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By LL.D. Johan Axhamn[*]

1. Introduction

The Nordic extended collective licensing model has been put forward as a solution to many of the challenges related to clearance of rights posed to copyright in the digital environment.[1] This is mainly due to high transaction costs related to clearance of rights in an individual basis. In its proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016)593, the Commission proposed that member states could introduce provisions on extended collective licensing at national level for the digitization and communication to the public of collections held by certain cultural institutions.[2] The proposal also included a mechanism by which such licenses could provide for cross-border dissemination.

During the same time as the directive was being negotiated in the Council, The Court of Justice of the European Union (CJEU) issued a judgment in relation to a French legislation, somewhat similar to the extended collective licensing model, in which the court held that the legislation constituted a limitation to the rights provided to authors.

Against this backdrop, my presentation will deal with the extended collective licensing model and analyse its consistency with relevant provisions in the international copyright conventions and EU copyright norms. The article is outlined as follows. Section 2 describes and analyses the Nordic model on extended collective licensing as developed from the 1960s up until today. In section 3, the ECL model is analysed in relation to international obligations in the area of

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[1] See e.g. the contributions to this volume by Rosén, Lund, Liedes & Knapstad and Stokkmo.

[2] See article 7 of the proposed directive.

copyright. Section 4 analyses the ECL model in relation to EU copyright norms and the recent case from the CJEU. Section 5 includes some concluding remarks.

2. The Nordic Model on Extended Collective Licensing

2.1 Establishment of the first ECL provision. The Nordic countries, who by tradition have cooperated in the field of copyright legislation,[3] introduced the first ECL provision in their respective national copyright acts at the beginning of the 1960s. This statutory provision aimed to solve the public service broadcasters' need for legal certainty in their use of works in the field of primary broadcasting of music. Considering the vast number of works involved, it was deemed not viable that the broadcasting organizations, who had collective agreements with national Collective Management Organisations (CMOs), should have to bear the administrative costs of finding out which authors were not members of the CMOs. The administrative effort of finding such non-members and negotiating a licence with them were considered to give rise to considerable transaction costs. In practice the broadcasting organizations had begun to broadcast without verifying whether the music was covered by the agreements, thus neglecting the need for prior permission. The national CMOs had accepted this (illegal) practice and provided the broadcasters with a guarantee against claims for compensation (damages) by non-members, including foreign right holders. However, the problem still remained that the broadcasters' use of non-members' rights – sometimes referred to as "outsiders' rights" – still constituted copyright infringement for which they stood the risk of criminal sanctions. This situation led the Nordic legislators to consider possible solutions for legislative support to make the current practice legal, bearing in mind that any solution had to be coherent with international obligations.[4]

The public broadcasters' initial proposal was the introduction of a compulsory licence (to be managed collectively). The proposal was, however, bluntly rejected by the right holders' organizations and the committee preparing the legislative proposal. It was deemed too far-reaching considering the right holders' exclusive rights. It was also considered unfair to give the broadcasters a special position compared to other users. In any case, the broadcasters were held to have the administrative resources to, by themselves or in cooperation with the right holders' organization, find and negotiate the necessary permissions from non-members.[5]

The second solution proposed by the broadcasters, and which got support from both the right holders' and the Nordic legislators, was the ECL model. The essential component of this proposed model was that it, subject to an agreement between a representative CMO and a user, conferred to the relevant broadcasting organization the right to broadcast published literary and musical works similar

[3] On the Nordic cooperation in the copyright field, see e.g. Koktvedgaard in Festschrift für Adolf Dietz (2001) p. 557 ff.

[4] See e.g. Swedish Government bill (proposition) 1960:17 p. 147 ff. See also the contribution by Lund to this volume.

[5] See e.g. Swedish Government bill (proposition) 1960:17 p. 147 ff.

to the ones covered by the agreement despite the fact that the authors of those works were not represented by the organization. If a broadcaster used a work belonging to a non-member, the author was given a right to remuneration. The ECL provision did not encompass works made for the stage, as collective agreements in this area were uncommon at that time: the rights to such works could be acquired on an individual basis directly with the right holder. Outsiders' were given the right to express reservations against the application of the provisions ("opt out"). Irrespective of any such reservation the broadcasters were under an obligation to refrain from broadcasting an outsiders' work on the basis of the ECL provision if there were special reasons to assume that the outsider would oppose the broadcast.[6]

The model created through the establishment of the first ECL provision took the form of a legislative provision supporting the system which had in practice already been developed by the CMOs and the broadcasters.[7] Even if the primary purpose of the introduction of the ECL model can be said to have been to protect the users, the model achieved a balance between users' and right holders' interests which is closer to ordinary collective rights management than compulsory licensing. The two main reasons put forward for this assessment is that it only applies on condition that there is a freely negotiated agreement between a representative CMO and a user, and that the outsider has the possibility to opt out.

2.2 The Development of the ECL Model Until Today. The second area where the ECL model was introduced was photocopying for educational purposes in the 1980s. This field of use shared many of the characteristics of primary broadcasting, such as mass use, related high transaction costs and a legitimate need for legislative support in an area of great public importance. An exception was rejected by the legislature as it was deemed to be too far-reaching to the detriment of the right holders, and also in violation of international obligations. The solution of a compulsory licence (to be managed collectively) was also rejected as it was deemed better to build on the existing collective agreements – thus safeguarding the principle of free negotiation. It was held that this would normally yield a higher remuneration to the right holders than a compulsory licence. In favouring a solution based on an ECL provision over a compulsory licence it was stressed that the introduction of an ECL provision presupposed that the market of collective agreements functioned well in practice, i.e. that the educational institutions and the CMO were prepared to conclude agreements so that the intended use could be carried out.[8]

However, the field of photocopying in educational institutions differed in several important respects from primary broadcasting. It was practically impossible

[6] See e.g. Swedish Government bill (proposition) 1960:17 p. 147 ff.
[7] Indeed, the ECL model has been described as a Nordic legal "invention" in the copyright field. See e.g. Koskinen-Olsson in Collective Management of Copyright and Related Rights (ed. Gervais, 2010) p. 306, Rognstad in NIR 2004 p. 151 and Kyst in NIR 2009 p. 44.
[8] See e.g. Swedish Government bill (proposition) 1979/80:132 p. 13 ff., 65 and 75 ff. See also the contribution by Lund to this volume.

to monitor the precise use of an individual work and hence calculate and distribute individual remuneration. The collective agreements often stated only the payment of a lump sum from the users to the CMO based on some rudimentary statistics on extent of use at a few educational institutions. Also, in practice the remuneration scheme detailing the level of remuneration from the organization to the members was often not part of the agreement between the CMO and the user. The remuneration scheme was rather an issue internal to the organization. Against this background, it was deemed necessary not only to introduce a statutory provision on the extension effect regarding the contents of the agreement, but also a provision on equal treatment of outsiders vis-à-vis members regarding the internal remuneration scheme of the CMO and other benefits. However to safeguard their essential interests, outsiders were granted the right to individual remuneration if the extent of the use could be proved. The right to opt out was maintained, however not the obligation of the user to refrain from use if he had special reasons to assume that the outsider would oppose it. To stimulate the coming into being of ECL agreements, the ECL provision was supplemented with rules on mediation between the user and the CMO. Similar to the ECL provision for primary broadcasting, this ECL was deemed by the Nordic legislators to be consistent with international obligations.[9]

The basic features of the ECL model introduced with the ECL provisions on photocopying in educational institutions has since been part of the "standard" ECL model now in use in the Nordic countries: extension effect of a collective agreement between a representative CMO and a user, principle of equal treatment, right to claim individual remuneration, a possibility to opt out, and provisions on mediation.

Since the introduction of the ECL on photocopying, the Nordic legislators have expanded the model to areas of use with common characteristics as those found in primary broadcasting and photocopying for educational purposes. Where applicable the ECL provisions encompass also related (neighbouring) rights mutatis mutandis. The underlying rationales for implementing an ECL provision in new areas have been the following:

i. Apparent demand for mass-use and legitimate public interest to make use legal.
ii. Individual and collective agreements incapable of meeting the demand due to high transaction costs for clearing outsiders' rights.
iii. Exception or compulsory licence (managed collectively) deemed too far-reaching, as the right holders should be given remuneration for the use and this remuneration should be based on free negotiations.
iv. Potential incompatibility of an exception or compulsory licence with international or EU copyright norms.

[9] See e.g. Swedish Government bill (proposition) 1979/80:132 p. 13 ff., 65 and 75 ff.

v. Where criteria mentioned in i)–iv) above are met, the introduction of an ECL provision is justified.[10]

The specific ECL provisions are sectorial, as their respective scope is defined in the statutory ECL provisions. However, the technical development tends to create more fields where ECL support is needed. To meet this demand and to relieve the legislator from the burden of constant amendments to the national copyright act with additional ECL provisions, the Danish government introduced a general ECL provision in 2008. According to this provision, the contracting parties may define the specific use for which the provisions of law will accord the extension effect. A similar provision was introduced in Sweden in 2013.[11]

3. ECL Provisions in Relation to International Norms

The legislators in the Nordic countries have over time established ECL regimes in several areas of mass-use. This development has, however, also made the ECL provisions and indeed the ECL model as such, more and more exposed to challenges based on international and EU copyright norms. The following sections will discuss these challenges, e.g. as they have been put forward in the legal literature.

3.1 Consistency with the Principle of National Treatment. The principle of national treatment is enshrined in article 5(1) of the Berne Convention and holds that "authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals."[12] Legal commentators have argued that ECL provisions could be in breach of this provision to the extent that a CMO eligible to conclude an ECL agreement favours its members. The argument is that those members are often nationals of the country where the ECL provision applies, whereas foreigners are often non-members and therefore subject to the principle of equal treatment. In other words, it has been questioned whether a national CMO is suitable to represent the interests of foreign right holders.[13]

The ECL model is designed to deal with the problem of risk of unfavourable treatment of non-members, including foreign non-members, through the

[10] See e.g. Swedish Government bill (proposition) 1960:17 p. 150 f., Swedish Government bill (proposition) 1979/80:132 p. 12 ff., Swedish Government bill (proposition) 2010/11:33 p. 18 ff., Norwegian Government bill (proposition) 1994-95:15 p. 23 ff., Norwegian Government bill (proposition) 2004-05:46 p. 43 ff., Karnell in NIR 1991 p. 16, Christiansen in EIPR 1991 p. 347, Karnell in Essays in honour of George Koumantos (2004) p. 392 and the contribution by Rosén to this volume.

[11] See Swedish Government bill (proposition) 2012/13:141 and the contribution by Rosén to this volume.

[12] A similar provision is enshrined in e.g. article 2 of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations and article 3 of the TRIPS agreement.

[13] See e.g. Karnell in Columbia Journal of Law and the Arts 1985 p. 75 f. and Karnell in EIPR 1991 p. 430 f.

principle of equal treatment. As mentioned previously, the principle holds that in respect of the remuneration deriving from the agreement and in respect of other benefits from the organization that are essentially paid for out of the remuneration, the outsider shall be treated in the same way as those authors who are represented by the organization. On a principle and theoretical level this entails that it is the responsibility of the eligible CMO to see to it that outsiders actually receive remuneration on equal footing with the members. However, the principle of equal treatment does not apply to "other benefits from the organization that are essentially paid for out of the remuneration" received from the user. In practice there is reason to believe that funds used for collective purposes, stipends and the like, are not used at all or to a negligible extent. Moreover, if the right holder cannot be found or located, he cannot be remunerated. The remuneration will therefore reside with the CMO and may be used for collective purposes to the benefit of its members.[14]

The practice of withholding a share of the remuneration for collective purposes could be seen as a contravention of the rule on national treatment, insofar as foreign right holders do not benefit from the collective purposes. It could be argued that it is a well-established feature of collective management of copyright that a certain share of the collected remuneration is kept by the CMO and used for collective purposes to the benefit of the members of the organization. The practice is widespread and generally accepted (at least in continental Europe).[15] It is however not self-evident that this practice also applies to use carried out on the basis of an ECL agreement.

It could be argued that the ECL provisions in addition to the principle of equal treatment confer on the author a right to remuneration also in cases where such a right appears neither in the agreement with the user or in the internal distribution scheme of the CMO. However, in most cases this right is probably more of a theoretical nature than a practical one, since the right holder must prove the extent of use. Even if it is possible for the right holder to obtain some data on the use by the CMO, the transaction costs connected with the necessary monitoring activities may in many cases be disproportionate.

Arguably if the ECL model in some instances were considered in breach of the principle of national treatment, the breach would not be related to the contents of the ECL provisions as such, but rather to the application of the provision on equal treatment in practice as carried out by the CMO. Hence, great trust is put in the hands of the eligible CMO to make sure that foreign right holders are treated equally to nationals. In other words, for any ECL to work in practice it is necessary that the activities of the eligible CMOs be transparent and attain good governance. The existence of a transparent and accountable system also ensures compliance with the principle of national treatment.

[14] Riis & Schovsbo in Columbia Journal of Law and the Arts 2010 p. 491.
[15] See e.g. Melichar in IIC 1991 p. 60.

3.2 Prohibitions on Formalities in article 5(2) of the Berne Convention. According to the first sentence of article 5(2) of the Berne Convention the "enjoyment and exercise" of copyright "shall not be subject to any formality". The second sentence of the same article holds that "apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed." Article 5(2) thus makes a distinction between "enjoyment and exercise", which are subject to the prohibition on formalities, and "extent of protection" which does not fall under this prohibition. Should the ECL model suggest the existence of a prohibited formality, this would probably be related to the "exercise" of copyright as ECL provisions deal with the administration of existing rights and not the coming into existence of copyright.

According to the legal literature, clearly prohibited examples of formalities include obligations to deposit works with state institutions (such as libraries) or the making of declarations of authorship to state bodies. It would seem to also be a clear violation of the prohibition on formalities if a national copyright law were to make protection dependent on membership in certain organizations.[16]

To the extent that a certain use is covered by an ECL agreement and the underlying ECL provision allows right holders to opt out of the system and enforce their copyrights against an exploiter, one could argue that this might contravene the prohibition in Article 5(2) because the opting out would constitute a "formality" as to the exercise of copyright. However, such reasoning is based on the assumption that the ban on formalities presupposes that copyright must always be enjoyed as "an exclusive right by individual exercise".[17] Conversely, it could be argued that outsiders covered by an ECL agreement clearly "exercise" their rights, albeit collectively, even when they do not opt out. In other words, the "opt out" is not a condition for the exercise of copyright as such. An ECL agreement merely reflects a specific mode of exploitation, and this mode is not prohibited by the ban on formalities (but it still has to be consistent with other norms, such as the three-step test).

In addition, it has been argued that if the Berne Convention permits each Contracting State to determine the conditions under which the copyright may be exercised in a specific case, a "formality" permitted under such a provision would be permitted also under article 5(2). In other words, if an ECL provision with or without the possibility to opt out is a permitted form of "limitation" under the three step test, such a provision will be permitted also under article 5(2).[18] In any case, if a model which does not provide the possibility to opt out, such as a mandatory collective licensing model, is deemed in conformity with both the three-step test and the ban on formalities, a similar model with the possibility to opt out should in all likelihood be accepted as well.

[16] Ricketson & Ginsburg, International copyright and neighbouring rights – the Berne Convention and beyond (2006) section 6.104.
[17] See e.g. Riis & Schovsbo in Columbia Journal of Law and the Arts 2010 p. 483 f.
[18] Riis & Schovsbo in Columbia Journal of Law and the Arts 2010 p. 484.

3.3 ECL Provisions as Limitations on Exclusive Rights. The international conventions on copyright – mainly the Berne Convention, the WIPO Copyright Treaty, and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) – are based on a system of exclusive rights, and provide the minimum level of protection that signatory states must confer on foreign right holders. The conventions contain no explicit rules on collective rights management, let alone on ECL provisions, but they do establish principles on the freedom of Contracting Parties to adopt exceptions and limitations to the exclusive rights. These principles are relevant to the scope of ECL provisions, because such provisions affect outsiders' rights, i.e. the rights, which are bound by the collective agreement through the extension effect. For the members of the contracting CMO, the "ECL agreement" is an ordinary collective agreement to which they have given their consent. Thus, considering that the "starting point" in the international conventions is an individual exclusive right, the extension effect of a collective agreement provided by an ECL provision could be deemed as a limitation on the outsiders' exclusive rights.[19]

The question of whether an ECL provision is a limitation on the outsiders' rights must be discussed, knowing that the international conventions confine the introduction in national law of exceptions and limitations on exclusive rights within certain boundaries, of which the most important restriction is the so-called three-step test. The test is laid down in article 9(2) of the Berne Convention, article 10 of WCT, and article 13 of TRIPS.[20] The wording differs slightly between the three instruments, but the three-step test generally holds that a Contracting State must confine exceptions and limitations on exclusive rights to i) certain special cases, ii) which do not conflict with a normal exploitation of the work, and iii) do not unreasonably prejudice the legitimate interests of the right holder.

As the test only applies to limitations and exceptions, we must first assess whether an ECL provision falls under either of these categories. A provision in national law which permits the unauthorized use of a work even if the use normally falls under the scope of an exclusive right granted by the conventions is deemed to be an exception or limitation on the exclusive right. An unauthorised use without payment of remuneration to the right owner is considered an exception, while an unauthorised use which foresees the payment of remuneration is a limitation on the rights of the owner.[21]

Having differentiated limitations from exceptions on the basis of whether remuneration is payable, the category limitations can be divided into three subcategories: statutory licences, compulsory licences and mandatory collec-

[19] See e.g. Swedish government bill (proposition) 1992/93:214 p. 43 and Norwegian Government bill (proposition) 2004-05:46 p. 46 ff.

[20] At EU level it is enshrined in article 5(5) of Directive 2001/29/EC.

[21] The terminology regarding "exceptions" and "limitations" is not settled, however the use of the terms here is in line with use in renowned legal literature. See e.g. Guibault, Copyright limitations and contracts: An analysis of the contractual overridability of limitations on copyright (2002) p. 22 ff., von Lewinski, International Copyright law and policy (2008) section 5.150 and Ficsor, The law of copyright and the Internet (2002) section 5.04.

tive licensing. Under a statutory licence the copyrighted material may be used without authorisation from the right holders, but against payment of equitable remuneration the amount of which is fixed by the legislator or by some regulatory authority. Under a compulsory licence a rights holder is obliged to grant permission to use, while the price and conditions of use must to be determined jointly with the user or fixed by the authorities where agreement cannot be reached. A provision on mandatory collective licensing requires that exclusive rights be exercised strictly through a collective rights management organization, and eliminates the possibility of individual exercise of rights.

It is sometimes held that provisions on mandatory collective licensing are not limitations to the exclusive right as the scope of the right is still intact. The argument put forward for this interpretation is that provisions on mandatory collective licensing do not deal with the relationship between authors and users, but rather between the author and the CMO – or in other words, that such a provision would only concern the exercise (and not the scope) of the right. Put differently a provision on mandatory collective licensing alters the claim of remuneration from one directed against the user to one directed against the organization: right holders exercise the same copyright no matter if they do it on an individual or collective basis.[22]

The predominant view, however, is that provisions on mandatory collective licensing are limitations on the exclusive right. This assessment emphasizes that the international conventions grant the authors an individual exclusive right to authorize the use of his work. These exclusive rights are granted in respect to the relationship between the author and the user; provisions stating that a right can only be exercised through a certain organization amount, for some commentators, to a restriction on this exclusive right.[23]

ECL provisions are very similar to provisions on mandatory collective licensing. One major difference is that pursuant to the provisions on mandatory collective licensing, right holders are deemed to be members of the eligible CMO and that there is no possibility to opt out. The rule in an ECL provision that extends the agreement to outsiders may in practice achieve the same practical effect as a statutory provision on mandatory collective licensing. The possibility under some of the ECL provisions to opt out of the scheme is an important feature which makes the ECL model (substantially) different from mandatory collective licensing.

Hence, if the right holder has the possibility to opt out, it could be argued that the exclusive right is unaffected by the ECL. Conversely, if the right holder does not have the possibility to opt out, he is left with the right of equal treatment and the possibility to claim individual remuneration – which to a large extent makes the effect of the ECL agreement akin to mandatory collective licensing. Hence, under this interpretation only ECLs without the possibility to opt out would

[22] See e.g. von Lewinski in e-Copyright Bulletin, January-March 2004 and Geiger in e-Copyright Bulletin January-March 2007.
[23] See e.g. Ficsor in Collective management of copyright and related rights (ed. Gervais, 2010) p. 44 ff.

be subject to international norms governing the introduction of limitations on exclusive rights.[24]

Conversely it has been submitted that even with the possibility to opt out, an ECL amounts to a limitation because it gives the right to use a work without the prior consent of the right holder, albeit against remuneration, until the right holder himself actively opposes such use. The argument consists in saying that the core of the ECL model – the conversion of the need of prior consent to a presumption of such consent – in itself is against the principle of exclusive rights.[25] Put differently, whereas the members of the CMO are (voluntarily) exercising their rights, the extended effect provided by an ECL provision brings about consequences for the outsiders' rights similar to those of a limitation. This has led some scholars to classify all ECL provisions as limitations, i.e. even those that provide the possibility to opt out, albeit of a different "nature" than "ordinary" limitations. This would also imply that all ECL provisions are subject to the international norm of the three-step-test. This is also the traditional view held by the Nordic legislators[26] and scholars.[27]

Against this background, I submit that ECL provisions may be prescribed only where the relevant international norms governing the adoption of limitations so allow. Having established that ECL provisions are probably to be considered as limitations on the outsider's exclusive rights irrespective of whether the possibility exists to opt out, we now assess the ECL model in the light of the three-step test.

3.4 The ECL Model and the Three-step test. The interpretation of the three-step test is currently much discussed in the legal literature.[28] The traditional view gives a narrow interpretation of the test where the three different steps are regarded as independent steps which apply on a cumulative basis, each constituting a discrete requirement that must be satisfied.

The first step, according to which limitations must be confined to "certain special cases", is held to require that a limitation in national legislation must be clearly defined and should be narrow in scope and reach. However, there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the limitation is known and particularized. This guarantees a sufficient degree of legal certainty. Shapeless provisions exempting a wide variety of uses would therefore not be permitted.[29]

[24] See e.g. Karnell in NIR 1991 p. 18, Riis & Schovsbo in Columbia Journal of Law and the Arts 2010 p. 485 f.
[25] Rognstad in NIR 2004 p. 154.
[26] See e.g. Swedish government bill (proposition) 1992/93:214 p. 43, Norwegian Government bill (proposition) 2004-05:46 p. 46 ff., Norwegian Official Government reports (NOU) 1988:22, Nordisk udredningsserie 21/73 p. 90 ff. Cf. Danish Official Government Reports 1981:912 p. 43.
[27] Karnell in Columbia Journal of Law and the Arts 1985 p. 75, Karnell in EIPR 1991 p. 434, Christiansen in EIPR 1991 p. 349, and Rognstad in NIR 2004 p. 154 ff.
[28] See e.g. Senftleben in JIPITEC 2010 p. 67 ff. and Hilty et al in IIC 2008 s. 707 ff.
[29] Ricketson & Ginsburg, International copyright and neighbouring rights – the Berne Convention and beyond (2006), section 13.11, and Senftleben, Copyright limitations and the three-step test (2004) p. 133 ff.

Applying this interpretation to the Danish sectorial ECL provisions, *Riis* and *Schovsbo* found that all of them most probably were consistent with the first step of the three-step test.[30] It has, however, been argued in the legal literature that the different steps of the three-step test should not be applied to the ECL provision as such, but rather to the contents and effects of the ECL agreements.[31] In other words, the argument is that in the ECL model the limitation takes place only in the forming of the agreement. No assessment should be made purely based on the "outer boundaries" of the sectorial ECL provision, as defined by the legislator, but rather on the application of the rule as carried out in the ECL agreement. Put differently, the ECL agreements concluded on the basis of the general ECL provision should be the ones subject to scrutiny against the first step of the three-step test – not the statutory provision itself. In addition it has been submitted that the "governmental approval" of the eligible CMOs in Norway, Denmark and Finland ensures a restricted application of the ECL provision.[32] For the same reason it has been argued that the general ECL provision in the Danish Copyright Act, in addition to being limited to "within a specified field" with verified rights-clearance problems is acceptable under the first step of the three-step test although it lacks statutory "outer borders".[33] In sum, no conclusion can be drawn on whether the ECL model or even an ECL provision pass mustard under the first step of the three-step test per se. Rather, an individual assessment must be carried out in every individual case, where emphasis should be put on the actual application of the provision through the contents of an ECL agreement.

The second step, according to which limitations must "not conflict with a normal exploitation of the work", has both empirical and normative connotations. By and large, it refers to permitted uses that would deprive authors of an actual or potential market of considerable economic or practicable importance. In other words it concerns the actual or potential markets of exploiting a work that typically constitute a major source of income and, thus, belong to the economic core of copyright.[34] The notion of "normal exploitation" cannot reasonably refer to areas of use normally characterized by market failure, i.e. situations where users want to use the work and the right holder wants to licence the use, but the costs associated with clearing the rights are too high. In situations like this, no use or illegal use will take place. In other words the only way to clear the necessary rights and solve the market failure is through a limitation or exception to the exclusive rights. One could therefore argue that to the extent an ECL provides a solution merely to a market failure, it would not conflict with the work's "normal exploitation".

[30] Riis & Schovsbo in Columbia Journal of Law and the Arts 2010 p. 487 ff.
[31] Rydning, Extended Collective licences: The compatibility of the Nordic solution with the international conventions and EC law (2010) p. 49.
[32] Rydning, Extended Collective licences: The compatibility of the Nordic solution with the international conventions and EC law (2010) p. 51.
[33] Riis & Schovsbo in Columbia Journal of Law and the Arts 2010 p. 488 f.
[34] Panel Report, United States – Section 110(5) of the US Copyright Act, WT/DS160/R (June 15, 2000) sections 6.183, 6.187 and 6.188. See also Senftleben, Copyright limitations and the three-step test (2004) p. 193 ff.

However, ECL provisions are not necessarily confined to types of uses characterised by market failure. Even though the fields in which they are imposed are marked by such failure, the scope of the provisions is often quite extensive. In fact, the scope of the ECL provisions is intentionally broad in order to give the parties necessary flexibility to conclude ECL agreements that best fit their needs. The ECL model relies on the assumption that the authors know best how their works are to be exploited, and that this flexibility will not be used to maximize the limitations in all directions, but rather to tailor them. It has, therefore, been submitted that the design of the ECL model to some extent safeguards against a broad application (or "misuse") of an ECL provision. The combination of free negotiations and the requirement of representativeness of the CMO ensures that any limitation imposed on outsiders' rights has been approved by a "substantial" number of authors of works of the same category. Unless outsiders exercise their opt out option, the limitation imposed through the ECL agreements is only an obligation on them to exploit their work in a manner that a substantial number of authors have found to be a "normal exploitation" of their own works. The reliance of the ECL model upon voluntary agreements concluded by representative CMOs will normally make the ECL provision consistent with the second step.[35] However, the ECL model provides no guarantee that the CMO will not conclude ECL agreements exceeding the limits of the second step. The risk that the ECL model be applied (or "misused") in such a way that it conflicts with a normal exploitation of the work may to some extent be solved by introducing rules on good governance and transparency addressed to the CMO that administers the agreement.[36]

The third step, which requires that limitations "do not unreasonably prejudice the legitimate interests of the right holder", serves as a proportionality or balancing test between the right holder's interests and those of the public. The legitimate interests of the right holders include at least the economic value of the exclusive rights conferred by copyright on their holders.[37] Some prejudice to the legitimate interests of the right holder is acceptable, until it becomes unreasonable. It is widely accepted that one means of attenuating the intensity of the prejudice caused by a limitation is the payment of equitable remuneration.[38] Moreover, it is reasonable to assume that systems that grant authors the possibility to influence the limitation's scope or function can be presumed to be less prejudicial than limitations not granting this opportunity. Hence, an ECL agreement based on an ECL provision would normally be less prejudicial to the interests of the author compared to, in turn, a compulsory licence, a statutory licence and

[35] Riis & Schovsbo in Columbia Journal of Law and the Arts 2010 p. 487 f.
[36] Such as the rules on good governance and transparency introduced within the EU by Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.
[37] Panel Report, United States – Section 110(5) of the US Copyright Act, WT/DS160/R (June 15, 2000) sections 6.227.
[38] See e.g. Ficsor, The law of copyright and the Internet (2002) p. 286 ff. and Senftleben, Copyright limitations and the three-step test (2004) p. 237.

an outright exception. The ECL model, as a category of limitation, has three features that distinguishes it from other types of limitations (the exception being mandatory collective licensing), namely its contractual and collective basis and (sometimes) the possibility to opt out. These features have a direct impact of the assessment of the ECL model under the third step of the three-step test.

That the ECL model is based on free negotiations by a representative CMO is to the benefit of the authors collectively, as it increases the bargaining power of the CMO vis-à-vis users. This is a priori also for the benefit of outsiders. Nevertheless, outsiders may not necessarily benefit in practice from the increased bargaining power established by the ECL provision. One explanation for this is that the ECL model is not combined with provisions on modalities of the remuneration or distribution schemes of the CMOs. Such issues are internal to the CMO and decided by it, where outsiders as non-members have no influence on their design. To ease unwanted effects, outsiders are given a right to individual remuneration in situations where they are not satisfied with the level of remuneration. However, as an outsider has to prove the extent of the use and in most cases bring his case to court, this right may have minor practical effect for him. The possibility to opt out also has implications for an assessment of the ECL model under the third step. Although an opt-out clause does not allow the ECL to avert entirely the brand of limitation, it clearly entails a reduction in prejudice caused to the right holders.

4. ECL Provisions in relation to EU Norms

In addition to the alleged challenges posed to the ECL model by international norms on copyright, the model may also meet challenges in relation to EU norms. These latter challenges will be discussed in the following sections, including the claim that the ECL provisions are disguised limitations on the exclusive rights given to authors and therefore in violation of the closed list of exceptions and limitations in article 5 of Directive 2001/29/EC.

4.1 The notion of ECL in relation to EU Copyright Norms. Article 5 of Directive 2001/29/EC contains a "closed list" of exceptions and limitations to the exclusive rights of reproduction and making available to the public online. Given the conclusion above that ECL provisions can probably be qualified as limitations in the meaning of this term under the international conventions on copyright, a preliminary assessment would be that ECL provisions are in conflict with the closed list in article 5. However, this concern was deliberately addressed during the negotiations of Directive 2001/29/EC. At the proposal of one of the Nordic countries, recital 18 of the Directive states that the text "is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences." It appears that the closed list of limitations does not encompass ECL provisions and related ECL agreements. Presumably, the notion "arrangements in the Member States concerning the management of rights" encompasses also provisions on mandatory collective licences. More generally, the notion of "arrangements in the Member States concerning

the management of rights" seems to take aim at "limitations" to the exclusive right stating that rights may only be exercised in a certain way, e.g. collectively through a CMO.

Some commentators have interpreted recital 18 of Directive 2001/29/EC to mean that it gives the Nordic countries and other Members States the possibility to introduce any provisions labelled "extended collective licence" without coming into conflict with international and EU norms.[39] However, the better view is probably that a recital has no legal value and cannot be the cause of derogation from an operative provision. In addition, irrespective of the classification at EU level of ECL provisions as "arrangements concerning the management of rights", they still have to comply with the international norms on copyright.[40]

4.2 Provision on ECL in Directive 93/83/EEC. Two provisions in Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission give additional insight regarding the nature of 'collective licensing' in the European copyright acquis, one provision on (voluntary) extended collective licensing and one provision on mandatory collective licensing. Article 2 of Directive 93/83/EEC states that authors are given an exclusive right to authorize the communication to the public by satellite ("satellite broadcasting") of their works. Article 3(1) of the same Directive holds that the authorisation to broadcast copyright works by satellite may be acquired only by agreement, i.e. it is not permitted for Member States to provide a statutory or compulsory licence for such use.[41] However, the requirement of "authorisation by contract" is combined with a provision in article 3(2) of the Directive which allows for the possibility to subject the right of satellite broadcasting to an ECL provision. The EU legislature would seem to recognize ECL provisions as something different than compulsory or statutory licences. Article 3(2) states that:

> "a Member State may provide that a collective agreement between a collecting society and a broadcasting organization concerning a given category of works may be extended to right holders of the same category who are not represented by the collecting society provided that i) the communication to the public by satellite simulcasts a terrestrial broadcast by the same broadcaster, and ii) the unrepresented right holder shall, at any time, have the possibility of excluding the extension of the collective agreement to his works and of exercising his rights either individually or collectively."

[39] Cf. the contributions by Rosén, Lund and Stokkmo to this volume. See also Koskinen-Olsson in Collective Management of Copyright and Related Rights (ed. Gervais, 2010) p. 303.
[40] Cf. Karnell in EIPR 1991 p. 434, Christiansen in EIPR 1991 p. 349, Kyst in NIR 2009 p. 53, Karnell in Columbia Journal of Law and the Arts 1985 p. 75 and 81, Rognstad in NIR 2004 p. 154 ff., and Riis & Schovsbo in Columbia Journal of Law and the Arts 2010 p. 482.
[41] Recital 21 of Directive 93/83/EEC prohibits that the broadcasting right is made subject to a statutory licence and article 3(1) of the Directive holds that the broadcasting right may be acquired only by agreement (thus ruling out compulsory licences).

It is my view that the notion of "extended collective licences" in recital 18 of Directive 2001/29/EC should be interpreted in a manner compatible with article 3(2) of Directive 93/83/EEC, based on the EU principle of uniform application of Community law and the principle of equality. These principles require that where provisions of Community law make no express reference to the law of the Member States for the purpose of determining their meaning and scope, they must normally be given an autonomous and uniform interpretation throughout the Community.[42] In other words the "extended collective licences" referred to in recital 18 of Directive 2001/29/EC should probably be understood as comprising the general characteristics of the ECL provided in article 3(2) of Directive 93/83/EEC. From this, it follows that for a national provision to fall outside of the closed list in article 5 of Directive 2001/29/EC, it should incorporate the general features of the ECL provision in article 3(2) of Directive 93/83/EEC.[43]

These "general features" seem to be that a statutory provision extends a freely negotiated "collective agreement between a collecting society" and a user "concerning a given category of works" to "right holders of the same category who are not represented by the collecting society," provided that "the unrepresented right holder shall, at any time, have the possibility of excluding the extension of the collective agreement to his works and of exercising his rights either individually or collectively." Thus, in addition to the "extension effect" an imperative feature to make an ECL provision fall within the scope of recital 18 of Directive 2001/29/EC seems to be that it is based on free negotiations and that it provides for the possibility to opt out.

If national ECL provisions contained the general features of the ECL in article 3(2) of Directive 93/83/EEC, they would probably be accepted as "arrangements in the Member States concerning the management of rights" in recital 18 of Directive 2001/29/EC and therefore fall outside the scope of the closed list of exceptions and limitations in article 5 of the same Directive.

4.3 Case C-301/15 – Soulier and Doke. The request for a preliminary ruling concerned the interpretation of Articles 2 and 5 of Directive 2001/29/EC.[44] The request was made in the course of proceedings between, on the one hand, Mr Marc Soulier and Ms Sara Doke and, on the other, the Prime Minister of France and the French Minister for Culture and Communication concerning the legality of Decree No 2013-182 of 27 February 2013, implementing Articles L. 134-1

[42] See e.g. Case C-306/05 SGAE [2006] ECR I-11519 p. 31. For a discussion on the mening of autonomous and uniform interpretation, see Axhamn, Striving for Coherence in EU Intellectual Property Law: A Question of Methodology, in Liber Amicorum Jan Rosén (2016).

[43] Cf. Karnell in Essays in honour of George Koumantos (2004) p. 397 f. As stated by Rognstad, it is not obvious that the interpretation given to the notion of ECLs in the Nordic countries apply to recital 18. See Rognstad in Nordic Intellectual Property Law Review 2004 p. 157. For a similar account, see Ficsor in Collective management of copyright and related rights (ed. Gervais, 2010) p. 63 f.

[44] Judgment of the CJEU of 16 November 2016 in case C-301/15, Soulier and Doke, ECLI:EU:C:2016:878.

to L. 134-9 of the French Intellectual Property Code and relating to the digital exploitation of out-of-print 20th century books.

By application registered on 2 May 2013, Mr Soulier and Ms Doke, who were both authors of literary works, had requested the Council of State to annul Decree No 2013-182. The French court asked the CJEU whether Articles 2 and 5 of Directive 2001/29 preclude legislation, such as that established in Articles L. 134-1 to L. 134-9 of the Intellectual Property Code, that gives approved collecting societies the right to authorise the reproduction and the representation in digital form of 'out-of-print books', while allowing the authors of those books, or their successors in title, to oppose or put an end to that practice, on the conditions that it lays down.

In its reply, the CJEU held that that legislation does not fall within the scope of any of the exceptions and limitations that the Member States have the option of placing, on the basis of Article 5 of Directive 2001/29, on the rights of reproduction and communication to the public laid down in Article 2(a) and Article 3(1) of that directive. The list of exceptions and limitations authorised by that directive is exhaustive in nature.[45]

More specifically, the CJEU held that the protection conferred by articles 2(a) and 3(1) must be given a broad interpretation: "… that protection must be understood, in particular, as not being limited to the enjoyment of the rights but as also extending to the exercise of those rights." The CJEU held that such an interpretation is supported by the Berne Convention, and that is apparent from Article 5(2) of that convention that the protection which it guarantees to authors extends both to the enjoyment and to the exercise of the rights of reproduction and communication to the public. Also, the Court held that the rights guaranteed to authors by Article 2(a) and Article 3(1) of Directive 2001/29 are preventive in nature in the sense that any reproduction or communication to the public of a work by a third party requires the prior consent of its authors. Thus, 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.[46]

Further, the CJEU held that 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. Also, article 2(a) and Article 3(1) of Directive 2001/29 must be interpreted as precluding national legislation, such as that at issue in the main proceedings. In light of the, the CJEU reached its conclusion that the national legislation in question establish an exception or a limitation to the exclusive rights laid down in Directive 2001/29. That exception or limitation is not included among those listed exhaustively in Article 5 thereof.

In reaching this conclusion, the CJEU seems to confirm the conclusion already reached in by some legal scholars and previously by some legislators (see above)

[45] Case C-301/15, Soulier and Doke, p. 26.
[46] Case C-301/15, Soulier and Doke, p. 31–34.

that arrangements in national law which gives an organisation a legislative support or right to conclude agreements or otherwise give permission to use a specific work without prior consent from the relevant rightholder (i.e. an ”outsider”), is to be understood as an exception or limitation to the exclusive rights.

5. Concluding remarks

The Nordic ECL model has been put forward as a “general” mechanism to solve many of the challenges posed by copyright, especially issues of rights clearance, in the digital environment. This increased focus on the model has also raised questions of its consistence with international and EU norms on copyright. In this presentation, I have put forward an analysis on some of the main concerns that has been raised, the model’s consistency with international norms on national treatment, prohibitions on formalities, whether the ECL rules or agreements are limitations to copyright and whether the model is consistent with the closed list of exceptions in article 5 of the EU infosoc directive and the three step test.

The main conclusion is that the model must reasonably be considered to constitute limitations to copyright and thus fall both within the ambit of the closed list of permitted exceptions and limitations and the three step test in article 5 of Directive 2001/29. This understanding has later on been confirmed by case law from the CJEU.