the users' interests are taken care of by guaranteeing blanket agreements, without the risk of claims from non-represented rightholders, and criminal sanctions. Important safeguards have been established in favour of rightholders that are not represented by the organisation, *i.e.* "outsiders".

The ECL is a flexible tool and it can be designed in various ways as concerns both legal and practical aspects.

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[9] "Mass use" of works means that the acts of using works are numerous or, there is a broad repertory of works that are used, or a large number of rightholders pertaining to works that are used. Often we are talking about hundreds or thousands of works or uses.

2.2 The development of ECL

The system has worked successfully since its introduction for the facilitated licensing for the broadcasting of musical works in the 1960's. The usual coverage of the ECLs has been:

- terrestrial and satellite broadcasting
- retransmission by cable

Extended collective licensing of some relevant uses of works in educational establishments has been also in the rightholders' as well as in the public interest since their introduction in the 1980's:

- use of works for educational purposes and
- reprographic reproduction of printed materials

Comparing to the times of the invention of the ECL system, there are much larger numbers of potential users[10] of works than before, as the use of works has become so easy in the digital environment. The centralised way of using works only by professional actors, *i.e.* radio/TV for example, is gradually changing.

As regards the *digitisation and online accessibility* of the collections of certain cultural institutions the ECL system works as a complementary system. All Nordic countries' copyright laws provide for broad limitations[11] to the exclusive rights of authors for the benefit of certain cultural institutions, mainly for their basic needs. The ECL provisions have then indicated which specific complementary uses an ECL provision covers and who may take advantage of such a system.

Around seven years ago new areas of possible extended collective licensing were introduced in the Nordic countries' legislations and the system was extended also to digital uses of works. In Finland and Norway the systems were extended also to cover online accessibility of works in the collections[12] of for example libraries, museums and archives. New ECLs were introduced in Sweden as well.

In 2008 the system was further complemented in Denmark with a feature of a "general" extended collective licence allowing even more flexible licensing of works.[13]

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[10] The notion of a "user" has developed remarkably during past decades. A user is anyone from professional users to individual users, who wishes to use a protected work or subject matter, either for commercial or non-commercial purposes. End-users, sometimes consumers, may also be in a position to need to obtain permission to use a work, for various purposes.

[11] Article 5 of the EC Information Society Directive (2001/29/EC) lists exhaustively the limitations and exceptions that Member States may provide for in their national laws. In Finland the directive has been interpreted as to cover the digitisation of works in the collections, for preservation purposes.

[12] ibid. Article 3(1) of the directive states that a work is communicated to the public including when the work is made available to the public in such a way that that members of the public may access them from a place and at a time individually chosen by them.

[13] The Danish Copyright Act of 2008 allows for an agreement with extended effect to take place if the agreement concerns the use of a work in a clearly defined area (on top of specifically defined areas provided for in the law), with a collective management organisation that represents a significant amount of rightholders of works in this area.

Some important clarifications have also been made in case there would be conflict between the individual agreements and collective agreements. ECL agreements are subject to agreements concluded individually between users and organisations representing rightholders.

Some of the problems the ECLs have encountered in the new digital environment are explained by the fact that ECLs have traditionally been used in areas that have been of secondary nature for the rightholders.

Taking advantage of the possibilities of the ECL system is now more difficult as any "secondary uses" have not yet been identified in the digital environment, and as all uses at least in theory can be licensed individually.

The visions of making "as much as possible" of protected content available on the Internet are understandably seen as a threat, because rightholders are considering exploiting the works themselves. The rights in the works might hold potential economic value regardless of their age. In fact, rightholders, especially in the European media sector, are exploring all possible streams of revenue to stay profitable as competition on both national level and from abroad is constantly increasing. They are, while mainly focusing on new content, taking also profit of the Long Tail[14], holding quite a large number of orphan works depending of the area.[15] Orphan works form also a considerable part of the collections of various European cultural institutions. These are very hard to licence even by publishers themselves.

The ECL system covers normally all works in a specific digitisation project – among them also orphan works as such works are treated in the collective arrangement in the same way as the rest of the works covered. This follows from the benefit of a collective arrangement that seeks to minimize the transaction costs of right clearance and at the same time, allow for remuneration to be paid to the authors. The issue of orphan works is tackled further in Chapter 4.

2.3 Essential elements of the system in a new environment

A. The CMO and the user concludes an agreement on the basis of free negotiations

Generally, if a specific way to use the work for public interest is not covered by a limitation, then normal negotiation to obtain a licence is required.

The first fundamental element of the ECL system is "the agreement". The conditions for the use of a work are set in the agreement between a CMO and a user, not by a provision in the law. As the conditions of the agreement extend also to works by non-represented rightholders, the pro-

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[14] The "long tail" means the theory of selling a large number of unique items in relatively small quantities – usually in addition to selling fewer popular items in large quantities. http://en.wikipedia.org/wiki/Long_Tail

[15] The amount of orphan works and hence the dimension and effects of the issue itself within cultural institutions is difficult to state with any kind of certainty - without extensive research. It is very difficult to assess the actual number of orphan works. A study about the dimension of the orphan works: Assessment of the Orphan works issue and Costs for Rights Clearance, http://ec.europa.eu/information_society/activities/digital_libraries/doc/reports_orphan/anna_report.pdf) published by the Commission in May 2010 includes a conservative estimate of the number of orphan books is included. The number of orphan books has been estimated to be 3 million in the EU which is 13 % of the total of in-copyright books in the EU.

visions in the law hold some directives on the framework for the agreements, for the safeguarding of the interests of such rightholders. The ECL system allows in principle the licensing of works for both commercial and non-commercial uses.

The ECL should not be seen as a limitation to the exclusive rights of the author, but as a sophisticated system for the management of rights in certain mass use situations. This is because of the reasons stated below.

Traditionally the ECL has been used in areas where an exception or a limitation from the authors' point of view would have been seen as reaching too far but also where individual licensing would not be practicable for either party. In Finland, the ECL has taken over the task of substituting possible limitations in the law, such as to allow schools to record broadcast works for use in classroom teaching.[16]

The provisions in the law represent also purely a possibility to negotiate about a specific use, until the matter accentuates itself in actual negotiations. The parties may not be forced to initiate negotiations.

It would be very good if both private and public parties could find a way to co-exist and be able to provide services to audiences in the same field without having to step on each others' territory. For example in France libraries and publishers are digitising works in co-operation for 20 million euro and making them available freely or to a very low price.

In the negotiations of an ECL it is possible to take into account all relevant viewpoints affecting the matter, such as where, when and on what terms the user is allowed to use the materials in question. Therefore when and if an agreement is reached, it normally has taken various relevant interests of authors into account, including the amount of remuneration to be paid for the use of the work. The agreement can also focus specifically on certain sub-categories of works instead of the broad category of literary works, if this is what the parties want. It is also possible to craft the agreement to allow the digitisation of works that are published after a certain date.

When applying the aspect of free negotiations on the *digitisation and online accessibility of works in a European Digital Library -project* it should be recalled that the oldest protected works still in copyright in Europe are from the 1880's. It is typical that the question of the level of remuneration arises especially when old works are concerned. Negotiating the issue of remuneration is often the most difficult part of licensing negotiations in any case.

There are many who argue that works whose copyright protection is almost run out are not economically valuable anymore and should therefore be accessible for free. It is said that the exclusive rights have most likely already given the rightholder the entitled return *e.g.* covered the expenses of their publishing. This is not an argument that holds entirely, as all business based on IPRs usually succeed economically only in a fraction of the cases.

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[16] Preamble 42 of the Information Society Directive (2001/29/EC) states that Article 5 includes distance learning, as an area where even a limitation in the exclusive rights of the authors would be allowed. At the moment this use and other educational and research uses are subject to many individual licensing schemes, and also a newly proposed collective agreement called "Digilupa".The permit has been purchased by the state of Finland for higher education such as vocational high schools and universities. The digital permit based on the ECL on section 14 in the Finnish Copyright Act allows the personnel and students of educational establishments to scan printed works and copy digital works on the internet for education purposes. The permit allows also distance teaching via a closed network.

Whether or not this is the case, it is fair to say that for older materials the historical importance is in any case the most valuable factor. As regards the rights pertaining to the internet environment, it has been clarified that they lie to the most part with the authors, and not with the publishers.[17] Authors have also moral rights to their works (on top of economic rights) which hold value throughout the term of protection and in some cases even longer.

If the use of a specific type of material is considered to be of low or non-existent economic value by the parties, the ECL system itself does not exclude the possibility that no remuneration would be paid for such uses or works (0-fees) or that the level of remuneration would be set at a nominal value.[18]

An important feature of the ECL is therefore "free negotiation". This separates it clearly from any limitations of authors' rights, even as regards the non-represented rightholders.

The system of extended collective licensing is accepted in Article 3 (2) of the Satellite and Cable Directive of 1993.[19] The ECLs are also otherwise exempted from being seen as limitations to exclusive rights of the authors in the EU acquis. This is stated in preamble 18 of the Information Society Directive (2001/29/EC) in the following way: "This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licenses".

An even more robust acknowledgement to the same effect is made in the preamble of the directive on certain permitted uses of orphan works (2012/28/EU). This is very important in order to maintain this type of licensing available and its future development and use regardless of specific EU-solutions pertaining to orphan works.

Rules on mediation and dispute settlement exist in the Nordic provisions for some situations where disputes about the conditions may arise. Mediation is available for uses that are closely linked to the public interest, such as reproduction for educational purposes. The use of such mediation is available only if negotiations have been initiated by the parties. In Denmark the possibility for mediation has been broadened in view to facilitating the conclusion of agreements between cultural institutions and collective management organisations. In Denmark, if there's disagreement about whether the CMO fulfils the representativeness requirement or is putting unreasonable conditions for entering into agreement (including level of remuneration), both parties may take the issue up in the Copyright Licence Board.

B. The CMO must be nationally representative of authors to the type of works to be used

The second fundamental requirement of the system is that the rightholders in a particular field are grouped together in organisations that are representative in a certain field. These organisations must also be mandated to conclude collective agreements on behalf of those they represent.

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[17] This is particularly true for older materials but sometimes clauses about competition prohibition in agreements or loyalty issues may become an obstacle for the licensing of the works between the author and a third party.

[18] It is then up to the CMO to evaluate whether such a deal would be in the interest of the represented rightholders they represent. The negotiation process takes time and they have their own costs to cover.

[19] Council Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable re-transmission (93/83/EEC).

The provisions in the copyright laws require that the organisation represents at national level a "substantial" or "significant" number or a proportion of rightholders of works used in a particular country in their field of business. The category of works is usually seen broadly, meaning for example "literary works" or "musical works".

Representativeness may only be achieved by legally binding mandates that may, however, take different forms.[20] The CMO may have achieved representativeness by proxies to administer the rights of authors or by agreements of transfer of rights.

The organisation then usually and ideally represents for example the majority of the composers, lyricists and music publishers of the country. International representativeness is not required.[21] Also in cases where the organisations have obtained international representativeness (by reciprocal agreements), the extended effect by law only concerns those who are not covered by these agreements.

The system of collective management of this type works also as regards *digitisation and online accessibility* of large collections because the rightholders' associations have acquired certain individual rights, *e.g.* reprographic rights[22], from the rightholders. The associations in turn have assigned these rights to a Reprographic Rights Organisation (RRO). These are CMOs with specific rights in their possession. This enables the RRO to conclude blanket agreements with users, who correspondingly do not have to seek permission from each individual rightholder.

The level of organisation to this degree exists only in very few countries in Europe. In many countries the advanced administration of rights is still developing or is non-existent. The CMOs have traditionally been highly representative in the Nordic countries. The most advanced field has been music, where the level of representativeness may be up to 90 %. However, the RROs have also developed steadily during recent years. Out of 27 Member States, the International Federation of Reprographic Rights Organisations (IFFRO) has member organisations from approximately 20 EU Member States[23].

Usually representativeness may be very hard to accomplish, either due to the low interest for collective management in general or that rightholders are spread around several smaller societies. When works include pieces of many types of works the representativeness criterion is not easily reached.

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[20] In the Commission's aforementioned documents it is said that collective licensing "could be complemented by an extended collective licensing system, whereby a rights manager is deemed to represent "outsiders". "This type of a construction is not familiar to the Nordic ECL system. The in the Nordic system the representativeness has been based on legal acts, such as *e.g.* proxies.

[21] The "Phil Collins" case of the European Court of Justice established that Article 12 EC Treaty on non-discrimination on the basis of citizenship applies also to copyright and neighbouring rights. Foreign rightholders may not be discriminated on the basis of nationality in countries applying the ECL system. This case caused some adjustments to be made to the representativeness criterion due to Article 12 EC Treaty on non-discrimination on the basis of citizenship, as it applies also to copyright and neighbouring rights. Before, the organisation had to be representative of substantial or numerous amount of for example "Finnish authors". To accommodate this aspect the rule has subsequently been changed to "works used in Finland".

[22] To be exact these rights could in modern copyright licensing terminology be called "right of digital reproduction" and "right of digital transmission to the public" for example.

[23] IFRRO, the International Federation of Reproduction Rights Organisations, is the main international network of collective management organisations and creators' and publishers' associations in the text and image spheres. They work to protect and enable easy legal access to copyright material. www.ifrro.org

History tells us that there are some means to achieve broader representativeness, although. During the 1970's, when the Nordic governments were considering how to solve the problem of wide-spread photocopying in the educational activities, the governments indicated to rightholders' organisations that they were considering introducing limitation to the rights if they do not organise the licensing of reprography themselves. Within a few years, a grouping of rightholders into organisations took place and the rightholders could be represented in a collective manner with extended effect like through the ECL.

Nowadays, the organising of rights could probably be done much faster, as there are much more effective ways to "get the word around" about a need to register yourself as an author or a rightholder, in order to exercise your exclusive right in practice and to receive remuneration for mass uses of your works.

A specific problem in this context are works that are not represented widely by any CMO. When taking the issue of online accessibility of works the ECL system requires representative organisations of authors in the field of the works to be used. The collections hold many kinds of materials, *e.g.* unpublished photographs, but also types of works whose rightholders never organised themselves, for example authors of theses or small printed leaflets or posters that are collected by the library on the basis of the legal deposit legislation. Examples from Europe show that there is an interest for digitisation and online accessibility of such works because they are useful for researchers. Individual licensing of such works would be very cumbersome because the rightholders are often, either unidentifiable or unlocatable.

The question whether an organisation is representative concerning for example images included in books, is relevant in each case when the organisation considers entering into negotiations on a new agreement. The agreements are usually time bound (2-3 years). The representativeness criterion is considered among other things based on the specified area of the provision in the law and the actual envisaged use on the basis of it. In Finland as well as in other Nordic countries, except in Sweden, the CMOs are also specifically approved by the government for the task. The approval of the ministry is given for a maximum of 5 years.

The practical functioning of the ECL requires therefore, on top of legislation, also the existence of a representative CMO. If no CMO exists, an ECL agreement cannot be concluded.

The obstacle of not finding a CMO that is sufficiently representative in the field could perhaps be overcome by deeming an already existing CMO with appropriate representativeness to represent the rights of even such authors. This could be an encouragement for authors of these types of works to "group" themselves. This could be much better than to deal with the issue by a limitation.

In the Danish law there is a possibility for mediation in cases where there is a disagreement whether a CMO fulfils the representativeness requirement, for example as regards above mentioned groups of works.

Alternatively the problem could also be solved within the process of a decision of approval of the CMO by the government (or the relevant Ministry) where such a procedure exists. In such cases a very important part in the reasoning behind the above presumption would be that these organisations do in fact represent a substantial part of rightholders, and have the necessary infrastructure to manage rights as well as to collect and distribute the remunerations further.

C. The user may use with legal certainty all works in the same field on conditions laid down in the contract ("the extended effect") also including foreign and orphan works

Normally the effects of an agreement between a CMO and a user of a work apply only to the contracting parties and those they represent. The third element of the ECL system is that the agreement concluded between specific parties[24] obtains in specific circumstances a broader binding effect on the basis of law.[25]

If an agreement about a certain use is reached between a CMO that fulfils the above requirement of representativeness and a user, the user may also use works in the same field or category by authors not represented by the organisation. This is the extension effect of the ECL.

The provision in the law protects the user from claims by non-represented rightholders, including rightholders of foreign and orphan works. Claims by rightholders of such works must be directed to the CMO instead of the user. The CMO receives the potential claims and acts according to set principles.

The extension effect of the ECL may be compared to the extension effect of collective labour agreements. In Finland this extension effect is called the "universal validity" of the agreement. This means that the labour agreement is given a universally applicable legal minimum for *any* individual's employment contract, union member or not.[26]

In fact the license also resembles a "blanket licence" used within the collective licensing of music, because the user may use all works of the same category by negotiating only one licence agreement instead of individual agreements with respective rightholders.

The fact that the negotiations are conducted by representative CMOs *i.e.* experts in the field, separates it clearly from any statutory licence solution, and may be considered a best possible deal even for non-represented rightholders.[27] These rightholders, who are not represented by the organisation, have also a specific - actually quite unique position to demand for remuneration, or to prohibit the use of their work.[28]

The ECL in comparison to other systems of collective licensing

In order to understand one of the most precious elements of the ECL system we need to distinguish it from the situation where an organisation is merely "deemed" to represent all the rightholders in a specific field.

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[24] In Finland, in the case of reprographic copying and recording of programs for educational purposes, the agreements are negotiated in a centralised manner by the relevant Ministry for the benefit of third parties, i.e. municipalities which maintain the main part of the school system.

[25] Finnish Copyright Act (14.10.2005/821): Section 26 on the extended collective licence: (1) the provisions of this Act regarding extended collective licences shall apply when the use of a work has been agreed upon between the user and the organisation which is approved by the Ministry of Education and which represents, in a given field, numerous authors of works used in Finland. A licensee authorised by virtue of extended collective licence may, under terms determined in the licence, use a work in the same field whose author the organisation does not represent.

[26] The definition of an extension effect of a collective agreement as defined by the Enterprise Finland website. (http://www.enterprisefinland.fi/liston/portal/page.lsp?r=3938&l=en)

[27] Among these non-represented authors might be also holders of rights that are large companies or well-known authors whose negotiation position differs greatly from a single author's position. In these cases a prohibition to use a work or works covered by an ECL should be issued by the author/ rightholder.

[28] Finnish Copyright Act: Section 25g (2): The provisions of subsection 1 shall not apply to a work whose author has prohibited the transmission.

In a mandatory collective management system specific CMOs are deemed or presumed to represent all the rightholders in order to effectively collect remuneration for the use of the works, for example from public performance. If a specific CMO is mandated or deemed to represent a rightholder, he or she cannot exercise his rights individually, if need be. In the ECL system the CMOs are not given a general right of representation but the agreement concluded by it is extended to non-represented rightholders.

Another option to cover the claims of outsiders in collective schemes and to enhance the legal security of the user is to incorporate into the agreement an indemnity clause by which the CMO assumes responsibility for claims by non-represented rightholders. Such arrangements are called "warranties". As agreements cannot transfer liability under criminal law, and they only eliminate financial liability under civil law, this system does not provide legal certainty of the same extent as the ECL which has a legal basis.

Furthermore the CMOs within the ECL system are normally broadly representative and can be considered to represent the interests of authors and other rightholders to the best of their ability. They are also subject to specific control under the laws of most Nordic countries to make sure their behaviour is reliable and appropriate in all relevant ways.

The extension effect requires, as already stated, a specific provision in the law. The provisions usually set the further conditions that must be fulfilled in order for the CMO and a user to be able to negotiate an ECL. The provisions concern also the qualitative requirements of the CMO and the obligation of the CMO to treat all rightholders equally.

The question relevant to *the digitisation and online accessibility of works* is the cross-border application of the extended effect, especially when the works would be available also outside the Member State on whose legislation the extended effect of the agreement builds.

Some have argued that the extended effect of ECLs created by a national provision of law cannot be applied outside the borders of that country. This position was also stated in the Impact assessment of the orphan works directive proposal too[29]. This claim does not go together well with the Nordic conception of the system.

It should be underlined, that there is nothing in the system of the ECL itself that restricts it from cross-border use. An ECL agreement may for example allow for access to the works from abroad via the Europeana.

This is because the "use" of a work by the user (cultural institution) *e.g.* a reproduction and making available of a work takes place in the country where the work is uploaded to the network. The principle is in use also as regards satellite transmissions were the relevant act takes place in the country of origin of the act or the service. The country of origin principle states that, where an action or service is performed in one country but received in another, the applicable law is the law of the country where the action or service is performed.

The use across borders within the EU would therefore be possible if the negotiation mandates from individual rightholders of the CMO/RRO allow for EU-wide licensing. Unless this is the case, the agreement would naturally not cover this wide availability. The fact that works in some

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[29] Commission staff working paper: Impact assessment on the cross-border online access to orphan works SEC(2011) 615 final, Accompanying the document Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works (COM(2011) 289 final), Brussels, 24.5.2011.

digitation projects are only available via IP addresses of specific countries does not seem to be a feature arising from the ECL system itself.[30] More about the cross-border applicability of ECLs follows in Chapter 3.

D. The non-represented rightholders have the right to equal treatment and sometimes even individual remuneration

In the ECL system the user has by signing an agreement with the CMO obtained a legally secure licence to use works according to the agreement. The user is safeguarded through law from unexpected claims from rightholders. Claims from non-represented rightholders cannot be directed to the user.

At this stage, the most relevant theoretical question is, however, what possibilities the non-represented rightholders, *i.e.* the outsiders, have to somehow affect (or to opt out from) the agreement that extends to the exploitation of their exclusive right based on the copyright law, for example the uploading of their works to the Internet. Also moral rights of authors may have significance because there are still some artists that cannot accept their works to be presented in digital form via an Internet portal. And this is their right.

According to the provisions on the ECL the non-represented authors must be treated equally. This means that essentially also non-represented rightholders must have access to the same benefits as authors represented by the CMO.

The CMO collects the remuneration for the use of the work based on the conditions of the agreement. The remuneration may be distributed individually or be used for joint purposes of the rightholders. According to the principle of equal treatment also non-represented rightholders must be able to benefit from these jointly collected remunerations.

Based on provisions in the laws, the non-represented rightholders may also have the possibility of claiming individual remuneration for the use of their works. They may have the right to claim individual remuneration, even in cases where the organisation does not distribute the concerned remunerations individually. If they have noticed that their work has been used according to the agreement the claim must, at least according to the Finnish rules, be submitted to the organisation within 3 years from the such use.[31]

In theory and also in practice the chance of receiving individual remuneration could render the non-represented author in a better position than the represented author.

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[30] The service covering a variety of also in-copyright books in Norway, called the The Bookshelf, has restricted the accessibility of those works to IP addresses located in Norway, making the works not accessible via Europeana.

[31] Finnish Copyright Act (14.10.2005/821): Section 26: 4) possible stipulations by the organisation [...] concerning the distribution of remunerations for the reproduction, communication or transmission of works among the authors it represents or the use of the remunerations for the authors' common purposes shall also apply to authors whom the organisation does not represent. (5) If the stipulations of the organisation referred to in subsection 3 do not provide the right to individual remuneration for the authors represented by the organisation, an author not represented by the organisation shall, however, have the right to claim an individual remuneration. The remuneration shall be paid by the organisation [...]. The right to individual remuneration shall expire if a claim concerning it has not verifiably been presented within three years from the end of the calendar year during which the reproduction, communication or transmission of the work took place.

This obligation enhances and clarifies the positions of various parties within the system. In the supporting elements of the system described below in Chapter 2.4 there is the possibility that when an organisation is approved for the purpose, it is in the decision of approval mentioned, that it is the organisation that is responsible to meet the claims by authors not represented by the CMO regarding the use of works, not the user. Such a condition may also be laid down in the agreement itself, or in the provision of law. The ways to achieve this feature of the ECL system vary between the legislations of Nordic countries.

Regarding the *question of digitisation and online accessibility* of a broad variety of work types (with more historical than economic value) it is the CMO who has to decide, whether it will engage itself in negotiations about the use with a user, and whether it can "take on" and on what conditions the risk of claims from non-represented authors. The theoretical possibility of such claims must be taken into consideration, as a part of the negotiations, if it decides to conclude an agreement with extended effect.

The effect of the ECLs has so far seldom extended across borders of a country. However, as regards broadcasting, as well as analogue photocopying, the ECLs' international coverage of works has been an inherent feature from the beginning. In any case, before the ways to collect and distribute remunerations were not very developed, and the use itself has been of such lesser importance that the non-represented rightholders have not had a reason to prohibit the use, or to claim remuneration.

Today online use of a work by non-represented authors, especially foreign works, is in fact very relevant also outside the borders of the country. A work uploaded to the internet (*e.g.* Europeana) by a cultural institution is available all over the world, unless access is restricted somehow. There are also no guarantees that once a work has been made available online possibly protected by technical measures (DRM), it would not "leak" to unintended recipients, if such technical measures to the work are circumvented.

The evaluation of risks assumed by the RRO is important where the works are to a significant extent orphan. The risk for claims by such rightholders is minimal or even non-existent for very old materials. Such materials are nevertheless still very important for education and research. This is why an ECL should not be excluded for the sake of the risk, if there is interest and a justification for a collective measure with extended effect. Unless the CMO, due to the risk of claims involved (regardless of how small), can include also orphan works to a broad extent in the agreements, another way to licence them may be necessary.[32]

In order to minimize the risk of claims from abroad, works by foreign rightholders could be left out from the agreement, or already by the provision in the law describing the conditions and the specific area of agreements with extended effect.

For example, the Finnish provision allowing archived TV programs of a broadcasting organisation to be transmitted anew[33] focuses only on works contained in programs transmitted before

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[32] The EU-directive on orphan works could be of some help in this situation. It is quite typical that CMOs would be reluctant to start negotiations about the use of works that are most likely to a large extent orphan. The remuneration negotiated could not be very high in these cases but the costs of the ECL process would still remain.

[33] Finnish Copyright Act: Section 25g (1) A broadcasting organisation may transmit anew a work made public by virtue of an extended collective licence, as provided in Section 26, if the work is included in a television programme produced by the broadcasting organisation and transmitted before the first of January 1985. It is proposed by the Copyright Commission of Finland that this section will cover online accessibility in the future.

a certain date and produced by the broadcasting organisation itself. The broadcasting organisation has obtained the necessary permissions for the programs and may seek to licence their use through a collective measure like the ECL. This feature, although not actually envisaged at the time of preparation, does in fact form a "carve-out like" provision concerning foreign programs to be licensed with extended effect.

Applied more broadly this type of a provision would, however, take away the very core idea of the ECL agreement that aims to allow for the use of a broad variety of works with legal certainty. The ECLs have had international coverage from the outset. It is also perfectly possible to limit the use of such works for example through the conditions as negotiated between the parties. This allows for an opt-in solution for interested non-represented rightholders in the agreement later on.

No negotiations have so far been conducted on the basis of the ECL provisions in context of the national digital library of Finland. Some contracts have been made in the other Nordic countries. At this stage it can only be gathered, that there has just not been enough interest and monetary capacity among the users initiate negotiations. Nor have the rightholders' organisations (authors or publishers) been actively indicating their readiness to negotiate. The risk of claims from outsiders (foreign or orphan works) is there in theory but it is not necessarily the reason behind the delay.

All things considered it seems likely that any negotiations about online accessibility of the European cultural heritage will focus at first instance on works of respective ECL-country's national repertoire rather than on foreign works. This way more content could be made available lawfully on the internet throughout Europe.

E. The non-represented rightholders have a right to prohibit the use of their works

The CMO who is representative in its field may choose to conclude a contract with a user. It may not be forced to it. The element of free negotiations is an important part of the system.

If the agreement is concluded, and the work of a non-represented author is covered by the extension effect of the agreement, the author has usually the right to prohibit the use of the work. Such a reason could be that the use is from the authors' point of view seen as a "primary type" of use of the work.

The right to prohibit is available for all the ECLs facilitating licensing of works in the online environment. The right to prohibit is, however, not included for cable retransmission because the right could gain an excessive effect: in fact a single rightholder could block the retransmission of a whole channel.[34]

The right to prohibit the use, or to opt-out from the agreement, has traditionally been available specifically for non-represented rightholders. The rightholders represented by the CMO are normally directly bound by the agreement made. This has made the broad use of works possible.

Wherever the right of prohibition is available, it should be issued with the CMO. The CMO would then refer this restriction further to its contracting party, the user. In the current Nordic

[34] There is no right to prohibit the use as regards the ECL-provision on photocopying either. This is due to the strong societal interest to facilitate photocopying from various sources.

system the right to prohibit has been scarcely used. In this new digital environment there is a need to develop some practices on how this right to prohibition is actually exercised.

In practice, the "right to prohibit" -feature would in case of *digitisation and online accessibility of works via Europeana* mean that the ECL agreement concluded by a cultural institution would not cover the making available online of works by a certain publisher or author. If the work would already be accessible online based on an ECL-agreement, the rightholder could issue a prohibition concerning that work, and the work would be taken down. The types of uses required for online accessibility of works in particular, may easily be subject to prohibitions and opt-in or opt-out mechanisms.[35]

The Danish system of a general ECL allows also the represented authors and other rightholders, such as publishers, to "issue a prohibition". This allows for agreements to be concluded between the rest of the rightholders represented by the organisation, and at the same time, leaves room for individual management of rights wherever this is possible and seems more beneficial for the rightholder.

In the digital environment the possibility of represented rightholders to issue a prohibition is a feature that gives more flexibility to the system. Publishers may decide to opt in the agreement later or licence their works separately through individual agreements. A middle-way could probably also be negotiable. Works of a particular type, or age, would only be available nationally while the rest also could have EU-wide or international accessibility.

2.4 The approval of a CMO, a supporting element of the system

There are of course also other elements pertaining to the different Nordic extended collective licensing systems that are equally important, but not completely essential in the system.

For once the ECL agreements include detailed agreements and demand usually long term engagement by both parties.

Another condition of the system may be that a CMO is authorized or approved by the government. In Finland the Ministry of Education and Culture approves the CMO for the task for a limited period of time, usually 5 years. The system of approval is not applied in Sweden.

The Finnish copyright law has no general rules regarding the functioning of CMOs. However, according to section 26, sub-section 3, the approval may be reversed if the organisation commits serious or essential breaches or dereliction of duty in breach of the decision and its terms and if notices or warnings have not led to rectification of the shortcomings of its operations. It can also be interpreted from other sections of the law that the organisation to be approved must be financially sound and capable of managing matters in accordance with the approval decision. The organisation shall also annually submit an account to the Ministry of Education and Culture of the actions it has carried out pursuant to the approval.

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[35] And also, as regards a non-represented rightholder, the linkage between particular works could just be cut from the online environment, allowing still other ways to access the work, for example by dedicated terminals on the premises of establishments of the institution, if this would be allowed based on a limitation in the law. Different additional protection mechanisms, such as watermarking, could be used to diminish the possible damage for the author that issued the prohibition.

The process of approval might also be necessary in cases where more than one organisation could fulfil the requirements established. In Sweden there is the requirement that only one organisation may conclude the agreements. In Finland these problems are solved within the law by requiring that the organisations grant the licences simultaneously and on compatible terms. These measures are set for the legal certainty of the user.

In practice, and also in comparison to several foreign CMOs, the Nordic organisations have been the most effective and transparent CMOs in Europe. They are most often also non-economic entities, i.e. not for profit organisations. In Hungary there are provisions stipulating that CMOs must not exercise the collective administration as an entrepreneurial activity. In the Nordic countries this fact has been more of a reality, than a requirement.

As already mentioned above, in cases where the applicability of the ECL system hangs on the non-existence of a representative CMO, it might be possible, as an intermediary step in the system, to deem at least for a preliminary period another "close by" CMO to represent such rightholders.

In countries where there are not any representative organisations, but who share a language or a similar culture, and otherwise activity and interest for collective measures in favour of streamlined copyright licensing, taking advantage of the existence of corresponding/sister organisations in other countries could be useful.

Other issues, such as good governance, transparency, accountability and supervision of CMOs involved, as well as social and cultural functions of CMOs and mechanisms relating to dispute settlements are of great importance these days and will most likely be discussed in detail in the coming years.

The proposal for a directive on the collective management of copyright and related rights and multi-territorial licensing (COM(2012)372, presented in July 2012 by the Commission, will touch on many of these issues.

The aim of the directive is to facilitate the transfer of the CMOs or collecting societies, as they are called in the proposal, to the digital environment. In a nutshell the proposal includes the following elements. The directive aims to improve the way all collecting societies are managed by establishing common governance, transparency and financial management standards.

As regards governance this would mean that rightholders could choose their organisation freely, and be able to withdraw their rights more effectively. The general meeting of the members of a collecting society would decide on the key matters within the collecting society. As regards financial issues, the directive aims to establish sound financial management practices for CMOs in Europe. The directive means also that the transparency of the CMOs towards all directions, including users will be improved.

The proposed directive also sets out minimum standards for the multi-territorial licensing by authors' collecting societies of rights in musical works for the provision of online services. The Commission envisions that this should facilitate the rolling out of new services, in particular in the online world across the single market. European consumers would thus benefit from access to a wider variety of creative content. No repertoires would be locked in the EU. As this proposal only concerns music, it will not be presented further here.

Rightholders, service providers and consumers would be the main beneficiaries of the proposal in general. The proposal includes also a provision concerning a dispute resolution system. The proposal does not limit Member States in their choice of a mechanism, as long as it is effective and ensures the timely resolution of the conflict.

3. Application of the ECL on cross-border situations

During the negotiations on the EU-directive on certain permitted uses of orphan works (COM (2011) 289), the cross-border applicability of the ECL system was surfaced. The European Commission hinted that the ECL would be applicable for national use of works, but would not allow for cross-border use of orphan works for example via Europeana. The Commission based its view on the Commission's impact assessment on the a few solutions available.[36] That is why we need to look at this question in more detail.

Firstly, when looking at the application of the ECL system on cross-border use and the potential this system holds for EU-wide licensing of content, it is necessary to separate the question whether the system itself allows for cross-border use and the question whether there are any concrete direct or indirect restrictions for cross-border application thereof due to international norms.

The answer to the latter question depends on whether the ECL qualifies as an exception to or a limitation of exclusive rights of the author.

If the system could be interpreted as an exception or a limitation, or a compulsory license of the relevant exclusive rights of those rightholders, who are not represented by the CMO that has concluded the agreement with the user, compliance of the norms would be necessary.

If it does not qualify as a limitation or exception, accordingly, a problem of compliance does not even arise. Yet a separate question is the cross-border applicability of the system itself, which is tackled in Chapter 3.3.

3.1 The ECL in the EU acquis communautaire

There are two clear indications that the ECL system itself is accepted in the acquis communautaire as a way of arranging collective management of rights.

Firstly, article 3(2) of the Satellite and Cable directive (93/83/EEC) applies to the case. According to it a Member State may provide that a collective agreement between a collecting society and a broadcasting organisation concerning a given category of works may be extended to rightholders of the same category who are not represented by the collecting society. This covers the extension effect of the Nordic ECL.

The extension is allowed under the condition that the communication to the public by satellite is a simulcast of a terrestrial broadcast by the same broadcaster and, that the unrepresented rightholder shall, at any time, have the possibility of excluding the extension of the collective agreement to his works and of exercising his rights either individually or collectively. This is equal

[36] Commission staff working paper impact assessment on the cross-border online access to orphan works SEC(2011) 615 final, Accompanying the document Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works (COM(2011) 289 final), Brussels, 24.5.2011.

to the right of prohibition. The aim of this directive was to facilitate the licensing of copyrights and related rights of the programme content of a broadcast by the relevant CMOs.

Secondly, the preamble 18 of the 2001 Information Society Directive (29/2001/EC) states that the directive is without prejudice to arrangements in the Member States concerning the management of rights such as extended collective licences. This preamble clarified the state of the ECLs as being a way of managing rights rather than exceptions or limitations to the authors' rights that were harmonized in Article 5 of that directive.

Based on conditions of Articles 2 - 4 of the Satellite and Cable directive as well as the Information Society directive, the Nordic ECL system is fully in line with the EU acquis communautaire. The state of the ECL has also been re-confirmed in the orphan works directive that was adopted in October 2012.

3.2 The nature of the ECL and international treaties

As regards the international system of copyright the purpose of an international convention is to guarantee minimum rights for foreign works in other contracting states. The obligation to grant full minimum rights does not, however, arise in the country of origin of the work, because the protection is governed by the domestic law. This reflects the principle of territoriality.

It has been suggested that the extension effect of the ECL is not applicable outside of the country where it is prescribed *i.e.* that the system of ECLs does not allow for cross-border licensing of works. This view is probably based on the notion on how the Berne Convention[37] allows for compulsory licensing to take place.

In order to analyse this claim we need to take a look at two aspects. The first aspect is if the ECL agreement in fact is a limitation to the non-represented author's exclusive right. An affirmative to this question would make the entire ECL model contrary to international law, especially as regards foreign works used. The second aspect is the cross-border applicability of the ECL that builds on this reasoning to a large extent.

In Berne Convention limitations to the protected exclusive rights have been accepted in the general interest of the society.

According to Article 9 (2) of the Berne Convention countries of the Union shall confine limitations and exceptions to exclusive rights to certain special cases provided that such reproduction do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder. This principle is also called the three-step-test.[38]

As already described above, an ECL agreement concluded in one country may have effects on works originating from another country. The system covers from the outset all works in a given category. The conditions of an ECL agreement are potentially applied also on works whose rightholders the contracting CMO does not represent, including foreign works.

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[37] The Berne Convention for the Protection of Literary and Artistic Works of 1886, latest amendments Paris 1971.
[38] Essentially the same principle is included in the TRIPS Agreement of 1994, the WIPO Copyright Treaty of 1996 and in the EU Information Society directive of 2001.

However, this does not have to mean that the authors of such works are completely powerless in front of such a situation.

Firstly, even if the CMO does not represent in reality all rightholders whose works are used, it is clear that it, as a copyright management organisation, has the necessary expertise and the benefit of the authors in mind. In fact, in the ECL system, a non-represented rightholder, whose works are used based on the agreement, does not need to be represented by the CMO, because the latter is obliged by law to treat these rightholders equally with those it represents.

Secondly, a rightholder may prohibit the use, in all cases that involve *digitisation and online accessibility of works* of cultural heritage. A right to claim individual remuneration is also possible under the rules of distribution of the remunerations. The fact that there are also supporting elements, such as government approval of the CMOs, increases the reliability of the system and secures the position of non-represented authors even further.

And, as already foreseen before, digitisation and online accessibility projects would not often concern foreign works, at least not such works, whose rightholders would be interested in prohibiting the use.

Therefore, the ECL could not be seen as a limitation to the exclusive rights of the authors.

And accordingly, as the ECL agreement should not be seen as an exception or a limitation of the rights of these "outsiders", the system does not have to meet the so called three-step-test.

This does not mean that the ECL agreement would automatically be contrary to the test either. The CMO which negotiates the agreement will have as its goal that the use would be in the best interests of the non-represented authors too. In fact the situation will in all relevant aspects be better than anything the rightholder could have negotiated by himself.

The below rules in the Berne Convention do not change this interpretation.

The Berne Convention permits the use of compulsory licenses, in some cases, on the basis of Article 11bis (2)[39] and Article 13 (1)[40] and hence, in practice, the replacement of the exclusive right by a remuneration right.

According to the Convention such conditions, provided for in the laws of Member States shall apply only in the countries where they have been prescribed. Such conditions shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by a competent authority.

These articles concern compulsory licenses. It means that compulsory licences would only be applicable only in the countries prescribing for such conditions.

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[39] Berne Convention **Article 11*bis*, Broadcasting and Related Rights:** (2) it shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

[40] Berne Convention **Article 13, Possible Limitation of the Right of Recording of Musical Works and Any Words Pertaining Thereto:** (1) Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

A compulsory licence is a much wider restriction than the collective management of rights through the ECLs. Compulsory licenses are consequences of the failure of negotiations. In practice the exclusive right of the author is in such cases reduced into a right to remuneration.

In the ECL system, if the non-represented rightholder does not want his works to be used according to the agreement, he may prohibit it *i.e.* "opt out" from the agreement that sets the conditions for the use. This is not possible when a use is subject to a compulsory licence.

In the Nordic ECL system, if the non-represented rightholder chooses not to issue a prohibition, he may in any case take advantage of any of the grants or other types of collective according to the practices of the CMO in the same way as represented rightholders, and, also in many cases, be able to claim individual remuneration for the use of his work.

Referring to the above reasoning, ECL agreements cannot be seen as a compulsory license in the meaning of the Berne Convention. Hence, there seems to be nothing in the system of the ECL itself that would make it contrary to international norms. Together with a rule that specifies the country of origin of the act of the use, will make the international application of the ECL intact.

3.3 The ECL and Europeana

The Commission has on several instances argued that the ECL system is applicable in a national context in Member States but not across borders of EU countries *i.e.* it could not have an extraterritorial effect.

This argument bases on the principle of territoriality of the copyright system. The principle of territoriality means that copyright protection is always given on the basis of national copyright laws. Some have argued that in the online environment this also means that permission to use a work must be acquired in each Member State where the work is accessible.[41]

In the following the cross-border effects of the ECL is analysed further.

The aspects arising are twofold. Firstly, does the ECL allow for the use of foreign works in general and secondly, can works be legally made accessible *i.e.* made available on demand across European borders for example via Europeana. Some commotion have been caused by at least French and German authors who do not want their works to be digitized and put online by cultural institutions in Member States based on this system.

At the outset the ECL system covers all works within a specific category, both works made by national and by foreign rightholders. The requirement is that there is a nationally representative organisation in the field.

In order to demonstrate the application of the ECL in cross-border cases both internationally and in an EU-context, the relevant act to be scrutinized is the use of the work by a party to the ECL agreement. Such a party would be, in cases of digitisation and online accessibility of works

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[41] Johan Axhamn, Lucie Guibault: IViR: Cross-border extended collective licensing: a solution to oline dissemination of Europe's cultural heritage? Final report prepared for EuropeanaConnect, Universiteit van Amsterdam, August 2011

through Europeana - the cultural institution. Such institutions may include for example libraries, museums or archives. These institutions work in order to fulfil their public interest missions according to mutual European goals.

The ECL system allows *for digitisation and online accessibility of works* if there is a provision about the specific use and the CMO has mandates to this extent from the rightholders.[42] But if this is not the case, the agreement could not cover this wide availability of works.[43] Accessibility of the works would in that case have to be restricted in line with the mandates - for example to the territory of a single country.

The uploading of a work to a network connected to the Internet could then cover the entire work or a part of it, or snippets – or the work in a specific non-downloadable format. It all depends on what has been agreed between the parties in the ECL agreement.

Whether or not it is possible to access the content from another country in the EU, as the case would be if the work would be accessible through Europeana, is a matter subject to the conditions of the agreement, not the law.

The reasoning behind this argument is that the relevant "use" here *i.e.* the reproduction and making available of protected works takes place in the country where the work is uploaded to the network. This principle may be called the "country of origin" –principle, as adapted to the situation.[44] The country of origin -principle is used also as regards satellite transmissions were the relevant act takes place in the country of origin of the act or the service.[45]

This is the relevant use of the work within the context of the ECL provisions on extended effect. It is not feasible that the acceptability of the uploading of a work to the Internet based on the conditions of the ECL agreement is considered based on the laws of the various countries where the work is accessible. A work uploaded to the internet is available everywhere in the world unless restricted. Such an interpretation would simply not make any sense from the point of view of the legal security of the ECL agreement given to the user.

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[42] In Denmark an ECL could also be built on the basis of a general ECL provision that gives more flexibility to circumstances where the ECL system may be used.

[43] The fact that some works are only available via IP addresses of specific countries is not a feature arising from the ECL system itself or any international norms, at least as regards digitisation and online accessibility of collections in cultural institutions. This is the case in Norway, where the The Bookshelf – service is accessible only in Norway.

[44] There are numerous ways to define the country of origin principle. For the purpose of this article it may be defined as stating that, where an action or service is performed in one country but available also in another, the applicable law is the law of the country where the action or service is performed. Therefore the acts that are agreed upon by an agreement based on the provisions of the ECL, may allow for the use of works by non-represented authors in that country, even if the effects of the agreement – online accessibility, is allowed from another country. The principle of country of origin is used in the directive of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') (2001/31/EC). The extent to which the country of origin principle should be applied to the provision of services was a main point of political controversy in the negotiation of the proposed amendment of the directive (2006/123/EC). In general the country of origin principle aims at encouraging the functioning of the internal market and the free movement of goods.

[45] Article 1 (2) b of the directive on the co-ordination if certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (93/83/EEC): The act of communication to the public occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the program-carrying signals are introduced to an uninterrupted chain of communication leading to the satellite and down towards the earth.

Subsequent uses of the materials from other EU countries (printing, downloading etc.) are more likely, at least to some extent, to be questions for the domestic laws of the countries in which the work is accessible. An end-user could use the works beyond mere accessibility, on the basis of the private copying rules for instance. Such uses could also be licensed in the ECL contract, or controlled through technical means (DRM) available.

There are arguments that speak in favour of employing the principle of country of origin, especially as regards the digitisation and online accessibility of the European cultural heritage. To institute this would allow for a simplified mechanism to obtain licences to use works and an increase in in-copyright materials on portals such as the Europeana.

It would benefit the rightholders as they would be able to negotiate about such uses effectively and receive remuneration for it. It would ultimately benefit the users, the general public, as they would get better access to content online.

Some downsides or risks may also be identified in this context. Some rightholders have considered that there is a risk that the levels of remuneration would drop if the whole of EU could be negotiated with one agreement by a foreign CMO. Such a concern would not arise if the ECL agreements would not concern foreign works at this stage.[46] The interest in Finnish language works in other EU Member States would probably be quite small, as it would still serve Finns abroad in accessing their own cultural heritage in a smooth way, via a unified European portal.

The question is, does the interpretation of the country of origin-principle need to be established somehow in the law. Also, one could ask whether is there a need for a specific statement that the negotiations should take into consideration all the relevant aspects, *i.e.* the dimension of the accessibility of the materials, when negotiating about an ECL across borders?

Parallel to the considerations of a country of origin – solution some instances have been developing an alternative for gaining the extraterritorial effect for the ECL, if needed. Such a solution would build on the reciprocal representation between CMOs.[47] This would mean that all countries of the EU would need to have legislation about a collective management system, either on voluntary or mandatory basis. An EU-wide solution on the mass-scale digitisation is still missing.

Therefore, in absence of any EU-wide solution, if the organisation is mandated by the rightholders to conclude contracts on an EU-wide basis, the ECL is a valid legislative construction for the use across borders.

So the bottom line is that nothing in the ECL system itself restricts the use of it in a cross border context. The cross border applicability of the ECL is intact also in the EU and international legal system, as analysed above.

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[46] The Norwegian Bookshelf case, based on the ECL, covers also translated literature, i.e. works by Finnish authors translated to Norwegian. This would give the rightholders in Finland the right to prohibit the use of the work based on the ECL, or to claim individual remuneration from the CMO involved.

[47] An example of multi-repertoire and multi-territorial agreement of this kind would be the IFPI Simulcasting Agreement. It builds, as does the ECL, on the existence of representative CMOs. It presupposes, however, voluntary effort of CMOs to conclude such agreements. This could be possible between Nordic CMOs but then it would cover only the use of cultural heritage from the Nordic countries. At least for now, it seems better for each Member State to focus the digitization and online accessibility of national cultural heritage via Europeana than to pursue multi-repertoire solutions.

Solutions for out-of-commerce works

Also so-called out-of-commerce works have been identified as troublesome. These are works that are no longer available in customary channels of commerce. Such works have also been called out-of-print – works. This status exists regardless of whether some tangible copies are available in libraries or second hand shops etc. Many public institutions consider such works an important part of the European cultural heritage and would like to make them available via the Europeana. Such a mission goes beyond the specific exceptions in the EU legal framework and since the rights have reverted back to the authors from the publishers, it is very difficult to license them individually. Many out-of-commerce works are also orphan works.

In order to facilitate the development of voluntary licenses for such works a Memorandum of Understanding was signed in September 2011 in Brussels by representatives of European libraries, authors, publishers and collecting societies and witnessed by the European Commission. It aims to develop solutions to large scale digitisation about the use of works out-of-commerce. The ECL system is completely in line with the principles of the MoU. Now discussions are underway to achieve some concrete agreements based on these principles.[48]

The MoU sets the principles for voluntary agreements concluded between users, rightholders and CMOs to benefit from the required legal certainty in a national and a cross-border context. Similar principles should be applicable to the use of orphan works as well.

[48] Memorandum of Understanding on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works on 20 September 2011 signed by relevant stakeholders (publishers, authors, libraries and the CMOs) and witnessed by the Commission. The main elements of the MoU are the following: the solution focuses on books and learned journals; it promotes voluntary licensing agreements to be negotiated in the country of first publication of the works, where also the status of an out-of-commerce work is determined; the authorised uses of the works are agreed by the parties in the agreement without prejudice to existing exceptions and limitations; licenses for works that are out-of-commerce may be granted by CMOs and rightholders have the right to opt out of and to withdraw all or parts of their works from the licence scheme resulting from any agreement with public libraries or archives. According to the Commission the MoU will serve as a blueprint for collective licensing agreements negotiated amongst rightholders, libraries and collecting societies.

4. The ECL and the orphan works issue

4.1 Background

Orphan works are works whose rightholders remain unidentified or cannot be located. A work is unidentified when the author is not indicated in context of the work, and cannot be determined by a representative CMO or a trade organisation in the field. In the same way it is possible that a rightholder remains unknown in situations where the right has been transferred to a third party via contract.

The issue of orphan works has become the key question to solve since the digitisation of works has started within cultural institutions around the world, and especially in Europe with the signing of the European Digital Libraries Initiative in 2005, and opening of the Europeana portal in November 2008. But to the broad public the question is still relatively new.

The Commission introduced its proposal for a directive to solve issues relating to orphan works, *i.e.* the Proposal for a Directive of the European Parliament and the Council on certain permitted uses of orphan works in May 2011 (COM (2011) 289 final). The directive aimed at building a system for using orphan works in a certain way based on harmonized criteria for a diligent search of the rightholders. This upfront search of the rightholders would be done on a work by work basis. The proposal covered the print sector (books, journals, magazines and newspapers) and cinematographic works and audio and audiovisual works.

The proposal was during the autumn 2011 subject to intensive work in the Council working group on Intellectual Property (Copyright) in Brussels. The goal of the Danish Presidency was to finalize the directive in a one reading-process. The directive was finally adopted in October 2012.

Several issues were on the table as the text of the directive was processed. Among others the scope of the directive was extended also to phonograms.

From Nordic point of view the most important issue was the reaffirming that the directive would not have an adverse effect on the extended collective licence system which had been part of our copyright system for many decades. In the final directive there is a preamble 20 stating that "This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences, legal presumptions of representation or transfer, collective management or similar arrangements or a combination of them, including for mass digitisation."

Furthermore the directive includes an additional paragraph in Article 1.4 on Subject matter and Scope that clarifies the status of specific collective licensing measures on national level: "This Directive does not concern and is without prejudice to any arrangements concerning the management of rights at national level". These clauses were included to ensure the future application and the development of the ECL system in Europe.

As the negotiations on the directive progressed it became clear that the directive did not actually provide for a solution to the problem of Europeana, *i.e.* how to allow for the digitisation and online accessibility of works in large scale. The orphan works directive was merely, but importantly, a solution specifically to the orphan works problem. Orphan works are only a part of the problem of mass digitisation.

The issue of orphan works have been discussed also in the WIPO (World Intellectual Property Organisation).The present WIPO Assistant DG for Copyright, Trevor Clarke reminded when estimating the dimension of the problem in the Madrid Seminar on Digital Libraries and Copyright in April 2010 that the orphan works issue may be described by the words: "It's not big, but it's big". By this he meant that although it is hard to find reliable data on the numbers of orphan works in cultural institutions, the problem is still considerable and should be addressed urgently. The question of orphan works has been suggested to be among the themes to be dealt with by WIPO. Future work will probably be activated in time, when the discussions on the limitations and exceptions (for VIP and for libraries and archives etc.) will advance sufficiently.

The issue of orphan works has not been discussed much in the Nordic countries, probably for many reasons - but mainly because of the ECL system.[49] The ECL system does not recognize any big problem with the orphan works as they are covered in the system in the same manner as the rest of the works. The system entails a solution for collective management of all works in a specific category.

4.2 The reasons behind orphan works problem

Until now, only a fraction of projects aiming at *the digitisation and online accessibility of European cultural heritage* have concentrated on works still in copyright. This is partly due to the problems relating to orphan works and as the fact is that the rightholders to particularly older works cannot be identified or located. If the work is of low economic value, it would not be worth the effort to find the relevant rightholders, due to high transaction costs involved. This is true especially when there are not any facilitating models in place that take the orphan works into account.

There are two major reasons for these problems: The first one is the lack of centralised registries of authors, their successors in title as well as of transfers of rights to third parties (due to the elimination of formalities in the Berne Convention).The other is the long term of protection (70 years from the death of the author). The time span of works protected by copyright extend from the end of 19th century to the year 2150 when works created today would slowly start becoming part of the public domain.

In order for a cultural institution to use a work it first needs to make sure the work is in copyright, and then take the steps in order to identify and locate the rightholder. Thereafter the use is still depending on receiving permission as well as paying a possible remuneration.

As regards mass use of works, these efforts could be completely contrary to the goals of the missions.

If, however, an author is represented by a CMO, it may be easier to locate him. But, if a work is very old, the chances are that any information about the rightholder has been outdated, as the interest to use works gradually decline after a certain amount of time has passed.

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[49] In Finland there was a public hearing about the Commission proposal June 22, 2011 and another on March 1, 2012. All participants and the comments sent to the Ministry of Education and Culture pleaded to make sure that national systems are safeguarded in the process.

Secondly, if the author is deceased, the chances of finding his successors or the current rightholder to obtain permission are slim. There are no coherent registries of authors' death dates. It is possible that only one rightholder of several is locatable when the rest is not, as is often the case for joint works. This makes the use of the entire work impossible and the work in this context a "half-orphan".

When someone wishes to use a published work for example, the publisher is not necessarily the holder of the needed rights as the publishing contract might not cover the so called "digital rights" of the work. Digital uses have been "invented" only lately, and have not been foreseen at the time of the contract. Consequently, there's no mentioning of them in the contract.

A work could therefore be orphan, as regards the digital rights that pertain to it, while it may be "non-orphan" as other rights are concerned, or, it would be too costly to find this out. This is typical for published materials.

But the fact is that not all rightholders are represented by a CMO. A typical example of this group is the rightholders of so called grey literature.[50] It could be that the author has never been known (anonymous) or he is simply unaware of his rights pertaining to the work.

Among older works, held in the collections of cultural institutions (especially archives), there are sub-categories of works whose author (nor his descendants) knows or even acknowledges that he is in fact an author. The work could have been the only work he has ever created and he has never realized that the subject matter could be regarded an original work subject to copyright protection. Such possible works are private letters and for example wills.

The problems that arise from the use of unpublished works included in the collections of cultural institutions, especially photographs, is another related matter.

In other words, the problems are less as regards works whose rightholders are represented by organisations, but grow considerably as concerns other types of works, normally those with less or even no commercial value, such as photographs, posters, leaflets etc.

Also, depending on the domestic law, there are different rules as regards holders of rights. In some countries all publishing rights revert back to the author after some time has lapsed when the published edition has been out-of-print or out-of-commerce. It could be that no one knows where the needed rights are to be found. Such circumstances increase the relevance of the issue of orphan works.

The question of potential orphan works has furthermore also a strong linkage to the criterion of originality, the basic requirement of copyright protection. The interpretation of this criterion varies from one country to another. It is often hard, especially for cultural institutions to assess originality of a work, but the same goes for anyone else contemplating on how to go forward when they would like to use a work made available to the public. This could mean that licenses are sought just to be on the safe side - even for materials outside of copyright protection.

The examples are numerous. The projects of cultural institutions are usually directed to older culturally or historically significant content but the situation is not much better for the use of newer works, in particular works that are published in an ever increasing rate on the Internet. There are no identification measures in place for them either.

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[50] Grey literature is the term used for documents and ephemeral material issued in limited amounts outside the formal channels of publication and distribution. Examples of grey literature are scientific and technical reports, government documents, theses, patent documents etc.

The efforts of finding out whether a work is protected, *i.e.* still in copyright – and from whom the permission to use the orphan work may be obtained from, and eventually obtaining it, perhaps against payment of remuneration, is not usually in proportion to the benefit of making the work available to the public. The transaction cost is likely to exceed the cost of digitisation which makes paying remuneration in many cases impossible.

It is also not possible to consider for example bulks of works to be "orphan" in a streamlined way for example all photographs from a specific time period. Such a solution would need a specific cut-off-date to be applied. In the absence of a dedicated system, all works need to be considered on a work by work basis.

It is very difficult to assess the actual number of orphan works. A study about the dimension of the orphan works issue[51] was published by the Commission in May 2010. The study includes a conservative estimate of the number of orphan books in Europe. The number of orphan books has been estimated to be 3 million in the EU which is 13 per cent of the total of in-copyright books in the EU. A large number of digitisation projects has been analysed for that report, and the findings indicate clearly that there are considerable amounts of orphan works in collections of cultural institutions around Europe, although no extensive research was made.

4.3 The ECL covers orphan works to a great extent

The search of rightholders for obtaining a license prior to the use of the work is the main rule in copyright. This rule does not, however, apply in the case of collective licensing. When authors of works are represented collectively, there is no need for a user to identify each and every work and locate its rightholders up front, and clear the rights for them separately.

In the ECL system orphan works, or possible orphan works, are treated in the same way as all other works covered by the agreement. This means that when an agreement is made, even orphan works of a specific category of works may be used. The agreement covers orphan works even if the organisation does not represent their rightholders. Orphan works are usually not very broadly used based on ECL agreements.

The search for the rightholders is, however, still an important part of the ECL system. This is because the use licensed through the ECL normally has provided the rightholders benefits in the form of remuneration. In order for the CMO to distribute the remuneration it has collected, it needs to identify and locate the rightholders. In the ECL system, instead of identifying and locating the rightholder upfront, a "diligent search"[52] of rightholders is taken care of by the CMO after the cause, i.e. after the conclusion of the agreement.

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[51] Assessment of the Orphan works issue and Costs for Rights Clearance, Anna Vuopala, European Commission, DG Information Society and Media, Unit E4 Access to Information, May 2010. http://ec.europa.eu/information_society/activities/digital_libraries/doc/reports_orphan/anna_report.pdf)

[52] A High Level Expert group established in 2008 some guidelines on "due diligent search" – criteria (for text, visual/image, audiovisual, sound/music) to be adopted by Member States in their efforts to clear rights for digitization and online accessibility of works especially in this context. They vary very much from sector to sector, as the fields have developed differently. The EU orphan works directive is built on the setting of relevant minimum criteria for the "diligent search" of the rightholders of an orphan work.

When the organisation has received the remuneration from the user, it will, on the basis of available data from the user or of studies to the same effect, distribute it to the rightholders. Depending on the type of use and the category of works, remunerations are distributed either individually or collectively.

The distribution of remunerations has been managed in different ways, depending on the field. Sometimes the use may be reported by the users quite accurately, and individual remunerations may be distributed accordingly. Remunerations that the CMO has collected from photocopying are in Finland usually passed on via the member organizations mainly as grants. Publishers receive direct compensation.

As for the transmission of TV programs in cable and small antenna networks, the remuneration is delivered onwards to foreign TV companies, film producers and other copyright owners. When this is not possible the remuneration is distributed to the collective benefit of authors, as grants for example.[53]

Nordic CMOs may in general, at least in international comparison, be considered very effective and reliable. They are never companies with a commercial purpose, but organisations that have a motivation to protect the interest of rightholders of a given category. The organisations are directly administered and controlled by the rightholders.

Traditionally CMOs invest considerable efforts to identify and locate also non-represented rightholders, and if need be, reserve a share of the remuneration for the unidentified or non-locatable rightholders.

Some have argued that the ECL would always require remuneration to be paid and would therefore not be suitable for the licensing of older, possible orphan works as the collected remuneration would not benefit the authors in the end. This is not a problem, as the system allows for non-payment for use as well. Another issue is whether the CMO is willing to negotiate such "0-agreements", due to mere administrative costs of the organisation of such negotiations.

Furthermore, as the CMOs are subject to the approval by the Ministry, they are at least in Finland responsible for specifying in a special report the way the collected remunerations have been distributed. This is why they would also have a high motivation to track down all the rightholders. It is, however, a burdensome effort for them as well.

The ECL is, for the above stated reasons, not a complete solution for the problems relating to orphan works, but a solution that works. It is best suited to broader (*e.g.* mass) use of protected content, and it may be used to solve the right clearance of either parts or entire collections of works within cultural institutions containing orphan works. In the following, there are some suggestions how to deal with situations where the entire project concerns orphan works.

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[53] www.kopiosto.fi (A joint reprographic rights organization in Finland. Corresponding CMOs in Denmark and Norway are Copy-Dan and Kopinor respectively)

4.4 A separate system for the use of orphan works

The system of collective licensing has been developed for facilitating mass use situations. The extended collective licensing is not suitable for situations where the number of works to be used is low.

Therefore the ECL system cannot facilitate licensing of sporadic or single uses of works by an author who cannot be identified or located. The ECL requires also a quite a heavy negotiation process, which might be too exhausting in situations where the use is considered "small". A system separate from the ECLs, would therefore seem to be necessary.

Such a separate system was envisaged by the Finnish Copyright Commission in 2001. The system would have been complementary to the ECL system and would have allowed for a general way to obtain a licence to use an orphan work after a certain level of "reasonable effort" of finding rightholders had been made.[54] The proposal did not, however, gain enough interest, and was never included in the Government Bill of 2004. It seems that it was because the need for such a system was not apparent at the time and because orphan works were already covered in the ECL to a great extent.

Another system is in fact what the orphan works directive delivers. It is not a general solution, however, as it applies only to certain specific cultural institutions and work categories.

It presents a way to use orphan works based on a limitation to the exclusive rights of the rightholders of orphan works. The directive allows digitisation and online accessibility of orphan works on condition that a specified diligent search of the rightholders is carried out, in the country of publication of the work, before the work is used. The permission to use the work is in force until the rightholder re-surfaces *i.e.* puts an end to the orphan work status of the work.

Compensation could be paid to the rightholder upon reappearance but it would be subject to consideration based on the economic harm caused by the use to the rightholder. The proposed rules would protect cultural institutions that use orphan works, from copyright claims.

The system applies to audiovisual and printed materials, including photographs or illustrations embedded in books, and phonograms published or broadcast in any EU country.

As the requirement is that the diligent search has to be made on a "work by work" basis, it is likely that this directive will not be used as regards mass use digitisation. However, even the ECL would need some adjusting to work perfectly as regards orphan works.

4.5 Problems to solve within ECLs as regards orphan works

The problems to solve in the context of orphan works and the ECL are in the situations where *digitisation and online accessibility projects* cover only orphan works, or such works to a major part.

The fact that there are large numbers of orphan works within the wealth of European cultural heritage, is something that must be taken into account also within the ECL system. If a project

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[54] Komiteanmietintö 2002:5, available in Finnish only. The proposal included a requirement that remuneration would be paid by the user which would be put in escrow (for 10 years) for the possibility that the author would later turn up and demand compensation. After that the moneys would be used to joint purposes of the rightholders.

would focus on these works only, the representativeness criterion described above would be challenged.

One option to mend this problem could be that a representative CMO in the field (literary works) would be considered, in the approval of the ministry, as the representative CMO, even for large amounts of rightholders that are unidentified. Another way would be to the "deem" a CMO in the field to represent even rightholders of certain types of works that usually are orphan.

This process could be supported by a requirement that CMOs inform the general public about the contract to be made with a user, and to urge the rightholders of a specific sub-category of works to register themselves at the organisation, in order to receive remuneration.

Problems that have to do with the level of remuneration to be paid for the use, are normally contractual matters. However, if a CMO clearly demands excessive remuneration for the use of a work, for research purposes for example, there should be a possibility to arbitrate such a claim.

4.6 Further relevant points regarding accessibility of works online

In addition to the questions tackled above, a relevant question is also the term of protection for copyright. The protection lasts for a long time. This could in today's interconnected world be seen as a question of freedom of speech issue as well. The public or the society has expectations to be able to access and legally use any work that has been published and is available to them.

Works that are created over the web every minute of the day are protected by copyright in the same manner as more traditional works, if they are considered original. Works or other protected subject matter might, putting it roughly, include both material whose copyright protection has just emerged and older works created and published decades ago, but which now are about to be used in new and creative ways. Both of these categories exist within cultural institutions (and are relevant in the discussion on orphan works). It would also be in the authors' best interest to be able to license all the works as effectively as possible.

The problem is that there are no coherent systems with rights information pertaining to all different kinds of works, and their rightholders. This is partly due to the Berne Convention that does not allow the protection to be subject to any formalities.

However, during recent years several projects aiming at developing databases on information of works and their rightholders have been launched.[55] These are burdensome but, very ambitious projects. The development of licensing registries has shown varying degrees of success.

One type of information sources will be developed in the context of the orphan works directive. At this stage it is very hard to see how effective such systems to identify orphan works actually will be, since the chance that same works (same editions) are used several times in the EU is quite small. The benefit of a database on orphan works is useful only when the same work will be used, *i.e.* digitised and made accessible, by a cultural institution for the second time and the diligent search would not have to be repeated for the work in question. Collections of the national libraries of various EU countries normally contain national content.

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[55] The idea of the Global Repertoire Database, launched in 2009, is for example to provide a single, comprehensive and authoritative representation of the global ownership and control of musical works. See more: www.globalrepertoiredatabase.com.

There is a regulatory basis for the use of identification information. The Information Society Directive (2001/29/EC) refers in Article 7 to electronic rights management information.

According to Article 7 (2) of the Information Society directive (2001/29/EC) electronic right management information means any information provided by rightholders that "identify the work or other subject matter, the author or any other rightholder, or information about the terms or conditions about the use of the work or other subject matter, and any numbers or codes that represent such information".

Electronic rights management information is utmost relevant today, and in the future, in order to minimise the number of new (unintended) orphan works on the internet. An EU directive on common standards of such rights management information would be very useful to encourage the use of the information, even when works are not intended for the commercial market.

Such a framework would not be in conflict with international norms, *i.e.* be seen as a formality for protection as defined in the Berne Convention art 5(2), as the exclusive rights of the authors would stay intact, only the exercise of the rights would be subject to usage of such rights management information.

All in all the smooth functioning of the copyright system requires that rightholders are aware of their rights. Registration will be a way to increase such knowledge effectively. Such a measure would also be required for the registering of transfers of rights.

And, if rightholders wish to let go of their copyright completely or conditionally, they should have a clear, standardized and easy way of making notice of it. There are already several methods of open licensing and the most commonly known is probably US-based Creative Commons licensing.[56]

[56] www.creativecommons.org

5. Executive summary

This paper has analysed the system of the Nordic extended collective licensing system (ECL) especially as regards a possible EU-wide solution for facilitating licensing for online accessibility of copyright protected works via the European digital library portal Europeana.

An EU-wide solution for licensing works in mass scale is needed, in order to be able to develop the accessibility of the European cultural heritage according to the needs of the researchers as well as of the general public in a way that respects the interests of the rightholders. An orphan works solution is only part of the problem.

The analysis shows that the ECL is well equipped to be a solution for EU-wide licensing of cross-border use of protected works, including orphan works. The benefits of an ECL are mutual, for both users and authors and other rightholders.

The Nordic solution on extended collective licensing has been developed in order to facilitate the exercise of the exclusive rights in situations where individual licensing is not possible in practice. The ECL represents a method that is legally secure and adaptable to both cross-border use and the use of orphan works, as analysed in this paper. The system is not in contradiction with any international norms.

There are, however, some concrete legal and practical obstacles to overcome before the system could be exported to other EU-countries.

The ECL has been developed by and through the historical common legal tradition of the Nordic countries and has some specific requirements:

1) The ECL system needs a (preferably only one) representative collective management organisation (CMO) in the respective category of works to be used. As the system is based on free negotiations, there is no one to make a contract, unless the rightholders in a specific field have gathered themselves in an organisation. It is, however, possible to allow the building up of representative CMOs in the Member States of the EU with the help of sister organisations in the same field in the Nordic countries. There are already so called Reprographic Rights organisations (RRO) in 20 of altogether 27 Member States of the EU.

2) The ECL system also needs clear and carefully prepared legislation and support mechanisms in place. The various questions regarding the representativeness criterion, the position of the non-represented rightholders, possible disputes about the collection and distribution of remuneration, orphan works etc. are better tackled if there is some degree of discreet but concrete supervision from the governments' side.

3) The conclusion of agreements needs also actual willingness among the parties to negotiate an agreement about a specific type of use. The justification of the system lays on the possibility to negotiate without force.

A solution based on the ECL has been previously used in situations where there have been important societal needs at stake, a need for balancing risks of an underdeveloped market, and a low respect for copyright. Now - when even librarians and custodians of the cultural heritages of European nations are frustrated with the functionality of the EU copyright system, it is inevitable that tools for facilitating the execution of these envisaged digitisation projects are available and provided. This is also the position of the Council of the European Union.

And all in all, comparing to a limitation or a compulsory licence (requiring remuneration) the ECL is much more respectful of the rights of the rightholders, and flexible, as the terms of the agreement may be negotiated between the parties.

It can also be said that the ECL system has been able to provide an answer to problems where the use in question is important; if not economically, then as a matter of principle. By fine-tuning the system it will be fit for the new challenges of the digital environment.

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Publication Series of the Finnish Copyright Institute

The Finnish Copyright Institute, established within the Finnish Copyright Society, publishes in its Publication Series studies, articles, research reports etc. Furthermore, the Institute publishes materials on legislation, preparatory legislative documents and case law.

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