



**International
Federation of
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BACKGROUND PAPER ON EXTENDED COLLECTIVE LICENSING

BY THE IFLA COPYRIGHT AND OTHER LEGAL MATTERS ADVISORY COMMITTEE¹ NETWORK

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This background paper aims to give an overview of how Extended Collective Licensing (ECL) works in different jurisdictions, and to provide background information that helps consider under which circumstances ECL is an efficient solution for rights management.

It is composed of several contributions from experts within the Network of the IFLA Copyright and Other Legal Matters Advisory Committee. Each report explains the system as applied in different countries or sectors (libraries, higher education and archives).

For some of these, the system described is not strictly considered extended collective licensing but is rather a presumption of representation. However, since the two systems raise many of the same issues, analysis of both is considered valuable to this study. For others, there is no system in place (Canada, United States), but there have been discussions at a legislative level that are worth underlining.

The key conclusions draw on the reports to summarise the conditions that should be in place in a country or region for ECL to work effectively from the perspective of libraries, archives and higher education.

Throughout the document, IFLA underlines its preference for exceptions and limitations to copyright, which in most cases offer a more effective and less bureaucratic solution to the same problem.

¹ <https://www.ifla.org/clm> (Accessed 7 August 2018)



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INTRODUCTION²

What is Extended Collective Licensing?

Collective management of copyright is a system that can provide an efficient way to ensure remuneration of rightholders and simple means for users (including libraries, educational institutions and archives) to clear rights.

Rightholders – writers, artists, musicians, producers and others – give authorisation to collective management organizations (CMOs) to administer their rights by negotiating with prospective users of the works concerned, issuing licences that specify fees and conditions, collecting the fees, and distributing them back to the original rightholders, minus administration costs.

A good collective management system should provide a cost-effective solution for creators, who can leave the management of their rights to a professional organisation, and for users (including libraries, educational institutions and archives), who benefit from a one-stop-shop for clearing rights. Usually, this also guarantees legal certainty – i.e. users cannot be sued for infringement, as long as they stay within the terms of the licence.

Under extended collective licensing (ECL), a CMO carries out the same activities, but the effect of the agreements between a CMO and rightholders is extended to works by rightholders who have not signed such an agreement.

As such, ECL does represent a step away from the traditional model of copyright, given that it allows uses of works without the original rightholder having officially signed over their rights to the collecting society (or equivalent) running the scheme. It also represents a half-way house between item-by-item licensing (which is very costly in terms of time and labour), and a statutory exception (considered by some to be too broad a limitation on the exclusive rights of a copyright owner).

Extended Collective Licensing and Exceptions and Limitations to Copyright

IFLA has made the case for exceptions and limitations (E&Ls) to copyright for libraries as a crucial means of helping them undertake their public interest mission³. E&Ls have been chosen in several occasions as a solution to issues raised by mass digitization projects or mass uses of works, such as the Orphan Works Directive in the European Union (European Parliament and Council of the European Union, 2012).

E&Ls generally offer a less bureaucratic (there is no intermediary added to the process) and costly solution (unless it is a remunerated exception, no payment needs to be made for the use). Licensing should serve to facilitate uses which go beyond what would be allowed under exceptions or limitations.

² Introduction by Karolina Andersdotter

³ <https://www.ifla.org/copyright-issues-for-libraries> (Accessed 9 July 2016)



Critically, it should not be a case of licensing (line-by-line, collective, or extended collective) replacing limitations and exceptions. Even if a licensing scheme works perfectly, there will always be situations where uses are (or should be) covered by unremunerated exceptions. Similarly, there are also situations where uses are subject to copyright, and so a form of remuneration is necessary. To understand which, or a combination of both⁴, is suitable, a case by case assessment needs to be done.

In any case, one or the other solution needs to be defined by law, at the national, regional or international level. Developments have taken place in both directions. In some countries there seems to be a preference for ECL systems as an adequate solution, and therefore rely more on licenses than on E&Ls⁵. These reflect national approaches to defining where the boundary between exceptions and licensing should lie, as well as preferences on how to support the creative industries.

Why and When Extended Collective Licensing?

ECL is often seen as being most applicable for “specified uses on a mass scale,” i.e., situations in which there are many rightholders, many works, many uses, or other cases where it is not realistic to negotiate individual licenses (Vuopala, 2010, pg. 9).

An “adequate” ECL scheme therefore gives users the security to guarantee that they will not be held liable for copyright infringement for not having acquired authorisation from every rightholder in situations where this is necessary. It also provides a ‘one stop shop’ for users, who pay money to a single CMO which then administers remuneration to rightholders, both members and non-members.

The success of an ECL system will depend, among other factors, on its relevance or ability to adapt to the context and the type of institution. Research institutions need to seek licenses different to the ones needed, for example, by education institutions. When evaluating the merits of ECL schemes, the type of licenses and contracts on offer should be considered.

For example, making digital library or archival holdings of 20th century works available on the Internet could count, especially if eventual use is for commercial purposes. So too could rules on education copying (although IFLA would argue that this should be only for copying that takes place beyond what is permitted under exceptions) i.e. where one student or teacher may copy large volumes of individual works, meaning that licensing per item would be onerous.

Indeed, Mikko Huuskonen (2006, pg. 201) referring to ECL as “the Scandinavian compromise”, argues that it was created to “resolve the contradiction between copyright exclusivity and mass use”, and states that the logical and practical problem of mass use of copyright protected works

⁴ For example, the European Parliament’s legal affairs committee brought forward a compromise for extended collective licenses that combined both an extended licensing scheme and a fall-back exception.

⁵ On the topic of licenses in the digital world and some of the issues it raises, IFLA commissioned the literature review “The Limits of Licensing” by Svetlana Yakovleva, available online <https://www.ifla.org/publications/node/11589?og=29> (Accessed 11 July 2018).



is “how to grant licenses when the identification of individual use is not possible or requires an unreasonable amount of effort”.

While ECL schemes have existed for half a century, the need for solutions allowing for mass uses remains a major challenge. As the Hargreaves Report (Hargreaves, 2011) stated, “there is an urgent need for an efficient way to license collections of works in as straightforward a manner as possible, enabling transaction costs to be kept to a minimum.”

Nonetheless, the fact that the system entitles CMOs to cover non-members, that is, authors or rightholders that have not given prior consent to the use of their works, has been subject to critique. Creators whose works are licensed may not even know this. They are not guaranteed to receive any revenues earned and may not be aware of possibilities to opt out from ECL (if such possibilities exist).

Another potential obstacle is the cost and bureaucracy of ECL systems even on a national level. As CILIP’s CEO Nick Poole said in an interview on ECL as a solution for rights clearance of orphan works, he had “yet to see a collective licensing scheme that is cheaper than it is to simply deal with the risk.” He added that “the collective licensing always falls down on price. (...) It costs human and organisational resources even if the licence cost is very low. (...) If [a work] has become orphaned it is highly unlikely the cost of collective licensing scheme is going to be proportionate” (Andersdotter, 2016).

In principle, ECL schemes hold the promise of much greater simplicity and certainty for libraries undertaking mass uses of copyrighted works. At the same time, there are sufficient questions about their scope and operation to mean that caution is essential, for the sake both of creators and users, and the legitimacy of ECL in general. It is therefore important to look at how they work in practice, in order to draw conclusions about what conditions – and safeguards – may need to be in place for them to function effectively, and legitimately.



KEY CONCLUSIONS FROM THE REPORTS

Cultural heritage and educational institutions are working to take advantage of the possibility granted by modern technologies. Yet in doing so, they frequently run up against important limits in the form of copyright. When using large volumes of works, this can make costs prohibitive. An alternative is necessary.

The contributions in this background paper show that countries are actively looking for solutions, in particular as regards the uses of orphan works, education, out of commerce works or foreign works, among others. These vary greatly, offering a rich evidence base (Guibault, 2014, pg. 11-12).

Wherever it is discussed or introduced, ECL brings with it both the promise of simplicity and legal security, and concerns about appropriateness, legitimacy and effectiveness. The systems shared in this collection offer a number of positive examples, but they also highlight negative experiences and perceptions such as the following:

- The collection of royalties for uses of works which were either intended to be freely available (for example under open licences or in the public domain), or which were never intended to be commercialised (never-in-commerce works) is highly controversial.
- Efforts to use ECL to extract payments for uses which were previously possible without payment under exceptions (for example for illustration for teaching).
- Bad practices and a lack of transparency leading to more of a focus on collection of fees rather than their redistribution. Transparency is also relevant when defining the criteria that establish the amount to be paid by cultural heritage institutions. Such practices can undermine overall faith in the system – when users do not trust CMOs, they are less willing to give them money.
- The need to ensure balance between stakeholders at the time of defining the ECL regime, as well as in subsequent licence negotiations. An unbalanced position between negotiators or the lack of legal expertise from cultural heritage institutions and higher education institutions might leave them in an unfavourable situation.
- A failure to update services and payments to take account of new ways in which works are selected and used.
- The impact of subsequent opt-outs by rightholders, meaning that investments by, for instance libraries in digitisation, are effectively lost.
- The lack, as yet, of any formally approved and operational scheme for cross-border ECL.
- CMOs entitled to give licenses for a specific type of works could decide not to offer an ECL for the purposes required by libraries (for example mass digitization and other educational purposes), making the system pointless.



- The burdensome and costly need under certain ECL schemes to “reapply” for permission every certain amount of years.

There have been efforts to determine the conditions that need to be in place for ECL to be both effective and accepted by all key stakeholders. In its own Impact Assessment for the draft Directive on Copyright in the Digital Single Market, focusing on ECL for out-of-commerce works, the European Commission suggested that the following conditions should be in place (European Commission, 2016, pg. 70):

- There should be adequate legal mechanisms allowing for voluntary collective management agreements between CMOs and users be extended to works by non-members of the CMO.
- The CMO must be ‘sufficiently representative’ of rightholders in the relevant category of works, rights and uses.
- Unrepresented rightholders must be treated the same as represented rightholders.
- Unrepresented rightholders must be able to opt out of an ECL scheme.
- There should be stakeholder dialogue on the implementation of ECL schemes.

Yet these suggestions focus only on specific legal changes, leave a wide margin of interpretation both as to definitions (what is a relevant category or use of work? What does ‘sufficiently representative’ mean?), and to the operation of licensing schemes and CMOs themselves.

From what we can see, for ECL to fulfil its potential as an instrument for the clearance of rights for the use of works by educational and cultural heritage institutions, the following characteristics should be met:

- There needs to exist a “culture” of collective management, implying broad understanding and appreciation of the value of a third party taking on the responsibility of licensing works on behalf of others.
- Depending on the local context, a private agreement or legislative change may be the most suitable way forward.
- Given its potential monopoly position, it is particularly important for CMOs to be able to show, through comprehensive reporting of both revenue collection and distribution, and external regulation and validation, exemplary levels of transparency and good governance.
- Similarly, CMOs must display a meaningful level of representativeness in the specific category of rightholder concerned. Inadequate representation, or an overly broad definition of categories, undermines the legitimacy of ECL.
- CMOs must be ready and able to offer licences that remove legal uncertainty for libraries and other cultural heritage institutions. If they are unable to do so, there is little value in ECL.
- Libraries and other users must be able to have the possibility to negotiate licences on a one-by-one basis, rather than being obliged to use ECL.
- Extended Collective Licences should not cover, works that have never been in commerce, that are in the public domain or that have been made available under open licences. It should



also in no circumstances replace exceptions and limitations to copyright, but rather open up new possibilities for libraries and cultural heritage institutions.

- There must be strong consideration that library money is often public, and so there is a responsibility to spend it effectively. Due attention should therefore be given, when planning mass digitisation projects, to the value for money represented by extended collective licensing fees asked for the results to be made accessible.
- Whenever there are negotiations – both concerning new and existing schemes, it should be ensured that all parties have the same information and enough legal background to understand the implications. A balance of power in the negotiations is also fundamental to reach fair agreements.
- Cultural heritage institutions' experience should be taken into account when defining ECL schemes, since they are the ones dealing with the every-day problems that they are meant to solve. In particular, extended collective licences should be offered for a period long enough to make mass-digitisation projects worthwhile.
- There needs to be a built-in flexibility to allow for adjustments to usage patterns. For example, in higher education there is a shift from printed to digital collections in libraries. A focus on ECL for printed material appears increasingly irrelevant.

It should be possible for rightholders to opt out of ECL schemes, and so have their works removed from access. In such a case, however, compensation should only be considered when there has been unreasonable prejudice to their legitimate interests.



REPORTS

CANADA

By Jean Dryden

Canada's *Copyright Act* contains no provision for an ECL scheme. ECL has never been part of the Canadian tradition or practice, and major amendments to the Act in 2012 did not address ECL. The Canadian Copyright Act is subject to a five-year statutory review, launched in December 2017 (Government of Canada, 2017). It remains to be seen whether the matter of ECL will be raised in the course of that exercise (which does not necessarily require that the Act be amended as a result of the review). To my knowledge, the matter is not a government priority for future amendments (whenever that occurs).

A study conducted in 2003 examined the advantages, disadvantages and constraints of using an extended collective license in Canada and concluded that the system would have some benefits (Gervais, 2003). It does note, however, that any ECL system should not apply to unpublished works (p. 29). A report of the House of Commons Standing Committee on Canadian Heritage (the "Bulte Report") also recommended that an ECL system be implemented (House of Commons Standing Committee on Canadian Heritage, 2004, recommendations 4, 6 and 7); however, these recommendations were not pursued in draft legislation.

CHINA: AN OVERVIEW OF THE COPYRIGHT COLLECTIVE ADMINISTRATION SYSTEM

By Shen Xiaojian, Zhang Ruobing, Liu Yuchu and Hao Jinmin

I. Overview of China's Copyright Collective Administration System

In 1990, China promulgated and implemented the Copyright Law of the People's Republic of China, supplemented with the special provisions of the "copyright collective administration system" in the amendment of 2001. The Article 8 of this special provision is:

The copyright owners and copyright-related right holders may authorize an organization for collective administration of copyright to exercise the copyright or any copyright-related right. After authorization, the organization for collective administration of copyright may, in its own name, claim the right for the copyright owners and copyright-related right holders, and participate, as an interested party, in litigation or arbitration relating to the copyright or copyright-related right.

The organization for collective administration of copyright is a non-profit organization. Provisions for the mode of its establishment, rights and obligations, collection and distribution of the royalties of copyright licensing, and supervision and administration thereof shall be separately established by the State Council.



According to the above provisions, the State Council enacted "Regulation on the Collective Administration of Copyright" in March 2005. There are seven chapters and 48 clauses in it, including general principles, establishment of the organization for copyright collective administration, institutions of the organization for copyright collective administration, activities of the organization for copyright collective administration, supervision of the organization for copyright collective administration, legal responsibility and supplementary provisions. Article 7 stipulates that the Chinese citizens, legal persons or other organizations that enjoy the copyright or the rights related to the copyright in accordance with the law may initiate the establishment of the organization for copyright collective administration.

To establish an organization for copyright collective administration shall meet the following requirements:

- a) The right holders that initiate the establishment of the organization for copyright collective administration shall not be less than 50;
- b) Do not overlap with the business scope of the organization for copyright collective administration which has been registered according to law;
- c) Can represent the interests of the relevant rights holders nationwide;
- d) Have draft articles of association of the organization for copyright collective administration, fee collection standard draft and draft of transfer of royalty to the rights holders.

In addition, the National Copyright Administration of China has formulated a series of rules and regulations in recent years, around the copyright royalty fee standards: "Interim Measures for the Payment of Legal Remuneration for Recording" (1993), "Interim Measures for the Payment of Remuneration for Phonograms Broadcast by Radio and TV Stations" (2009), "Criterion of Collective Management Fee for the Copyright of Film Works" (2010), "Criterion of Copyright Licensing Fee for performances using music works" (2011), "Measures for Paying Remunerations to Works Legally Permitted to Be Used in Textbooks" (2013), "Measures for Paying Remuneration for the Use of Written Works" (2014), etc. The development of these regulations is an important basis for the copyright collective administration.

II. Practice Situations of China's Copyright Collective Administration

At present, there are 5 organizations for copyright collective administration established according to law in China, and the copyright collective administration activities for different types of works are carried out, including:

Organization Name	Established Time	Type of Collective Administration Works
Music Copyright Society of China (MCSC) ⁶	1992	musical works
China Audio-Video Copyright Association (CAVCA) ⁷	2008	audio-visual programs

⁶ Music Copyright Society of China [EB/OL] <http://www.mcsc.com.cn/>

⁷ China Audio-Video Copyright Association [EB/OL] <http://www.cavca.org/>



China Written Works Copyright Society (CWWC) ⁸	2008	written works
Images Copyright Society of China (ICSC) ⁹	2008	photography works
China Film Copyright Association (CFCA) ¹⁰	2010	films

In accordance with the provisions of "Regulation on the Collective Administration of Copyright", the main functions of the organization for copyright collective administration of China include, authorized by the holder, to concentrate the related-rights of the right holder and to do the following activities in his own name: (a) to enter into a copyright or copyright-related rights licensing contract with the user; (b) to collect royalties from users; (c) to transfer royalties to the right holder; (d) to engage in the litigation or arbitration involving copyright or copyright-related rights.

The Music Copyright Society of China was founded by the National Copyright Administration and the Chinese Musicians Association in December 17, 1992. Currently, it is the only organization for music copyright collective administration in mainland China. Music Copyright Society of China is a non-profit organization to maintain the legitimate rights and interests of the composers, lyricists and other music copyright holders. By 2016, it has had 8,502 members and over 390,000 registration works and collected copyright fee of 184 million RMB.

China Audio-Video Copyright Association, founded in 2008, is the only organization for audio-visual collective association in China, which has been formally approved by the National Copyright Administration and registered with the Ministry of Civil Affairs. China Audio-Video Copyright Association shall exercise collective administration of the copyright or copyright-related rights of audio-visual programs according to law, mainly collects royalties from karaoke establishment and distributes them to the right holders. By now, it has about 1000 members and over 100,000 registration works and collected copyright fee of 154 million RMB in 2015.

China Written Works Copyright Society was founded in October 24, 2008, and there were 12 organizations including China Writers Association, Development Research Center of the State Council and more than 500 famous copyright owners in various fields jointly launched the establishment. China Written Works Copyright Society is the only organization for copyright collective administration in China, which is officially approved by the National Copyright Administration. It is responsible for the collective management of the copyright of written works and the rights related to copyright in accordance with the law and is the only statutory body responsible for the transfer of the legal license fee for the national newspapers and teaching materials. It cooperates with publishing agencies and digital resource companies successively, collects and distributes the copyright benefits to the members, and solves the authors' or translators' authorization of more than 100 kinds of compilation works for the domestic and overseas publishing agencies each year. By 2013, it has had over 7,000 full members and over 30,000 authorized works.

⁸ China Written Works Copyright Society [EB/OL] <http://www.prccopyright.org.cn/>

⁹ Images Copyright Society of China [EB/OL] http://www.cpanet.org.cn/html/zhuzuoquanxiehui/guanyu_xiehui/ruhuixize/index.html

¹⁰ China Film Copyright Association [EB/OL] <http://www.cfca-c.org/>



The Images Copyright Society of China was founded in 2008, with the approval of the National Copyright Administration and the permission of the State Council. Images Copyright Society of China is a national first-level community and non-profit organization, hosted by State Administration of Press, Publication, Radio, Film and Television of China and assisted by China Photographers Association. Its duties are to safeguard the lawful rights and interests of the copyright owners of photographic works, to manage the copyright of photographic works, and to hold exhibitions, trainings, photo contests, works limited identification (trading) and other activities. By 2017, it has had over 10,000 members.

The China Film Copyright Association was founded from the predecessor of China Film Copyright Protection Association established in August 2005. After the auditing by the National Copyright Administration, in October 2009, it was officially renamed as China Film Copyright Association approved by the Ministry of Civil Affairs. China Film Copyright Association is the only organization for copyright collective administration of film works in China. Up till now, it has had 87 film companies in all.

Organizations for copyright collective administration can effectively solve the authorization problems of right attribution, high costs of negotiation and transaction and so on. The cooperation between libraries and organizations for copyright collective administration can help to concentrate the work authorization on a large scale, to save the bargaining costs and transaction costs caused by the dispersion of copyright holders, and to enhance the competitiveness of libraries in providing digital content.

At present, the organization for copyright collective administration that has cooperated with libraries is mainly the China Written Works Copyright Society. This kind of cooperation is still under exploration and has not yet been conducted on a large scale. Known examples of cooperation are as follows: from 2012 to 2014, the library of Party School of Central Committee of C.P.C cooperated with China Written Works Copyright Society and entrusted it with the task of collecting more than 1,000 kinds of books for the established "online learning platform".

III. Overview of China's Copyright Extended Collective Administration

At present, China's copyright law and other laws and regulations have no explicit provision about copyright extended collective administration. However, in China, organizations for copyright collective administration have involved the copyright collective administration for non-members in the process of charging and transferring the legal license fee.

According to the relevant provisions of "Copyright Law of the People's Republic of China", "Regulation for the Implementation of the Copyright Law of the People's Republic of China", "Regulation on the Collective Administration of Copyright", "Measures for Paying Remunerations to Works Legally Permitted to Be Used in Textbooks ", organizations for copyright collective administration are responsible for the charging and transferring of royalties for copyright with "legal permission", such as the textbooks compilation, the newspapers reproduction, the sound recording production and so on. In practice, if the right holder of the legal license is a non-member, the organization for copyright collective administration shall, in accordance with the articles of association, collect the copyright royalties.



For example, Music Copyright Society of China approved "Constitution of Music Copyright Society of China" in 2005. Article 7 stipulates that for the purpose of the collective management, to the music copyright owner who does not join this society, the association also charge for the copyright royalties and assigned to the owner¹¹.

China Written Works Copyright Society approved "Constitution of China Written Works Copyright Society" in 2008. Article 6 stipulates that the association shall collect and distribute the copyright royalties of non-members' written works. Article 7 stipulates the association shall, for the purpose of collective management, assign to the users who have not joined the association the copyright royalties and distribute the copyright royalties to them¹².

Images Copyright Society of China approved "Constitution of Images Copyright Society of China" in 2013. Article 6 stipulates that the association will collect and transfer fees for non-member photographic works¹³.

FRANCE: THE STATUTORY LICENSE FOR OUT-OF-COMMERCE BOOKS THAT THE EUROPEAN COURT OF JUSTICE REBUTTED

By Sylvie Nérisson

French law doesn't provide for any ECL. France has however been credited with providing for an ECL scheme that enables mass digitisation (Guibault, L., 2015). The scheme at issue relies on Act No. 2012-287 of 1st March 2012 and concerns the digital exploitation of unavailable books of the 20th century (C.P.I., L. 134-1). It was presented as an implementation of the 2011 MOU (European Commission, 2011) on key principles on the digitisation and making available of out-of-commerce works.

To consider this French scheme as an ECL seems questionable, since no collective license is involved. If a CMO¹⁴ is indeed necessary in the scheme, the management is not collective (Nérisson, 2015). Therefore, even if an opt-out possibility is provided, this scheme is mentioned here because the basis for the entrustment of the CMO with rights at issue is a legislative act and not the will of authors.

According to articles L. 134-1 to L. 134-9 of the French intellectual property code (*Code de la propriété intellectuelle*), unless its author or its publisher opposes (i.e. opts out), digital rights in out-of-commerce books of the twentieth century registered as commercially unavailable in a

¹¹ Constitution of Music Copyright Society of China [EB/OL] <http://www.mcsc.com.cn/infom-21-1.html>

¹² Constitution of China Written Works Copyright Society [EB/OL] <http://www.prccopyright.org.cn/static/news/2010-01-28/100128150538781/2.html>

¹³ Constitution of Images Copyright Society of China [EB/OL] <http://www.cpanet.org.cn/html/zhuzuoquanxiehui/guanyuxiehui/index.html>

¹⁴ SOFIA, the main French CMO for literary work, is the CMO running this scheme. See "Arrêté du 21 mars 2013 portant agrément de la Société française des intérêts des auteurs de l'écrit", JORF no 76 of 30 March 2013, 5420.



dedicated database held by the French national library¹⁵ for more than six months are managed by a CMO (SOFIA, authorized to do so by the Minister for cultural matters)¹⁶. This CMO consequently manages the digital rights of 204.000 books¹⁷.

However, the authorized CMO has to contact the publisher of the ‘paper book’ and offer to digitally exploit the work. If the publisher accepts the offer, he gets an exclusive license (for 10 years, tacitly renewable). This individual request of a single user and the exclusivity of the license granted can’t be considered collective. A more classical scheme of collective management of copyright only appears if this first publisher has no interest in the digital reproduction and distribution rights: then, any user may get a non-exclusive license in the digital exploitation of the work (for five years).

In 2012, the Act No. 2012-287 introduced a provision in favour of libraries. Art. L 134-8 of the “Code de la Propriété Intellectuelle” enabled public libraries to freely digitize and communicate books that had been registered in the out-of-commerce books database but for which no rightholder is found within 10 years. However, this article has been repealed in the course of the implementation of the Orphan Works Directive (Act no 2015–195 of 20 February 2015, Art. 3).

Two writers have meanwhile challenged the French out-of-commerce books scheme. Due to the *Soulier & Doke* decision (C-301/15) of the EUCJ, the Conseil d’Etat (French highest administrative court) annulled the provisions of the implementing decree that transferred the digital rights to the CMO (CE 7 June 2017, No. 368208). The issue is the requirement for actual and individual information of rights holders without which their silence cannot be considered a tacit consent to the intended exploitation of the works.

The scheme is therefore suspended (the law foresees an information campaign, but no individual information of rights holders).

GERMANY: LEGAL PRESUMPTION FOR OUT-OF-COMMERCE WORKS

By Armin Talke

I. Introduction

In September 2013, the German legislator adopted a law on orphan works and another on out-of-print-works. While both categories include works, which are still under copyright, they are less likely to see a clash of interests between cultural heritage institutions and rightholders, as they are presently not exploited by authors or publishers.

¹⁵ The database is called ‘ReLIRE’, which in French means ‘read again’, see <https://relire.bnf.fr/accueil>.

¹⁶ For a presentation in English, see Ginsburg, J. C., 2015.

¹⁷ This amount was meant to grow each year: on each 21 March a new list of out-of-commerce books was to be released, on each 21 September rights in works whose rights holders haven’t opted out were to be transferred to SOFIA. The scheme has been suspended after the 2016 campaign. See <https://relire.bnf.fr/accueil>.



On the one hand, the law implements EU Directive 2012/28/EU which allows libraries and other cultural institutions, under certain conditions, to digitize copyright protected “orphan” works and make them available in their digital (online-) libraries¹⁸. In line with the Directive’s provision that it does not prejudice national efforts to develop solutions for large mass-digitisation issues, the German law on (printed) out-of-commerce works (the Collecting Societies Act, VGG)¹⁹ allows CMOs to grant rights for their use, if they were published before 1966.

Before such licences are granted, the works have to be registered in the “Register Vergriffener Werke” (Register of out-of-commerce-works) comprises almost 18.000 records (November 2017)²⁰. If the rightholder appears later, the works have to be taken down and the rightholder can claim an appropriate compensation for the use from the CMO that has licensed the work.

II. Overview of the Legal Framework

Section 51 of the VGG in the use of out-of-commerce works allows the scan and making available of works (their holdings) by libraries and other cultural institutions, with the following limitations:

- a) Only works published before 1966;
- b) Only reproduction and making available;
- c) Only printed works in books, trade journals, newspapers, magazines or in other writings;
- d) Only works published in Germany (given that CMOs do not represent foreign rightholders);
- e) Licensing of the works must be by the collective society VG Wort, even for rightholders who have not mandated the collecting society with the management of their rights;
- f) The works to be digitized have to be registered in a register of out of print works, administered by German Patent and Trade Mark Office beforehand. After 6 weeks, the CMO (and library) is notified that no rightholder objects;
- g) However, rightholders can object the use anytime afterwards. If so, they should receive reasonable compensation from the CMO.

With regards to the type of works, the framework agreement between the German Federal and regional authorities and Collective Societies covers only books.²¹ The current price for a licence is between 5 and 15 euros for a one-time use (Section 7).

¹⁸ Act on Copyright and Related Rights, Sections 61a-61c. Available here: https://www.gesetze-im-internet.de/englisch_urhg/index.html

¹⁹ Collecting Societies Act, Sections 51 and 52. Available here: https://www.gesetze-im-internet.de/englisch_vgg/index.html

²⁰ Available here:

https://www.dpma.de/dpma/wir_ueber_uns/weitere_aufgaben/verwertungsges_urheberrecht/vergriffene_werke/recherche/index.html (Accessed 9 July 2018)

²¹ See the agreement concluded:

http://www.bibliotheksverband.de/fileadmin/user_upload/DBV/vereinbarungen/2015_01_RV_vergriffene_Werke.pdf



THE UK EXPERIENCE OF EXTENDED COLLECTIVE LICENSING: GREASED LIGHTNING OR THE ROAD TO NOWHERE?

By Benjamin White

**Disclaimer: The views expressed are personal views and not those of an employer.*

After an unsuccessful attempt in 2010, and in the face of significant opposition from creators,²² the government finally managed to introduce Extended Collective Licensing (ECL) into UK law in October 2014.²³ It subsequently took 3 years for the first collecting society²⁴ to apply to government to extend their mandate to operate in “extended mode” to offer licences that include the works of non-members. In March 2018 the UK government is still going through the process of public consultation before deciding whether to grant the Copyright Licensing Agency (CLA) an extended licence for 5 years to allow them to continue to offer their pre-existing licences for internal business copying type activities. e.g. Photocopying, internal organisational intranet hosting of articles, book chapters etc.²⁵

In terms of libraries, who see ECL as being the main legal mechanism to allow mass digitisation of books, journals as well as other types of works, the wait continues. The CLA whose existing licences allow the copying of books and journals in the main, will (assuming they are successful in their application to operate in extended mode for their business-as-usual licences) have to apply again at a later date in order to be able to offer licences to libraries for making available online their digitised in-copyright books and journals. Given that since 2004 and the Google Books case, the discussion in Europe has focussed predominantly on out-of-commerce works, any such licence is almost certainly going to focus on books which are no longer commercially available.

The difficult and prolonged birth of these regulations in the UK is perhaps a lesson for other countries of the complexities and pitfalls when introducing extended collective licensing into law.

Perhaps the most fundamental issue with ECL is its complexity. This may explain some of the strong opposition the UK government received from some creator groups in the run up to the UK government abandoning the legislation in 2010. The UK Intellectual Property Office held

²² One example of a group that opposed Extended Collective Licensing was Stop 43, a reference to the clause in the Bill. Available at <http://www.stop43.org.uk>.

²³ The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014 implemented the primary legislation relating to ECL contained in the Enterprise and Regulatory Reform Act of 2013.

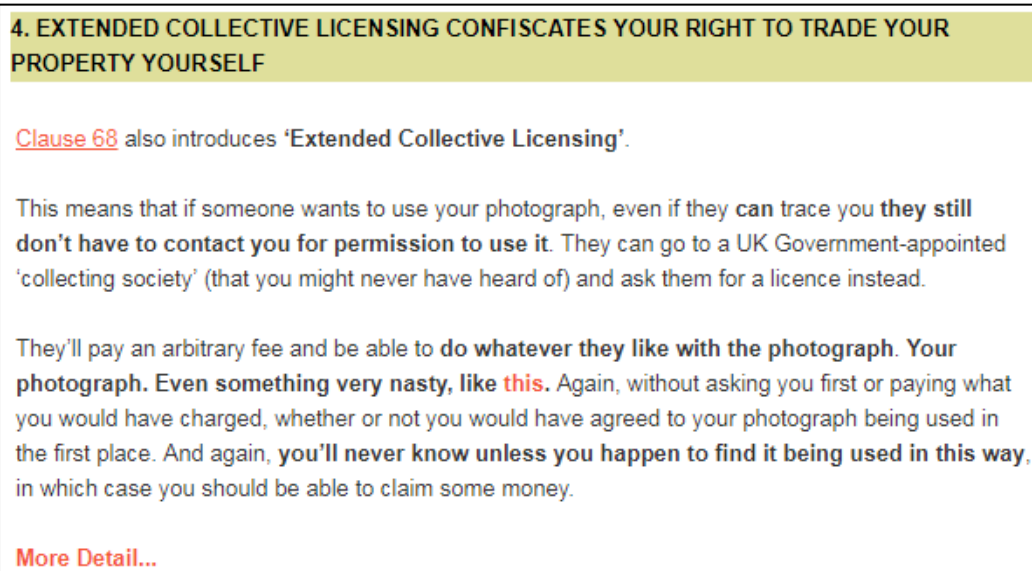
²⁴ Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/665679/extended-collective-license.pdf (Accessed 9 July 2018)

²⁵ Currently the CLA’s licences are a mix of opt out and opt in licences. The opt out licences therefore operate on the assumption that they represent all UK publishers and authors, whereas in reality they only can represent the rightholders they have received an express mandate from. Due to this gap between who they have a mandate from, and the licences they offer the CLA is applying to operate extended collective licences.

many rounds of written and face to face consultations with stakeholders in the run up to 2010 and then again in 2013 and 2014. One concern strongly expressed by some creator groups was that anybody would “pay an arbitrary fee and be able to do whatever they liked with”²⁶ a creator’s work (see image 1). In other words, collecting societies would be given the right in law to enter into any type of licence, with any type of potential customer.

This misunderstanding is of course at odds with the legislation itself which requires approval from government in response to an application from a Collective Management Organisation outlining the specific nature of the licences to be offered under an ECL. This ensures that where individual licensee / licensor relations are the norm these transactions will not be affected. The main advantage of ECL being that creators can receive remuneration for activities where the number of rightholders are so numerous, that one to one licensing is impossible.

IMAGE 1



4. EXTENDED COLLECTIVE LICENSING CONFISCATES YOUR RIGHT TO TRADE YOUR PROPERTY YOURSELF

Clause 68 also introduces ‘Extended Collective Licensing’.

This means that if someone wants to use your photograph, even if they can trace you **they still don’t have to contact you for permission to use it**. They can go to a UK Government-appointed ‘collecting society’ (that you might never have heard of) and ask them for a licence instead.

They’ll pay an arbitrary fee and be able to **do whatever they like with the photograph. Your photograph. Even something very nasty, like this**. Again, without asking you first or paying what you would have charged, whether or not you would have agreed to your photograph being used in the first place. And again, **you’ll never know unless you happen to find it being used in this way**, in which case you should be able to claim some money.

More Detail...

Arguably the most vocal group opposing the introduction were an organisation called Stop 43 which represented photographers. The strapline on their website states “Stop Confiscation of your property and Human Rights in the UK Enterprise and Regulatory Reform Bill”. A testament to their strong opposition to the legislation.

Clause 43 of the 2010 Digital Economy Bill, which was ultimately abandoned by the government, contained provisions for both the licensing of orphan works and extended collective licensing. On analysing the group’s successful grassroots campaign, the conflation of these two separate issues is at points evident. For example, reading the FAQ pages on the website after a paragraph entitled “What is “Extended Collective Licensing?”²⁷ it states:

²⁶ <http://www.stop43.org.uk/> (Accessed 14 February 2018).

²⁷ http://www.stop43.org.uk/faq/faq_us.html#What is Extended Collective Lic (Accessed 14 February 2018)



Why is it a problem?

ECL schemes are typically advocated as a "solution" to "the orphan works problem". However, as proposed in the Digital Economy Bill Clause 43 and by the British Copyright Council's current proposal on orphan works, these schemes would also encompass works of known provenance.

Whereas any large-scale digitisation will almost by definition include orphan works, it is not the aim or intention of ECL to address the very separate issue of orphan works per se. Dealing with orphan works is essentially just a side product of the legislation. In the case of ECL being used as a mechanism to clear rights in books, for the more modern monographs at least, it will include a majority of known and traceable rightholders.

Both sets of legislation are complex, and this conflation is perhaps understandable, particularly if not intricately familiar with the details of extended forms of licensing and the licensing of orphan works. The very sparse and succinct nature of wording of the 2010 Digital Economy Bill²⁸, if you have very little background in this field of law, does appear to raise many more questions than it answers. In hindsight attempting to introduce both complex licensing of orphan works and extended collective licensing at the same time probably exacerbated opposition to ECL.

While libraries, museums, and archives supported the introduction of ECL into UK law, its intricate nature is something that is likely to be felt more keenly as licences start to be negotiated. From the library side, a Danish colleague from the Royal Danish Library / Århus University explained that one of the main challenges of ECL was the need to have specialist experienced library staff to negotiate the licences – such people being very thin on the ground in the sector. Another challenge being the long run-in, usually measured in years in Denmark, to negotiate such licences.

Probably not unconnected to the strong opposition that the UK government received in 2010 to ECL, is the very onerous nature of the application process that is set out in the Regulation. This requires collecting societies to provide the government with an extremely wide range of 20 different sets of information when applying to the Secretary of State to operate in extended mode. Even then the ability to offer extended licences will only last for 5 years. Upon reapplication 24 different sets of information have to be further supplied by the collecting society. This no doubt is the reason why a period of over three years has elapsed before the first UK collecting society was even in a position to apply for an ECL.

Until 2014, the UK had one of the least regulated regimes for collecting societies in Europe - the introduction of ECL must be understood in this context. The same year that ECL was introduced into UK law the government introduced the Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014 enhancing obligations on CMOs to be more transparent and putting in place minimum operational standards to protect the interests of their members.

²⁸ <https://publications.parliament.uk/pa/cm200910/cmbills/089/10089.49-55.html> (116A / 116 B) (Accessed 9 July 2018)



As ECL extends the monopolistic nature of collecting societies further, and given the strong opposition to its introduction, it can perhaps be argued that the many obligations on CMOs were in part to assuage opposing creator groups. In addition to this the need to conform to a high bar of transparency, representativity etc. serves to protect extended collective licensing from a challenge in the courts. Whether ECL is compliant with international law was certainly something those who opposed the legislation often questioned and was the very issue that we saw reach the European Court of Justice (Soulier and Doke, 2016) in 2016 when a couple of authors took the French government to court challenging the right of a collecting society to offer extended licences for making available online out of print books as well as to sell them.²⁹

As this is new legislation, which is known as a “general ECL”,³⁰ and is not specific to making in copyright works from libraries available online, there remain a number of crucial hurdles that need to be surmounted to find out whether it will in reality facilitate mass digitisation or not. If we take the making available online of books as an example, the Copyright Licensing Agency (the CMO that represents books, journals, magazines etc), only applied in October 2017 to the UK government to operate in extended mode in order to cover their existing internal business licences. Assuming its application is successful, it will then have to reapply to the government at a future date to be able to offer libraries licences for making their in-copyright digitised collections available online.

²⁹ The European Court of Justice ultimately found against the French government, because there is no provision in the European Copyright Directive, such as an exception, that allows the works of an author to be made available online in their entirety without receiving permission from each and every rightsholder. Relevant section on this point from the ruling include:

34. It follows that, subject to the exceptions and limitations laid down exhaustively in Article 5 of Directive 2001/29, any use of a work carried out by a third party without such prior consent must be regarded as infringing the copyright in that work (see, to that effect, judgment of 27 March 2014, UPC Telekabel Wien, C-314/12, EU:C:2014:192, paragraphs 24 and 25).

35. Nevertheless, Article 2(a) and Article 3(1) of Directive 2001/29 do not specify the way in which the prior consent of the author must be expressed, so that those provisions cannot be interpreted as requiring that such consent must necessarily be expressed explicitly. It must be held, on the contrary, that those provisions also allow that consent to be expressed implicitly.

37. However, the objective of increased protection of authors to which recital 9 of Directive 2001/29 refers implies that the circumstances in which implicit consent can be admitted must be strictly defined in order not to deprive of effect the very principle of the author’s prior consent.

38. In particular, every author must actually be informed of the future use of his work by a third party and the means at his disposal to prohibit it if he so wishes.

39. Failing any actual prior information relating to that future use, the author is unable to adopt a position on it and, therefore, to prohibit it, if necessary, so that the very existence of his implicit consent appears purely hypothetical in that regard.

40. Consequently, without guarantees ensuring that authors are actually informed as to the envisaged use of their works and the means at their disposal to prohibit it, it is de facto impossible for them to adopt any position whatsoever as to such use.

³⁰ A general ECL is a type of Extended Collective Licensing system that does not limit in statute the purposes for which a collecting society may extend its mandate and offer licences that cover the works of non-members also,



This raises the important issue of representativity of CMOs. The CLA was established thirty-five years ago in 1983, and its “parent” organisations PLS and ALCS, in 1981 and 1977 respectively. Making a wide generalisation the repertoires of collecting societies will be more oriented towards modern works, produced by authors and publishers who are in part motivated by commercial interests. While these organisations will of course represent authors and publishers older than their respective founding dates it seems unlikely that this would be as comprehensive as their membership today is of currently active authors and publishers. By contrast, library collections will comprise large amounts of grey literature and span the entire duration of copyright which in the EU can last as long as 140 years from creation.

The 2014 Regulation has specific stipulations regarding the representativeness of a CMO who wishes to operate an ECL (s.4.4(b)) (emphasis added):

The Secretary of State may only grant an authorisation to a relevant licensing body if the Secretary of State is satisfied that ... the relevant licensing body’s representation in the type of relevant works which are to be the subject of the proposed Extended Collective Licensing Scheme is significant;

Representation is defined as:

“representation” means the extent to which the relevant licensing body currently—

(a) acts on behalf of right holders in respect of relevant works of the type which will be the subject of the proposed Extended Collective Licensing Scheme; and

(b) holds right holders’ rights in relevant works of the type which will be the subject of the proposed Extended Collective Licensing Scheme;

Currently it is unknown how the above sections in the regulations are going to be interpreted by the Secretary of State. Taking an example of a library wishing to digitise all poetry from the UK written up to 1930 in Gaelic, Welsh and Irish, the regulation quoted above could allow or disallow this. It could be interpreted to mean that as the CLA represents poets and poetry they would be representative. Similarly, the government could decide that it is not representative of works of this type because very few poets of this era and language group form part of CLA membership. This important issue will require clarification as it will affect enormously the types of projects that can be undertaken under the banner of ECL.

Libraries in the UK supported the introduction of a general ECL in 2010 and 2014 because one of its potentially many applications is mass digitisation of in-copyright works. The impact assessment produced by the government on this point states:³¹

“Extended collective licensing has been successfully deployed for a range of works and rights where the market is characterised by high volumes of transactions, including reprographic use

³¹ Available here: https://www.legislation.gov.uk/ukia/2014/189/pdfs/ukia_20140189_en.pdf (Accessed 23 February 2018)



and the broadcast of copyrighted works. It has also begun to be used to facilitate mass digitisation projects, demonstrated by the Bokhylla project which allows the Norwegian National Library to make 50,000 books available in full-text on its website for users within Norway. It is envisaged that the introduction of ECL on a voluntary basis in the UK could enable similar uses to take place if the market – including rights holders - supported such an approach.”

However, one fundamental problem with the way ECL was introduced in the UK is the limitation of duration of the licence. The Regulation limits the duration of authorisation from the government to a collecting society to a period of 5 years only. That is to say the duration for which a CMO can operate in extended mode is a maximum of 5 years (S.4.6). This is certainly the case for the first application. Although the relationship between the initial authorisation and renewal of an authorisation could be clearer S.9.4 of the Regulation states that:

“The Secretary of State may renew an authorisation for a fixed period or may express the renewed authorisation to continue until the earlier of revocation or cancellation ...”.

S.17.1.c of the Regulation underlines the potentially limited period of the licence further:

17.1. A relevant licensing body may only grant, under an Extended Collective Licensing Scheme, a licence in respect of a relevant work owned by a non-member right holder which... c) terminates on or before the expiration, revocation or cancellation of the authorisation of the relevant licensing body.

A large-scale digitisation takes years of execution, and a project of this length will cost the library many millions of pounds in management and development costs. For example, the British Library is working with over 130 sound archives currently planning the largest scale digitisation of unpublished sound recordings the UK has ever seen.

If ECL licences had been available, the project would have been radically different. Without it, the types of content and the volume at which differing types of sound recordings could have been made available will be dramatically different to where the project will end up. The project, called Unlocking Our Sound Heritage, will cost at least £10 million and will take a minimum of 5 years. Costs of such projects include digitisation, cataloguing, establishing optimum workflows, staff costs, web development and IT development.

If the maximum business certainty that a library can get, despite the high levels of investment required in a digitisation project, is a licence of only 5 years, or upon reapplication by a CMO still time limited it is difficult to see how ECL will stimulate much digitisation in the UK. We may simply well end up with the current situation where more business certainty is created by investing in rightsholder by rightsholder rights clearance because this provides a far higher likelihood of indefinite licences being granted.

In reality any licence is likely to be available for significantly less than the initial period of 5 years. This is because it is difficult to see how all the many complex elements of a large-scale digitisation project, and the negotiations for a licence (which in Denmark often take a number of years), can



be aligned so a licence can be offered to a library at the start of the 5-year window a collecting society has to offer licences.

Given the risk this creates - with the investor having to hope the CMO will reapply and be granted subsequent authorisation to offer extended collective licences - how enabling of large scale digitisation projects ECL will be has yet to be seen. If a library has large collections of public domain material this would certainly be a safer focus of their investment, as there are no rights barriers to digitising this material and no limitation to how long they can keep the material available for on the open web. The issue of the “black hole of the 20th century”, as European policy makers call the lack of digitised in-copyright 20th century materials, may therefore well continue for some time yet in the UK.

By contrast Germany introduced a far more enabling solution for large scale digitisation in 2014. This does not utilise extended collective licensing but creates the right for a collecting society, through the creation of a legal presumption of representativity, to offer licences to cultural heritage institutions to make works available online for non-commercial purposes. The legislation only relates to commercially unavailable text-based books, scientific journals, newspapers, magazines and “other literary works.”

The German system seems to have a number of advantages over ECL, from the perspective of a library. Namely higher levels of certainty for libraries encouraging digitisation and the making available online of in copyright works. Not only does a collecting society not have to go through a protracted application and reapplication system in order to be able to offer a time limited licence, arguably the libraries are in a stronger position to get a licence in the first place. This is because, subject to opt outs, the collecting society has the right in law to give cultural heritage institutions a licence and working on the assumption that an agreeable royalty rate can be agreed, there appear to be no obvious reasons as to why a library cannot request a licence and it be granted.

This contrasts markedly with the UK, where a collecting society has to decide first of all even if it wants to offer extended licences and then go through the protracted application process. As we have seen with the CLA even getting to this point has taken over three years. Certainly, at the moment in the UK there has been no application from any CMO representing film or sound, just that from the CLA to cover their current “business as usual” licences. As libraries are a niche market for collecting societies, whether there is enough financial incentive to encourage CMOs to go through the arduous application process to offer licences for the making available of in copyright works has yet to be seen.

In conclusion, while ECL theoretically has the potential to enable libraries mass digitising and making their commercially unavailable collections online, in reality only time will tell whether this happens. Compared to Germany where the CLA equivalent (WG Wort) does not have to go through a burdensome application and reapplication process every 5 years, things appear less enabling of mass digitisation in the UK.

Compared to business markets, given the limited economic resources of libraries, UK collecting societies will have to make market driven decisions as to whether the economic benefits that



would derive from the issuing of licences to libraries outweigh the time and cost in investing in relatively frequent reapplications. The time limited nature of licences is also a major disincentive for British libraries to digitise their collections for online access. The long lead in times, project planning, resource and technical infrastructure requirements of hosting large numbers of creative works online are high. While some organisations may feel expenditure on the hope that a licence would be reissued every 5 years is worthwhile, others are likely to decide the risk is too high and invest in the digitisation of public domain works.

Despite the fact a legal solution for mass digitisation has been discussed globally since the Google Book Project hit the headlines in 2004, disappointingly the prospect of a workable solution in the UK still feels rather a long way off.

UNITED STATES

By Janice Pilch

The United States has not implemented any extended collective licensing (ECL) system to facilitate use of copyrighted works. After extensive study that included public comments and roundtables on the issues of orphan works and mass digitization from 2005-2015, the United States Copyright Office recommended ECL as a comprehensive solution for mass digitization in the U.S. The Copyright Office proposed to Congress the adoption of a limited pilot program to implement ECL for certain mass digitization projects serving non-profit educational and research purposes in order to gain experience with ECL in the U.S.

Findings of the Copyright Office were released in a lengthy report entitled *Orphan Works and Mass Digitization: A Report of the Register of Copyrights* issued in 2015 (“2015 Report”). The report benefited from two earlier studies, *Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document* issued in October 2011 (U.S. Copyright Office, 2011) and *Report on Orphan Works: A Report of the Register of Copyrights* issued in January 2006 (U.S. Copyright Office, 2015).

The 2015 Report discussed possible legal mechanisms for orphan works and mass digitization, understood as situations where the dissemination of literary and creative works is hindered by the inability to secure permission. Legal mechanisms considered by the Copyright Office included fair use, direct licensing, voluntary collective licensing, statutory licensing, extended collective licensing, and industry memoranda of understanding. The 2015 Report proposed that the U.S. adopt a limitation on liability for eligible users who can prove they conducted a good faith diligent search that failed to identify or locate a copyright holder in the case of orphan works; and that the U.S. adopt a statutory framework for ECL to facilitate mass digitization.

The Copyright Office rejected ECL as a solution for orphan works because “by definition there is no owner to be identifiable or locatable, and thus no one to receive a licensing fee, or to opt out of the CMO altogether. Although some stakeholders from the creative sector endorsed the idea of applying ECL to the orphan works problem, the Office agrees with various commenters that ECL specifically for orphan works would end up ultimately as a system to collect fees, but with



no one to distribute them to, potentially undermining the value of the whole enterprise.” (U.S. Copyright Office, 2015:50)

The ECL framework for mass digitization in the U.S. proposed in the 2015 Report would apply to literary works and extend to pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to literary works, and also be used to permit licensing of photographs in qualifying mass digitization projects. The Copyright Office would authorize collective management organizations representing copyright owners to issue licenses for mass digitization projects and to collect royalties on behalf of both members and non-members “based on transparent formulas and accounting practices.” (U.S. Copyright Office, 2015:6) An opt-out would be available for rightholders.

The Copyright Office believes that ECL legislation should accomplish the following:

- Permit the Register of Copyrights to authorize collective management organizations meeting specified criteria to issue licenses on behalf of both members and non-members;
- Apply only to literary works; pictorial or graphic works published as illustrations, diagrams, or similar adjuncts to literary works; and photographs, with possible additional limitations based on commercial availability or date of publication of works;
- Give copyright owners the right to limit licenses or to opt out of the system;
- Permit licensed works to be used only for non-profit educational or research purposes and without any purpose of direct or indirect commercial advantage;
- Establish eligibility requirements for collective management organizations;
- Provide for negotiation of license rates and terms between collective management organizations and prospective users, subject to a dispute resolution process;
- Require negotiation for implementing and maintaining reasonable digital security measures;
- Require collective management organizations to collect and distribute royalties to rightholders within a specified period and to conduct diligent searches for non-members;
- Provide for the disposition of unclaimed royalties after a specified period;
- Preserve the ability of users to assert fair use in connection with mass digitization projects; and
- Sunset five years after the legislation’s effective date. (U.S. Copyright Office, 2015:7-8)

The Office proposed the limited pilot program as a way to gain further experience with ECL in providing full text access to literary works, pictorial or graphic works published in literary works, and photographs under conditions to be agreed upon between rightsholder and user representatives. Because legislation would likely be needed to establish an ECL program, the Copyright Office recommended further consultation and input from stakeholders. To that end, the Copyright Office posted a notice of inquiry on June 9, 2015 for public comments on the scope and administration of an ECL program, in an effort linked to the 2015 Report. This request invited interested parties to submit specific recommendations regarding the operational aspects of the pilot program. It received 83 written responses.³²

³² Comments are available at United States Copyright Office website on Mass Digitization, at <https://www.copyright.gov/policy/massdigitization/comments/> (Accessed 9 July 2018).



Although the U. S. has never used an ECL regime, it is understood that the Google book settlement initially negotiated to resolve the litigation brought in 2005 by the Authors Guild and five major publishers against Google would have closely resembled an ECL system.

The settlement agreement, announced on October 28, 2008 and re-filed as an amended settlement agreement on November 13, 2009, was ultimately rejected on March 22, 2011 in the United States District Court for the Southern District of New York. Approval of the settlement would in effect have created an ECL system by allowing Google to digitize and make use of books without the prior authorization of rightholders unless they opted out. The centralized Book Rights Registry envisioned in the proposed settlement would have collected and distributed payments to rightholders regardless of whether they had authorized the Registry to do so. The settlement agreement was criticized for its effective creation of a compulsory licensing system, similar to ECL, that would have bypassed congressional approval.³³

The unsuccessful Google Book settlement agreement addressed the issue of in-commerce and out-of-commerce works and would have allowed Google to display out-of-print books publicly but not in-print books. This is an issue being considered in the ECL framework. In the 2015 Report, the Copyright Office weighed various options for eligibility of in- and out-of-commerce works: to make both in- and out-of-commerce works eligible for ECL but place greater limits on uses of in-commerce works, to exclude in-commerce works, or to limit eligibility to works published before a certain date. To enable the Copyright Office to make further recommendations on this issue, the notice of inquiry for the pilot program invited stakeholders to comment on whether collections that include commercially available works should be eligible for ECL, or whether the program should cover only out-of-commerce works, or whether the program should be limited to works published before a certain date.³⁴

After two years of deliberation, based on the input received from stakeholders on the viability of the pilot program, the Copyright Office has concluded that there is currently insufficient stakeholder agreement to warrant proposed ECL legislation (U.S. Copyright Office, 2017). On October 4, 2017 the Copyright Office announced that it had submitted a letter to members of Congress reporting the results of the public inquiry on establishing the pilot program to facilitate the mass digitization of books and other copyrighted works. Citing a lack of stakeholder consensus on key elements of such a program, the letter, dated September 29, 2017,³⁵ concludes that proposed legislation would be premature at this time. The Copyright Office stated that it

³³ See, for example, the Statement of Marybeth Peters, Register of Copyrights, before the Committee on the Judiciary, United States House of Representatives, 111th Congress, 1st Session (September 10, 2009), at <https://www.copyright.gov/docs/regstat091009.html>: “[A]llowing Google to continue to scan millions of books into the future, on a rolling schedule with no deadline, is tantamount to creating a private compulsory license through the judiciary.... [S]uch decisions are the domain of Congress and must be weighed openly and deliberately, and with a clear sense of both the beneficiaries and the public objective.”

³⁴ U.S. Copyright Office, Notice of Inquiry (June 9, 2015)

³⁵ Letters sent to the Senate Judiciary Committee and the House Judiciary Committee are available at United States Copyright Office website on the Mass Digitization Pilot Program, at <https://www.copyright.gov/policy/massdigitization/> (Accessed 9 July 2018).



still believes that ECL offers a viable solution for mass digitization projects and that it remains ready to assist stakeholders in developing consensus-based legislation should Congress wish to pursue further discussion in this area.

SOUTH KOREA: EXPLORING ECL FOR INTERNATIONAL ELECTRONIC DOCUMENT DELIVERY

By Karolina Andersdotter

Suhyeon Yoo and Hyesun Kim (2013, pg. 54-58) explore copyright clearing methods for electronic document delivery in South Korea. The nation is a contracting party of the Berne Convention since 1996 and has a fair use provision in its national copyright law similar to that of the US. Because the fair use provision is relatively new in Korean legislation it is unclear whether it applies to works from before its entry into effect. Furthermore, the fair use provision on the effect on current or potential market value of the work makes it difficult to apply fair use to electronic document delivery.

The authors' proposed solution for this is licensing agreements between institutions and publishers, but an obstacle is that copyright clearing practices are difficult in Korea due to 'linguistic and cultural barriers that often accompany most documents (...) that are published overseas.' Agreements between national copyright collectives provide 'relatively cost-effective ways to manage (...) using and reproducing copyrighted materials', but licence fees are 'quite expensive compared to library remuneration fees in Korea.' Incorporating ECL into the copyright law is seen as a solution to enable rapid and legitimate distribution of international works, including orphan works, since ECL is designed specifically for mass use (Yoo & Kim, 2013).

ECL seems to be appreciated as the most centralised version of a licensing scheme; limiting the amount of time and resources libraries and similar institutions have to spend on copyright clearing. The argument in favour of applying ECL to works by foreign rightholders is an interesting one, given that schemes elsewhere have tended to seek to avoid doing this.

EXTENDED COLLECTIVE LICENCE IN NORWAY: LIBRARIES AND EDUCATION

By Kristine Abelsnes

I. Legal Basis

For some types of use, it is difficult for the user³⁶ to enter into agreements with all rightholders involved. In such cases, the extended collective licensing solution gives the user access to a copyright protected repertoire through one single agreement.

³⁶ Both libraries and individuals.



When a licensing agreement has been concluded between a user and a CMO, it is by law given an extended effect, so that it also covers rightholders not represented by the organisation.

The licensing scheme must fulfil certain conditions:

- The organisation must represent a substantial part³⁷ of the creators of the category of works in question.
- When fees are distributed, rightholders not represented must be given equal treatment to those who are directly represented within the scheme.

The Norwegian Copyright Act³⁸ authorises the extended collective licensing in different types of uses:

- copying and broadcast fixation for educational use (§ 13b)³⁹
- copying and broadcast fixation within institutions and enterprises (§ 14)
- copying and making available in archives, libraries and museums (§ 16a)⁴⁰
- fixation for use by the disabled (§ 17b)⁴¹

³⁷ There is no definition in the law itself of what is considered a “substantial part”.

³⁸ Act No. 2 of 12 May 1961 Relating to Copyright in Literary, Scientific and Artistic Works

³⁹ **Extended collective licence for the use of works in educational activities § 13b.** Copies of a published work can be made for use in own educational activities if the conditions for an extended collective licence pursuant to section 36 first paragraph are fulfilled. Fixations of broadcasts can be made on the same conditions. This does however not apply if the broadcast consists of a cinematographic work which must be perceived as also intended for uses other than presentation via television, unless only minor parts of the work are used in the broadcast. Fixation centres which are approved by the Ministry may, for use in educational activities, make fixations as specified in the first paragraph, if the centre fulfils the conditions for an extended collective licence pursuant to section 36, first paragraph. Copies made pursuant to the first and second paragraphs may only be used in educational activities covered by the agreement under section 36. The King will issue regulations concerning the storage and use of fixations pursuant to the first and second paragraphs.

⁴⁰ **Extended collective licence for the use of works in archives, libraries and museums § 16a**

Archives, libraries and museums as described in section 16 first paragraph can make copies of published works in the collections and make such works available to the public if the conditions of the extended collective licence pursuant to section 36 first paragraph are fulfilled.

⁴¹ **Making copies for use by the disabled § 17.** (Exception)

From a published literary or scientific work or musical work copies intended for the use of the blind and persons whose sight is impaired and others who due to the disability cannot attain the work in a usual manner may be made in a form other than a sound fixation. Published literary or scientific works may be reproduced on film, with or without sound, intended for the use of persons whose hearing or speech is impaired. The provision does not apply to commercial use. The provisions of the first paragraph shall not confer a right to reproduce copies which others have made with a particular view to the uses specified therein.

Compulsory license for the production and use of fixations for the disabled § 17a. The King may decide that certain specified organizations and libraries shall, on stipulated terms, for the purpose of free use by the disabled, have the right to make copies of published literary or scientific works by making a fixation on a device that can reproduce them. In connection with the text of such works, issued works of art and



- broadcasting in the Norwegian Broadcasting Corporation (§ 30)
- use of works in the broadcasting organizations' collections (§ 32)
- retransmission of broadcasts (§ 34)

In addition to these cases, the Copyright Act stipulates the use of the extended collective licence in other, more limited, licensing agreements (new addition to § 36)⁴².

The Norwegian copyright law is currently being revised, but there will probably be no substantial changes to the legal basis for ECLs. However, there may be some change in wording, and the numbering of the articles is altogether different from the ones listed above. The consultation period is over, and the proposed law is now in Parliament.

ECL for Libraries

§ 16a is relatively new, it was added in 2005. Before that libraries did not have any legal basis for negotiating ECL for copying or other use in libraries. Most of copying activities in libraries were however covered by exceptions and limitations (E&Ls), and still are. But these E&Ls are for the most part limited to analogue copying (except for copying for preservation purposes). ECL for libraries, archives and museums was introduced to make it possible for these institutions to make digital copies of works in their collection and make them available outside of the library premises.

The most known ECL license is the *National Library's Bokhylla* (The Book Shelf) where the library has digitised a large part of their collection (appr 250.000 works) and made it available online for everyone with a Norwegian IP address. The National Library is also part in an agreement with KOPINOR⁴³ as of 2015 on allowing the National Library and other publicly funded libraries to make digital copies of articles and other short excerpts of works available for individual persons by specific request. This agreement was earlier only between libraries in higher education and KOPINOR, but it now allows ALL publicly funded libraries in Norway to scan articles and excerpts

issued photographic works may be reproduced on the fixation. The author is entitled to remuneration to be paid by the State. The provision does not apply to commercial use.

Extended collective licence for the production and use of fixations for the disabled § 17b. The King may issue regulations regarding the right to make a fixation of a published film or picture, with or without sound, and of a transmitted broadcasting programme not essentially consisting of musical works. Such regulations shall only apply to such use as is specified in section 17a, and only be applicable when the person making the fixation fulfils the conditions for an extended collective licence pursuant to section 36, first paragraph.

⁴² **§ 36.** When there is an agreement with an organization referred to in section 38 a which allows such use of a work as is specified in sections 13b, 14, 16a, 17b, 30, 32 and 34, a user who is covered by the agreement shall, in respect of rightholders who are not so covered, have the right to use in the same field and in the same manner works of the same kind as those to which the agreement (extended collective licence) applies. The provision shall only apply to use in accordance with the terms of the agreement. The provision shall not apply in relation to the rights that broadcasting organizations hold in their own broadcasts.

⁴³ Collective management organisation in charge of text and images.



of works in their collection and send these directly to patrons for research and private study, also outside their own institution. Newspaper articles and sheet music are not included. Whereas Bokhylla is about making available online digitized works, this agreement is about digital document delivery.

The ECL that is the basis for Bokhylla is an agreement between Kopinor and the National Library. The agreement limits the user from downloading works that are protected by copyright but works in public domain can be downloaded.

The National Library is granted an exception in the law to digitise all of their collection and make the digitised works available on terminals on the premises. Other libraries have the same possibility, but only for out of commerce works. Other uses of digitized works need to be subject to license, like ECLs.

ECL for Education

Libraries in educational institutions are not party to these agreements. The agreements are between the institutions, represented by the Higher Education Council and KOPINOR / NORWACO⁴⁴ and do not concern library copying⁴⁵. The agreement covers both photocopying and digital copying. The volume of copies is based on spot tests and is negotiated at certain intervals.

The price is also an issue in the negotiation. A key factor influencing the value of the licences include declining volumes of copies related to this agreement, since more digital material, especially journals, is now available through other licenses, i.e. Elsevier et al. There is also an ongoing discussion between KOPINOR and the universities/colleges to ensure that material that is covered by other licenses shall not be part of the KOPINOR agreement. Although there doesn't seem to be any difference of opinion on this, it remains to be seen how this will be followed up in practice through the spot tests. The trend is that the volume of ECL copies will decline in the coming years.

II. How ECL Works in Practice

ECL in Norway is an efficient way to manage mass clearance, and it saves libraries and educational institutions a lot of time and hassle. It is widely accepted among both rightholders and institutions depending on the use of copyrighted material.

Bokhylla is popular among libraries (and the general public) as it offers an alternative to inter-library loan in some cases, and they can advise patrons to find books/information and works in public domain to download. Even the most local publication can be found there. It is regarded as a national investment in the making available of our written cultural heritage, which justifies the great deal of money that Norway is spending on it.

⁴⁴ Collective management organisation in charge of broadcasting material.

⁴⁵ §§16 and 16a of the Norwegian Copyright Act



Of course, there is always the discussion of price and extent. And since an organisation like KOPINOR has what can be called a monopoly position, the negotiation positions risk being asymmetrical, even if there are mechanisms of mediation put in place when an agreement cannot be reached.

There have also been efforts to introduce ECL as a solution for uses that, in the libraries' opinion, are and should remain part of or be included in exceptions and limitations. These are uses that, in the view of libraries, do not cause any illegitimate harm to the interests of rightholders, and serve the public interest, meaning that payments are not justified. The library association is therefore on guard every time there is a revision or new legislation concerning copyright and libraries/users. For instance, to protect and keep the private copying/use exception has also been part of the library association's advocacy efforts.

SWEDEN: EXTENDED COLLECTIVE LICENSES IN HIGHER EDUCATION

By Inga-Lill Nilsson

The need to use copyrighted literature in higher education has increased over the years, due to digital education and digital publishing.

The ECL-provisions in the Swedish Copyright Act, Article 42 c allow higher education institutions to negotiate contracts with representative organizations rather than with each individual author or publisher. The Swedish license for reproduction in teaching in higher education is handled by the CMO Bonus Copyright Access, an umbrella organization representing copyright owners and publishers. There is also a separate license that allows universities to copy material for internal distribution and use.

Universities pay fees according to the number of students (and employees for internal use). The cost is approximately € 21 per student.

Bonus monitors and distributes copyright fees to representatives of copyright owners in Sweden and other countries, where copyright fees are collected through reciprocal agreements. Foreign copyright owners in countries without a bilateral agreement setting out a principle of reciprocity will not be compensated.

I. Bonus Copyright Agreement and E-learning

The license with Bonus Copyright Access is negotiated centrally by The Association of Swedish Higher Education and can only be terminated by the government – not by the Association. The latest Agreement for Higher Education Institutions entered into force in 2014⁴⁶. The aim was to harmonize the license with digital education. The license covers digital uses of protected material, such as scanning, downloading and sending by mail.

The use of works under the agreement is subject to the following conditions:

⁴⁶ Bonus Copyright Access. More information available at:
<http://en.bonuscopyright.se/pages/HigherEducationInstitutions> (Accessed 9 July 2018).



- Teachers and students are allowed to copy and share copyright protected material from Swedish and non-Swedish books, teaching materials, periodicals, digital publications, websites and more.
- Audio and moving images are not covered.
- Copied material may be copied and shared digitally and through analogue means between teachers and students in a teaching group.
- Distance learning in Sweden is covered and material can be shared via the higher education institution's (HEI) closed network.

There are several conditional clauses regarding the quantity of a work that can be used and how to distribute copies:

- The 15/15 rule means that you can only copy up to 15% of a single publication, or 15 pages, whichever is the lower.
- You are not permitted to make reproductions from publisher-produced compulsory course literature. However, there are some exceptions, when the literature includes single works and only a minor section, for slide presentations and for an examination task.

The most important paragraph in the license explains WHEN to use the agreement. "If the HEI has entered into another agreement that governs how digitally stored works may be reproduced and used, the terms of such agreement shall prevail". Such other agreements are mainly database licenses and they provide the users with a more generous access than the ECL.

II. ECL in Practice – Fit for Purpose?

Online and other digital publications have revolutionised education, giving students and teachers new types of resources and ways of using them, including at distance. ECL can be seen as a complement for printed material where there are no digital resources. However, the value is decreasing the more 'digital' libraries are becoming central to higher education. If ECL fails to keep up, it can mean that it no longer offers flexibility or legal certainty – rather the opposite (Xalabarder, 2011).

As concerns access to scientific literature, database licences have becoming increasingly important (at least where open access is not an option), meaning that ECL is becoming less relevant. For students expected to buy or borrow textbooks, ECL is also of little use, given the limiting and confusion conditions it involves.

Copying or distribution of printed material, which is covered by ECL, is constantly decreasing, as teachers see the advantages of using e-resources. ECL does not cover full access to books and journals or allow for the more flexible uses which teachers now prefer as they make the most of changing technologies. Universities specialized in natural and social science education programs are concerned about the high cost. They use mainly digital material and the ECL license offers little value. Since the cost is based on the number of students and not the volume of copies they pay just as much as other universities with programs in humanities where the license is more relevant to their needs.



The ECL-system is binding, and university libraries cannot cancel the ECL ‘subscription’. Moreover, ECL is normally not handled by the library or university units with expertise in e-learning and therefore they are not represented in negotiations with the CMO, meaning that there is little effort to take account of real uses or need to copy.

III. ECL as a Model in Higher Education

Worldwide, ECL has been presented as a means of solving problems with mass-digitalization, foreign works or orphan works. The discussion is mostly about whether authors can exercise their right against the CMO.

Unfortunately, the discussion is seldom about the need to reproduce copyrighted material in education and research. Academic needs are different than those in public libraries, museums and archives. The success of the model in other sectors hides the effect it has on higher education. The disadvantages have not been expressed or discussed. The Higher Education-license was introduced in 1973 to regulate copying in schools and in higher education does not provide solutions in modern teaching.

Furthermore, the ECL model relies on the willingness and experience of different parties to engage in collective bargaining. However, it is not a balanced negotiation when universities normally lack legal expertise with practical experience. They are not in a position to be an active part in negotiations.

Universities are only to a limited extent gaining access to learning resources through ECLs. The needs of e-learning force them to find alternative tools such as open educational resources and open access material. Due to high costs and the lack of representability and possibility to engage in negotiations, ECL in Sweden is an inferior alternative in the academic environment. Digitalization in teaching and research is constantly changing educational needs. A better balance can be achieved by exceptions for educational purposes.

ECL AND ARCHIVES

By Jean Dryden

Extended Collective Licensing (ECL) is seen by some to be “the primary means to solve most of the copyright complications in the information society” (Riis, T. and Schovsbo, J., 2010). This paper examines the extent to which ECL could be of use in situations where an archival institution is the “user” of its own holdings, particularly where the archives wishes to digitize its holdings and make the digitized material available online. In doing so, the archives potentially infringe two of the exclusive rights of the copyright owner: the reproduction right and the making available/communication right.



I. The Nature of Archival Holdings

The discussion must begin with an understanding of the nature of archival holdings. Four characteristics are important from a copyright perspective:

- 1) Archival holdings comprise all categories of works⁴⁷ that are protected by copyright and related rights;
- 2) The entire aggregation of materials created or received by an individual or organization must be presented as a whole;
- 3) The amount of copyright-protected material preserved in archives is voluminous; and
- 4) Archival holdings are largely unpublished.

Each of these characteristics is discussed in more detail below.

1) Archival institutions acquire, preserve, and make available for use records of enduring value. The materials preserved in archival repositories are “the information by-products of organizational or social activity” (Ellis, J., 1993). Thus, archival holdings consist of all media types (e.g., text, photos, paintings, maps, plans, sound recordings, and moving images) in both digital and analogue formats. From the perspective of copyright, archival holdings meet the criteria for copyright protection (originality and fixation), and archival holdings comprise all categories of works protected by copyright and related rights.

2) As the information by-products of human activity, archival holdings were created and accumulated naturally by an organization, a person, or a family in the conduct of their affairs and preserved because of the enduring value of the information they contain or as evidence of the functions of their creator (Pearce-Moses, 2005). Archivists treat the materials created and received by each organization, person, or family as a unit called a *fonds d’archives*.⁴⁸

Thus, the Mary Smith Fonds would consist of works created by Smith (e.g., diaries, drawings, outgoing copies of letters, photos, etc.) as well as letters, photos, etc., created by others and received by Smith. Many rightholders are involved. For an archivist, the whole of the fonds is greater than the sum of its parts because the relationships between the items and files provide evidence and information about the context of their creation and use that is essential to understanding the material.

Therefore, digitizing only part of a fonds (e.g., works in which the archives owns the copyright, or in which the copyright has expired, or only the items for which the archives has the copyright owner’s permission) presents an incomplete picture of the material and its creators. Limiting what is to be digitized and made available online to items that present no copyright complications deprives users of access to a significant amount of commercially and culturally valuable content.

⁴⁷ The expression ‘work’ will be used to include all subject matter covered by copyright (i.e., literary, artistic, musical, and dramatic works) as well as the subject matter (sound recordings, performances, and broadcasts) covered by related (or neighbouring) rights.

⁴⁸ There is no satisfactory English equivalent



3) Although archivists treat the materials created and received by each organization, person, or family as a unit; from a copyright perspective, each item within the fonds (e.g., each letter, photo, video, etc.) is a separate work. For example, the papers of a cabinet minister may contain thousands of letters and emails from citizens, bureaucrats, and other officials. If an archive wished to digitize these papers and make them available online, obtaining the necessary permissions would require a labour-intensive search for thousands of rightholders. The voluminous extent and disparate nature of archival holdings has important implications for any discussion of ECL.

4) Archival holdings were not (for the most part) created for commercial purposes or dissemination to the public, and thus are largely unpublished.⁴⁹ The unpublished nature of the majority of archival holdings has several consequences. Rightholders are unlikely to be interested in monetizing their intellectual property; in fact, many are unaware that they own the copyright in what they have created. For these reasons, the many rightholders represented in archival material are unlikely to be members of a collective management organization (CMO). Furthermore, archival holdings contain a high proportion of orphan works, whose copyright owners cannot be identified or located.⁵⁰ Where content is created for commercial purposes, rightholders have a vested interest in being readily traceable to grant permission for use and derive income from their creations. Generally speaking, it is much easier to identify and locate rightholders of published works. However, as noted in the foregoing example of the cabinet minister's papers, obtaining any necessary authorizations for use of unpublished materials is a more costly prospect.

II. Why ECL Does Not Work for Archives

Provided that an archival institution operates in a jurisdiction with an ECL scheme, and provided that there is a CMO that participates in the scheme and represents those who hold rights for a particular category of works or uses, an archival institution wishing to digitize an entire fonds for online access could apply to that CMO for a licence to do so.

Assuming that the archives and the CMO reach an agreement, and provided that the archives complies with the conditions set out in the agreement (including payment of a fee), the archives could digitize works whose rights are owned by rightholders not represented by the CMO. This could be done with a single licence instead of many individual licences with numerous rightholders covering numerous works.⁵¹

⁴⁹ But not exclusively so. Archives holdings also include published materials, such as maps, posters, pamphlets, films and videos, and sound recordings

⁵⁰ Although ECL is not directly related to orphan works, several commentators have suggested ECL as a solution for the orphan works problem (Vuopala, A., 2013; Finnish Copyright Society, 2013; Axhamn, J. & Guibault, L., 2011; Hargreaves, I., 2011). Thus, the orphan works problem inevitably arises in any discussion of ECL and archives (as well as the holdings of other memory institutions such as libraries and museums)

⁵¹ Several licences with different CMOs may be required, depending on the range of media types in the fonds.



Unlike other proposed solutions to the orphan works problem, no prior “good faith, reasonably diligent” search for rightholders would be required of the archives.⁵² It would be the CMO’s responsibility to locate and distribute payment to the rightholders, both members and those not represented.

ECL appears to hold promise, in that it offers archival institutions wishing to make their digitized holdings available online legal certainty without the need to search for rightholders. But archives have not embraced ECL as a solution to rights clearance in mass digitization projects. Although more research is needed to determine the extent to which archives actually participate in ECL schemes, Geir Magnus Walderhaug of the University of Oslo indicated that in Norway no archives has yet concluded an agreement with a CMO.⁵³ A deeper examination of the ECL system reveals the following potential impediments.

Do ECL Regimes Include Unpublished Works?

As noted, a significant proportion of archival holdings are unpublished. The ECL systems recently instituted in France and Germany apply only to published works (Guibault, L., 2014, pg. 11). However, the statutes authorizing ECL regimes in the Nordic countries⁵⁴ and the UK neither exclude nor include unpublished materials.⁵⁵ Axhamn and Guibault maintain that “an ECL provision for the benefit of Europeana content providers should not be restricted to content that has been previously published or communicated to the public” (Axhamn, J. & Guibault, L., 2011). However, a report on the feasibility of implementing an ECL system in Canada recommended that any ECL regime should not apply to unpublished works (Gervais, D., 2003), and the scheme proposed by the U.S. Copyright Office would exclude unpublished works, because “the administrative costs associated with managing such a vast universe of rights would likely outweigh any benefit a CMO could realize from doing so under an ECL scheme” (U.S. Copyright Office, 2015).

Fees

Archivists believe that rightholders should be fairly compensated for the use of their works. However, how does one determine the fair market value of archival material? Because much archival material was not created for commercial purposes, and was never intended to be monetized, one could argue that the market value of the material is low, and fees – if any – should reflect that.⁵⁶ While it is possible that the current value of some older material may be

⁵² The diligent search requirement presents a nightmare for archival material because the heterogeneous nature of archival holdings means that there is no single strategy to identify or locate rights holders. A search for even one rights holder could potentially include many different avenues of investigation, be very costly, and possibly fruitless

⁵³ Summary of interview by Karolina Andersdotter, 16 Dec. 2016

⁵⁴ The Norwegian statute extends ECL to the published holdings of LAMS (s. 16a) (Guibault, L., 2014, p. 39; Axhamn, J. & Guibault, L., 2011).

⁵⁵ Guibault, L., 2014, 29-47 (containing relevant extracts from national copyright statutes).

⁵⁶ The Hargreaves report suggested that, given that archives and other cultural heritage institutions serve a public good, it may be that, for the purposes of ECL administration, archival material could be zero-rated (Hargreaves, ¶4.58, p. 39)



greater than its initial value if it serves new uses that are in demand, this possibility only adds to the difficulty of determining the fair market value of hundreds of works within a fonds. If an archive considers the licensing fee to be unreasonably high (particularly when combined with additional administrative costs such as staff time), the archives may choose to take a risk-based approach to digitization by carefully assessing what it selects for digitization, providing appropriate disclaimers, and having a take-down policy.

Remuneration of Unrepresented Rightholders

As noted above, an ECL system requires that unrepresented rightholders must be treated the same as represented rightholders. This includes the right to remuneration, and it would be the CMO's responsibility to locate unrepresented rightholders. However, given the high number of unrepresented rightholders associated with archival materials and the difficulty of locating them, fees may not be distributed to the rightholders at all because CMOs would not be willing to undertake the task of locating them.⁵⁷ In situations where licensing activity consists of high volume, low cost transactions, the administrative cost of locating rights holders could be very costly. And expending resources to locate unrepresented RH presents an even greater potential cost that could raise concerns among the represented rightholders who constitute the CMO's core membership. The European Commission's impact assessment paper suggests that undistributable revenue would be added to the remuneration of represented rightholders or retained by the CMOs in case the rightholders do not appear (Riis, T. and Schovsbo, J., 2010, pg. 28). Doubts that the fees will be distributed to the rightholders may be a further incentive for archives to adopt a risk-based approach.

Cross-border Issues

The benefits of Internet dissemination are lost if access to works licensed within ECL schemes is limited to computers with IP addresses in that jurisdiction (Guibault, L., 2014, pg. 2-3). As Guibault says, "A pragmatic solution to rights clearance should not come at the expense of cross-border access to the digitised material" (Guibault, L., 2014, pg. 3). However, ECL licenses would cover cross-border uses. Guibault has argued that adopting a "country of first publication" rule would mean that a CMO can authorize uses outside the CMO's national boundaries (Guibault, L., 2014, pg. 16, 19-23), but this solution appears to apply only to works that were published or broadcast. Furthermore, Riis and Schovsbo maintain that such a rule may conflict with the terms of the Berne Convention, and a CMO can grant permission only for uses within the borders of the CMO's home country (Riis, T. and Schovsbo, J., 2010, pg. 498).

National Tradition

Copyright is a national regime, and the copyright policies of a country reflect its history, culture, and experience (Riis, T. and Schovsbo, J., 2010; European Commission Impact Assessment,

⁵⁷ This has been referred to as the "orphan works paradox" where the lower the commercial value of a work, the less likely it is that the RH can be found to grant permission. Because the least valuable works create the biggest search costs, so there is no incentive to incur the cost of a search for orphan works (European Commission, 2011, p. 26).



¶15.3.4. p.28). ECL has been a part of the copyright tradition of the Nordic countries since the 1960s, but it has not been widely adopted elsewhere. However, ECL is receiving closer scrutiny, particularly in Europe, as nations attempt to find efficient solutions to ensure compensation for rightholders. France, Germany, Hungary, and the UK⁵⁸ have adopted ECL systems (Guibault, L., 2014, pg. 1-2), but the U.S. Copyright Office has stopped work on a limited ECL scheme to address mass digitization issues (U.S. Copyright Office, 2015, pg. 104-105). It remains to be seen whether other countries for whom ECL is an unfamiliar concept will warm to the idea of ECL.

III. How Would ECL Have to be Changed in Order to Work for Archives?

1. Any ECL regime must meet the needs of the archival mission by encompassing:

- all archival material regardless of media type or publication status,
- all rights relevant to mass digitization, and
- archival institutions as a user group.

2. If the system does not waive fees for archival institutions, the quantum of fees must be affordable for under-resourced institutions. Presumably legal certainty that provides freedom from liability for copyright infringement is worth paying something for. However, some may view the fees as a tax that benefits only the CMOs and does not compensate rightholders. One alternative might be to direct remuneration for unrepresented rightholders to a fund to support grants to archival institutions. Depending on the value of such grants, archives may be willing to pay licence fees. ECL would be even more attractive if it included a process for unclaimed and undistributed fees to be returned to the archival institutions that paid the fees after a reasonable time.

3. Archival institutions acquire and preserve their holdings so that they can be used. The Internet provides an exciting new way to make archival holdings available for use not just beyond the reading room, but across national borders. But the territorial nature of copyright law stands in the way. If ECL is to be of any value to archives, a solution must be found to address the cross-border problem.

IV. Conclusion

Although ECL could offer significant benefits for archives, i.e., increased access to a wider range of archival holdings, and legal certainty for those making their holdings available online, substantial obstacles stand in the way of archival participation in an ECL scheme. As indicated, the very nature of archival material – voluminous multi-media extent, rarely created for commercial purposes – offers little incentive to a CMO. These impediments may not be insurmountable. However, a more formidable barrier lies in the territorial nature of copyright law itself. Without an integrated international solution to cross-border rights management, ECL is unworkable as a means of licensing archival material.

⁵⁸ In the UK, no CMO has included ECL in its operations



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