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## Cross-Border Extended Collective Licensing

### A Solution to Online Dissemination of Europe's Cultural Heritage

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# CROSS-BORDER EXTENDED COLLECTIVE LICENSING: A SOLUTION TO ONLINE DISSEMINATION OF EUROPE'S CULTURAL HERITAGE?

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INSTITUUT VOOR INFORMATIERECHT

## **Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage?**

Final report prepared for EuropeanaConnect

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## List of Abbreviations

BC	Berne Convention for the Protection of Literary and Artistic works
BTLJ	Berkeley Technology Law Journal
CMO	Collective Management Organization
EC	European Community
ECJ	European Court of Justice
ECL	Extended Collective Licensing
ECR	European Court of Justice Reporter
EIPR	European Intellectual Property Review
EU	European Union
IFTI	International Federation of the Phonographic Industry
IIC	International Review of Industrial Property and Copyright Law
JIPITEC	Journal of Intellectual Property, Information Technology and E-Commerce Law
JIPLP	Journal of Intellectual Property Law & Practice
NIR	Nordiskt Immateriellt Rättsskydd (Nordic Intellectual Property Law Review)
RIDA	Revue Internationale du Droit d'Auteur
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property rights
WCT	WIPO Copyright Treaty
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WTO	World Trade Organization





## **Executive summary**

The ever increasing use of the Internet and of digitisation technologies have opened up new possibilities for distributing and accessing creative content online, including for cultural heritage institutions. However, the digitisation and dissemination of a substantial proportion of the collections held by European cultural institutions may be considerably hindered due to high transaction costs related to clearance of copyright and related rights. This holds equally true for the cultural institutions taking part in the Europeana project. This study examines whether the Nordic “extended collective licensing” (ECL) model could provide a viable solution to the problems of digitisation and dissemination of copyright protected works held by cultural heritage institutions, with a brief incursion into the issue of the cross-border dissemination of works.

Following a general introduction in Chapter 1, Chapter 2 describes the Europeana project and its content providers, and identifies the challenges posed to them in relation to the digitisation and making available of protected works through the Europeana portal. These challenges are then put in their legal context, where Chapter 3 gives an overview of the current European legal framework applicable to the digitisation and dissemination of protected works. Chapter 4 analyzes the main characteristics of the ECL model and discusses how it could be applied in the context of Europeana. The chapter focuses on the Nordic ECL model, as it is the oldest model of this sort. Chapter 5 discusses the challenges posed by cross-border dissemination and examines two possible solutions for Europeana. Chapter 6 makes some concluding remarks.

It must be mentioned at the outset that of the many possible solutions to the right-clearance problem only those related to “extended collective licensing” are examined in this report. While the analysis is based on the ECL systems of the Nordic countries, it is worth pointing out that many other forms of ECL exist outside Scandinavia, including those set up in Canada and in Eastern and central Europe. Other options have also been put forward to solve the rights clearance issue, based on new kinds of contractual arrangements focusing on the out-of-commerce nature of many works and different cut-off dates. It should be stressed that it is highly unlikely that one single solution can be applied for all types of works, domains and territories. The pragmatic approach is to adopt a flexible and innovative perspective, select and even “pick and mix” appropriate solutions adapted to a specific rights clearance situation.

This study was produced by the Institute for Information Law of the University of Amsterdam, as part of work package 4, led by the National Library of Luxembourg, within the of Europeana Connect project, which was financed by the European Commission as a 7<sup>th</sup> Framework Project. The principal author of the study is Johan Axhamn, PhD candidate in intellectual property law at the Faculty of Law, Stockholm University, who worked in close collaboration with Dr. Lucie Guibault of the Institute for Information Law.

### **Chapter 2 - Copyright challenges related to digitisation and cross-border online dissemination**

In general, the digitisation and dissemination of content protected by copyright normally involves the accomplishment of acts that are exclusively reserved to the rights owner, including the reproduction and the communication of the work to the public. As regards cultural institutions, two core issues have emerged: the production of digital copies of materials held in the libraries’ collections for preservation purposes and the online dissemination of this content to users. Apart from situations where the content

is in the public domain or an exception or limitation to copyright applies, such acts require the consent of the right holders. To the extent that the digital rights are not vested in one hand, whether with a publisher or a collective management organization (CMO), it can prove very burdensome for cultural heritage institutions to clear the rights individually with every author, especially in case of multiple authorship. Indeed, if the transaction costs for such rights clearance are higher than the expected value, the institution will probably not carry out any rights clearing efforts. As a result, a lot of content held by the cultural heritage institutions cannot be digitized or made available online to the public.

### **Chapter 3 - Current legal framework**

Directive 2001/29/EC on copyright in the information society establishes the main legal framework at the European level for the protection of works. Accordingly, authors enjoy the exclusive rights to reproduce and make their works available to the public online. On the basis of article 5 of the Directive, Member States are allowed to introduce limitations to these rights that are specifically directed at the activities of these institutions:

- a limitation to the reproduction right for specific acts of reproduction for non-commercial purposes (article 5(2)(c) of Directive 2001/29/EC), and
- a narrowly formulated limitation to the communication to the public right and the making available right for the purpose of research or private study by means of dedicated terminals located on the premises of such establishments (article 5(3)(n) of Directive 2001/29/EC).

In practice, the implementation of article 5(2)(c) of Directive 2001/29/EC in the laws of the Member States is generally too narrow to cover the mass-digitisation of whole or large parts of the collections held by cultural institutions. Furthermore, reproductions made on the basis of this limitation may not be used as a basis for online dissemination. Similarly, the limitation in article 5(3)(n) of Directive 2001/29/EC does not allow the making available (online) of whole or large parts of the collections held by cultural institutions. More specifically, it only covers uses made on the premises of the institution, where such uses must be for the purpose of research or private study. Also, the fact that the limitation does not apply to content that is made available subject to purchase or licensing terms to the contrary, may constitute an additional obstacle for the institutions, depending on how they obtained the copy of the content in the first place. In other words, to digitize the works in their collections and make them available to the public, the cultural heritage institutions participating in the Europeana project cannot rely on the limitation laid down in the Directive and would need to obtain the prior authorization of the rights holders beforehand for fear of facing infringement actions.

In addition to the challenges posed by rights clearance at national level, the cross-border dissemination of the content held by each cultural heritage institution raises separate difficulties. Although efforts have been made during the past twenty years to harmonize some aspects of copyright law in the European Union, the current European copyright system is still based on the principle of territoriality. In such a fragmented landscape, two rules could be invoked to pinpoint the law applicable to the dissemination of works in a cross-border online environment: the international private law rule of *lex loci protectionis* and the principle of country of reception. On the basis of the international private law rule of *lex loci protectionis*, the making available of works over the Internet seems to imply that the legality of such acts has to be assessed according to as many laws as there are countries where the making available can be received. In addition, the scope of the right of making available content over

the Internet seems to be that the copyright relevant act occurs not only in the country of transmission but also in every country where the content can be accessed, or in other words received (“principle of country of reception”).

The combination of the principles of *lex loci protectionis* and country of reception is that cultural institutions would have to clear rights for every country where their content can be accessed online. There is at present no legislative or voluntary measure between national CMOs that allows a cultural institution to obtain a licence covering the rights represented (“repertoires”) by several CMOs for use in several territories, i.e. a multi-repertoire, multi-territory licence. With respect to the cross-border use of works from authors who have entrusted their rights to a CMO, this means that a licence must be obtained in each of the 27 EU Member States. Therefore transaction costs incurred in cross-border dissemination of content represented by several CMOs may be detrimental to the exploitation of European cultural works outside their national markets.

#### **Chapter 4 - Possible solution to challenges posed by rights-clearance at national level: the extended collective licence**

In view of the vast amount of works for which the rights have to be cleared, the problems related to the mass-digitisation and online dissemination of copyright protected items held by cultural institutions would best be solved through collective licensing. Among the different options available in the area of collective licensing is the Nordic extended collective licensing (ECL) model. ECLs have been an important part of the copyright acts of the Nordic countries ever since the first introduction in relation to primary broadcasting at the beginning of the 1960s. This system offers a solution to the high level of transaction costs associated with mass-digitisation. This chapter focuses on the ECL model in the Nordic countries as a solution for the rights-clearance challenges posed to cultural institutions. The chapter first explains the background to the establishment of the first ECL provision in the 1960s, followed by a description of the development of the model up until today. These sections aim at describing the underlying rationales and background to the basic features of the model. A more thorough description of the basic features follows, as well as an assessment of the compatibility of the model with certain international and EU norms and an examination of the model from the perspective of the Europeana content providers.

Referring only to its most characteristic, basic elements, a provision on ECL in the copyright acts of the Nordic countries establishes that the effects of a freely negotiated collective agreement between a user of a work and a representative CMO pertaining to specific forms of exploitation of works is extended to right holders who are not members of the organization. The agreement which is given the “extended” effect is referred to as an ECL-agreement. Once an ECL agreement has been concluded, the user may use the works covered by the agreement and does not run the risk of getting a claim, either legal or financial, from a non-represented right holder (sometimes referred to as “outsiders”). A user who enters into an ECL agreement with a representative organization is thus assured that the organization will meet all claims from those affected by the extension. To safeguard their interests, the non-represented right holders have a right to individual remuneration and in most cases, a right to opt out of the agreement. In addition the requirement of representativeness of the eligible CMO gives the model legitimacy as a means of managing outsider’s rights.

The fact that the ECL model is based on free negotiations should in most cases be for the benefit of the outsider, as the CMO will be able to negotiate a level of remuneration which would normally be

higher than a level of remuneration granted under a compulsory licence or a statutory licence. At least in theory, the principles of equal treatment and right to (separate) remuneration should provide the outsider with enough safeguards to ensure that he will not find himself in a less favourable position under an ECL than he would be under a statutory or compulsory licence. However, the belief that free negotiations always lead to higher remuneration, is of course a presumption which does not find support in practice. Thus, as long as the right holder has not opted out of an ECL agreement, he is subject to the remuneration agreed upon by others. He is also subject to the internal remuneration scheme of the CMO upon which he has no influence, as he is not a member. Even if the mentioned rights of equal treatment and remuneration are said to address these issues, their application in practice is to a great extent dependent on the governance and transparency of the CMO. It may, for example, be very burdensome or impossible for an outsider to prove that his work has been used. In addition, even if he can prove such use, some of the Nordic countries do not provide with a simplified arbitration mechanism in cases where an outsider is not satisfied with the level of remuneration offered by the CMO. It seems unlikely that an ordinary author will bring his claim for remuneration to court otherwise than in extreme cases where his work has been considerably used.

The Nordic countries have a longstanding tradition of collective management, which has resulted in a well-developed structure and culture of activities of CMOs. Thus, the functioning and legitimacy of the ECL model in another context than the Nordic countries may well be dependent on the existence of a well-developed structure and culture of collective management. If the ECL model is to be established in countries where the structure and culture of collective management is not as developed, the model may need to be supplemented by rules of good governance.

Since it allows cultural institutions to use an outsider's work without prior authorization, the ECL system actually amounts to a limitation on the outsiders' exclusive rights. The ECL agreement must therefore comply with the so-called 'three-step test' laid down in article 9(2) of the Berne Convention, article 10 of WIPO Copyright Treaty, and article 13 of Agreement on Trade Related Aspects of Intellectual Property (TRIPS), which governs the introduction in national legislation of exceptions and limitations on copyright. This test holds that a contracting state must confine limitations and exceptions 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. In our opinion, the characteristics of the ECL statutory provisions reduce the risk that ECL agreements come into conflict with the three-step test. These characteristics are the freely negotiated agreements between a representative CMO and the user, the principles of equal treatment and to (separate) remuneration and the possibility to opt out from the arrangement. However, the consistency of the ECL model with the three-step test and other international copyright norms such as the principle of national treatment in article 5(1) of the Berne Convention would presuppose that the principle of equal treatment and right to remuneration operate well in practice. Otherwise the effects of an ECL agreement may turn out to be less favourable to the outsiders' rights than a more in theory far-reaching restriction on the exclusive rights, such as a compulsory or statutory licence.

Assessing the ECL model in the light of the transaction cost challenges posed to European content providers, an ECL provision could be put in place for cultural institutions participating in European content. As regards the eligible users, the provision would best address the same beneficiaries as those of the limitations in articles 5(2)(c) and 5(3)(n) of Directive 2001/29/EC: certain museums, libraries and archives. However, to the extent they are not already covered by the notion "archive", broadcasters' archives and film heritage institutions should be included among the beneficiaries. The ECL provision

should be broad enough to cover all forms of digitisation and making available online, but it could be restricted to content that is “not contemporarily commercially available”. The precise legal definition of this notion would have to be decided by the legislator in consultation with the representative CMOs and the content providers. In order to increase legal certainty for the content providers, the ECL provision could include a rule according to which content created before a certain date would be presumed to no longer be commercially available and therefore covered by the ECL provision unless the right holder opts out. The decision on whether the ECL would apply to content that has been previously published or communicated to the public could be left to the negotiations between the CMOs and the users, supplemented by the possibility for the right holder to opt out and by a feature giving priority to existing agreements over any ECL agreement.

To stimulate the coming into being of agreements between European content providers, an ECL provision for the benefit of cultural institutions should include rules on mediation. Whereas a provision on mandatory arbitration could be prejudicial to the right holders’ interests, a voluntary simplified arbitration mechanism should be available to any outsider to deal with disputes against a CMO, regarding e.g. the level of remuneration. Such a provision may have a positive correlated effect on the contents of the agreements concluded by a CMO and the user, for the CMO would presumably be reluctant to fix levels of remuneration that are in conflict with the interests of outsiders, if the outsiders have a right to submit the issue to a simplified arbitration mechanism.

## **Chapter 5 - Solutions to the cross-border challenges**

The pan-European online dissemination of the collections held by cultural institutions is seriously hampered due to the territorial segmentation in the licensing practices. The harmonisation of copyright and related rights in the EU has so far done relatively little to alleviate these challenges. EU institutions and legal scholars have, however, stressed the need to overcome these problems and have brought forward several proposals over the years.

Two solutions are more readily amenable to overcome the challenges posed by the territorial segmentation of current licensing practices. The first one is a solution based on a country of transmission principle, inspired by the definition of “country of transmission” in Directive 93/83/EEC on Cable and Satellite, i.e. a principle stating that cultural institutions should only be obliged to obtain a licence in the country where the institution initiated the online dissemination. This solution would require legislative intervention at the EU level.

The second solution is based on voluntary measures by the CMOs, and essentially means that the CMOs would give each other a mandate to issue multi-territory licences. This solution is realistic considering the support it currently receives from the Commission and the fact that it would not deprive the right holders in the countries of reception of their rights. For this solution to work in practice, it would need to be supported by legislative intervention both as regards licensing practice and rules on good governance and transparency. To stimulate the coming into being of mandates between the CMOs similar to the IFPI Simulcasting Model Agreement model, the national ECL provision could be made conditional on such mandates.

## **Chapter 6 - Conclusion**

The ECL model is premised on the existence of a representative CMO in the intended field of use. The practical functioning of the model and its consistency with international and EU norms is also based

on the presumption that the CMO carries out its activities in a transparent manner and in compliance with principles of good governance. In other words, the model presupposes an environment characterized by sound structure and culture of CMOs. Should the ECL model be exported to new countries, it may need to be supplemented by statutory provisions on good governance and transparency.

As regards cross-border solutions, the report puts forward two main solutions. The solution based on a country of transmission principle is quite far-reaching from the right holders' perspective as it takes away their legal and bargaining position in the countries of reception. It could also be argued that it does not solve the problem of territorial delineation, as the right holder may still, through contractual provisions, limit the use of the content to certain territories. The other proposed solution consists in stimulating the CMOs to give each other mandate to issue multi-territory, multi-repertoire licences. Note that both proposed solutions are discussed globally and may have different outcomes depending on whether a uniform rights clearance system is introduced at the European level or whether Member States have some leeway in adopting a solution for the clearance of rights for the mass-digitisation and dissemination of works by cultural institutions. This report does not take a position on the desirability of either course of action. Further research will have to be carried out in the future to take account of the fact that if Member States adopt different solutions, this is bound to have an effect on the cross-border situation, e.g. because not every right is managed by a CMO in every country.

# **Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage?**

## **1. Introduction**

The ever increasing use of the Internet and of digitisation technologies have opened up new possibilities for distributing and accessing creative content online.<sup>1</sup> It is projected that by 2020 digital content will be almost entirely delivered online.<sup>2</sup> This technological development has also created a new market for pre-existing works: content that could previously not be re-exploited over analogue distribution channels can now be disseminated over digital channels.<sup>3</sup> Cultural institutions, such as libraries, museums and archives have begun to show interest in mass digitisation projects to preserve their archives and to disseminate them online.<sup>4</sup> As tangible and factual records of the past, these institutions contain a wealth of cultural and scientific materials, such as books, newspapers, maps, films, photos and music – sometimes referred to as our cultural heritage.<sup>5</sup> Digitisation of this content can thus serve a twofold purpose – preservation of content for future generations and online dissemination to end users.<sup>6</sup>

Against this background, Europeana was launched in 2008, with the goal of making the cultural and scientific heritage from Europe's cultural institutions accessible to the public online. Europeana is not a digitisation project in itself, but a portal for national digitisation projects. As of spring 2011, more than 15 million items are accessible through [www.Europeana.eu](http://www.Europeana.eu). The ambition is that all material from every institution participating in Europeana will be made available on a pan-European basis.

However, the digitisation and cross-border dissemination of a substantial proportion of the collections held by European cultural institutions may be considerably hindered due to high transaction costs related to clearance of copyright and related rights.<sup>7</sup>

The Europeana Connect project, in its Work Package 4 (Europeana Licensing Framework), is therefore starting to look into issues of rights clearance. The licensing framework was developed to

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<sup>1</sup> Creative content in a European Digital Single Market: Challenges for the Future. A Reflection document of DG INFO and DG MARKT (2009), p. 2.

<sup>2</sup> Communication from the Commission on A Digital Agenda for Europe, COM(2010) 245 final/2, p. 4.

<sup>3</sup> van Gompel in IIC 2007 p. 669.

<sup>4</sup> Commission Green Paper, Copyright in the Knowledge Economy, COM(2008) 466/3, p. 7 and Communication from the Commission on Copyright in the Knowledge Economy, COM(2009) 532 final, p. 3.

<sup>5</sup> van Gompel in IIC 2007 p. 669 and Communication from the Commission on Copyright in the Knowledge Economy, COM(2009) 532 final, p. 4 f.

<sup>6</sup> Commission Green Paper, Copyright in the Knowledge Economy, COM(2008) 466/3, p. 7.

<sup>7</sup> For the purposes of this study, unless specified otherwise, when mention is made of copyright, it shall include related rights as well, including rights on performances, phonograms, films and broadcasts.

enable the vision of the “New renaissance report”<sup>8</sup> and the concrete implementation of the “Europeana strategic plan 2011-2015”<sup>9</sup>. Two other key elements of the Licensing framework are:

- the “Europeana Data Exchange Agreement”<sup>10</sup> and its associated “Usage guidelines”, governing the collection, enrichment and distribution of descriptive Metadata,
- the “Europeana Public Domain Charter”<sup>11</sup>, describing the value of the public domain and how to maintain it; the “Public Domain Mark”, launched with Creative Commons in 2010, facilitating the labelling of public domain works on the Internet, the “Public Domain Usage Guidelines”, a second set of non-binding community norms; and the “Public Domain Calculator”<sup>12</sup>, a machine executable analysis of protection terms of 30 jurisdictions.

## 1.1 Mass-digitisation and related challenges

In general, the digitisation and dissemination of content protected by copyright normally involves the accomplishment of acts that are exclusively reserved to the rights owner, including the reproduction and the communication of the work to the public. As regards cultural institutions, two core issues have emerged: the production of digital copies of materials held in the libraries’ collections for preservation purposes and the online dissemination of this content to users.<sup>13</sup> Apart from situations where the content is in the public domain or an exception or limitation to copyright applies, such acts require the consent of the right holders. Such rights clearance can be very burdensome, costly or even impossible – especially in situations where the right holder cannot be identified or located. This latter problem is often referred to as the problem of “orphan works”.

The digitisation of works implies the making of a copy (reproduction). Both the right of reproduction and the possibility for Member States to introduce a limitation or exception thereto are regulated at European level by Directive 2001/29/EC.<sup>14</sup> Under this legal framework, cultural institutions do not enjoy a broad exception from the exclusive right of reproduction. Rather, reproductions are only allowed in specific cases, a criterion which has generally been interpreted as covering certain acts necessary for the preservation or restoration of works contained in the libraries’ catalogues, but most probably not as a source for mass-digitisation of entire collections.<sup>15</sup>

Permission is certainly required if the digitized material is to be communicated to the public online. Under the framework of Directive 2001/29/EC, Member States may allow publicly accessible libraries, educational establishments or museums and archives to benefit from a narrowly formulated

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<sup>8</sup> Elisabeth Niggemann, Jacques De Decker, Maurice Lévy, “The new renaissance”, Brussels, 2011, [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/comite\\_des\\_sages/index\\_en.htm](http://ec.europa.eu/information_society/activities/digital_libraries/comite_des_sages/index_en.htm)

<sup>9</sup> “Europeana strategic plan 2011-2015”, <http://www.version1.europeana.eu/web/guest/news/-/blogs/europeana-s-strategic-plan-2011-2015>

<sup>10</sup> The “Europeana Data Exchange Agreement”, its guidelines and FAQ can be found at <http://www.version1.europeana.eu/web/europeana-project/newagreement>; the consultation process is described at <http://www.version1.europeana.eu/web/europeana-project/newagreement-consultation>

<sup>11</sup> The “Public Domain Charter”, its Mark and Guidelines can be found at <http://www.version1.europeana.eu/web/europeana-project/publications/>

<sup>12</sup> The Public Domain Calculator and its associated research and software can be found at [www.outofcopyright.eu](http://www.outofcopyright.eu)

<sup>13</sup> Communication from the Commission, Copyright in the Knowledge Economy, COM(2009) 532 final, p. 4.

<sup>14</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (hereafter “Directive 2001/29/EC”).

<sup>15</sup> See article 5(2)(c) of Directive 2001/29/EC.



exception to the right of communication to the public, if this is done for the purpose of research or private study by means of dedicated terminals located on the premises of such establishments. This exception does not cover the electronic delivery of content to end users at a distance.<sup>16</sup>

Cultural institutions have argued that, for certain types of works in particular, like historical newspapers or audiovisual archives, the principle of “prior authorization” may entail considerable transaction costs, because of the time and effort required to identify and locate each and every right holder. Right holders, on the other hand, have stressed that library-sponsored mass-digitisation and online dissemination of their works without diligent search would infringe their copyright and erode their revenue streams.<sup>17</sup> To examine this and similar challenges related to the knowledge economy, the Commission in 2008 launched a public consultation. In its follow-up Communication of October 2009, the Commission stated that a sustainable system of prior authorization for a variety of library initiatives requires “simple and cost efficient right clearance systems covering digitisation and online dissemination.” According to the Commission, possible solutions include collective licensing, which could be supplemented by an extended collective licensing system, or the possible creation of a statutory exception for such digitisation efforts.<sup>18</sup>

At the heart of the deliberations is the need to preserve the delicate balance between the interests of right holders and the legal certainty of prospective users. This challenge is made even more complex as there is a pressing need to establish a common European solution which will ensure legal certainty and a level playing field throughout the 27 EU Member States.<sup>19</sup> A related issue is the cross-border dissemination of the material. The current copyright system holds that rights have to be cleared for every country where the content can be accessed, which potentially leads to a situation where a cultural institution has to clear rights in as many as 27 Member States. In addition to any licence fee, this gives rise to astronomical transaction costs.

## 1.2 Possible solutions

Many possible solutions to the right-clearance issue have been brought forward. Among the options available are the introduction of an exception or of statutory licence, mandatory collective licensing, a limitation-on-remedy rule, a legal presumption of representation and contracts with indemnity clauses.<sup>20</sup> An exception would allow the use of a work in pre-defined cases without the prior permission from the right holder. Under a statutory licence, a work can be used provided that remuneration is paid to the right holder, the level of which is decided by a government body or authority. Under a system of mandatory collective licensing it is stipulated by law that right owners

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<sup>16</sup> See article 5(3)(n) and recital 40 of Directive 2001/29/EC. For a more thorough interpretation see section 3.1.3.

<sup>17</sup> Communication from the Commission on Copyright in the Knowledge Economy, COM(2009) 532 final, p. 3.

<sup>18</sup> Ibid. p. 5.

<sup>19</sup> Creative content in a European Digital Single Market: Challenges for the Future. A Reflection document of DG INFO and DG MARKT (2009), p. 7, Commission Green Paper on Copyright in the Knowledge Economy, COM(2008) 466/3, p. 11, Communication from the Commission on Copyright in the Knowledge Economy, COM(2009) 532 final, p. 6, Monti, “A new Strategy for the Single Market at the Service of Europe’s Economy and Society”, Report to the President of the European Commission José Manuel Barroso, p. 46, KEA European Affairs, Study on Multi-territory licensing of Audiovisual Works in the European Union, p. 160, and Communication from the Commission on a Digital Agenda for Europe, COM(2010) 245 final/2, p. 8.

<sup>20</sup> See e.g. Communication from the Commission on Copyright in the Knowledge Economy, COM(2009) 532 final, p. 5, Swedish Government: Ministry publication series 2007:29 p. 117 ff. and van Gompel in IIC 2007 p. 686 ff.

can exercise their rights only through a collective management organization (CMO), with no possibility for individual claims or prohibitions. A limitation-on-remedy rule is a solution based on a statutory provision that limits the liability of those users who use work, most often an orphan work, after an unsuccessful but reasonable (“diligent”) search for the right holder has been conducted. In a system based on a legal presumption, it is presumed by law that a CMO has a general authorization to represent the right holders in a given field. Finally, in a system based on contracts with indemnity clauses the CMO assumes the financial liability for any claim made by a copyright owner who is not represented by the CMO.

This report focuses on the “extended collective licensing” (ECL) system, modelled after those in force in the Nordic countries. The essential component of the ECL model is that a statutory provision in the copyright act extends the application of a freely negotiated agreement between a CMO and a user to non-members, sometimes referred to as “outsiders”. The legal implication of this extension effect is that the agreement not only gives the user the right to use outsider’s rights without any risk of civil remedies, but it also provides full limitation against criminal sanctions. To safeguard the outsiders’ interests, the legally supported extended effect only occurs provided that certain conditions have been met. These conditions are, mainly, outsiders’ possibility to opt out, equal treatment vis-à-vis members of the organization and receipt of remuneration. There are also conditions related to the representativeness and supervision of eligible CMOs. Since this model is less known outside of the Nordic countries but gaining in popularity elsewhere,<sup>21</sup> it is worth considering it in greater detail to see whether it could provide additional benefits for the stakeholders, compared to the other options put forward so far.

Therefore, of the many possible solutions to the right-clearance problem, only those related to ECL are examined in this report. While the analysis is based on the ECL systems of the Nordic countries, it is worth pointing out that many other forms of ECL exist outside Scandinavia, including those set up in Canada and in Eastern and central Europe. Other options have also been put forward to solve the rights clearance issue, based on new kinds of contractual arrangements focusing on the out-of-commerce nature of many works and different cut-off dates. It should be stressed that it is highly unlikely that one single solution can be applied for all types of works, domains and territories. The pragmatic approach is to adopt a flexible and innovative perspective, select and even “pick and mix” appropriate solutions adapted to a specific rights clearance situation.

### **1.3 Outline of the study**

This study examines the ECL model and its applicability to the Europeana project. Chapter 2 describes Europeana and its content providers, and identifies the challenges posed to them in relation to the digitisation and making available of protected works through the Europeana portal. Chapter 3 gives an overview of the current legal framework as applied to the Europeana content providers. Chapter 4 analyzes the Nordic ECL model, its historical development, basic features, scope, criteria for eligible CMO, protection of outsiders’ rights and interests, the institutional environment in the Nordic countries (i.e. well-organized and managed CMOs in several areas of copyright), and compatibility of

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<sup>21</sup> See: UK, Government Response to the Hargreaves Review of Intellectual Property and Growth, July 2011, p. 7, where one can read: “The Government will this autumn also bring forward proposals for extended collective licensing to benefit sectors that choose to adopt it, and look to maximize the benefits it could bring to smaller creative firms and individual creators in particular” available at: <http://www.ipo.gov.uk/ipresponse-full.pdf> and Elisabeth Niggemann, Jacques De Decker, Maurice Lévy, “The new renaissance”, Brussels, 2011, p. 18, [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/comite\\_des\\_sages/index\\_en.htm](http://ec.europa.eu/information_society/activities/digital_libraries/comite_des_sages/index_en.htm)

the ECL system with international and EU norms. The chapter concludes by applying the ECL model to the rights clearance challenges confronting the Europeana content providers. Chapter 5 discusses the challenges posed by cross-border dissemination and examines possible solutions for Europeana. Chapter 6 makes some concluding remarks.

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## 2. Europeana and its content providers

### 2.1 Europeana: its mission and goals

In a letter in 2005 to the President of the European Commission, six Heads of State suggested the creation of a European virtual library, giving online access to the cultural heritage of Europe.<sup>22</sup> Support for the project was subsequently obtained from the Commission,<sup>23</sup> the Council<sup>24</sup> and the European Parliament<sup>25</sup>. In 2007 work began to create a prototype portal, which was launched in 2008 under the name Europeana ([www.europeana.eu](http://www.europeana.eu)).

Europeana is funded by the European Commission and its offices are based in the National Library of the Netherlands. However, it is not a digitisation project in itself, but rather works as an aggregator, e.g. by accumulating and enriching the descriptive metadata about the content digitized works, which stay on the servers of the respective cultural institutions. Europeana ensures that the metadata is widely re-used and made available via different channels, thereby ensuring that the digitised works are found and traffic is driven to the partners' sites. The agreement governing the collection, enrichment and distribution of metadata is the "Europeana Data Exchange Agreement"<sup>26</sup> and its associated guidelines. Europeana also standardizes the data that describes the content (so-called metadata).<sup>27</sup>

Currently over 1500 partner institutions have contributed content to Europeana. Among the contributors are distinguished institutions such as the Rijksmuseum in Amsterdam, the Louvre in Paris and the British Library in London. However, many smaller institutions across Europe are also important contributors.<sup>28</sup> In most cases, Europeana does not work with the institutions directly, but rather through national and domain aggregators, which then channel metadata into Europeana. Access to the digitised content is granted to end-users via the partner institutions' own sites.<sup>29</sup>

As of spring 2011, more than 15 million objects are accessible through Europeana. Europeana differentiates between four types of content: images (e.g. paintings, drawings, maps, photos and pictures of museum objects), texts (e.g. books, newspapers, letters, diaries and archival papers),

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<sup>22</sup> The letter is available (only in French) at

[http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/letter\\_1/index\\_en.htm](http://ec.europa.eu/information_society/activities/digital_libraries/doc/letter_1/index_en.htm)

<sup>23</sup> See e.g. Communication from the Commission on i2010: Digital libraries, COM(2005) 465 final and Commission Recommendation 2006/585/EC of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation.

<sup>24</sup> See e.g. Council Conclusions on the Digitisation and Online Accessibility of Cultural Material, and Digital Preservation, 2006/C 297/01.

<sup>25</sup> See e.g. European Parliament resolution of 27 September 2007 on i2010: towards a European digital library, (2006/2040(INI)).

<sup>26</sup> The "Europeana Data Exchange Agreement", its guidelines and FAQ can be found at <http://www.version1.europeana.eu/web/europeana-project/newagreement>; the consultation process is described at <http://www.version1.europeana.eu/web/europeana-project/newagreement-consultation>.

<sup>27</sup> "Europeana strategic plan 2011-2015", <http://www.version1.europeana.eu/web/guest/news/-/blogs/europeana-s-strategic-plan-2011-2015>.

<sup>28</sup> A list of the contributors the Europeana is accessible at <http://www.europeana.eu/portal/partners.html>

<sup>29</sup> Europeana strategic plan 2011-2015 and Europeana Content Strategy (August 2009). Europeana and the aggregator's portal complement each other in the services offered to the end-users. Europeana gives end-users access to a broad range of European content on an item level, and provides the users with a single point of reference for content that would otherwise be accessed only via various sites. In addition, the national aggregators can offer services that allow end-users to explore content at deeper and more specific levels. For example, many aggregators do not only give access on item level but also provide bibliographical data and collection descriptions.

sounds (e.g. music and spoken word from cylinders, tapes, discs and radio broadcasts), and videos (e.g. films, newsreels and TV broadcasts).<sup>30</sup>

Europeana's aim for 2015 is to reach 30 million items and to have a national aggregation initiative in every EU Member State. The long-term goal is to give online access to Europe's entire digitized cultural heritage by 2025.<sup>31</sup> These goals are also supported by the Commission, the Council and the European Parliament.<sup>32</sup>

## 2.2 Digitizing and disseminating content

A digital library presupposes the existence of digital material and the possibility to make it available online. Most material from the past exists only in analogue format. A first step in making the material available online would thus be to digitize it. However, if the material in question is protected by copyright both the act of digitisation and the act of making available would normally require the consent of the right holders.

A key challenge to the development of Europeana is the fact that many of the items in the collections held by the institutions are still protected by copyright as they have been created during the 20<sup>th</sup> and 21<sup>st</sup> century. In addition to any licence fee, the transaction costs for clearing the rights for the digitisation and making available of the content – i.e. the time and effort necessary to clear the rights for a specific item and to obtain licence to use it – are in many cases very high.<sup>33</sup> Indeed, the transaction costs are infinite as regards so-called orphan works, i.e. works that is still protected by copyright, but the right holders of which cannot be identified or located.<sup>34</sup> This is the case, for example, when data on the author and/or other relevant right holders (such as publishers, photographers or film producers) is missing or outdated.<sup>35</sup> In many cases this leads to a situation where the transaction costs together with an eventual licence fee are significantly higher than the expected value (commercial or otherwise) of the work if digitized and made available online.

The transaction costs depend on many things. In a Commission report from 2010, the main types of transaction costs related to the activities of the cultural institutions are identified as the following:<sup>36</sup>

- verifying copyright and related rights status of the item, taking account of different layers of rights
- identifying and locating right holders of protected items
- contacting right holders for obtaining permission
- negotiating the extent and conditions of use
- documentation of the steps above.

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<sup>30</sup> Europeana Content Strategy (August 2009).

<sup>31</sup> Europeana Content Strategy (August 2009). Available at <http://version1.europeana.eu/web/guest/content-strategy/> and Europeana strategic plan 2011–2015.

<sup>32</sup> See e.g. Communication from the Commission: Europe's cultural heritage at the click of a mouse. Progress on the digitisation and online accessibility of cultural material and digital preservation across the EU, COM(2008) 513 final, Communication from the Commission on Europeana - next steps, COM(2009) 440 final, Council conclusions of 20 November 2008 on the European digital library EUROPEANA, 2008/C 319/07, Council conclusions of 10 May 2010 on Europeana: next steps, 2010/C 137/07 and European Parliament resolution of 5 May 2010 on "Europeana - the next steps".

<sup>33</sup> Commission staff working document; Annex to the Communication from the Commission on i2010: Digital libraries, Brussels, 30.9.2005, SEC(2005) 1194.

<sup>34</sup> Europeana strategic plan 2011–2015.

<sup>35</sup> See e.g. Communication from the Commission on Copyright in the Knowledge Economy, COM(2009) 532 final, p. 5.

<sup>36</sup> Assessment of the Orphan works issue and Costs for rights Clearance, European Commission, DG Information Society and Media, Unit E4 Access to Information, February 2010 (author Anna Vuopala).

All these transaction costs can be referred to as challenges to easy rights clearance. As a general rule it is held that the older the work and the less economic value it has, the higher the related transaction costs. These costs are very cumbersome for the institutions, especially considering that they normally do not have the necessary resources or expertise to assess copyright status and conduct rights clearance. To some extent the costs are reduced if rights holder information is available within registries of collecting societies and publishers or databases kept by libraries. In addition to the transaction costs, there are costs related to the digitisation of the material, the development and maintenance of the infrastructure for providing access to the content and the licence fee to be paid to the right holders. The challenges to digitizing and making available content that is still protected by copyright are reflected by the fact that over two thirds of the content made available through Europeana in 2010 was created before 1900 – therefore in the public domain, and only 10 % was created after 1950.<sup>37</sup> Such an imbalance can also be observed as regards the type of content digitized: whereas 65 % of the content consists of images and 33 % of text, only 2 % constituted sound or video.<sup>38</sup>

It would go far beyond the bounds of this study to conduct an empirical investigation of the challenges faced by the national cultural institutions that provide or intend to provide content to Europeana. Instead, reference is made to existing studies carried out on the topic, mainly the report by the Commission from 2010 mentioned above, which provides concrete data from actual digitisation projects.<sup>39</sup> The 2010 Commission report is based on 22 responses from representatives of cultural institutions with experience of digitisation projects. Even if it is based on a limited data range, it is held to provide solid and reliable raw information on the challenges created by the time and effort involved in rights clearance in different cultural institutions in relation to the categories of interest to Europeana: text, sound, video and images.<sup>40</sup>

The Report reveals that cultural institutions around Europe hold considerable amounts of orphan works in their collections. The percentage of orphan works is high for almost all categories of works, especially for photographs, and audiovisual content. A related problem is that many items in the collections of cultural institutions have uncertain copyright status. Thus, even if an institution is deliberately focusing on digitizing content in the public domain, efforts have to be made in order to establish whether certain items are (still) protected by copyright or not. For example, around 160 000 works in the collections of the Danish National Library from the period 1880-1930 are said to have an uncertain copyright status.

Based on the findings of the 2010 commission Report, the following sections provide more details on categories of content of interest to Europeana: text, images, video (audiovisual works) and sound.

### **2.2.1 Text**

With respect to texts, a dividing line can be drawn between commercially or formerly commercially available content, on the one hand, and private or otherwise “domestic” material on the other. Commercially or formerly commercially available literary works are e.g. books and journalistic texts in newspapers and magazines. Private and domestic literary works are texts created by private persons or companies intended for internal use.

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<sup>37</sup> Presentation Jill Cousins, Europeana Connect WP4 workshop, Luxembourg, March 31 2011.

<sup>38</sup> Ibid.

<sup>39</sup> Assessment of the Orphan works issue and Costs for rights Clearance, European Commission, DG Information Society and Media, Unit E4 Access to Information, February 2010 (author Anna Vuopala).

<sup>40</sup> Ibid. Unless otherwise indicated, the present section is based on this report.

The rights pertaining to commercially or formerly commercially available texts (sometimes referred to as “out-of-print”) may reside either with the publisher or the original author. With respect to works created before the advent of the Internet, the rights pertaining to digital modes of exploitation often remain with the author, since these rights are generally presumed not to have been transferred to the publisher, unless expressly mentioned in the contract.<sup>41</sup> In the case of books, the rights to publish, whether online and off-line, may revert to the author should the work no longer be commercially available, either by virtue of the provisions in the national legislation or in the publishing contract. The possible reversal of rights to the author makes it very difficult to determine who the right holder of each work is. Hence, even if a national cultural institution may identify and locate both the publisher and the author, it may still be uncertain from whom the institution needs to obtain the necessary permission to digitize and make available online. With respect to works contained in newspapers and magazines, the right holders are often even harder to locate than for books. This is the case of freelancers or of journalists whose names have not been mentioned (“credited”) in the newspaper. The situation is complicated as some journalists are represented by collecting societies while others are not. For example, according to a digitisation project in the UK 95 % of all (British) newspaper articles written before 1912 are orphan.<sup>42</sup>

To address the issue of rights information in relation to books, the European Commission has funded the Accessible Registries of Rights Information and Orphan Works towards Europeana (ARROW)<sup>43</sup> project. This project is carried out by European national libraries, publishers and collective management organizations with the aim of developing better databases on information relating to right holders of books. The project does not, however, deal directly with rights clearance issues. Hence, even if ARROW provides support in identifying and locating the rights holder, costs still exist related to rights clearance with the right holder. In other words, ARROW does not function as a CMO or as an umbrella organization for CMOs from which it is possible (for a cultural institution or anyone else) to obtain a licence to use a work.

An additional difficulty in making texts available through Europeana is the private or otherwise domestic nature of certain texts, because in such a case the right holders are typically not represented by a CMO and no professional publishers are involved. For example, the National Archive in the UK is said to have spent £ 35 000 and 2 years on clearing copyright for the digitisation and online accessibility of 1 114 old wills.<sup>44</sup> In less than half of the cases the project managed to find the rights holders and to obtain permission to make them available online.

### 2.2.2 Images

The category of images consists of photographs, pictures of museum objects, paintings (including fine art) and maps. In general, the category for which rights owners can most easily be found is fine art as right holders in this field are normally members of a collecting society. Identifying rights holders on other types of images, like photographs, is more complex as photographers are (normally) not organized to the same extent and many of them are non-professionals. While sufficient right holder information about photojournalists may be missing due to poor crediting of photographs published in

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<sup>41</sup> P.B. Hugenholtz, L. Guibault with cooperation of M. Vermunt and M. Berghuis, ‘[Study on the conditions applicable to contracts relating to intellectual property in the European Union](#)’, final report, study commissioned by the European Commission (May 2002). The situation is different in the UK, Ireland and the Netherlands if the work has been created in the course of employment, in which case the rights belong to the publisher.

<sup>42</sup> Assessment of the Orphan works issue and Costs for rights Clearance, European Commission, DG Information Society and Media, Unit E4 Access to Information, February 2010 (author Anna Vuopala), p. 5.

<sup>43</sup> <http://www.arrow-net.eu/>

<sup>44</sup> Assessment of the Orphan works issue and Costs for rights Clearance, European Commission, DG Information Society and Media, Unit E4 Access to Information, February 2010 (author Anna Vuopala), p. 39.



newspapers, very little information is available regarding collections of unpublished photographs created by non-professionals, such as photographs of local views, or family and daily-life situations. A survey amongst museums in the UK found that the right holders of 17 million photographs, i.e. 90 % of the total collections of photographs of the museums, could not be traced.<sup>45</sup>

Another challenge concerns so-called embedded illustrations, i.e. illustrations in a book or newspaper or magazine. The rights to such works must be cleared separately (from the rights on the text). Hence, even if the rights on the literary work have been cleared, the images in the book have to be left out (“blackened out”) during the digitisation process if the rights on the image cannot be cleared. This could lead to loss of important information or at least value for the user.

### **2.2.3 Audiovisual**

Numerous right holders are usually involved in the making of a film such as the director, producer, actors, screen play writer etc. The role of CMOs is not as important in this field, although they may be involved, for instance, in the licensing of rights for the public performance and the mechanic reproduction of the soundtrack of the film. In many countries the rights to audiovisual works are presumed to have been transferred to the film producer, at least with respect to some central forms of exploitation of the film – such as the theater release. However, this presumption may not encompass the online dissemination of the film, which would require additional permissions to be obtained. Hence, considering the number of rights holders, clearing the digital rights to a film may prove to be very difficult, if the rights have not been transferred to the producers. According to a survey carried out by Association des Cinémathèques Européennes in 2009/2010, 229 000 of the works included in European film archives are presumed to be orphan.<sup>46</sup>

### **2.2.4 Sound**

There are comparatively fewer challenges to the digitisation and making available of music through Europeana, at least as far as commercial music is concerned. The reason is that the right holders in this area are better organized, i.e. members of CMOs, than in the other fields. Nevertheless, difficulties do arise in the area of recordings of traditional cultural expressions, i.e. recordings that include music or oral folkloric stories. Problems with rights clearance may also occur in relation to older productions or productions of small, unknown (non-professional / amateur) production companies.

In conclusion, the above subsections show that the transaction costs related to the identification and localisation of the right holders and to the negotiation of an (individual) permission are often very high and seldom in balance with the value of online accessibility for the cultural institutions and the users. The main reason for the high transaction costs are that the digital rights, i.e. rights necessary for digitisation and making content available online, are generally vested with the author rather than a publisher or other producer or a CMO. At least this is the case for content created before the advent of the Internet. To the extent that the digital rights are not vested in one hand, it is very burdensome for cultural institutions to clear the rights individually with every author. Indeed, if the transaction costs for such rights clearance are higher than the expected value to be derived from its digitisation and dissemination, the institution will probably not carry out any rights clearing efforts. This leads to a situation where much content in the collections of the cultural institutions cannot be digitized and

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<sup>45</sup> Id., p. 43.

<sup>46</sup> Association des Cinémathèques Européennes, Results of the Survey on Orphan Works 2009/10, p. 2. The report is available at [http://www.acefilm.de/fileadmin/dokumente/ACE\\_Orphan\\_Works\\_Survey\\_Results\\_final\\_1004014.pdf](http://www.acefilm.de/fileadmin/dokumente/ACE_Orphan_Works_Survey_Results_final_1004014.pdf)

made available online. All this is reflected, in practice, in the material made available through Europeana, which shows significant imbalances with respect to the types of content and timeframe from which the content originates.

### 3. Current legal framework

The previous chapter described the challenges posed to cultural institutions in relation to the digitisation and making available of protected works through the Europeana portal. If a limitation or exception on copyright already allows the digitisation and dissemination of works, the cultural institutions need no other permission from the rights holders for their mass-digitisation and dissemination efforts and the issue of astronomical transaction costs does not arise. This chapter gives an overview of the current European legal framework applicable to the digitisation and dissemination of protected works, with particular attention to the exceptions and limitations adopted for the benefit of cultural institutions and to the cross-border dissemination problem.

#### 3.1 Exceptions and limitations in Directive 2001/29/EC

Directive 2001/29/EC on copyright in the information society establishes the main legal framework at the European level for the protection of works. Accordingly, authors enjoy the exclusive rights to reproduce and make their works available to the public online. The reproduction right is enshrined in article 2 of Directive 2001/29/EC according to which the reproduction right includes “the exclusive right to authorize or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part.” The right of making available is stated in article 3 paragraphs (1) and (2) of the same Directive and covers the exclusive right to authorize and prohibit the making available to the public of works “in such a way that members of the public may access them from a place and at a time individually chosen by them.”

Member States are allowed to introduce limitations to these rights, pursuant to article 5 of the Directive, which contains an exhaustive list of permissible limitations. All but one limitation listed in article 5 are optional, leaving it to the Member States to decide whether to implement them in national legislation and if so, how – provided the implementation complies with the text of the Directive.<sup>47</sup> In addition, it follows from settled case law of the Court of Justice of the European Union that limitations must be interpreted strictly.<sup>48</sup> In addition, the limitations must be applied in accordance with the so-called three-step test of article 5(5) of the Directive, that is, only in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right holder.<sup>49</sup> The three-step test has its origin in international conventions and will be analyzed in greater detail in section 4.2.1.3 below.

Directive 2001/29/EC only provides for narrow limitations for the benefit of cultural institutions. The two relevant provisions directed at the activities of these institutions are the following:

- a limitation to the reproduction right for specific acts of reproduction for non-commercial purposes (article 5(2)(c) of Directive 2001/29/EC), and
- a narrowly formulated limitation to the communication to the public right and the making available right for the purpose of research or private study by means of dedicated terminals located on the premises of such establishments (article 5(3)(n) of Directive 2001/29/EC).

<sup>47</sup> Guibault in JIPITEC, 2010-2, p. 55-66; van Eechoud et al. 2010, p. 101 and ff.

<sup>48</sup> See e.g. Case C-476/01 Kapper [2004] ECR I-5205, paragraph 72, Case C-36/05 Commission v Spain [2006] ECR I-10313, paragraph 31 and Case C-5/08 Infopaq International A/S v Danske Dagblades Forening [2009] ECR I-6569, paragraph 56.

<sup>49</sup> Cf. Case C-5/08 Infopaq International A/S v Danske Dagblades Forening [2009] ECR I-6569, paragraph 58. The case is analyzed by Axhamn in NIR 2010 p. 339 ff.

In the following three sections, we examine the category of institutions aimed at by both provisions, before turning to the analysis of each of the two articles.

### 3.1.1 Beneficiaries of the limitations

The limitations in articles 5(2)(c) and 5(3)(n) of Directive 2001/29/EC cover acts carried out by “publicly accessible libraries, educational establishments or museums, or by archives”. Recital 40 to the Directive labels these institutions as “non-profit establishments”. The difficulty lies in determining when an establishment is a non-profit institution. The decisive factor is whether profits are generated from entrance fees or other fees or charges that go beyond what is necessary to cover the administration or operating costs of the institution.<sup>50</sup> Any profit based on advertisements would most certainly make the institution non-eligible for the application of these limitations. To meet the criterion of “non-profit”, it is, however, not necessary that the institution be publicly funded or operated; rather, it may be a privately funded institution. In individual cases, it may be difficult to ascertain whether an institution is a “non-profit establishment”, especially when individual projects are organized in public-private partnerships.<sup>51</sup>

In addition to being non-profit, the institution must be accessible to the public. Archives are the only exception to this criterion, which follows from the wording of most language versions of the Directive (including the English and German version). This is affirmed by recital 40 of the Directive according to which “publicly accessible libraries” and “equivalent institutions” have to be accessible to the public to benefit from the referred limitations, whereas archives are mentioned separately.<sup>52</sup> The Directive does not define the expression “public”, but the ECJ has given this notion a broad interpretation in the context of the notion “communication to the public”. It is said to cover situations where it is (potentially) possible for anyone who so wishes to get access to the work (on a non-discriminatory basis).<sup>53</sup> Most probably, the expression should be given the same interpretation also in the context of the limitations examined here. From this follows that non-public, i.e. private, libraries and museums are excluded from this limitation if they do not qualify as an archive.

With respect to museums, the Directive considers museums to be equally eligible to benefit from the relevant limitations, if they provide public access to a collection of items on a non-profit basis. Since the Directive does not further specify the type of museums to which the limitations apply, it may be considered to cover any kind of institution that offers public exhibits of any objects, be they protected by copyright or related rights or not. In any case, the general conditions of non-profit nature and public access applies also to museums.<sup>54</sup>

Further, the limitations also refer to “educational establishments”. This is normally understood to cover schools, universities, institutions offering continued education for adults, language schools, and similar institutions that offer acquisition or deepening of knowledge or any kind of proficiency in any area. It does not matter if the education is carried out through face-to-face teaching, distance

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<sup>50</sup> First sentence of recital 40 to Directive 2001/29/EC reads “Member States may provide for an exception or limitation for the benefit of certain non-profit making establishments, such as publicly accessible libraries and equivalent institutions, as well as archives.” The criterion of the “non-profit” nature of the institution is difficult to separate from “directly or indirectly non-commercial” activities – which is another important criterion for the limitations in articles 5(2)(c) and 5(3)(n) to apply.

<sup>51</sup> See Walter & von Lewinski, *European Copyright Law – A Commentary*, section 11.5.38 and Bechtold in *Concise European Copyright Law* (ed. Dreier & Hugenholtz) p. 377.

<sup>52</sup> See Walter & von Lewinski, *European Copyright Law – A Commentary*, section 11.5.36 and Bechtold in *Concise European Copyright Law* (ed. Dreier & Hugenholtz) p. 376.

<sup>53</sup> See Case C-306/05 SGAE [2006] ECR I-11519, paragraph 43. The case is analyzed by Axhamn in NIR 2007 p. 148 ff.

<sup>54</sup> Bechtold in *Concise European Copyright Law* (ed. Dreier & Hugenholtz), p. 376.

education, or in any other manner.<sup>55</sup> To the extent that an educational institution holds a collection of copyright protected items, the collection could meet the criteria of a library or an archive (or maybe even a museum) and thereby enjoy the benefit of the limitations.

Finally, “archive” normally refers to centers of documentation of certain materials, be they protected by copyright or related rights or not. As mentioned, the Directive does not expressly require that archives need to be accessible to the public to benefit from the limitations. In other words the limitations apply to archives regardless of whether they are publicly accessible or not. Similar to libraries etc. archives must, however, have a non-profit purpose.

As the expression “archive” also encompasses institutions that are not publicly accessible, the only common denominators among the cultural institutions<sup>56</sup> covered by the limitations in articles 5(2)(c) and 5(3)(n) of Directive 2001/29/EC seems to be that the institutions shall have a non-profit purpose and that any permitted act must be restricted to items in the institution’s own collection. Depending on whether they are accessible to the public or not, they may, for the purpose of these limitations, be labeled a “library” (or an “equivalent institution”) or an “archive”. In any case, any institution not satisfying the identified common denominators falls outside the scope of the limitations.

At first blush the scope of the designated users of articles 5(2)(c) and 5(3)(n) seems adequate also in the context of digitisation and online dissemination of Europe’s cultural heritage. However, cultural heritage content may also be located in collections held by other cultural institutions, such as broadcasters’ archives and film heritage institutions.<sup>57</sup> Arguably these collections may already be covered by the reference to “archives”, but for clarification a broader scope as regards designated users may be needed for any measure taking aim at the digitisation and online dissemination of cultural heritage content. This issue will be further elaborated on in section 4.5.

### 3.1.2 Limitation for specific acts of reproduction

Article 5(2)(c) speaks of “specific acts of reproduction” which are “not for direct or indirect economic or commercial advantage”.<sup>58</sup> The reference to “specific acts” suggests that the individual acts to be

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<sup>55</sup> See Walter / von Lewinski, European Copyright Law – A Commentary, section 11.5.37.

<sup>56</sup> Thus excluding the category “educational institution”.

<sup>57</sup> Cf. Commission Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works, COM(2011) 289 final, article 1.

<sup>58</sup> For clarification, it should be mentioned that it is unclear whether the criterion in the last sentence of Article 5(2)(c) of the English version of the Directive – “which are not for direct or indirect economic or commercial advantage” – refers to the acts of permitted reproduction or the nature of the institution as such. However, linguistically it is odd to refer to the nature of a cultural institution as being “not for direct or indirect economic or commercial *advantage*” (our emphasis). A more suitable word in that context would have been “purpose” or “aim”. Acts of reproduction, on the other hand, can be carried out for a commercial “advantage”. Further, the referred expression is taken directly from article 2(1)(b) and recital 11 of Directive 2006/115/EC, and there it refers to the acts that are carried out – not the nature of the institution. This interpretation is also supported by the Commission, see Communication from the Commission on Copyright in the Knowledge Economy, COM(2009) 532 final, section 3.1. However, Walter & von Lewinski and Bechtold argue that the cited part refers to the non-commercial nature of the institution. See Walter & von Lewinski, European Copyright law – A Commentary, section 11.5.38 and Bechtold in Concise European Copyright Law (ed. Dreier & Hugenholtz) p. 377. The interpretation by Walter & von Lewinski and Bechtold finds support in the French language version (“lorsqu’il s’agit d’actes de reproduction spécifiques effectués par des bibliothèques accessibles au public, des établissements d’enseignement ou des musées ou par des archives, qui ne recherchent aucun avantage commercial ou économique direct ou indirect”) and the Dutch version (“in welbepaalde gevallen, de reproductie door voor het publiek toegankelijke bibliotheken, onderwijsinstellingen of musea, of door archieven die niet het behalen van een direct of indirect economisch of commercieel voordeel nastreven;”), whereas the interpretation of the Commission finds clear support in the Swedish version (“För särskilda fall av mångfaldigande, utan direkt eller indirect ekonomisk eller kommersiell vinning, av bibliotek, utbildningsanstalter eller museer som är

exempted must be precisely described. Reading this criterion in the light of recital 40 of the Directive<sup>59</sup> indicates that the limitation does not encompass all forms of reproduction for all categories of works in unlimited quantity.<sup>60</sup> Indeed, the notion “special cases” indicates that the limitation does not provide the cultural institutions with a blanket exception to digitize their entire collections (mass-scale digitisation).<sup>61</sup> Arguably, it would permit acts necessary for the preservation of works contained in the collections.<sup>62</sup> Further, the third sentence of the same recital denotes that the limitation does not encompass “uses made in the context of online delivery of protected works or other subject-matter.” Therefore, cultural institutions cannot base online dissemination of their collections on a digital copy which has been produced based on this limitation.<sup>63</sup> Instead, it follows from the last sentence of the recital that such delivery should be based on licensing contracts that “given the cultural and educational tasks of these institutions”, should “not create imbalances” and should “favor the disseminative purposes of the institutions”.

The requirement that the reproduction “not [be] for direct or indirect economic or commercial advantage” was modelled after article 2(1)(b) and recital 11 of Directive 2006/115/EC on rental right and lending right<sup>64</sup> which defines the act of “lending”, as distinct from the act of “rental”, in that it is not “for direct or indirect economic or commercial advantage”.<sup>65</sup> It is irrelevant whether the act is carried out with the intention of creating an economic or commercial advantage as the term “indirect” encompasses acts producing such an advantage as a side-effect only.<sup>66</sup>

A strict interpretation of the limitation would leave out acts carried out by cultural institutions which charge their users an entry or user fee. However, this interpretation seems inappropriate as it would result in most cultural institutions not being able to benefit from the limitation. Therefore, the purpose of the limitation is best fulfilled if it is interpreted in the light of recital 11 of Directive 2006/115/EC.<sup>67</sup> According to this recital there is no “direct or indirect economic or commercial advantage” if the

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tillgängliga för allmänheten eller av arkiv”). The German version (“in Bezug auf bestimmte Vervielfältigungshandlungen von öffentlich zugänglichen Bibliotheken, Bildungseinrichtungen oder Museen oder von Archiven, die keinen unmittelbaren oder mittelbaren wirtschaftlichen oder kommerziellen Zweck verfolgen”) is equally ambiguous as the English version. This said, this report is not the place for a thorough research into the interpretation of article 5(2)(c) of Directive 2001/29/EC. For the purposes of this report, it is sufficient to establish that pursuant to recital 40 of the Directive the institution must be “non-profit” and, in addition, there are strong reasons to interpret article 5(2)(c) to encompass only acts that are “not for direct or indirect economic or commercial advantage”. In any case an interpretation of article 5(2)(c) in the light of the three-step test would confine the limitation to acts which would not conflict with a normal exploitation of the work or be prejudicial to the legitimate interests of the rights holder.

<sup>59</sup> The second sentence of recital 40 holds that the acts permitted under article 5(2)(c) “should be limited to certain special cases covered by the reproduction right”. The first condition of the three-step test states that exceptions and limitations must be confined to “certain special cases”.

<sup>60</sup> Green Paper from the Commission on Copyright in the Knowledge Economy, COM(2008) 466/3, p. 8 and Bechtold in Concise European Copyright Law (ed. Dreier & Hugenholtz) p. 376.

<sup>61</sup> Walter & von Lewinski, European Copyright law – A Commentary, section 11.5.39, Green Paper from the Commission on Copyright in the Knowledge Economy, COM(2008) 466/3, p. 8 and Communication from the Commission on Copyright in the Knowledge Economy, COM(2009) 532 final, p. 4.

<sup>62</sup> Walter & von Lewinski, European Copyright law – A Commentary, section 11.5.39 and Green Paper from the Commission on Copyright in the Knowledge Economy, COM(2008) 466/3, p. 7 f.

<sup>63</sup> See Commission Green Paper, Copyright in the Knowledge Economy, COM(2008) 466/3, p. 7 f.

<sup>64</sup> Directive 2006/115/EC has repealed and replaced Directive 92/100/EEC on rental right and lending right.

<sup>65</sup> Bechtold in Concise European Copyright Law (ed. Dreier & Hugenholtz) p. 377 and Walter & von Lewinski, European Copyright law – A Commentary, section 11.5.38. The history behind and the difference between the acts of rental and lending is thoroughly explained in Reinbothe & von Lewinski, The EC Directive on Rental and Lending Rights and on Piracy, p. 38 ff.

<sup>66</sup> Walter & von Lewinski, European Copyright law – A Commentary, section 11.5.38.

<sup>67</sup> Ibid.

lending gives rise “to a payment the amount of which does not go beyond what is necessary to cover the operating costs of the establishment”. Thus, a direct commercial advantage refers to, for example, any profit or fee charged beyond the level of mere administration or operation costs.<sup>68</sup> Indirect advantage may be the goodwill effect of a library run by a company and rendered accessible to the public free of charge.<sup>69</sup> In any case, the application of the three-step test to this limitation would narrow its scope to acts which do not conflict with a normal exploitation of the work or is prejudicial to the legitimate interests of the right holders.

Not all Member States have implemented this optional limitation. And those that did have often chosen different ways to do it, subjecting the act of reproduction to different conditions of application and requirements. Some Member States only allow reproductions to be made in analogue format; others restrict the digitisation to certain types of works, while yet other Member States allow all categories of works to be reproduced in both analogue and digital form.<sup>70</sup> In addition, Member States have identified different beneficiaries of this limitation. Some have simply replicated the wording of article 5(2)(c), while others have limited its application to public libraries and archives to the exclusion of educational institutions. The prevailing legal uncertainty regarding the manner in which digitised material may be used and reproduced, is likely to constitute a disincentive to digitisation. This militates especially against cross-border exchange of material, and may discourage cross-border cooperation.<sup>71</sup>

It follows from the above analysis that the formulation of article 5(2)(c) of the Directive is too narrow to accommodate the interest of digitizing whole or large parts of the collections held by cultural institutions. Furthermore, reproductions made on the basis of this limitation may not be used as a basis for online dissemination.<sup>72</sup> In other words, to digitise the works in their collections, the cultural heritage institutions participating in the Europeana project cannot rely on the limitation laid down in article 5(2)(c) of the Directive and would need to obtain the prior authorization of the rights holders before engaging in any related digitising activity for fear of facing infringement actions.

### **3.1.3 Limitation for use on dedicated terminals**

Article 5(3)(n) of Directive 2001/29/EC allows Member States to introduce a limitation for the benefit of the same cultural institutions as those referred to in article 5(2)(c), for “use by communication or making available” if the purpose is “research of private study”, to individual members of the public “by dedicated terminals on the premises” of the cultural institutions. The limitation only concerns “works and other subject-matter not subject to purchase or licensing terms which are contained in their collections.” The idea behind this provision is that the referred uses, which are mere consultations, are comparable to the traditional situation in which a user simply borrows a book and reads it on the premises of the library.<sup>73</sup>

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<sup>68</sup> Ibid, section 11.5.38 and Bechtold in Concise European Copyright Law (ed. Dreier & Hugenholtz) p. 377.

<sup>69</sup> Walter & von Lewinski, European Copyright Law – A Commentary, section 11.5.38.

<sup>70</sup> U. Gasser and S. Ernst, *Best Practice Guide – Implementing the EU Copyright Directive in the Digital Age*, s.l., Open Society Institute, December 2006, p. 16.

<sup>71</sup> L. Guibault JIPITEC 2010, p. 60; European Commission, ‘i2010: Digital Libraries’, SEC (2005) 1194, Brussels, 30 September 2005, p. 9.

<sup>72</sup> This assessment is shared by the Commission, see Communication from the Commission on Copyright in the Knowledge Economy, COM(2009) 532 final, p. 4 and ff.

<sup>73</sup> See recital 40 of Directive 2001/29/EC and Commission Green Paper on Copyright in the Knowledge Economy, COM(2008) 466/3, p. 9 f. and Walter & von Lewinski, European Copyright law – A Commentary, section 11.5.70.

In comparison to the limitation provided in article 5(2)(c), article 5(3)(n) is not explicitly limited to acts “which are not for direct or indirect economic or commercial advantage”.<sup>74</sup> For some commentators, the criterion that the material contained in the collections cannot be disseminated if it is subject to “purchase or licensing terms”, denotes the fact that the limitation only covers material that individual users cannot purchase or obtain on the basis of a licensing contract.<sup>75</sup> In other words, the limitation would only be applicable to material that is not available on the market – sometimes referred to as not commercially available or “out-of-print”. An alternative interpretation of the cited phrase, which seems more probable, is that cultural institutions may not disseminate content on the basis of the limitation to the extent that such dissemination would contravene clauses in a purchasing or licensing agreement that the institution have concluded with the rights holder to the material in question.<sup>76</sup> One example is when publishers conclude agreements with libraries on the deposit of new editions of books. Another example is when an individual donates his or her private collection of e.g. private letters, manuscripts or photographs to a library or archive for preservation or research purposes. In these instances, the agreement between the publisher or the individual and the library may deviate from the permitted uses under article 5(2)(c) and 5(3)(n) of the Directive. The latter interpretation of the article would provide that the conditions of such agreements prevail over the statutory limitation. Admittedly, both interpretations may be valid. In any case, an interpretation of the limitation in the light of the three-step test would narrow its scope to acts that do not conflict with a normal exploitation of the work or is prejudicial to the interests of the right holders.<sup>77</sup>

The use permitted under article 5(3)(n) is limited to the communication and making available of works to individual members of the public, rather than to a gathered audience, such as public performances.<sup>78</sup> The criterion that the uses must be made by members of the public at dedicated terminals on the premises of the establishment indicates that only on-the-spot consultation is permissible, e.g. via computer, audio and video terminals.<sup>79</sup> In other words, an online access to the collections of a cultural institution at a distance – i.e. from any other location than on the physical premises of the institution – is not covered by the limitation. It follows from the last sentence recital 40 of the Directive that such delivery should be based on licensing contracts that “given the cultural and educational tasks of these institutions”, should “not create imbalances” and should “favor the disseminative purposes of the institutions”. Thus, the provision establishes a priority of private ordering mechanisms (market transactions) over the statutory limitation.

Furthermore, the uses are only permissible for the purpose of research or private study (of the individual members of the public). “Private study” is deemed to be narrower than “private use” in that it is limited to the exploration and acquisition of knowledge – in particular “study” does not include entertainment.<sup>80</sup>

As a result, the applicability of the limitation in article 5(3)(n) is quite restricted. The provision is a limitation to the exclusive right to communication to the public, but article 3 of the Directive only

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<sup>74</sup> Cf. Walter & von Lewinski, *European Copyright law – A Commentary*, section 11.5.70.

<sup>75</sup> This interpretation is supported by Walter & von Lewinski, *European Copyright law – A Commentary*, section 11.5.70 and Bechtold in *Concise European Copyright Law* (ed. Dreier & Hugenholtz) p. 381.

<sup>76</sup> The English, German and French language versions are equally ambiguous and open up for (at least) these two interpretations.

<sup>77</sup> For an interpretation of the three-step test, see section 4.4.1.3.

<sup>78</sup> Bechtold in *Concise European Copyright Law* (ed. Dreier & Hugenholtz) p. 381 and Walter & von Lewinski, *European Copyright law – A Commentary*, section 11.5.70.

<sup>79</sup> Bechtold in *Concise European Copyright Law* (ed. Dreier & Hugenholtz) p. 381 and Walter & von Lewinski, *European Copyright law – A Commentary*, sections 11.5.70 and 11.5.71.

<sup>80</sup> Walter & von Lewinski, *European Copyright law – A Commentary*, section 11.5.70.



regulates forms of communication to the public that takes place at a distance– i.e. communication to the public to remote places.<sup>81</sup> In other words, forms of communication to a public present at the place where the communication originates is not regulated by the Directive.<sup>82</sup> Hence, the only perceivable, practical case of application of the limitation in article 5(3)(n) seems to be the communication on the spot via terminals following a previous communication or making available through the internal network of the institution. The application of the limitation therefore depends on how the cultural institution has organized its data network.

It is clear that the limitation in article 5(3)(n) is far too narrow to cater for Europeana's goal of making available (online) whole or large parts of the collections held by the partner cultural institutions. More specifically, the limitation only covers uses made for the purpose of research or private study at the premises of the institution. Moreover, since the limitation only applies absent purchase or licensing terms to the contrary, the probability that it finds application in practice also depends on how the institutions have acquired the objects in their collection in the first place.

## **3.2 Law applicable to cross-border dissemination**

Although efforts have been made during the past twenty years to harmonize some aspects of copyright law in the European Union, the current European copyright system is still based on the principle of territoriality. The principle of territoriality means that the scope of the copyright protection is determined per territory, but also that rights can be exploited on a territorial basis. From the perspective of cultural heritage institutions, this means that they must obtain a licence from the rights holders covering each territory of the EU in which the work is to be made available, so as to avoid liability for copyright infringement. With respect to the cross-border use of works from authors who have entrusted their rights to a CMO, permission is necessary in each of the 27 EU Member States. In such a fragmented landscape, two rules could be invoked to pinpoint the law applicable to the dissemination of works in a cross-border online environment, outside any contractual arrangement : the international private law rule of *lex loci protectionis* and the principle of country of reception, which are analyzed below.

### **3.2.1 Principle of *lex loci protectionis***

The principle of territoriality is mainly derived from article 5 of the Berne Convention.<sup>83</sup> This provision holds that the effects of national copyright legislation are limited to the territory of the legislating state, i.e. national copyright laws do not have extraterritorial effect. As a consequence, an author does not enjoy a uniform, worldwide copyright, but rather a bundle of national, independent rights, for which the conditions for protection, contents, and effects are governed by each of the relevant legislations within their territories. The principle of territoriality is justified by state sovereignty: states have an interest in regulating copyright protection for all works in their territory.<sup>84</sup>

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<sup>81</sup> See recital 23 and 24 to the Directive.

<sup>82</sup> See e.g. Axhamn in NIR 2007 p. 148 ff.

<sup>83</sup> See e.g. von Lewinski, *International Copyright Law and Policy* (2008), section 1.07, Fawcett & Torremans, *Intellectual Property and Private International Law* (2011), sections 12.18 and 12.66, and Commission proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II"), COM(2003) 427 final, p. 20.

<sup>84</sup> Rognstad in *Rett og toleranse*, Festschrift for Helge Thue (ed. Frantzen et al, 2007), p. 411 ff., von Lewinski, *International copyright law and policy*, section 1.08 Fawcett & Torremans, *Intellectual Property and Private International Law* (2011), section 12.31, and Frohlich in BTLJ 2009, p. 851.

The predominant view is that the principle of territoriality implies a rule of private international law, which refers to the law of the country for which protection is sought (*lex loci protectionis*).<sup>85</sup>

To a large extent the principle of territoriality has not been affected by the harmonization of copyright in the EU. This process of harmonization has primarily been guided by the aim to remove disparities between national laws that might pose barriers to the free movement of goods and services. Indeed, given the obligation under the European Economic Agreement for Member States to adhere to the Berne Convention, this principle can even be described as “quasi-acquis”, i.e. quasi EU legislation.<sup>86</sup> The principle has also been expressly confirmed by the ECJ.<sup>87</sup>

Although the predominant view is that the principle of *lex loci protectionis* already follows from international obligations, the EU has enshrined it in article 8(1) of the Rome II Regulation on the law applicable to torts. The provision holds that “the law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed.” The view that the provision merely confirms what already follows from international obligations is reflected in recital 26 of the Regulation which holds that “[r]egarding infringements of intellectual property rights, the universally acknowledged principle of the *lex loci protectionis* should be preserved.” This view is also expressed by the Commission in its initial proposal.<sup>88</sup>

With respect to making works available over the Internet, which has a trans-border character by definition, this rule seems to imply that the legality of such acts has to be assessed according to as many laws as there are countries where the work is made available.<sup>89</sup> From this does not follow, however, that each of these laws will qualify the access to or reception of a work as a copyright relevant act. This is a question relating to the scope of the right, which is further developed in the next subsection.

### 3.2.2 The principle of country of reception

The principles of territoriality and *lex loci protectionis* do not provide a final answer to the question whether making content available online constitutes infringement in every country where the work can

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<sup>85</sup> von Lewinski, International copyright law and policy, section 1.06, Fawcett & Torremans, Intellectual Property and Private International Law (2011), sections 12.23 and 12.66 to 12.68, Reflection document of DG INFSO and DG MARKT. Creative content in a European Digital Single Market: Challenges for the Future, p. 10. UNESCO e-Copyright Bulletin, October – December 2005: “Applicable law in copyright infringement cases in the digital environment”, Commission proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (“Rome II”), COM(2003) 427 final, p. 20. Cf. Dickinson, The Rome II Regulation: A Commentary, p. 447 ff. and 457 ff., Frohlich in BTLJ 2009, p. 859 ff., 870 ff. and 884 ff., Matulionyte in JIPITEC 2011 p. 26 ff., van Eechoud in Intellectual Property and Private International Law, IIC Studies vol 24, p. 289 ff., Kur in Brook J Int L 2005, p. 951 and Rognstad in Rett og toleranse, Festschrift for Helge Thue (ed. Frantzen et al, 2007), p. 411 ff. See also section 5.2.

<sup>86</sup> See e.g. Hugenholtz in IRIS special: Digitisation and Online Exploitation of Broadcasters’ Archives (2010), p. 49.

<sup>87</sup> See e.g. Case C-192/04, Lagardère Active Broadcast, [2005] ECR I-7199, p. 46: “At the outset, it must be emphasised that it is clear from its wording and scheme that Directive 92/100 provides for minimal harmonisation regarding rights related to copyright. Thus, it does not purport to detract, in particular, from the principle of the territoriality of those rights, which is recognised in international law and also in the EC Treaty. Those rights are therefore of a territorial nature and, moreover, domestic law can only penalise conduct engaged in within national territory.”

<sup>88</sup> Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (“Rome II”), COM(2003) 427 final, p. 20.

<sup>89</sup> See e.g. Fawcett & Torremans, Intellectual Property and Private International Law (2011), section 17.13, van Eechoud et al, Harmonizing European Copyright Law, p. 309 Frohlich in BTLJ 2009, p. 872 and Matulionyte in JIPITEC 2011 p. 27.

be accessed. Rather, it is the law of the place where the right is invoked that determines whether the right exists and what its scope is.<sup>90</sup> Although the issue is not yet entirely settled, the predominant view is that the right of making available to the public online not only encompasses the act of initiating the “transmission” of content online, but also the act of providing access/reception of the content – i.e. a principle of country of reception applies. This principle means that the act of making available copyright protected content via the Internet occurs not only in the country of transmission, but also in every country where it can be accessed, or in other words received. From this, also follows that anyone making content available online without the permission of the right holder(s) can be held liable for copyright infringement in every country where the content can be received.<sup>91</sup>

Combined with the principle of *lex loci protectionis*, the principle of country of reception means that content providers aiming at European consumers need to clear rights covering some 27 EU Member States. All this also applies to providers of content to Europeana, i.e. national cultural institutions, who would have to clear rights for every country where their content can be accessed online.

### 3.2.3 Cross-border collective rights management

Assuming that Europeana content providers need to clear rights for every country of reception, there are currently no legal mechanisms through which they can obtain all the necessary licences from one actor on the market, i.e. there is at present no “one-stop-shop”. To the extent that the rights are managed collectively, i.e. through a CMO, it is at present only possible to obtain the necessary licences through negotiations with a CMO in every country of reception. However, a domestic CMO is able to represent also the repertoires belonging to other CMOs for uses carried out within its own territory, through reciprocal agreements with “sister CMOs” in other countries. A national CMO is thus able to offer the users within its own territory a multi-repertoire, mono-territory licence.

Because authors and publishers usually assign the worldwide administration of their rights to their local CMO, it is in theory possible for the CMO to issue licences for its own repertoire for use carried out in other territories. In this case a user would obtain a mono-repertoire, multi-territory licence. For practical and economic reasons, such as the traditionally limited possibility of monitoring use and enforcement of rights from a distance, the CMOs have preferred limiting their activities to uses carried out within their own territory and rely on their sister organizations for use of their repertoire in foreign territories.<sup>92</sup> This practice of “territorial delineation” has also been accepted by the EU institutions for use carried out in the analogue environment.<sup>93</sup> With the advent of the Internet and the increased

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<sup>90</sup> See e.g. Dickinson, *The Rome II Regulation: A Commentary*, p. 448, Fawcett & Torremans, *Intellectual Property and Private International Law* (2011), section 17.13, and Torremans in *RIDA 2001*, p. 49.

<sup>91</sup> See e.g. Case No COMP/C2/38.014 — IFPI “Simulcasting”, p. 21 to 23, Rognstad in *Rett og toleranse*, *Festskrift for Helge Thue* (ed. Frantzen et al, 2007), p. 411 ff., Bechtold in *Concise European Copyright Law* (ed. Dreier & Hugenholtz) p. 362, van Eechoud et al, *Harmonizing European Copyright Law*, p. 307 and 314 and Hugenholtz in *IRIS special: Digitisation and Online Exploitation of Broadcasters’ Archives* (2010), p. 49 and 52, Dreier in *The Future of Copyright in a Digital Environment* (ed. Hugenholtz), p. 62 and Matulionytė in *The Journal of World Intellectual Property* 2008 p. 467 ff.

<sup>92</sup> Walter & von Lewinski, *European Copyright law – a commentary*, section 12.0.16 and Guibault and van Gompel in *Collective Management of copyright and Related Rights* (ed. Gervais, 2010), p. 135 ff.

<sup>93</sup> In the *Tournier* case the ECJ ruled that a national CMO may refuse to grant direct access to its own national repertoire to users established in other EU Member States only for efficiency reasons, e.g. if it would be too burdensome to organize its own management and monitoring system in these countries. However, if the refusal were the result of agreements or concerted practices between national CMOs in the Member States in which the users are established, this would have the object or effect of restricting competition in the common market contrary to Article 81 TEC (currently Article 101 TFEU). See Case 395/87 *Ministère Public v Tournier* [1989] ECR 2521 and Joint Cases 110, 241 and 242/88, *Lucazeau et al. v. SACEM*, [1989] ECR 2811.

possibility to exploit works on a cross-border basis the demand for multi-repertoire, multi-territory licences for the making available of content on a cross-border basis has now become pressing.<sup>94</sup>

Some attempts have been made by Confédération Internationale des Auteurs et Compositeurs (CISAC) and other umbrella organizations to address the demand for multi-territory and multi-repertoire licences through amendments of their model reciprocal agreements. However, the design of some of these amendments has met opposition from the European Commission on the basis of the rules on competition.<sup>95</sup> The only reciprocal agreement mandating each participating CMO with multi-territory, multi-repertoire licences which so far received the approval of the European Commission is the IFPI Simulcasting Agreement. Other model agreements have sought but not gained approval.<sup>96</sup>

The IFPI Simulcasting Agreement was submitted to the attention of the Commission in November 2000 by IFPI (International Federation of the Phonographic Industry) on behalf of several record producers' collecting societies.<sup>97</sup> The IFPI Simulcasting Agreement amended the traditional reciprocal agreements allowing users to obtain a multi-territory, multi-repertoire licence for certain forms of online dissemination.<sup>98</sup> According to the agreement, which the participating CMOs had signed on an experimental basis until the end of 2004, each of the participating societies could issue multi-territorial licenses for the online use of copyrighted works of the repertoires of these societies only to online users established in their own territory.

Referring to the *Tournier*<sup>99</sup> and *Lucazeau*<sup>100</sup> cases, the European Commission considered that the monitoring task of CMOs in the online environment could easily be carried out directly on the Internet and could therefore take place from a distance, which meant that the traditional economic justification for CMOs not to compete in cross-border provision of services no longer applied in this context. Moreover, the parties in this case must undertake to increase transparency in regard to the payment charged to the users of phonograms in their repertoire, by separating the tariff that covers the royalty proper from the fee meant to cover the administration costs. This transparency in pricing would enable users to recognize the most efficient societies and to seek their licenses from the society that provides them at the lower cost. The Commission further stated that "In the present case, the model chosen by the parties for the simulcasting licensing structure results in the society granting a multi-repertoire/multi-territory license being limited in its freedom as to the amount of the global license fee it will charge to a user". The Commission therefore held that where the IFPI Simulcasting agreement

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<sup>94</sup> See e.g. Reflection document of DG INFSO and DG MARKT. Creative content in a European Digital single Market: Challenges for the Future, p. 12, and Communication from the Commission on a Digital Agenda for Europe, COM(2010) 245, p. 8 and Communication from the Commission on a Single Market for Intellectual Property Rights, p. 10. See also Monti, "A new strategy for the Single Market", Report to the President of the European Commission, p. 46.

<sup>95</sup> The reciprocal agreements between CMOs are subject to article 101 TFEU (former Article 81 TEC) which prohibits agreements between undertakings and concerted practices that may affect trade between Member States and that have as their object or effect the prevention, restriction or distortion of competition within the common market.

<sup>96</sup> See Notice published pursuant to Article 27(4) of Council Regulation (EC) No 1/2003 in Cases COMP/C2/39152 — BUMA and COMP/C2/39151 SABAM (Santiago Agreement — COMP/C2/38126); and Notification of cooperation agreements (Case COMP/C-2/38.377 — BIEM Barcelona Agreements).

<sup>97</sup> See Commission Decision of 8 October 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/C2/38.014) (hereafter "IFPI Simulcasting").

<sup>98</sup> Simulcasting is defined in the Agreement as "the simultaneous transmission by radio and TV stations via the Internet of sound recordings included in their broadcasts of radio and/or TV signals". See IFPI Simulcasting, p. 2.

<sup>99</sup> ECJ judgment in Case 395/87, *Ministère public v. Tournier*, (1989) E.C.R. 2521.

<sup>100</sup> ECJ judgment in Joint Cases 110/88, 241/88 and 242/88, *Lucazeau v. SACEM*, (1989) E.C.R. 2811, at paras 10–20.

determined that each contracting party could charge users the license fees that apply in the territories into which the user simulcasts its services, it significantly reduced competition between CMOs in terms of price (Article 101 TFEU (ex Article 81 TEC)), because this practice resulted in tariffs that were to a large extent pre-determined. At the request of the Commission during the proceedings, the parties undertook to split the copyright royalty from the administration fee such as to bring about an increased degree of transparency in the relationship between CMOs and users. This was meant to allow users (as well as members of the societies) to better assess the efficiency of each of the societies and have a better understanding of their management costs.

Before drawing its conclusion regarding the compatibility of the IFPI Simulcasting agreement with Article 101(1) TFEU (ex Article 81(1) TEC), the Commission considered whether the agreement could be exempted under paragraph (3) of the same Article. As the Commission previously stated, in certain circumstances cooperation may be justified and can lead to substantial economic benefits, namely where companies need to respond to increasing competitive pressure and to a changing market driven by globalization, the speed of technological progress and the generally more dynamic nature of markets. The Commission noted first that the IFPI Simulcasting agreement gave rise to a new product – a multi-territorial, multi-repertoire simulcasting license, covering the repertoires of multiple CMOs, enabling a simulcaster to obtain a single license from a single CMO for its simulcast that is accessible from virtually anywhere in the world via the Internet. Second, under the reciprocal simulcasting licenses system, broadcasters would benefit from the fact that by obtaining one simulcast license from a single CMO, they would be able to simulcast in any participating territory without fear of being sued for infringement of the relevant rights. Third, the system put in place through the IFPI Simulcasting agreement would also benefit consumers, for it provides them with easier and wider access to a range of music by means of available simulcasts.<sup>101</sup> Therefore, the Commission granted an individual exemption until the end of 2004 when the agreement expired.

The model reciprocal agreement drawn up by the CISAC became the object of a comparable inquiry under Article 101 TFEU (ex Article 81 TEC), as a result of two separate complaints from the radio broadcasting group RTL and Music Choice, an online music supplier in the United Kingdom. In 2006, the European Commission issued a statement of objection against the CISAC model contract itself and its bilateral implementation between the CMOs of the European Economic Area (EEA), which contained territorial restrictions creating an obstacle to obtaining a multi-territory, multi-repertoire license for the online use of music. The model contract at issue and the agreements deriving from it at bilateral level form the basis of collective copyright-management for all modes of performance of copyright protected music to the public. It is important to note, however, that the complaints related only to the exploitation of musical works on modern platforms, such as the Internet, satellite and cable.<sup>102</sup>

The European Commission identified two potentially restrictive clauses in the CISAC model contract and the reciprocal agreements concluded on its basis by the European CMOs: a membership restriction clause and a territorial delineation clause. The membership restrictions in the model contract impeded the ability of an author from becoming a member of the CMO of his choice or to be simultaneously a member of different EEA societies in different EEA territories. With respect to the second form of

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<sup>101</sup> See: L. Guibault, “When will we have cross-border licensing of copyright and related rights in Europe?” UNESCO eCopyright Bulletin April/June 2005.

<sup>102</sup> See Decision by the Commission in Case COMP/38.698 – CISAC. In October 2008, CISAC filed for appeal of the Commission’s decision before the Court of First Instance. At the time of writing (May 2011), the appeal was still pending. See action brought on 3 October 2008 – CISAC v Commission (Case T-442/08).

restraint on competition, the territorial delineation clause, the Commission considered that territorial restrictions were not explained by the territorial nature of copyright and that the need for a local presence did not justify the systematic delineation of the territory as the territory of the country where the CMO is established. According to the Commission, this clause “effectively leads to national monopolies for the multi-repertoire licensing of public performance rights and has the effect of segmenting the EEA into national markets. Competition is restricted on two levels: (i) on the market for administration services which collecting societies provide to each other; and (ii) on the licensing market”. The Commission concluded that, on the basis of the evidence presented, the territorial delineation clause could not be objectively explained and was not necessary for ensuring that EEA CISAC members grant each other reciprocal mandates. The model contract therefore amounted to a concerted practice in restraint of competition contrary to Article 101 TFEU (ex Article 81 TEC).

The intended effect of the CISAC decision was to stimulate CMOs into giving each other a mandate to conclude multi-territorial and multi-repertoire licences in a similar fashion as under the IFPI Simulcasting Agreement.<sup>103</sup> Whether this is the case remains to be seen: In order to comply with the decision, CMOs were required to revise their reciprocal agreements with respect to Internet uses. The CMOs had also undertaken either to issue mono-repertoire, multi-territory licences or to mandate, under certain conditions, each signatory CMO that met specific qualitative criteria to grant multi-repertoire, multi-territorial licences. However, so far no CMO has granted the rights to its repertoire to all CMOs without limitations in terms of users or territories covered by the licence, and any attempt to do so by another CMO has been met by a lawsuit.<sup>104</sup> The result is a patchwork of different agreements and provisions which makes it difficult for a user to establish which society is able to licence which rights to which user.<sup>105</sup>

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<sup>103</sup> Former Competition Commissioner Kroes expressed this view in the 2008 and 2009 roundtable meetings, [http://ec.europa.eu/competition/sectors/media/online\\_commerce.html](http://ec.europa.eu/competition/sectors/media/online_commerce.html). See also press release “Antitrust: Commission prohibits practices which prevent European collecting societies offering choice to music authors and users – frequently asked questions”, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/511&form>.

<sup>104</sup> *Vereniging BUMA v. The Performing Rights Society Limited*, Court of Appeal of Amsterdam (*Gerechtshof Amsterdam*), 200.016.122/01 KG (19 Jan. 2010), LJN: BL4289, *The Performing Rights Society Limited v. Vereniging BUMA*, District Court of Haarlem (*Rechtbank Haarlem*), 148418/KG ZA 08-410 (19 Aug. 2008), LJN: BE8765, <[www.rechtspraak.nl/ljn.asp?ljn=BE8765](http://www.rechtspraak.nl/ljn.asp?ljn=BE8765)>, 6 Jan. 2010 (for an English language translation of the case, made available by Pauline Kuipers (Bird & Bird), see <[www.boek9.nl/index.php?/Prs+vs.+Buma///20609/](http://www.boek9.nl/index.php?/Prs+vs.+Buma///20609/)>, 6 Jan. 2010; B9 7021); *MyVideo Broadband S.R.L. v. CELAS GmbH*, District Court of Munich (*Landgericht München*), No. 7 O 4139/08 (25 Jun. 2009), <[http://openjur.de/u/31093-7\\_o\\_4139-08.html](http://openjur.de/u/31093-7_o_4139-08.html)>, 6 Jan. 2010 (for an English language summary, see M. von Albrecht & J.N. Ullrich, ‘Munich District Court Holds Pan-European Copyright Licensing Model of Joint Venture CELAS Invalid’, 20 Jul. 2009, <[www.klgates.com/newsstand/Detail.aspx?publication=5793](http://www.klgates.com/newsstand/Detail.aspx?publication=5793)>, 6 Jan. 2010).

<sup>105</sup> See e.g. Brinker & Holzmüller in EIPR 2010 p. 556 f. and Frabboni in Research handbook on the future of EU copyright (ed. Derclaye), p. 385.

## 4. The Nordic ECL model

Considering the high transaction costs associated with the identification and location of each and every right holder to each and every copyright protected item in the collections held by cultural institutions, the problems related to the digitisation and online dissemination of these items would best be solved through collective licensing. Among the different options available in the area of collective licensing is the Nordic extended collective licensing (ECL) model. ECLs have been an important part of the copyright acts of the Nordic countries ever since their first introduction in relation to primary broadcasting at the beginning of the 1960s.<sup>106</sup> This system offers a solution to the high level of transaction costs associated with mass-digitisation and online dissemination. This chapter focuses on the ECL model in the Nordic countries as a solution for the rights-clearance challenges posed to cultural institutions. The chapter first explains the background to the establishment of the first ECL provision in the 1960s, followed by a description of the development of the model until today. A more in-depth description of the basic features follows as well as an assessment of the compatibility of the model with certain international and EU norms. The last subsection examines the model from the perspective of the Europeana content providers.

### 4.1 Establishment of the first ECL provision

The Nordic countries, who by tradition have cooperated in the field of copyright legislation,<sup>107</sup> introduced the first ECL provision in their respective national copyright acts at the beginning of the 1960s.<sup>108</sup> 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

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<sup>106</sup> The creation of ECL system is traditionally attributed to the Swedish professor Svante Bergström who coined the term "extended collective licence" for the first time in the article "Program för upphovsrätten" in *Rättsvetenskapliga studier ägnade minnet av Phillips Hult* (ed. Elvin, 1960).

<sup>107</sup> The Nordic cooperation in copyright legislation was initiated in the middle of the 20<sup>th</sup> century and resulted in near identical copyright acts in the Nordic countries. This cooperation has been deemed important for both cultural and practical reasons, e.g. because the countries share a common culture and understanding of their respective languages – particularly the Scandinavian countries Sweden, Norway and Denmark. The nature and scope of the cooperation has changed substantially in the last 25 years in light of the evolution of the European Union and its activities in the field of copyright. Denmark became a member of the Union in 1972, followed by Sweden and Finland in 1995. The latitude for an independent Nordic policy in this field of law has therefore been reduced. On the Nordic cooperation in the copyright field, see e.g. Koktvedgaard in *Festschrift für Adolf Dietz* (2001) p. 557 ff. An important feature of Nordic legal tradition is the prominent role played by the preparatory works when interpreting and applying statutory law, see e.g. Cederlund & Axhamn in *Copyright Throughout the World* (ed. von Lewinski), section 36:1. This does however not apply in cases where a national provision falls under the scope of a provision in an EU Directive. In such instances the national provision shall be interpreted, as far as possible, in the light of the wording and the purpose of the Directive in order to achieve the result pursued by the latter. That applies notwithstanding any contrary interpretation which may arise from the preparatory works for the national provision. See e.g. Case C-371/02 *Björnekulla Fruktindustrier* [2004] ECR I-5791, p. 13. They will be examined in this report mainly on the basis of national preparatory works such as official reports and government bills. These documents include sections on general reasoning and explanatory memorandums on the interpretation of provisions in statutory law, such as ECL provisions. Due to the language barrier, the ECL provisions in the Icelandic Copyright Act will not be covered in this report. Hence "Nordic countries" refers, throughout the text, to Denmark, Sweden, Norway and Finland.

<sup>108</sup> The Nordic ECL model has been analysed mainly in the Nordic legal literature, but for English language contributions, see e.g. Koskinen-Olsson in *Collective Management of Copyright and Related Rights* (ed. Gervais, 2010), p. 284 ff., Christiansen in *EIPR* 1991 p. 346, Kyst in *NIR* 2009 p. 44, Karnell in *NIR* 1991 p. 15 f., Karnell in *EIPR* 1991 p. 431, Karnell in *Essays in honour of George Koumantos* (2004), p. 392, and Rognstad in *NIR* 2004 p. 151.

collective agreements with national CMOs<sup>109</sup>, 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.<sup>110</sup> 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”<sup>111</sup> – 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.<sup>112</sup>

The public broadcasters' initial proposal was the introduction of a compulsory licence (to be managed collectively).<sup>113</sup> 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.<sup>114</sup>

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 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.<sup>115</sup>

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<sup>109</sup> In practice these organizations were, inter alia, the Swedish Performing Rights Society (STIM), the Swedish Writers' Union and the Writers Guild of Sweden.

<sup>110</sup> Whereas the mutual agreements between national CMOs in the music field are fairly extensive today, that was not the case in the late 1950s. On this topic, see e.g. Koskinen-Olsson in *Collective Management of Copyright and Related Rights* (ed. Gervais, 2010), p. 285.

<sup>111</sup> Sometimes the notions “un-attached”, “non-represented” or “non-attached” right holders are used, see e.g. Karnell in NIR 1991 p. 16 f. and Karnell in EIPR 1991 p. 431.

<sup>112</sup> Swedish Government bill (proposition) 1960:17, p. 147 ff.

<sup>113</sup> This proposal may be seen in the light of the 1928 Rome and 1949 Brussels revisions of the Berne Convention which had introduced the possibility in article 11bis(2) of the Convention for Member States to substitute certain exclusive rights with compulsory licences, including for primary broadcasting.

<sup>114</sup> Swedish Government bill (proposition) 1960:17, p. 147 ff.

<sup>115</sup> Ibid. The latter criterion was introduced to safeguard the authors' personal interests and was said to apply in, for example, cases where the author had changed his opinions in artistic, political or religious respects, or if his work had gained unfavourable approval from the general public.



The main reasons for conferring the broadcasters this special position – compared to other users who may have encountered similar difficulty with high transaction costs – were the scale of their (broadcasting) activities and the fact that they were said to reach a much larger audience than other means of dissemination. Emphasis was also put on the public broadcasters’ importance from an educational and cultural point of view and their “semi-official” nature as the (then) sole providers of broadcasting services in the Nordic countries. The latter argument was relevant as it was said to safeguard from abuse of the provision, i.e. it was deemed that a public service broadcaster by its nature was more restrained than other users of copyrighted content.<sup>116</sup>

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.<sup>117</sup> Even if the primary purpose of the introduction of the ECL model can be said to have been to protect the users<sup>118</sup>, 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.<sup>119</sup>

## 4.2 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<sup>120</sup>, and also in violation of international obligations<sup>121</sup>. 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.<sup>122</sup> 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

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<sup>116</sup> Ibid.

<sup>117</sup> Ibid. Indeed, the ECL model has been characterized 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.

<sup>118</sup> Swedish Government bill (proposition) 1960:17 p. 152. See also Christiansen in EIPR 1991 p. 348, Karnell, in NIR 1991 p. 15 f., Koskinen-Olsson in *Collective Management of Copyright and Related Rights* (ed. Gervais, 2010), p. 283.

<sup>119</sup> For these reasons it is also held that this ECL provision was clearly permitted under the Berne Convention, since article 11bis(2) of the Convention permits compulsory licences, which are (normally) more restrictive than ECL provisions.

<sup>120</sup> It was held that “[n]o responsible person would suggest an exception for free photocopying in educational institutions.” See Swedish Government bill (proposition) 1979/80:132 p. 13 and 75.

<sup>121</sup> Swedish Government bill (proposition) 1979/80:132 p. 13, 65 and 75. It was deemed that an exception permitting “the current extent of photocopying in educational institutions would unreasonably prejudice of the legitimate interests of the author”, and therefore in violation of third step in the so-called three-step test in article 9(2) of the Berne Convention. In interpreting the latter, reference was made to Section 85 in the Report on the Work of the Main Committee I, Records of the Intellectual Property Conference of Stockholm 1967, p. 1145 f. (Geneva, 1971).

<sup>122</sup> Swedish Government bill (proposition) 1979/80:132 p. 13 f. and 75 f. Cf. Upphovsrätt 1. Fotokopiering och bandinspelning – särskilt inom undervisningsverksamhet. Delbetänkande av Nordiska upphovsrättskommittén. Nordisk udredningsserie 21/73, Nordiska rådet, Stockholm 1974, p. 82.

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.<sup>123</sup>

However, the field of photocopying in educational institutions differed in several important respects from primary broadcasting. It was practically impossible 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.<sup>124</sup> To stimulate the coming into being of ECL agreements, the ECL provision was supplemented with rules on mediation between the user and the CMO.<sup>125</sup> Similar to the ECL provision for primary broadcasting, this ECL was deemed by the Nordic legislators to be consistent with international obligations.<sup>126</sup>

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.

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<sup>123</sup> Swedish Government bill (proposition) 1979/80:132 p. 13 f.

<sup>124</sup> Swedish Government bill (proposition) 1979/80:132 p. 13 ff. and 79 f.

<sup>125</sup> Swedish Government bill (proposition) 1979/80:132 p. 14 f. and 20 and Karnell in NIR 1991 p. 17 f.

<sup>126</sup> Swedish Government bill (proposition) 1979/80:132 p. 15 ff.

- v. Where criteria mentioned in i)- iv) above are met, the introduction of an ECL provision is justified.<sup>127</sup>

All Nordic countries provide for an ECL covering primary broadcasting;<sup>128</sup> simultaneous and unaltered cable re-transmission;<sup>129</sup> and communication to the public of previously broadcast television programs in broadcasting organizations' own archives.<sup>130</sup> All countries also have adopted ECL provisions covering certain forms of reproductions within certain organizations or for certain activities. The provisions, however, differ in scope. Sweden provides for an ECL provision for all forms of reproduction of works in educational activities<sup>131</sup> and an ECL for photocopying within public institutions, business enterprises and organizations to satisfy their need for domestic use.<sup>132</sup> Norway and Denmark have a similar ECL provision as Sweden as regards reproductions within educational activities. Contrary to Sweden, the Norwegian and Danish ECL provisions for reproductions within public institutions, business enterprises and organizations to satisfy their need for domestic use are not limited to photocopying but encompass all forms of reproductions.<sup>133</sup> Finland provides for an ECL provision for photocopying in general, i.e. it is not restricted to certain activities or users.<sup>134</sup> In addition, Finland provides for ECL provisions for reproduction other than photocopying and communication to the public of works within public institutions, business enterprises and organizations to satisfy their need for domestic use<sup>135</sup> and in educational activities or in scientific research.<sup>136</sup>

As regards ECL provisions for activities carried out by cultural institutions, Norway and Finland provide for broad ECL provisions for communication to the public and reproductions of works in the collections of archives, libraries and museums.<sup>137</sup> In Denmark, the related ECL is restricted to digital forms of reproduction by libraries upon request of articles from newspapers, magazines and composite works, brief excerpts of books and other published literary works, as well as illustrations and music reproduced in connection with the text.<sup>138</sup> In Sweden, the ECL provision for cultural institutions encompasses communication of works in the collections of archives and libraries to individual "library patrons as regards short portions of material which, because they are vulnerable, should not be delivered in its original form", and "distribution of works to library patrons in certain cases".<sup>139</sup>

In addition to the ECL provisions mentioned above, which share some similarities, the legislators in the different Nordic countries have introduced ECL provisions in the following cases. Norway and Denmark provide for ECL provisions concerning the reproduction of certain categories of works for

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<sup>127</sup> 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, and Karnell in Essays in honour of George Koumantos (2004), p. 392.

<sup>128</sup> Section 42e of the SCA, section 30 of the NCA, section 25f of the FCA and section 30 of the DCA.

<sup>129</sup> Section 42f of the SCA, section 34 of the NCA, section 25h of the FCA, and section 35 of the DCA.

<sup>130</sup> Section 42g of the SCA, section 32 of the NCA, section 25g of the FCA, and section 30a of the DCA.

<sup>131</sup> Section 42c of the SCA.

<sup>132</sup> Section 42b of the SCA.

<sup>133</sup> Section 14 of the NCA and section 14 of the DCA.

<sup>134</sup> Section 13 of the FCA.

<sup>135</sup> Section 13a of the FCA.

<sup>136</sup> Section 14 of the FCA.

<sup>137</sup> Section 16a of the NCA and section 16d of the FCA.

<sup>138</sup> Section 16b of the DCA.

<sup>139</sup> Section 42d of the SCA.

disabled people<sup>140</sup>, Denmark and Finland provide for an ECL for the reproduction of works of fine art in certain cases<sup>141</sup>, and Finland provides for an ECL for certain ephemeral recordings<sup>142</sup>.

The ECL provisions just mentioned 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 has recently been proposed by a Governmental inquiry in Sweden.<sup>143</sup>

### **4.3 Basic features of the ECL model**

Having described the background to the introduction of the first ECL provision and the subsequent development of the model in the previous two sections, the following sections describe and analyze the system's basic features in greater detail: the extension effect of a collective agreement between a representative CMO and a user, the principle of equal treatment, the right to claim individual remuneration, the possibility to opt out and provisions on mediation and arbitration. The following sections reveal the small but important variations between the ECL models as developed in the different Nordic countries.

#### **4.3.1. Eligible organization**

The legal policy reasoning behind the ECL model is that the legislator has deemed the conditions of an agreement concluded between a professional CMO and a user to be reasonable also for third parties not directly involved in the negotiations. This puts the CMO in a position of responsibility. Accordingly the Nordic legislators have established criteria according to which CMOs are eligible to conclude ECL agreements. A common criterion in all Nordic countries is that the CMO in question be "representative". In most of the Nordic countries, it is also a requirement that the organization be approved by the government.

##### *Representativeness of the organization and government approval*

The basic statutory provisions on ECLs in the Nordic countries provide that an ECL agreement as referred to in the different copyright acts applies to the specific form of exploitation of works, on condition that such an agreement has been concluded with a representative organization. The criterion of "representativeness" differs between the Nordic countries. In Denmark, Norway and Finland the criterion is that the CMO must represent "a substantial number of authors of certain types of works which are used" in each respective country.<sup>144</sup> In Sweden, the criterion is that the CMO must "represent a substantial number of Swedish authors in the field concerned."<sup>145</sup> The difference between the two criteria is that where the former relates to works which are used in a specific area, the latter refers to the nationality of the authors. The Danish, Finnish and Norwegian criterion have been amended after critique from the European Commission against the former Danish wording – which is the wording used in Sweden today. The Commission argued that the reference to authors of a certain nationality limited the possibility of foreign organizations to conduct business in Denmark and that it

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<sup>140</sup> Section 17b of the NCA and section 17 of the DCA.

<sup>141</sup> Section 24a of the DCA and section 25a of the FCA.

<sup>142</sup> Section 25f of the FCA.

<sup>143</sup> Swedish Government Official Reports (SOU) 2010:24, p. 272 ff.

<sup>144</sup> See section 50 first paragraph of the DCA, section 38a first paragraph of the NCA and section 26 of the SCA.

<sup>145</sup> See section 42a first paragraph of the SCA.

therefore constituted discrimination on the basis of nationality.<sup>146</sup> A recent Swedish governmental report has proposed that the criterion of representativeness be amended to be brought in line with the criterion in the other countries.<sup>147</sup> It is possible for a foreign CMO to meet the criteria and be eligible for an ECL provision. In practice, however, this has not been the case so far.

A question related to the representativeness of the CMO is whether more than one organization is authorized to conclude ECL agreements within a certain field. If more than one organization were eligible, this would create confusion on the part of outsiders, as to where to claim remuneration or opt out, as well as confusion on part of the users, as to which work is directly (through membership) or indirectly (through reciprocal agreements or an extended effect) in the repertoire of which organization.<sup>148</sup>

The notion “a substantial number” is vague enough in the Nordic languages to refer to “many”, “a major part” as well as “the main part”. From the wording of the statutory provisions in the Danish, Norwegian and Swedish respective copyright acts, it is not clear whether more than one organization can be eligible. In Finland it is expressly stated that more than one organization can be eligible. Legal certainty and predictability is created to some extent in Norway, Finland and Denmark by the fact that any representative organization must be approved by the ministry responsible for the copyright Act before they can be eligible to conclude an ECL.

In Denmark both the preparatory documents and the legal literature have highlighted that only one organization may be authorized to conclude ECL agreements in a given field. All circumstances must be taken into account: the fact that a CMO represents the majority of right holders in a specific field is not in itself sufficient for eligibility; more relevant is whether the CMO represents the right holders whose works are actually used; whether the organization’s statutes offer the CMO the possibility to conclude agreements for its members; whether the CMO has adequate administrative capacity and experience to conclude agreements in Denmark; and whether the organization has the possibility to conclude mutual agreements with organizations abroad.<sup>149</sup>

Recent Norwegian preparatory works state that it is possible for more than one organization to be eligible, but in such a case, the organizations are presumed to cooperate.<sup>150</sup> In addition, the ministry responsible for approving a CMO may lay down rules on good governance and transparency of the organization.<sup>151</sup>

In Finland, the statutory provisions expressly recognize that more than one organization can be authorized. When several organizations are accredited to grant a licence for a given use of works, the terms of the approved decisions shall ensure, where needed, that the licences are granted simultaneously and on compatible terms. For an organization to become eligible, additional criteria must be fulfilled. The organization must have the financial and operational prerequisites and capacity to manage affairs in accordance with the approval decision. The organization must render account annually to the responsible ministry of the measures it has taken pursuant to the approval decision. The approval decision, which lasts for a fixed period (maximum five years), may also lay down terms guiding the practical licensing of the organization. The approval may be reversed if the organization

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<sup>146</sup> Schønning, *Ophavsretsloven med kommentarer* (2008), p. 453 f.

<sup>147</sup> Swedish Government Official Reports (SOU) 2010:24.

<sup>148</sup> Riis & Schovsbo in *Columbia Journal of Law and the Arts* (2010), p. 493 and Kyst in NIR 2009 p. 49.

<sup>149</sup> Danish Governmental report 1197/1990, p. 189, Schønning, *Ophavsretsloven med kommentarer* (2008), p. 454, and Kyst in NIR 2009 p. 48.

<sup>150</sup> Norwegian Government bill (proposition) 2004-2005:46 p. 55.

<sup>151</sup> See section 38a of the NCA and section 3-1 in the accessory legislation “Forskrift til åndsverkloven”.

commits serious or substantial offences or dereliction of duty in breach of the approval decision and its terms, and if notices to comply or warnings issued to the organization have not led to the rectification of the shortcomings in its operation.

The question whether more than one organization can be eligible to conclude ECL agreements has raised much attention in Sweden. When examining the same criterion of “a substantial number...” in the provision relating to the resale right remuneration, the Supreme Court held that the provision means that more than one organization may be entitled to claim remuneration, but that certain requirements must apply with regard to the organization’s structure and stability.<sup>152</sup> In a recent Governmental report it is, however, suggested that the criteria be amended to “the organization that is most representative and best represents the authors”.<sup>153</sup>

The fact that a CMO is deemed eligible to conclude an ECL agreement consolidates its position, but at the same time it adds to the responsibilities of the CMO. However, from the above, it follows that not all Nordic countries have rules on the supervision of or government control over the CMOs. In Sweden, the major limits on the behavior of the organizations are provided by competition law. Thus, one conclusion to draw from the Nordic experience is that for an extension system to function, so as to be enshrined in a statutory ECL provision, the respective collective societies must be professionally efficient, have sufficient know-how and have at their disposal appropriate techniques for distribution of remuneration. In other words, the success of the ECL system in the Nordic countries has not simply been because of the design of the “rules” or the content of the “agreements”. ECLs have been successful because of the context in which they function. If one, therefore, sought to transplant these models elsewhere, one should be very careful to include into the design of the systems not just the rules themselves, but also the broader background of right holders’ organization.<sup>154</sup>

#### **4.3.2. ECL agreements**

Although the wording differs slightly, the basic statutory provisions on ECLs in the Nordic countries state that “an extended collective licence” as referred to in the different ECL provisions “confers to the user the right to exploit works of the kind referred to in the agreement despite the fact that the authors of those works are not represented by the organization”. When a work is used on the basis of an ECL agreement, “the conditions concerning the exploitation of the work that follow from the agreement apply.”<sup>155</sup> In other words, given the fact that an agreement has been reached between a representative CMO and a user, the statutory ECL provisions extend the contents of the agreement to outsiders. The extended effect does not, however, have the effect that the author is presumed to be a member of the organization.

“Outsiders” are defined as authors of works “which are not represented by the organization”. In other words “outsiders” refers to national and foreign right holders who are not members of the organization, as well as heirs of deceased authors. It has been claimed in the legal literature that an “outsider effect” is present also if a use is not authorized explicitly in the agreement between an author and his CMO.<sup>156</sup> This latter “outsider effect” seems to imply that if the CMO is “representative”

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<sup>152</sup> Swedish Supreme Court case NJA 2000 p. 178.

<sup>153</sup> Swedish Government Official Reports (SOU) 2010:24.

<sup>154</sup> Karnell in Essays in honour of George Koumantis (2004), p. 399 f., Koskinen-Olsson in *Collective Management of Copyright and Related Rights* (ed. Gervais, 2010), p. 289, Karnell in NIR 1991 p. 19, and Riis & Schovsbo in *Columbia Journal of Law and the Arts* 2010, p. 497.

<sup>155</sup> See section 50 third paragraph of the DCA, section 36 first paragraph of the NCA, section 26 first paragraph of the FCA and section 42a first paragraph and 42a third paragraph of the SCA.

<sup>156</sup> Rognstad, *Opphavsrett* (2009), p. 276 and Riis & Schovsbo in *Columbia Journal of Law and the Arts* 2010 p. 475.

enough to be eligible to conclude an ECL agreement in a certain field of use based on the fact that most of its members have mandated the CMO in that field, then the extension effect will apply also to members who have not (yet) mandated the CMO in this field.

*The scope of an ECL agreement based on the sectorial ECL provisions*

The scope of the current statutory ECL provisions in the Nordic countries has been briefly mentioned at the end of section 4.2. However, the extension effect becomes applicable only after an agreement has been concluded between an eligible CMO and a user. In other words exclusivity of rights prevails for uses concerning which no agreement is reached. The parties may also agree with the extension effect pertaining to a use which is narrower than the use recognized in the statutory provision. To the extent that the parties agree on a use broader than the statutory provision, the extension effect does not apply. Hence, within their scope, the statutory ECL provisions do not affect the content of a concrete ECL agreement, but only extends it to outsiders.<sup>157</sup>

Hence the ECL provisions include a high level of flexibility. As its functioning is based on the terms agreed upon by the users and the representative CMO, its applications can be adapted to the prevailing circumstances and considerations of the parties. For example, the conditions of the agreement may be differentiated concerning different uses, and there may be restrictions on use of certain works or types of works. For example, there may be restrictions on use of works in high demand or of greater (commercial) value compared to other works. The agreement may thus contain different conditions concerning different parts of the repertoire, and even include conditions prohibiting the use of certain types of works.

From the perspective of the outsider, the ECL is often held to have obvious advantages over compulsory licences. It is, for example, held that an ECL agreement based on free negotiations and the contents of which have been accepted by a substantial number of right holders is for the benefit of the outsider because he is deemed to normally be in a weaker bargaining position if he acted on his own.<sup>158</sup>

From the perspective of the user, the ECL provision confers him a statutory immunity against civil remedies and criminal penalties for use of outsiders' works. In other words the ECL provision provides him with full limitation on liability for the said use.<sup>159</sup> It is possible to address the outsider problem by incorporating an indemnity clause in an agreement between a CMO and a user. On the basis of an indemnity clause, the CMO assumes liability for the payment of remuneration to outsiders in case they appear and claim remuneration or even damages. However, in comparison to this, the ECL model has the obvious advantage that it makes the use of outsiders' works lawful and provides limitation also against criminal penalties.<sup>160</sup> The ECL model has therefore been described as giving

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<sup>157</sup> Swedish Government bill (proposition) 1979/80:132 p. 84.

<sup>158</sup> See e.g. Swedish Government bill (proposition) 1979/80:132 p. 15, Karnell in NIR 1991 p. 17 f., Rognstad in NIR 2004 p. 155, Koskinen-Olsson in *Collective Management of Copyright and Related Rights* (ed. Gervais, 2010), p. 293 and Karnell in *Essays in honour of George Koumantos* (2004), p. 391. The extension effect provided by the ECL provisions has resemblance with collective labour agreements where the contents of the agreement are made applicable also to non-members. Indeed, this is held to be one of the roots of the model, especially in the light of the fact that the "inventor" of the model was an expert in labour law and that the extension of collective labour agreements is a common feature of Nordic labour law. See e.g. Christiansen in EIPR 1991 p. 347.

<sup>159</sup> Karnell in *Essays in honour of George Koumantos* (2004), p. 392 with footnote 3, Karnell in EIPR 1991 p. 430 f., and Koskinen-Olsson in *Collective Management of Copyright and Related Rights* (ed. Gervais, 2010), p. 292.

<sup>160</sup> Karnell in EIPR 1991 p. 433 f. Koskinen-Olsson in *Collective Management of Copyright and Related Rights* (ed. Gervais, 2010), p. 292. It has been argued in the legal literature that even if private subjects may well be

“true extension effect”.<sup>161</sup> Indeed, as stated above in section 4.1, the inability of “indemnity agreements” to solve the problem with outsiders’ rights so as to ensure some legal certainty for users, were the main reasons for introducing the ECL model in the Nordic countries in the first place.

In practical terms, the extension effect entails that the eligible CMO will be able to clear rights for the global repertoire for use carried out within the territory to which the ECL provision applies. The extension effect applies irrespective of whether the CMO has reciprocal agreements with “sister” CMOs in other countries. In other words the ECL provision gives the CMO mandate to provide domestic users with a mono-territory, multi-repertoire licence.

*The scope of an ECL agreement based on the general ECL provision*

As pointed out earlier, technical developments tend to create more fields where ECL support would be desirable. To relieve the legislator from the burden of constant amendments to the national copyright act to provide for additional ECL provisions, the Danish government introduced a general ECL provision in 2008. According to article 50(2) of the DCA, an ECL agreement “may also be invoked by users who, within a specified field, have made an agreement on the exploitation of works with an organization comprising a substantial number of authors of a certain type of works which are used in Denmark within the specified field.” A similar provision is currently under consideration in Sweden.<sup>162</sup>

The general ECL provision differs from the other ECL provisions in that it allows the contracting parties to define the specific area of use for which the provision will accord the extension effect. In other words, the legislator has not, as in the case of the traditional sectorial ECL provisions, defined the “outer boundaries” of the ECL agreement. It is thus up to the CMOs and users to define the area for which an agreement shall be given extended effect. Agreements based on this provision can encompass all types of works and forms of uses. The general ECL can also work as a mechanism to supplement the existing specific ECL provisions, which do not precisely meet a specific form of use. For example, the Danish preparatory works state that the general ECL provision may be used in situations characterized by many orphan works, e.g. as regards the collections held by libraries and archives.<sup>163</sup>

The general ECL provision is, however, of a subsidiary character; it will only apply in situations where it is (almost) impossible to obtain consent from the right holders individually or through their representative organizations.<sup>164</sup> In other words, the area of use must share two of the common characteristics of primary broadcasting and photocopying for educational purposes identified in section 4.2: i) apparent demand for mass-use and ii) incapability of individual and collective agreements to meet the demand due to high transaction costs for clearing outsiders’ rights.

The traditional provisions for the safeguard of outsiders apply also to the general ECL: the conclusion of an agreement between a representative CMO and a user, the principle of equal treatment, the right to claim individual remuneration and the possibility to opt out. In addition, the system with government approval is also said to constitute an important feature for safeguarding against the

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willing to accept the risk of infringing authors’ rights, perhaps arguing that in all probability the infringement will not be discovered, a public institution, however, cannot reasonably accept the responsibility of knowingly violating the law and risk criminal sanctions. See Christiansen in EIPR 1991 p. 347 f.

<sup>161</sup> Karnell in Nordic Intellectual Property Review 1981, p. 257 and Liedes, On the Extended Collective Licence, presentation at the EFTA’s Copyright seminar 30 September 2010.

<sup>162</sup> Swedish Government Official Reports (SOU) 2010:24, p. 272 ff.

<sup>163</sup> Kyst in NIR 2009 p. 47.

<sup>164</sup> Kyst in NIR 2009 p. 50 f.



“misuse” of the general ECL to the detriment of “outsiders” rights. The extended effect must follow explicitly from the ECL agreement, but other agreements are given priority. Thus, an ECL agreement based on the general ECL provision can never set aside an already valid agreement.<sup>165</sup>

*Extension effect on level of remuneration and principle of equal treatment*

The extended effect includes the level of remuneration paid when using an outsider’s work. For the outsider this means that, in respect of the remuneration deriving from the agreement, he shall be treated in the same way as the members of the CMO.<sup>166</sup> As indicated above, in most instances this is deemed to be for the benefit of the outsider as he normally would not be in a position to negotiate a higher level of remuneration on an individual basis.

However, it can happen that the agreement between the CMO and the user does not contain provisions on the distribution of remuneration to individual members. Rather, the distribution scheme will be deemed to be an internal matter for the CMO. For example, it is not uncommon that the CMO does not distribute individual remuneration to its members, but rather collectively – e.g. for pensions, stipends or educational activities.<sup>167</sup> Therefore, the ECL provisions state that outsiders shall be treated equally also in respect of other benefits (than individual remuneration based on the use) from the organization that are essentially paid for out of the remuneration from the users.<sup>168</sup> The CMO’s inability to provide individual remuneration could be the case when, for example, the remuneration from the user is a lump sum paid to the organization, based on a statistical assessment on the extent of use.<sup>169</sup>

As most outsiders are foreigners, the provision on equal treatment as regards remuneration from the CMO serves the purpose of making the extension effect consistent with the principle of national treatment in article 5(2) of the Berne Convention.<sup>170</sup>

Theoretically, it is the responsibility of the organization to see to it that outsiders actually receive remuneration on an equal footing with the members.<sup>171</sup> However, this does not mean that every outsider within the scope of the ECL provision and agreement has the right to receive the said remuneration at all times. As regards distribution of collective means, i.e. “other benefits from the organization that are essentially paid for out of the remuneration”, the principle of equal treatment has been deemed by the Nordic legislators not to apply to authors whose works there is reason to believe are not used at all or to a negligible extent.<sup>172</sup> However, a recent Government inquiry in Sweden looked into the issue whether the Swedish CMOs in practice did make efforts to seek out and find the non-members, including foreign non-members and provide them remuneration, and found that in practice, this is indeed the case.<sup>173</sup> The same inquiry has, however, proposed the introduction of a statutory provision applicable to all ECL provisions according to which the CMO must publish

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<sup>165</sup> Riis & Schovsbo in Columbia Journal of Law and the Arts 2010 p. 476 f. and Kyst in NIR 2009 p. 46 ff.

<sup>166</sup> Although the wording of the statutory provisions differ slightly, this is the denotation of section 51 first paragraph of the DCA, section 37 first paragraph of the NCA, section 26 fourth paragraph of the FCA and section 42a third paragraph of the SCA.

<sup>167</sup> Swedish Government bill (proposition) 1979/80:132 p. 79.

<sup>168</sup> Although the wording of the statutory provisions differ slightly, this is the denotation of section 51 first paragraph of the DCA, section 37 first paragraph of the NCA, section 26 fourth paragraph of the FCA and section 42a third paragraph of the SCA.

<sup>169</sup> See section 4.2 above on the introduction of the ECL provision for photocopying in educational institutions; Swedish Government bill (proposition) 1979/80:132 p. 16 f. and 79.

<sup>170</sup> Ibid. p. 15 ff.

<sup>171</sup> Koskinen-Olsson in Collective Management of Copyright and Related Rights (ed. Gervais, 2010), p. 294.

<sup>172</sup> Swedish government bill (proposition) 1979/80:132 p. 20.

<sup>173</sup> Swedish Government Official Reports (SOU) 2010:24.

information about the ECL agreement so that an outsider can assess whether he or she wants to be part of the scheme.<sup>174</sup>

As the ECL model is based on free negotiations, it is possible for the CMO and the user to distinguish between different kinds of works and their use. This includes the possibility to differentiate the remuneration to be paid for different kinds and categories of works. It is also possible to permit use for certain works without remuneration. However, any differentiation between works must not violate the principle of equal treatment, especially not to the extent that it would violate the principle of national treatment.

#### **4.3.3. Right to claim individual remuneration**

The author's interests are safeguarded to the extent that, should he be dissatisfied with the agreed level of remuneration or with the internal remuneration scheme of the organization, he enjoys a right to claim individual remuneration from the organization for the exploitation of his work pursuant to the statutory ECL provisions – on condition that he can prove the extent of use of his work(s). Similar to the right of equal treatment, this right serves the purpose of safeguarding foreign outsiders' rights in conformity with international norms, in this case the so-called three-step-test enshrined in several of the international treaties on copyright.<sup>175</sup>

This right applies regardless of any decision made by the organization and is without prejudice to the right of equal treatment vis-à-vis the members.<sup>176</sup> In this sense, the outsider is in a better position than the members of the CMO.

However, in practice it can be difficult for the outsider to prove the extent of use of his work(s) and there is no obligation on the part of the user or the CMO to keep track of the use of individual works.<sup>177</sup> Indeed, the decision to institute the ECL model was justified *inter alia* because of the impracticality of keeping track of the use of a specific work and to obtain prior consent (from outsiders) in mass-use situations.<sup>178</sup> If the outsider cannot prove the extent of use of his work(s), he may base his claim for individual remuneration on the statistical samples, carried out by the CMO, which constitute the basis for the calculation of the remuneration from the user to the CMO.<sup>179</sup>

The outsider's claim for individual remuneration must be forwarded to the organization within three years from the year in which the work was exploited.<sup>180</sup> This right is therefore subject to a shorter term of limitation (period of prescription) than is otherwise generally applicable under private law.

The rules differ between the Nordic countries on how to solve disagreements between the outsider and the organization regarding the level of remuneration for a certain use (the extent of which the outsider can prove). Sweden and Finland provide no specific rules on how such disagreements must be solved,

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<sup>174</sup> A similar provision, on notification of the ECL agreement, has recently been proposed by a Government inquiry in Sweden, see Swedish Government Official reports (SOU) 2010:24, p. 322.

<sup>175</sup> Swedish Government bill (proposition) 1979/80:132 p. 18 f. and 80.

<sup>176</sup> Although the wording of the statutory provisions differ slightly, this is the denotation of section 51 second paragraph of the DCA, section 37 second paragraph of the NCA, section 26 fifth paragraph of the FCA and section 42a third paragraph of the SCA.

<sup>177</sup> Swedish government bill (proposition) 1979/80:132 p. 17.

<sup>178</sup> See section 4.2.

<sup>179</sup> Swedish Government bill (proposition) 1979/80:132 p. 17.

<sup>180</sup> Although the wording of the statutory provisions differ slightly, this is the denotation of section 51 second paragraph of the DCA, section 37 second paragraph of the NCA, section 26 fifth paragraph of the FCA and section 42a third paragraph of the SCA.

whereas Denmark refers to a specific Copyright Tribunal (“Ophavsretslicensnaevnet”). In Norway, rules on arbitration apply regarding the remuneration for cable re-transmission only.

As mentioned in the previous section, a recent Government inquiry in Sweden has proposed the introduction of a statutory provision applicable to all ECL provisions according to which the CMO must publish information about the ECL agreement. This way, outsiders can better assess whether they want to be part of the scheme or put forward claims towards the CMO.<sup>181</sup> To some extent this provision aims at further safeguarding the interests of outsiders.

The only exception to the ECL provisions requiring equal treatment and giving authors the right to claim individual remuneration if they can prove the extent of use is the ECL provision on primary broadcasting in Sweden. This ECL provision holds that when a work is being exploited on the basis of the provision, the author has a right to remuneration. Nothing is said about whom the claim should be addressed to and no time limit is put on making the claim. In addition, and contrary to the other ECL provisions in Sweden, the author may ask a court to decide on the appropriate level of remuneration if he is not satisfied with the level of remuneration fixed by the CMO. In practice, however, the level of remuneration in the agreement has been applied also to outsiders.<sup>182</sup> Furthermore, there is no case where a court has decided that an outsider’s “right of remuneration” (as provided for by this ECL) should be set higher than that which would result from the distribution plan of the organization.<sup>183</sup> Hence, legal commentators have considered it appropriate that the ensuing ECL provisions require as a starting point that outsiders should be given the same level of remuneration as the members of the organization.<sup>184</sup>

#### **4.3.4. Possibility to opt out**

Some of the ECL provisions in the Nordic countries provide the author with the right to opt out from the application of the extension effect and thus fall back on his exclusive right. In other words a right holder may veto the use of his work under the ECL agreement, e.g. to prohibit the said use completely or for the purpose of negotiating an individual agreement with the user. The right to opt out was part of the first ECL provision (on primary broadcasting),<sup>185</sup> and is often described as being an integrated feature of the ECL model.<sup>186</sup> As regards most ECL provisions in the Nordic countries, however, right holders cannot opt out and rely on their exclusivity.

The right to opt out is designed and applied somewhat differently in the different countries. Normally the prohibition may be lodged with any of the contracting parties to the agreement and must be issued personally and individually, i.e. the opt out is normally not valid if it is made by an organization, if they have not been explicitly permitted to do so by the author.

In Sweden, the opt out clause applies to all ECL provisions<sup>187</sup> except the one on cable re-transmission<sup>188</sup> where an opt-out is not possible due to mandatory provisions in Directive

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<sup>181</sup> A similar provision, on notification of the ECL agreement, has recently been proposed by a Government inquiry in Sweden, see Swedish Government Official reports (SOU) 2010:24, p. 322.

<sup>182</sup> Swedish Government bill (proposition) 1979/80:132 p. 76. Nordisk udredningsserie 21/73: Upphovsrätt 1. Fotokopiering och bandinspelning – särskilt inom undervisningsverksamhet, p. 83 and Swedish Government bill (proposition) 1979/80:132 p. 76 ff.

<sup>183</sup> Christiansen in EIPR 1991 p. 348.

<sup>184</sup> Christiansen in EIPR 1991 p. 348.

<sup>185</sup> See section 4.1 above.

<sup>186</sup> Riis & Schovsbo in Columbia Journal of Law and the Arts 2010, p. 476. Cf. van Gompel in IIC 2007, p. 688.

<sup>187</sup> In Sweden the right to opt out applies to the ECL provisions on reprographic reproduction for information purposes within authorities, enterprises, organizations etc (section 42b of the SCA); copying for educational

93/83/EEC.<sup>189</sup> In Norway, the situation is almost the reversed: most ECL provisions do not provide for the possibility to opt out,<sup>190</sup> the only exceptions being primary broadcasts and use of works in the collections of the broadcasting organizations. In Finland, it is possible to opt out of all ECL provisions<sup>191</sup> except photocopying for educational purposes and cable retransmission. In Denmark roughly half of the ECL provisions permit the right holder to opt out.<sup>192</sup>

The fact that most ECL provision do not provide for the possibility to opt out is somewhat curious considering that the possibility to opt out has been put forward as one the main traits that make the ECL model differ from a provision on mandatory collective management of rights.<sup>193</sup>

At EU level there is currently only one provision on mandatory collective licensing, and it concerns the right of cable re-transmission in article 9 of Directive 93/83/EEC. In order to facilitate cross-border retransmission of television programs, copyright holders of televisions programs cannot exercise their cable retransmission rights individually vis-à-vis cable operators, but only through collecting societies. This system of compulsory collective management was introduced to avoid a scenario where individual right holders would block cable-retransmission, and hence cause a “black out” in the cable, by putting forward unreasonable claims towards the re-transmitter or refusal of re-transmission altogether.<sup>194</sup> Hence, an a priori assessment is that an ECL provision is to be preferred over a scheme of mandatory collective licensing unless the risk of similar “black out” is present for the intended use.

#### **4.3.5. Mediation and arbitration**

It is often held that one of the major benefits of the ECL model for outsiders in comparison with a compulsory licence is that it is based on free negotiations and thus presupposes mutual consent from the CMO and the user. However, as indicated in e.g. sections 4.1 and 4.2, the choice by the Nordic legislators for an ECL over a compulsory licence (managed collectively) has been based on the assumption that the market of collective agreements functions well in practice. In other words it is based on the assumption that the users and the CMO are prepared to conclude agreements so that the intended use can be carried out. However, to solve differences between the CMO and the users and stimulate the conclusion of agreements, the ECL model in the Nordic countries is often supplemented with provisions on mediation or arbitration between the user and the CMO. The importance of the use

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purposes (section 42c); communication and copying of single articles to library borrowers in certain cases (section 42d); and primary sound radio and television transmission (section 42e).

<sup>188</sup> Sections 42f and 47 third paragraph of the SCA.

<sup>189</sup> Article 9 of Directive 93/83/EEC.

<sup>190</sup> In Norway, the ECL opt out does not apply to use of works in educational activities (section 13b of the NCA); use in institutions, business enterprises etc. (section 14); use in archives, libraries and museums (section 16); reproduction for the benefit of persons with functional disabilities (section 17b); use of works in broadcasters' archives (section 32); and retransmission of broadcasts (section 34).

<sup>191</sup> In Finland the right to opt out applies to the ECL provisions on use for internal communication (section 13a of the FCA); certain uses by archives, libraries and museums (section 16d); use of works of fine art in collections (section 25a); ephemeral recordings (section 25f); use of a television program stored in archives (section 25g); and primary radio or television broadcast (section 25f).

<sup>192</sup> It is possible to opt out from the ECL provisions on use of works of fine art (section 24a of the DCA), primary radio or television broadcast (section 30); use by the broadcasting organizations of works in their archives (section 30a). It is not possible to opt out from the ECL provisions on copying in educational activities (section 13); photocopying in business enterprises, institutions etc. (section 14); online distribution of articles by libraries (section 16b); use of the benefit of persons with visual and hearing impairments (section 17 fourth paragraph) or cable re-transmission of broadcasts (section 35).

<sup>193</sup> Kyst in NIR 2009 p. 49 and Karnell in NIR 1991 p. 18.

<sup>194</sup> See recitals 10, 11 and 28 of Directive 93/83/EEC.

from a public interest point of view is often put forward as a reason for the introduction of these provisions.<sup>195</sup>

#### **4.3.5.1. Sweden**

It is still the case in Sweden that all ECL provisions are based on free negotiations. However, rules on mediation are applicable to all ECL provisions except the one for primary broadcasting.<sup>196</sup> These rules, which are based on similar rules in Swedish labour law,<sup>197</sup> provide for a voluntary process to assist the parties in reaching an agreement. If the mediation process fails, the mediator may propose arbitration, but the parties are not obliged to participate. The mediator may also make a notification to the government in cases where the mediation does not lead to any result. It is then for the government to consider taking action. As regards the ECL provision on cable re-transmission, there is a specific provision on mediation stating that a proposal from the mediator shall be binding on the parties, unless one of them expresses its opposition within a period of three months. This special provision was inserted to fulfil the obligations of article 11(3) of Directive 93/83/EEC.

Regarding the ECL provision on cable re-transmission, certain provisions also ensure that the parties enter and conduct negotiations (“entitlement to negotiation”). According to these provisions the relevant right holders have a duty to participate in such negotiations and, if necessary, put forward a reasoned proposal for a solution. If the right holders do not comply with this obligation, they must pay a compensation for the damage incurred on the re-transmitter. These provisions, also based on principles of Swedish labour law, only provide for an obligation for a party to respond to a counterpart and do not purport to force a party to conclude an agreement with a specific content.<sup>198</sup> This provision was instituted to fulfil the obligations of article 12 of Directive 93/83/EEC.<sup>199</sup>

In sum, other than the ECL on re-transmission via cable, the Swedish legislator has constantly been reluctant to introduce any form of mandatory provisions which would limit the principle of contractual freedom. This would, in the view of the Swedish legislator, transform the ECL into a compulsory licence which would be to the detriment of the right holders’ negotiating position as their counterpart already has been given the right by law to use the works in a specific manner.<sup>200</sup> It has generally been deemed that the public interest underlying the introduction of an ECL provision does not amount to a level where the freedom of contract is to be abandoned.<sup>201</sup>

#### **4.3.5.2. Denmark**

Similar to Sweden, Denmark also adopted provisions on mediation for most of its ECL provisions.<sup>202</sup> According to these provisions, in the absence of any result from the negotiations on an ECL agreement, either party may demand mediation. The request may be made if one of the parties has broken off the negotiations or rejected a request for negotiations, or if the negotiations do not appear to lead to any result. The demand for mediation must be addressed to the Minister for Culture who appoints a mediator. The mediation negotiations are based on the parties’ proposal for a solution, if

<sup>195</sup> Swedish Government bill (proposition) 1979/80:132 p. 14 f. and 20 and Karnell in NIR 1991 p. 17 f.

<sup>196</sup> Swedish Act (1980:612) on mediation in certain copyright disputes.

<sup>197</sup> Swedish Government bill (proposition) 1995:58 p. 53 f.

<sup>198</sup> Swedish Government bill (proposition) 1994/95:58 p. 53 f.

<sup>199</sup> See article 12(1) of Directive 93/83/EEC.

<sup>200</sup> Swedish Government bill (proposition) 1979/80:132 p. 14f. and 76 ff.

<sup>201</sup> Swedish Government bill (proposition) 1979/80:132 p. 78 f.

<sup>202</sup> The rules on mediation are applicable to the ECL provisions on reproduction within educational activities (section 13 of the DCA), reproduction by business enterprises etc. (section 14), certain uses by archives, libraries and museums (section 16b), reproduction of certain categories of works for disabled people (section 17), certain uses of works of fine art (section 24a) and use by broadcasting organizations of works in their archives (section 30).

any. The mediator may make proposals for the solution of the dispute and must notify the Minister for Culture of the outcome of the mediation.<sup>203</sup>

In practice the rules of mediation have only been used once since their introduction in 1995, maybe due to the fact that the mediator has no mandate to decide on an agreement between the parties.<sup>204</sup> This has been deemed inappropriate by the Danish legislator, who has supplemented the rules on mediation with provisions on arbitration. The provisions on arbitration apply to all ECL provisions except the ones for use by broadcasting organizations of works in their archives,<sup>205</sup> reproduction of certain categories of works for disabled people,<sup>206</sup> and the general ECL provision.<sup>207</sup> If negotiations have been initiated between parties and a dispute arises on the reasonability of licence terms proposed by an eligible CMO, either party may bring the dispute before the Copyright Tribunal. The Tribunal consists of a chairperson, who is a judge of the Supreme Court, and two members appointed by the Minister for Culture.<sup>208</sup> The Tribunal may lay down all the terms of the agreement, including terms relating to remuneration.<sup>209</sup>

The rules on arbitration are not applicable to the general ECL regime. The reason for this, is that it could have a negative effect on the number of agreements concluded, especially in areas where there is no tradition of ECLs, if the right holders were brought before the Tribunal against their will. This would thus discourage some right holders from initiating negotiations with the users.

#### **4.3.5.3. Finland**

No provisions on mediation exist in Finland. In some cases, provisions on arbitration apply, however. The rules on arbitration are applicable to the ECL provisions on photocopying (in educational activities),<sup>210</sup> reproduction and communication to the public of works made available to the public in educational activities,<sup>211</sup> and simultaneous and unaltered cable re-transmission of broadcast works.<sup>212</sup> According to the provisions on arbitration, if the parties disagree on the terms of the licence, but agree on having the issue solved by an arbitration procedure, they may refer it to a special Copyright arbitration procedure. Each party must then appoint an arbitrator for the arbitration, and those appointed invite a third arbitrator as a chairperson. The arbitrators may decide on the terms of the ECL agreements, including the level of remuneration. The parties concerned may also agree to submit the matter to arbitration to be settled in accordance with the Finnish Arbitration Act. If one of the parties refuses any form of arbitration, the matter may, upon application by a party concerned, be submitted to a court for settling. If the court has decided on the terms of the agreement but the decision is appealed, the terms enter into force until the matter is settled with finality or until a higher court otherwise rules in regard of the appeal.

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<sup>203</sup> The provisions on mediation are provided in section 52 of the DCA.

<sup>204</sup> Kyst in NIR 2009 p. 49.

<sup>205</sup> Section 30a of the DCA.

<sup>206</sup> Section 17 of the DCA.

<sup>207</sup> Section 50 second paragraph of the DCA.

<sup>208</sup> The provisions on the Copyright Tribunal are provided in section 47 of the DCA.

<sup>209</sup> This follows from section 13(2), section 14(2), section 16b(2), section 17(3), section 24a(2), section 30(6), and section 48(1) of the DCA.

<sup>210</sup> Section 13 of the FCA. The provisions on arbitration are provided in section 54 of the FCA.

<sup>211</sup> Section 14 of the FCA.

<sup>212</sup> Section 25h of the FCA.

#### **4.3.5.4. Norway**

In Norway, provisions on mediation apply to the ECL provisions on reproductions of published works in educational activities,<sup>213</sup> reproductions of published works within public institutions, business enterprises and organizations to satisfy the need for domestic use,<sup>214</sup> making available to the public and reproductions of published works in the collections of archives, libraries and museums,<sup>215</sup> fixations of a published a film or picture and of transmitted broadcasting programs for disabled people,<sup>216</sup> primary broadcasting of published literary and musical works and works of fine art which has been made public,<sup>217</sup> and communication to the public of previously broadcast television programs stored in broadcasting organizations' archives.<sup>218</sup> With the approval of the parties, a mediator may decide on the terms of the agreement<sup>219</sup>, or a dispute concerning the interpretation of an agreement may be decided in a binding manner through an arbitration process.<sup>220</sup>

The only ECL provision for which the provisions on mediation do not apply is the ECL concerning simultaneous and unaltered cable re-transmission of broadcast works (section 34 of the NCA). For this ECL, specific provisions on arbitration apply. If negotiations on an ECL agreement are refused or no agreement has been entered into within six months after the commencement of negotiations, either party may demand that permission and conditions for retransmission be determined in a binding manner through an arbitration process.<sup>221</sup>

#### **4.3.6. General conclusions on the ECL model**

The previous subsections have presented the background and basic features of the Nordic ECL model. The model is a legislative measure introduced in areas of mass-use characterized by high transaction costs, where limited or no legal use can take place on the basis of traditional individual and collective licensing. Evidently the model presupposes the existence of a representative CMO. No use can be carried out on the basis of the ECL provisions themselves – an agreement has to be reached with a representative CMO and thus, the existence of such an organization is a prerequisite for the model to work in practice. It could be argued that the introduction of an ECL provision could work as a catalyst for right holders to organize themselves and create a representative CMO, but the model itself does not pose a solution to the situation where no CMO exists.

From the description of the different features of the ECL provisions in the Nordic countries follows that all provisions have a number of feature characteristics in common, the design of which differs between the Nordic countries. The common features of the model are the following:

- The model presupposes the existence of a representative CMO with a sound culture of good governance and transparency,

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<sup>213</sup> Section 13b of the NCA.

<sup>214</sup> Section 14 of the NCA.

<sup>215</sup> Section 16a of the NCA.

<sup>216</sup> Section 17b of the NCA.

<sup>217</sup> Section 30 of the NCA.

<sup>218</sup> Section 32 of the NCA.

<sup>219</sup> The provisions on mediation are provided in section 38 of the NCA.

<sup>220</sup> The provisions on arbitration for interpretation are provided in sections 35 and 38 second paragraph of the NCA.

<sup>221</sup> The provisions on arbitration for this ECL are provided in sections 35 and 36 second paragraph of the NCA.

- The model extends a collective agreement concluded by a CMO to outsiders of the same categories of works<sup>222</sup>,
- The agreement between the CMO and the user is normally based on free negotiations,
- The model has built-in safeguards for outsiders which include the principle of equal treatment of outsiders vis-à-vis members of the CMO,
- Provided that they can prove the extent of use, outsiders have a right to individual remuneration<sup>223</sup>

In addition to these similarities, the ECL provisions differ regarding the following aspects: the need for government approval of the CMO; whether the ECL only applies to content that has been (previously) published, communicated or performed to the public; whether provisions on mediation or arbitration apply to stimulate the conclusion of ECL agreements; whether it is possible for outsiders to opt out; and whether the user must refrain from use if there is special reason to assume that the right holder would oppose the use. All this is visualized in the following table:

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<sup>222</sup> As stated in section 4.2, in most cases and where applicable the ECL provisions encompasses also related (neighbouring) rights mutatis mutandis.

<sup>223</sup> The only exception is the ECL provision for primary broadcasting in Sweden.



		Government approval of CMO	Extended effect applicable only to content that has been published, communicated or performed to the public	Mechanism on (voluntary) mediation to assist in negotiations	Mechanism on mandatory arbitration if no agreement is concluded	Possibility for outsiders to opt out	User shall refrain from use if there is special reason to assume that the right holder would oppose the use
Sweden	Primary broadcasting						
	Reprography for domestic (internal) use by public authorities, companies and other organizations						
	Reproduction in educational institutions						
	Making available and distribution of works in the collections of archives and libraries (in certain cases)						
	Cable re-transmission of broadcast works						
	Use of television programs stored in broadcasting organizations' archives						
Norway	Use in educational activities						
	Reproductions for domestic (internal) use by public authorities, companies and other organizations						
	Use in archives, libraries and museums						
	Certain forms of reproduction for the benefit of persons with functional disabilities						
	Primary broadcasting						
	Use of television programs stored in broadcasting organizations' archives						
	Cable re-transmission of broadcast works						
Finland	Photocopying (general)						
	Domestic (internal) use by public authorities, companies and other organizations						
	Use in educational activities and scientific research						
	Certain uses by archives, libraries and museums						
	Use of works of fine art in collections						
	The making of ephemeral recordings						
	Primary broadcasting						
	Use of television programs stored in broadcasting organizations' archives						
Denmark	Cable re-transmission of broadcast works						
	Reproduction within educational activities						
	Reproductions for domestic (internal) use by public authorities, companies and other organizations						
	Online distribution of articles by libraries						
	Use for the benefit of persons with visual and hearing impairments						
	Use of works of fine art in collections						
	Primary broadcasting						
	Use of television programs stored in broadcasting organizations' archives						
	Cable re-transmission of broadcast works						
	General ECL provision						

In contrast to other forms of legislative measures aimed at solving the problem of high transaction costs in mass-use situations – such as exceptions, and compulsory or statutory licences – the ECL model has the advantage of (often) being based on free negotiations and of providing the possibility to opt out. That the ECL model is based on free negotiations should in most cases be to the benefit of the outsider, as the CMO will be able to negotiate a level of remuneration that would normally be higher than a level of remuneration granted under a compulsory licence or a statutory licence. At least in theory, the principles of equal treatment and right to remuneration should provide the outsider with enough safeguards so that he does not find himself in a lesser favourable position under an ECL than he would be under a statutory or compulsory licence. Compared to a provision on mandatory collective licensing, the ECL model has the advantage of providing the possibility to opt out and to manage one's rights voluntarily on an individual or collective basis.

However, the belief that free negotiations would always lead to higher remuneration, is a presumption which does not necessarily find support in practice. As long as the right holder has not opted out of an ECL agreement, he is subject to the remuneration agreed upon by others. He is also subject to the internal remuneration scheme of the CMO over which he has no influence, as he is not deemed to be a member. Even if the rights of equal treatment and remuneration address the lack of influence on the CMO's distribution model, their application in practice is to a great extent dependent on the governance and transparency of the CMO. It may, for example, be very burdensome or impossible for an outsider to prove the extent of use of his work(s). In addition, even if he can prove such use, some of the Nordic countries do not provide for a simplified arbitration mechanism in cases where an outsider is not satisfied with the level of remuneration offered by the CMO. It seems unlikely that an ordinary author would bring his claim for remuneration to court otherwise than in extreme cases where his work has been considerably used.

The Nordic countries have a longstanding tradition of collective management, which has resulted in a well-developed structure and culture of activities of CMOs. Thus, the functioning and legitimacy of the ECL model in another context than the Nordic countries may well be dependent on the existence of a well-developed structure and culture of collective management. With the exception of provision on government approval of CMOs eligible to conclude an ECL agreement in some of the Nordic countries, these countries do not have rules on good governance and transparency of CMOs. If the ECL model is to be established in countries that currently lack a well-developed structure and culture of collective management, the model may need to be supplemented by such rules. As discussed in the next subsection, the consistency of the ECL model with international and EU norms may well presuppose that the principle of equal treatment and right to remuneration operate well in practice. Otherwise the effects of an ECL agreement may end up being less favourable to outsiders' rights than a more, in theory, far-reaching restriction on the exclusive rights, such as a compulsory or statutory licence.

#### **4.4 ECL provisions in relation to international and EU 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.<sup>224</sup> The following sections will discuss these challenges, e.g. as they have been put forward in the legal literature. To make the assessment more comprehensible, it is divided into challenges raised in connection with international copyright norms, which are dealt with in subsection 4.4.1, and challenges raised in connection with EU norms, which are covered by subsection 4.4.2.

##### **4.4.1. ECL provisions in relation to international copyright norms**

In the following pages, the ECL model will be examined in the light of the principle of national treatment in article 5(1) of the Berne Convention, of the prohibition on formalities in article 5(2) of the Berne Convention, and the three-step test as laid down in article 9(2) of the Berne Convention and article 13 of the TRIPs Agreement.

###### *4.4.1.1. Consistency with 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

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<sup>224</sup> Rognstad in NIR 2004 p. 151, and Riis & Schovsbo in Columbia Journal of Law and the Arts 2010, p. 481.

or may hereafter grant to their nationals.”<sup>225</sup> 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.<sup>226</sup>

The ECL model is designed to deal with the problem of risk of unfavorable treatment of non-members, including foreign non-members, through the 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 by 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.<sup>227</sup>

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.<sup>228</sup> 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).<sup>229</sup> It is however not self-evident that this practice also applies to use carried out on the basis of an ECL agreement, as ECL schemes are not used outside the Nordic countries.<sup>230</sup>

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.

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<sup>225</sup> 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.

<sup>226</sup> See e.g. Karnell in *Columbia Journal of Law and the Arts* 1985, p. 75 f. and Karnell in *EIPR* 1991, p. 430 f.

<sup>227</sup> Riis & Schovsbo in *Columbia Journal of Law and the Arts* 2010, p. 491 and Commission Staff Working Paper, Impact Assessment on the cross-border online access to orphan work accompanying the Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of orphan works, COM(2011) 289 final, p. 28.

<sup>228</sup> See e.g. Melichar in *IIC* 1991 p. 53 ff.

<sup>229</sup> See e.g. Matulionytė in the *Journal of World Intellectual Property* (2009) p. 481, Melichar in *IIC* 1991 p. 60. and Dietz, “Cultural Functions of Collecting Societies”, available at

[http://www.ip.mpg.de/shared/data/pdf/2\\_dietz\\_-\\_cultural\\_functions.pdf](http://www.ip.mpg.de/shared/data/pdf/2_dietz_-_cultural_functions.pdf)

<sup>230</sup> Riis & Schovsbo in *Columbia Journal of Law and the Arts* 2010, p. 492.

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.

#### 4.4.1.2. *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.<sup>231</sup>

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.<sup>232</sup>

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”.<sup>233</sup> 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).<sup>234</sup>

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).<sup>235</sup> 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.

<sup>231</sup> See e.g. Riis & Schovsbo in *Columbia Journal of Law and the Arts* 2010, p. 483 with footnote 49.

<sup>232</sup> Ricketson & Ginsburg, *International copyright and neighbouring rights – the Berne Convention and beyond* (2006), section 6.104.

<sup>233</sup> See e.g. Riis & Schovsbo in *Columbia Journal of Law and the Arts*, Vol. 33, Issue IV, p. 483 f.

<sup>234</sup> For a thorough interpretation of the prohibitions on formalities in relation to the “opt out” requirement in some ECL provisions, see van Gompel, *Formalities in Copyright Law* (2011), p. 188 ff.

<sup>235</sup> Riis & Schovsbo in *Columbia Journal of Law and the Arts* 2010, p. 484.

#### 4.4.1.3. *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.<sup>236</sup> 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.<sup>237</sup>

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.<sup>238</sup> 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.<sup>239</sup> 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.<sup>240</sup>

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 collective 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.<sup>241</sup> 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

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<sup>236</sup> See e.g. Ricketson & Ginsburg, *International copyright and neighbouring rights – the Berne Convention and beyond* (2006), section 9A.01 et seq and von Lewinski, *International Copyright law and policy*, section 5.110 et seq.

<sup>237</sup> See e.g. Swedish government bill (proposition) 1992/93:214, p. 43 and Norwegian Government bill (proposition) 2004-05:46, p. 46 ff.

<sup>238</sup> At EU level it is enshrined in article 5(5) of Directive 2001/29/EC.

<sup>239</sup> Senftleben, *Copyright limitations and the three-step test* (2004), p. 115.

<sup>240</sup> 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.

<sup>241</sup> Guibault, *Copyright limitations and contracts: An analysis of the contractual overridability of limitations on copyright* (2002), p. 22 ff.

reached.<sup>242</sup> 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.<sup>243</sup> 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.<sup>244</sup>

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.<sup>245</sup>

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 be subject to international norms governing the introduction of limitations on exclusive rights.<sup>246</sup>

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

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<sup>242</sup> Ibid, p. 25 f.

<sup>243</sup> See e.g. von Lewinski in e-Copyright Bulletin, January-March 2004 and Geiger in e-Copyright Bulletin January-March 2007.

<sup>244</sup> Guibault, Copyright limitations and contracts: An analysis of the contractual overridability of limitations on copyright (2002), p. 26 f. and Hugenholtz & Okediji, “Conceiving an international instrument on limitations and exceptions to copyright” (2008), available at [http://www.ivir.nl/publications/hugenholtz/limitations\\_exceptions\\_copyright.pdf](http://www.ivir.nl/publications/hugenholtz/limitations_exceptions_copyright.pdf) and Riis & Schovsbo in Columbia Journal of Law and the Arts 2010, p. 485.

<sup>245</sup> See e.g. Ficsor in Collective management of copyright and related rights (ed. Gervais, 2010), p. 44 ff.

<sup>246</sup> Karnell in NIR 1991 p. 18, Riis & Schovsbo in Columbia Journal of Law and the Arts 2010, p. 485 f.

presumption of such consent – in itself is against the principle of exclusive rights.<sup>247</sup> 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<sup>248</sup> and scholars<sup>249</sup>.

Against this background, we submit that ECL provisions may be prescribed only where the relevant international norms governing the adoption of limitations so allow.<sup>250</sup> 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.

#### *The ECL model and the three-step test*

The interpretation of the three-step test is currently much discussed in the legal literature.<sup>251</sup> 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.<sup>252</sup>

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.<sup>253</sup> Shapeless provisions exempting a wide variety of uses would therefore not be permitted.<sup>254</sup>

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.<sup>255</sup> It has, however, been argued in the legal literature that the different steps of the three-step test should not be applied to the

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<sup>247</sup> Rognstad in NIR 2004 p. 154 and Rydning, Extended Collective licences: The compatibility of the Nordic solution with the international conventions and EC law (2010), p. 24 f.

<sup>248</sup> 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.

<sup>249</sup> Karnell in Columbia Journal of Law and the Arts 1985, p. 75, Karnell in EIPR 1991 p. 434, Christiansen in EIPR 1991 p. 349, Rognstad in NIR 2004, p. 154 ff. and Rydning, Extended Collective licences: The compatibility of the Nordic solution with the international conventions and EC law (2010), p. 22 ff. Cf. Schønning, Ophavsretsloven med kommentarer (2008), p. 452 f.

<sup>250</sup> Cf. Rognstad, in NIR 2004 p. 154, Ficsor in Collective management of copyright and related rights (ed. Gervais, 2010), p. 62, and Rydning, Extended Collective licences: The compatibility of the Nordic solution with the international conventions and EC law (2010).

<sup>251</sup> See e.g. Senftleben in JIPITEC 2010, p. 67 ff.; Hilty et al in IIC 2008 s. 707 ff.; and Kur, "Of oceans, islands, and inland water – how much room for exceptions and limitations under the three-step test", Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 08-04.

<sup>252</sup> Panel Report, United States – Section 110(5) of the US Copyright Act, WT/DS160/R (June 15, 2000).

<sup>253</sup> Panel Report, United States – Section 110(5) of the US Copyright Act, WT/DS160/R (June 15, 2000), sections 6.108, 6.109 and 6.112.

<sup>254</sup> Ricketson & Ginsburg, International copyright and neighbouring rights – the Berne Convention and beyond (2006), section 13.11; Senftleben, Copyright limitations and the three-step test (2004), p. 133 ff.

<sup>255</sup> Riis & Schovsbo in Columbia Journal of Law and the Arts 2010, p. 487 ff.

ECL provision as such, but rather to the contents and effects of the ECL agreements.<sup>256</sup> 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.<sup>257</sup> 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.<sup>258</sup> 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”.<sup>259</sup> 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.<sup>260</sup> 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”.<sup>261</sup>

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.<sup>262</sup> It has, therefore, been submitted that the design of the ECL model to some extent safeguards

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<sup>256</sup> Rydning, *Extended Collective licences: The compatibility of the Nordic solution with the international conventions and EC law* (2010), p. 49.

<sup>257</sup> Riis & Schovsbo in *Columbia Journal of Law and the Arts* 2010, p. 485 and 488 f..

<sup>258</sup> Rydning, *Extended Collective licences: The compatibility of the Nordic solution with the international conventions and EC law* (2010), p. 51.

<sup>259</sup> Riis & Schovsbo in *Columbia Journal of Law and the Arts* 2010, p. 488 f. and Rydning, *Extended Collective licences: The compatibility of the Nordic solution with the international conventions and EC law* (2010), p. 50 ff.

<sup>260</sup> 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.

<sup>261</sup> Riis & Schovsbo in *Columbia Journal of Law and the Arts* 2010, p. 487 f. and Rydning, *Extended Collective licences: The compatibility of the Nordic solution with the international conventions and EC law* (2010), p. 61.

<sup>262</sup> Rydning, *Extended Collective licences: The compatibility of the Nordic solution with the international conventions and EC law* (2010), p. 61 f.



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.<sup>263</sup> However, the ECL model provides no guarantee that the CMO will not conclude ECL agreements exceeding the limits of the second step.<sup>264</sup> 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.

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.<sup>265</sup> 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.<sup>266</sup> 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 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

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<sup>263</sup> Rydning, *Extended Collective licences: The compatibility of the Nordic solution with the international conventions and EC law* (2010), p. 62 ff. and Riis & Schovsbo in *Columbia Journal of Law and the Arts* 2010, p. 487 f.

<sup>264</sup> Rydning, *Extended Collective licences: The compatibility of the Nordic solution with the international conventions and EC law* (2010), p. 64.

<sup>265</sup> Panel Report, *United States – Section 110(5) of the US Copyright Act*, WT/DS160/R (June 15, 2000), sections 6.227.

<sup>266</sup> 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. That the intensity of the prejudice caused by a limitation can be reduced by payment of equitable remuneration is supported by section 85 in the Report on the Work of the Main Committee I, *Records of the Intellectual Property Conference of Stockholm 1967*, p. 1145 f. (Geneva, 1971): “If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies are made, photocopying may be permitted without payment, particularly for individual or scientific use.”

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.<sup>267</sup>

#### **4.4.2. 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. The first subsection covers 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. The following subsection deals with the argument that the ECL provisions, by favoring national CMOs, are in violation of the EU principle on non-discrimination. The last subsection covers the issue of whether the systems of government approval in some of the Nordic countries are coherent with Directive 2006/123/EC on services.

##### *4.4.2.1. 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 our conclusion 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.<sup>268</sup> However, the better view is probably that ECL provisions are outside the scope of the closed list of limitations in article 5 only to the extent that they are to be characterized as “arrangements concerning the management of rights”. 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.<sup>269</sup>

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<sup>267</sup> Rydning, *Extended Collective licences: The compatibility of the Nordic solution with the international conventions and EC law* (2010), p. 84 and Riis & Schovsbo in *Columbia Journal of Law and the Arts* 2010, p. 485 and 488.

<sup>268</sup> See e.g. Koskinen-Olsson in *Collective Management of Copyright and Related Rights* (ed. Gervais, 2010), p. 303.

<sup>269</sup> 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., Riis & Schovsbo in *Columbia Journal of Law and the Arts* 2010, p. 482, Rydning, *Extended Collective licences: The compatibility of the Nordic solution with the international conventions and EC law* (2010), p. 22 ff., Ficsor in *Collective*

### *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<sup>270</sup> 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.<sup>271</sup> 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.”

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.<sup>272</sup> 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.<sup>273</sup>

The “general features” referred to in the previous section 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

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Management of Copyright and Related Rights (ed. Gervais, 2006), p. 49, Swedish Government bill 2004/05:110 p. 245, 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., Danish Official Government Reports 1981:912, p. 43 and Schönning, *Ophavsretsloven med kommentarer* (2008), p. 452 f.

<sup>270</sup> OJ L 248, 6.10.1993, p. 15–21.

<sup>271</sup> 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).

<sup>272</sup> See e.g. Case C-306/05 SGAE [2006] ECR I-11519, p. 31.

<sup>273</sup> Cf. Karnell in *Essays in honour of George Koumantis* (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.

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.

#### *Provision on mandatory collective licensing in Directive 93/83/EEC*

Article 9 of Directive 93/83/EEC provides for a provision on mandatory collective management for cable re-transmission rights.<sup>274</sup> According to this provision, in situations where a right holder has not transferred the management of his rights to a collecting society, the collecting society which manages rights of the same category “shall be deemed to be mandated to manage his rights”. Where more than one collecting society manages rights of that category, the right holder shall be free to choose which of those collecting societies is deemed to be mandated to manage his rights. It also follows from the article that a right holder shall have “the same rights and obligations resulting from the agreement between the cable operator and the collecting society” vis-à-vis the members of the CMO. In addition, the right holder shall be able to claim those rights within a period, to be decided at national level, which shall not be shorter than three years from the date of the cable retransmission.

Similarly to the ECL on satellite broadcasting, the provision on mandatory collective management is based on free negotiations. In addition, it has many characteristics similar to those which the Nordic countries have labelled “extended collective licence”, such as the requirement that the organization be deemed to manage also outsiders’ rights, the principle of equal treatment, and the right to claim individual remuneration within a certain period of time. However, as the notion “mandatory” implies, there is no possibility to opt out. The reason for the rejection of the possibility to opt out is based on the legal uncertainty of cable operators as regards whether they have actually acquired all the rights necessary for a cable re-transmission.<sup>275</sup> The provision thus aims to “ensure that the smooth operation of contractual arrangements is not called into question by the intervention of outsiders holding rights in individual parts of the programme.”<sup>276</sup> The mandatory nature is thus driven by other reasons than the transaction costs argument behind the ECL provisions in the Nordic countries.

#### *4.4.2.2. ECL provisions vis-à-vis the EU principle of non-discrimination*

Pursuant to similar arguments as those put forward regarding the conformity of the ECL model with the principle of national treatment in the Berne convention, it has been suggested that the model may be in breach of the principle of equal treatment as enshrined in article 18 TFEU (ex Article 12 TEC).<sup>277</sup> The principle of equal treatment holds that “Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of

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<sup>274</sup> Article 1(3) of Directive 93/83/EEC defines “cable retransmission” as “the simultaneous, unaltered and unabridged retransmission by a cable or microwave system for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public.”

<sup>275</sup> Recital 10 to Directive 93/83/EEC.

<sup>276</sup> Recital 28 to Directive 93/83/EEC.

<sup>277</sup> Riis & Schovsbo in Columbia Journal of Law and the Arts 2010, p. 490 ff. On the general issue of the coherence of deductions for social and cultural purposes with the principle of non-discrimination, see e.g. Matulionytė in the Journal of World Intellectual Property (2009) p. 481 f.

nationality shall be prohibited.” The ECJ has applied the principle of non-discrimination in copyright cases rather strictly.<sup>278</sup> Discrimination between Member States’ nationals regarding the distribution of the deductions from collected copyright royalties would not be allowed. If the non-discrimination principle is strictly applied, it then means that the deductions by a particular society should be distributed (through cultural or social establishments) equitably to all authors around the EU.<sup>279</sup>

In theory the principle of equal treatment in the ECL provisions would guarantee against any discrimination by the eligible CMO based on nationality. The Nordic countries have amended or are in the process of amending their ECL provision to make them more “neutral” from a non-discrimination perspective as regards the eligible CMO. However, the provision itself does not guarantee that nationals of different Member States are treated equally by the CMO. As mentioned in section 4.3.3, ECL provisions and related ECL agreements create potential problems for foreign rights holders, especially as regards the possibility to receive remuneration and information about the use carried out. Therefore, it is worth reiterating that the legitimacy of the ECL model presupposes a sound culture of good governance and transparency on the part of the CMO.

#### 4.4.2.3. *Government approval in relation to Directive 2006/123/EC*

Directive 2006/123/EC on services in the internal market<sup>280</sup> seeks to remove legal and administrative barriers to trade in the services sector in the EU.<sup>281</sup> As described in section 4.3.1 above, however, the CMOs of Norway, Denmark and Finland are subject to a process of approval in order to be declared eligible to conclude ECL agreements on the basis of an ECL provision. The question arises as to whether such approval scheme falls within the scope of the Services Directive and, if so, whether it is consistent with the Directive, especially if only one CMO is eligible per area of use.

Following the majority opinion, the activities of CMOs most certainly fall within the scope of the Directive, which holds that it is applicable to “services supplied by providers”.<sup>282</sup> An approval scheme where only one CMO can be approved to administer an ECL agreement in a certain field seems at first blush not to be consistent with the freedom to provide services, pursuant to article 16 of the Directive. According to this provision, Member States shall “respect the right of providers to provide services in a Member State other than that in which they are established.” According to the same article, Member States are not permitted to restrict the exercise of a service activity in their territory subject to compliance with any requirements which do not respect the principles of non-discrimination, necessity and proportionality. The principle of “necessity” holds that the conditions “must be justified for reasons of public policy, public security, public health or the protection of the environment.”

The existing national approval schemes have been adopted to ensure efficient copyright clearance mechanism, irrespective of the actual efficiency of such clearance mechanisms. They are, however, not justified for reasons of public policy, public security, public health or the protection of the

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<sup>278</sup> See e.g. joined cases C-92/92 and C-326/92 *Phil Collins v. Imtrat Handels and Patricia Im v. EMI*, ECR 1993 I-5145.

<sup>279</sup> *Matulionytė* in the *Journal of World Intellectual Property* (2009) p. 481 f.

<sup>280</sup> Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market OJ L 376, 27.12.2006, p. 36–68.

<sup>281</sup> Article 1(1) of the Directive holds that “This Directive establishes general provisions facilitating the exercise of the freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services.” See also recitals 1, 5–7, 12 and 30 to the Directive.

<sup>282</sup> See e.g. *Riis* in *JiPLP* 2011, p. 482 ff. According to article 4(1) of the Directive, “service” refers to “any self-employed economic activity, normally provided for remuneration”. Article 4(2) stipulates that “provider” means “any natural person who is a national of a Member State, or any legal person as referred to in Article 48 of the Treaty and established in a Member State, who offers or provides a service.”

environment.<sup>283</sup> Article 17(11) contains an exception to this rule according to which article 16 is not applicable to e.g. copyright and neighbouring rights. From that provision one could assume that article 16 does not affect the activities of the CMOs, but the issue is as yet unsettled.<sup>284</sup> According to the Commission the derogation in article 17(11) for intellectual property rights covers the rights as such (existence of the right, scope and exceptions, duration, etc.), and not services linked to the management of such rights, such as those provided by collecting societies or patent agents.<sup>285</sup> Hence, the Commission holds that article 16 applies to CMOs. That interpretation has been disputed in various countries, including Denmark and Sweden. Against the Commission's view it has been held that the exception in article 17(11) can only apply to the management of copyright and not the existence of the right, scope and exceptions, duration etc, because these latter features are not services and thus cannot be exempted from a provision on services.<sup>286</sup> According to this view, the exception in article 17(11) refers to aspects of copyright and neighbouring rights that are services, such as the activities of CMOs, and as a result, the "approval scheme" in the Nordic countries would not be in violation of article 16 of Directive 2006/123/EC. Considering the legal uncertainty currently prevailing regarding the scope of the exception in article 17(11), only judicial interpretation would at this point settle the issue definitively.

#### **4.5 The ECL model applied to Europeana content providers**

Tailoring the ECL model to the needs of Europeana content providers would almost by definition include the general features of the ECL model that are common to all ECL provisions and that form the core of the ECL model. These are the extension of a collective agreement concluded between a CMO and a user to outsiders of the same categories of works, and the model's built-in safeguards for outsiders in the form of the principle of equal treatment of outsiders and the right to individual remuneration under certain circumstances. However, defining the appropriate contours of an ECL model for Europeana demands that greater attention be put on the features of the ECL model that vary between the different ECL provisions, namely the eligible users and the scope of the ECL provision and related ECL agreements. The following pages focus on the varying features of the ECL model, and assess how these features would best be designed to address the needs of Europeana content providers. Finally, some additional measures may be necessary for the proper functioning of the model.

##### **4.5.1. Eligible users: Europeana content providers**

The beneficiaries of the limitations contained in articles 5(2)(c) and 5(3)(n) of Directive 2001/29/EC could serve as a model for the elaboration of an ECL provision on digitisation and online dissemination of Europe's cultural heritage. The criterion according to which the institutions must be of a non-profit nature and that any permitted acts be related to items in the institutions' own collections could also constitute the basis for eligible users of an ECL provision for Europeana content providers. By this, most of the Europeana content providers would fall within the scope of the eligible users of the ECL provision. However, as pointed out in section 3.1.1, it is uncertain whether the beneficiaries of the said limitations include the archives of other cultural institutions, such as broadcasters' archives and film heritage institutions.<sup>287</sup> The scope of designated users of an ECL

<sup>283</sup> For a discussion, see e.g. Riis & Schovsbo in *Columbia Journal of Law and the Arts* 2010, p. 493.

<sup>284</sup> See e.g. Riis & Schovsbo in *Columbia Journal of Law and the Arts* 2010, p. 494.

<sup>285</sup> Handbook on the implementation of the Services Directive, published by the European Commission 2007 (although not a binding document). Available at [http://ec.europa.eu/internal\\_market/services/docs/services-dir/guides/handbook\\_en.pdf](http://ec.europa.eu/internal_market/services/docs/services-dir/guides/handbook_en.pdf)

<sup>286</sup> Riis & Schovsbo in *Columbia Journal of Law and the Arts* 2010, p. 494.

<sup>287</sup> A list of the contributors the Europeana is accessible at <http://www.europeana.eu/portal/partners.html>

provision for the benefit of Europeana content providers should therefore be extended to also include the archives held by broadcasters' and film heritage institutions.

#### **4.5.2. Scope of ECL provision for the benefit of Europeana content providers**

The scope of the limitations in articles 5(2)(c) and 5(3)(n) of Directive 2001/29/EC are generally too narrow to meet the demands of digitisation and dissemination of whole or large parts of the collections held by Europeana content providers. Existing ECL provisions for the benefit of cultural institutions in Norway and Finland can provide insight for the design of an ECL provision for the benefit of these providers. According to these ECL provisions certain archives, libraries and museums may make copies of works in their collections and make such works available to the public, provided that an agreement has been concluded with an eligible CMO.<sup>288</sup>

In comparison with the limitation in article 5(2)(c) of Directive 2001/29/EC, the Norwegian and Finnish ECL provisions are not restricted to "specific acts" nor must the reproduction be devoid of any "direct or indirect economic or commercial advantage". In comparison with the limitation in article 5(3)(n), there are no constraints specifying that the communication must be directed towards individual users, that the purpose must be for private study or research, that the content can only be accessed at terminals at the premises of the institution, nor that the material is "not subject to purchase or licensing terms". Hence, the proposed ECL provision provides the cultural institutions and eligible CMOs with a possibility to conclude ECL agreements with far broader scope than the permitted limitations in articles 5(2)(c) and 5(3)(n). For example, the parties could agree on mass digitisation and making available of items in their collections online directly to individual users, e.g. in their homes. Thus, at national level these ECL provisions seem to fulfil many of the objectives behind the establishment of Europeana.

One example of the scope of use defined in an ECL agreement based on an ECL provision for the benefit of cultural institutions is the scope of use regulated in the ECL agreement between the Norwegian CMO Kopinor and the National Library of Norway, as part of the Bokhylla ("Bookshelf") project.<sup>289</sup> According to the agreement the National Library of Norway is given the right to make available published copyright-protected material. The material is to be made available as individual pages in a digital format to be viewed on a computer screen. The users will be able to search in the text and search for covers, title pages and tables of contents, as well as to browse through individual pages. However, no arrangements are to be made for downloading or printing the material until the copyright-protected period has expired.

The Bookshelf contract is a practical example of the fact that the scope of use provided in an ECL agreement is often narrower than the "outer boundaries" of the ECL provision. As has been stated elsewhere in this report, the fact that the ECL model is based on free negotiations by a representative CMO and a user will act as a safeguard also for outsiders' rights; the Nordic legislators have put their trust in the activities of the CMOs. Outsiders' interests are also safeguarded by the ECL model's rules on right to remuneration and equal treatment.<sup>290</sup> To further safeguard the outsiders' interests, there may be a need to supplement any new ECL provision with common rules on good governance and transparency. However, in addition to these safeguards, there may be a need to safeguard outsider's rights even further. To eliminate the risk that a national CMO and a cultural institution act

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<sup>288</sup> A similar ECL provision has recently been proposed by a government inquiry in Sweden. See Swedish Government Official Reports (SOU) 2010:24, p. 247 ff. The report (in Swedish, but with a summary in English) is available at <http://www.sweden.gov.se/content/1/c6/14/33/63/a1746577.pdf>

<sup>289</sup> The agreement is available at [http://www.nb.no/pressebilder/Contract\\_NationalLibraryandKopinor.pdf](http://www.nb.no/pressebilder/Contract_NationalLibraryandKopinor.pdf)

<sup>290</sup> See section 4.3.3.

opportunistically and conclude overly broad ECL agreements, the scope of the ECL provision could be restricted to content that is not contemporarily commercially available (“cut-off date”). In this way, any extension effect of a collective agreement between a CMO and a Europeana content provider would only relate to content that is “not contemporarily commercially available”. The precise legal definition of this notion would have to be decided by the lawmaker in consultation with the representative CMOs and all stakeholders.<sup>291</sup> A suggestion, designed to provide legal certainty to the content providers, would be to include in the ECL provision a rule according to which content created before a certain date is presumed not to be commercially available and therefore encompassed by the ECL provision unless the right holder chooses to opt out.

#### **4.5.3. Other general features of the ECL model**

Other general features of the ECL model that deserve examination in the context of the Europeana project are: the need for government approval of the CMO; whether the ECL only applies to content that has been (previously) published, communicated or performed to the public; whether provisions on mediation or arbitration apply to stimulate the conclusion of ECL agreements; whether it is possible for outsiders to opt out; and whether the user must refrain from use if there is special reason to assume that the right holder would oppose the use.

##### *Government approval of eligible CMO*

The fact that the ECL model is functioning well in Sweden without government approval, proves that the model can work even without such approval. Thus, it seems too far-reaching to supplement any EU provision on ECL for the benefit of Europeana content providers with a mandatory provision prescribing government approval. Rather, it should be a matter for national legislation to decide whether to have an approval scheme or not. To reduce the transaction costs inherent in a system where more than one CMO can be eligible, it should be an obligation on the CMOs to cooperate, as in the Finnish Copyright Act.

##### *Application of ECL provision to unpublished content*

It is not uncommon to note that parts of the collections held by Europeana content providers contain works that have not previously been published. This is especially true for archives whose main aim is to store and preserve items, including private items such as private letters or photographs. The question therefore arises whether it should be permissible for a Europeana content provider to digitize and make available such unpublished content online. From the perspective of the Europeana content providers, it can be very difficult to assess whether a specific item has been published before. In addition such an assessment – for each and every item – would give rise to astronomical transaction costs for the content providers. The need for such an assessment would run counter to the basic idea behind a solution based on collective rather than individual rights management as a mechanism to lower the transaction costs for the content providers. The right holder’s interest of not having his unpublished content digitized or made available online, must be solved by the possibility for the right holder to opt out and a feature giving priority to existing agreements over any ECL agreement. Thus, 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.

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<sup>291</sup> Due to decreased costs for inventory and distribution, doing business over the Internet is said to be characterised by a so-called “long tail” distribution of demand, i.e. selling a large number of unique items in relatively small quantities rather than selling few popular items in large quantities. See e.g. Anderson, *The Long Tail: Why the Future of Business Is Selling Less of More* (2006). The presence of “long tail” distribution of demand for cultural content over the Internet may pose a challenge for establishing a legal definition of “not contemporarily commercially available.”



#### *Provisions on mediation or arbitration*

To stimulate the conclusion of ECL agreements, the Nordic legislators have supplemented the ECL provisions with provisions on arbitration and mediation. A mandatory arbitration mechanism which takes away the possibility to refuse a licence would however make an ECL provision similar to a compulsory licence (managed collectively), which is generally considered to be less favourable to right holders than an ECL provision and related agreement. The creation of an arbitration mechanism must therefore be justified by the level of “necessity” of the use, which in the context of Europeana, is not entirely clear. By contrast, rules on mediation can stimulate the coming into being of agreements. Therefore an ECL provision for the benefit of cultural institutions could be supplemented by rules on mediation, but probably not arbitration.

As regards the relationship between the outsider and the CMO, not all ECL provisions in the Nordic countries include a feature conferring outsiders the right to refer disagreements concerning the level of remuneration (or other benefits) to an arbitration mechanism. It would be in the outsider’s interest to have such a right. This would presumably have a positive effect on the contents of the agreements concluded between a CMO and a user, for a CMO would be reluctant to agree to levels of remuneration that conflict with the outsiders’ interests, if the latter have a right to submit a dispute to an arbitration mechanism.

#### *Possibility to opt out*

The absence of a right to opt out is justified only in situations where there is a risk for so-called black-outs, such as the case is for cable retransmission. This is not the case as regards the activities carried out by Europeana content providers. In addition, the possibility to opt out would increase the likelihood that an ECL provision and related ECL agreement pass the three-step test much easier than if the feature is left out. Against this background, there seem to be several arguments in favour and no strong argument against including the possibility to opt out in an ECL provision for the benefit of Europeana content providers.

#### *Refrain from use in certain cases*

The ECL provision for public service broadcasting organizations in the Nordic countries includes a feature according to which the broadcasters must refrain from use if there is special reason to assume that the right holder would oppose the use. This feature is included in very few of the other ECL provisions in the Nordic countries. Such a feature would, if mandatory, give rise to legal uncertainty for Europeana content providers, because they would need to assess the possibility that owners might “oppose the use of their work” on a case-by-case basis, before proceeding with the digitisation and making available. Moreover since the right holder’s interest of not having his work digitized or made available online due to personal reasons could be solved by the possibility to opt out, an obligation to refrain from use might not be justified. Nevertheless, the possibility for a provider to refrain from use should there be a special reason to assume that the right holder would oppose the use of his work may be a welcome feature, especially in view of the presence of sensitive material in the collections of some of the Europeana content providers (war-time or religious material etc.).

#### **4.5.4. Additional provisions**

Apart from the current features of the ECL model, an ECL provision for the benefit of Europeana content providers could be supplemented with additional features, including: the obligatory publication of ECL agreements; the priority of existing agreements; and the provisions on good governance and transparency.

#### *Obligatory publication of ECL agreements*

It is currently rather difficult for outsiders to obtain information on the extent of use of their works in the context of an ECL agreement. This is especially problematic for foreign right holders and undermines the legitimacy of the model, as well as its consistency with international copyright norms. To make it easier for outsiders to obtain information about the use and claim remuneration, an ECL provision designed for Europeana content providers should include a feature according to which the eligible CMOs must supply right holders adequate information about the use carried out on the basis of an ECL agreement.

#### *Priority of existing agreements*

None of the ECL provisions in the Nordic countries includes a feature stating that existing or future agreements between a right holder and the user have priority over the ECL agreement. In the interest of legal certainty and in line with the principle that an ECL mechanism should be introduced only in areas where ordinary individual and collective management is deemed impossible, an ECL provision for the benefit of Europeana content providers should specify that other agreements receive priority over an ECL agreement, be they individual or collective. Such a feature would ensure that content which has been deposited in a cultural institution on the basis of certain conditions (explicit or implied) are not superseded by an ECL agreement. This could, for example, concern content of a personal nature, such as private letters, personal photos, diaries and similar content deposited in a cultural institution on condition that it only be made available to individuals for research purposes.

#### *Provisions on transparency and good governance of CMOs*

The functioning of the ECL model and its consistency with international and EU norms are dependent on the manner in which the eligible CMOs carry out their activities. Should the model be introduced in other Member States, there might be a need to supplement the model with provisions on good governance and transparency. As will be shown in the following chapter, the need for supplementary provisions in this sense becomes even more acute in cross-border situations where a “national” CMO can approve dissemination of content also to “foreign” territories.

## 5. Cross-border dissemination

One of the main obstacles to the ambition of making Europe's cultural heritage accessible to the greatest number of people without distinction or barrier<sup>292</sup> is the difficulty of clearing rights for the cross-border dissemination of items held in the collections of the cultural institutions. Cross-border rights clearance is rendered complex for a number of reasons but the main problem lies in the territorial nature of copyright in the light of the emerging European market for copyright-based services.<sup>293</sup> The exclusivity that a copyright confers upon its owner is strictly limited to the territorial boundaries of the Member State where the right is granted. Because of the application of the principle of territoriality, permission for use must therefore be obtained for each Member State. The harmonisation of copyright in the EU has so far done relatively little to lessen the problems created by the principle of territoriality. A solution must now be put forward, either on a legislative or a contractual basis. A first radical answer to the problem of territoriality in European copyright law would be to replace national copyright norms by a truly uniform European copyright law. Right owners would in this case no longer be able to partition the market along the territorial boundaries of the Member States on the basis of national copyright law. Another drastic option would be to create one pan-European 'one-stop-shop', where all rights would be cleared at once through one CMO for the entirety of the European market. Both scenarios are a bridge too far, however. Although the political and scholarly debates devote increasing attention to the issue, the hurdles towards realising either one solution are still too high to consider them for solving the immediate problems of cross-border licensing of content through the Europeana portal. For this reason, they are not discussed further in this report.

The following pages make a first enquiry into the meanders of finding suitable cross-border solutions for the dissemination of content through the Europeana portal. Two key solutions to the cross-border challenges are examined below: 1) creating a "country of transmission rule"; and 2) promoting multi-territorial (collective) licensing. Note that both proposed solutions are discussed globally and may have different outcomes depending on whether a uniform rights clearance system is introduced at the European level or whether Member States have some leeway in adopting a solution for the clearance of rights for the mass-digitisation and dissemination of works by cultural institutions. This report does not take a position on the desirability of either course of action. Further research will have to be carried out in the future to take account of the fact that if Member States adopt different solutions, this is bound to have an effect on the cross-border situation, e.g. because not every right is managed by a CMO in every country.

### 5.1. Country of transmission rule

One way to circumvent the need to clear rights in every Member State would be to designate one single territory where the rights should be cleared with effect in the entire EU territory. This model is not without precedent in European law, for Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission did just that in the past. The following pages first present the model created by Directive 93/83/EC in relation to satellite broadcasting, before discussing its possible application to the dissemination of content through the Europeana portal.

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<sup>292</sup> Comité des Sages, p. 21.

<sup>293</sup> Hugenholtz, Copyright without Frontiers, p. 25.

### 5.1.1. The satellite broadcasting model

Apart from the codification of the rule of exhaustion applicable to physical goods<sup>294</sup>, the only structural legislative solution introduced by the EU institutions to the problem of territoriality of copyright is the principle of country of transmission in article 1(2)(b) of Directive 93/83/EEC, on satellite broadcasting. According to this principle, sometimes also referred to as “home country rule”<sup>295</sup>, “principle of country of origin”<sup>296</sup> or “emission theory”<sup>297</sup>, a satellite broadcast will amount to communication to the public only in the country of origin of the signal, i.e. where the “injection” (“start of the uninterrupted chain”) of the program-carrying signal can be localized.<sup>298</sup> Thus determining the country of transmission does neither depend on the country from which the programme-carrying signals are transmitted to the satellite nor on the country in which the broadcasting organization has its place of establishment.

Similar to the principle of country of reception described in section 3.2, the principle of country of transmission is a rule of substantive copyright law – it defines where the act of satellite broadcasting takes place – rather than a rule on private international law.<sup>299</sup> It follows that for satellite broadcasting a licence for the broadcast by satellite is needed only in the country of transmission. Likewise, the legal remedies are also to be determined by the law of the country of transmission.<sup>300</sup>

The principle of country of transmission was introduced for satellite broadcasting as it was deemed more appropriate than a country of reception principle in view of the free movement of satellite broadcasting services. The principle of country of transmission attempts to circumvent national barriers within the EU and thereby prevent the European satellite market from being fragmented.<sup>301</sup> In

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<sup>294</sup> Article 4(2) of Directive 2001/729/EC holds that “[t]he distribution right shall not be exhausted within the community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent.”

<sup>295</sup> See e.g. van Eechoud et al, *Harmonizing European Copyright Law*, p. 315.

<sup>296</sup> See e.g. recital 18 to Directive 93/83/EEC and Commission staff working document: Document accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions on Creative Content Online in the Single Market, SEC(2007) 1710, p. 26.

<sup>297</sup> See e.g. Torremans in RIDA 2001, p. 61.

<sup>298</sup> According to article 1(2)(a) of Directive 93/83/EEC, the act of communication by satellite occurs “solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.” The act of “communication to the public by satellite” is defined in article 1(2)(a) of the same Directive as “the act of introducing, under the control and responsibility of the broadcasting organization, the programme-carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth.”

<sup>299</sup> It follows that even if a national conflict of laws rule in an EEA country declared the copyright law of one or more of the reception states applicable, that state’s copyright law would not be infringed by the mere fact that reception of satellite signals took place in this state. See e.g. Torremans in RIDA 2001, p. 63, Reflection document of DG INFSO and DG MARKT. Creative content in a European Digital single Market: Challenges for the Future, p. 12, Hugenholtz in IRIS plus: Convergence, copyrights and Transfrontier Television (2009), p. 8, Hugenholtz in *Concise European Copyright Law* (ed. Dreier & Hugenholtz) p. 272, Dreier in *The Future of Copyright in a Digital Environment* (ed. Hugenholtz), p. 61 and Walter & von Lewinski, *European Copyright Law – A Commentary*, section 7.1.7. That the principle of country of transmission is a substantive copyright rule (and not a rule on private international law) is however often misunderstood or overlooked. See e.g. Report from the Commission on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, COM/2002/0430 final, p. 6.

<sup>300</sup> Walter & von Lewinski, *European Copyright Law – A Commentary*, sections 7.1.9 ff. and Hugenholtz in *Concise European Copyright Law* (ed. Dreier & Hugenholtz) p. 272.

<sup>301</sup> The Directive is the counterpart of the Television without Frontiers Directive (89/552/EC), that has the same objective with respect to barriers in the field of broadcasting and advertising law. See e.g. recitals 4, 5, 12 and 13 to Directive 93/83/EC.

contrast, a country of reception principle would have made national copyright law applicable not only in the country of transmission, but also in all countries in which the respective broadcast could be received, i.e. the “footprint” of the satellite. According to this principle, a satellite broadcaster would have had to clear rights for all states within this “footprint”.<sup>302</sup> The failure to do so, or the termination of a single of the many contracts to be concluded would have jeopardized the whole programme distribution. In other words, right holders in one Member State would have been able to block a satellite broadcast intended for the whole of Europe. Furthermore, in many cases it is difficult to determine the “footprint” of the broadcast, e.g. as it often tends to unintentionally “spill over” also to other countries than envisaged by the broadcaster. In contrast, the country of transmission is comparatively easy to determine given the definition in the Directive.<sup>303</sup>

The introduction of the country of transmission principle for satellite broadcasting required the existence of a common minimum protection for authors in every single Member State. Otherwise, satellite providers might have felt tempted to relocate their transmission activities to countries with a low level of copyright protection, which would invariably have led to a distortion of competition within the Community. Therefore, the Directive also harmonized the right of satellite broadcasting.<sup>304</sup>

The introduction of the country of transmission for satellite broadcasts, which derogates from the international norm of country of reception, was not controversial for right holders and Member States. A prerequisite for them to accept the country of transmission principle was that they were assured that the remuneration payable for the acquisition of the satellite broadcasting right in the country of transmission took into account the significance of the broadcast as a whole. In other words, the remuneration payable should take into account the audience in all countries within the footprint of the satellite, and not only for the country of transmission. Thus, as far as the contractual practice in relation to the exercise of the satellite broadcasting right is concerned, recital 17 to Directive 93/83/EEC is of crucial importance. It asserts that “in arriving at the amount of the payment to be made for the rights acquired, the parties should take account of all aspects of the broadcast, such as the actual audience, the potential audience and the language version.” The parties should take into consideration the total economic value of the satellite broadcast. This is a necessary consequence of

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<sup>302</sup> The Berne Convention in article 11*bis* speaks of broadcasting as communication to the public, but one has to turn to the law of the country where protection is claimed to see how this principle has been translated into national law, as this issue is part of the scope of copyright. The wording of the Convention could lead one to the conclusion that both emission and reception are essential elements and that the copyright law of the emission country and the copyright laws of the countries inside the footprint of the satellite should be applied cumulatively. The opposing theory is the country of transmission theory which underlie article 1(2)(a) of Directive 93/83/EEC. See e.g. recitals 7, 14 and 15 to the Directive and Torremans in RIDA 2001, p. 59 f., Hugenholtz in IRIS plus: Convergence, Copyrights and Transfrontier Television (2009), p. 9, Hugenholtz in IRIS special: Digitisation and Online Exploitation of Broadcasters’ Archives (2010), p. 52, Hugenholtz et al, Harmonizing European Copyright Law, p. 313, Walter / von Lewinski, European Copyright Law – A Commentary, section 7.1.12 and Trettenbrein, in IRIS special: Digitisation and Online Exploitation of Broadcasters’ Archives (2010), p. 57.

<sup>303</sup> See recitals 5, 7 and 14 to the Directive and e.g. Commission staff working document: Document accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions on Creative Content Online in the Single Market, SEC(2007) 1710, p. 26, Walter & von Lewinski, European Copyright Law – A Commentary, section 7.1.12, Hugenholtz in Concise European Copyright Law (ed. Dreier & Hugenholtz) p. 263 and Trettenbrein in IRIS special: Digitisation and Online Exploitation of Broadcasters’ Archives (2010), p. 57.

<sup>304</sup> See e.g. recitals 21—25 to Directive 93/83/EEC, Hugenholtz in IRIS plus: Convergence, copyrights and Transfrontier Television (2009) p. 10, Hugenholtz in Concise European Copyright Law (ed. Dreier & Hugenholtz) p. 274 and Trettenbrein in IRIS special: Digitisation and Online Exploitation of Broadcasters’ Archives (2010), p. 56 f. and Walter & von Lewinski, European Copyright Law – A Commentary, section 7.1.12.

the fact that under the principle (of country of transmission) cross-border broadcasting via satellite only takes place in the country of transmission, although the signals transmitted can be received, and the works thus broadcast be enjoyed, in all countries of the satellite's footprint.

The sole purpose of limiting communication to the public to one country was to facilitate the acquisition of the rights necessary for the cross-border broadcasting of programmes via satellite, i.e. it is a mechanism to facilitate simplified rights clearance. It is not the purpose of this mechanism to prejudice or weaken the economic position of right holders. Recital 17 of Directive 93/83/EC therefore ensures that the solution adopted by the Directive accommodates the primary concern of the country of reception principle, even if the principle of country of transmission at first blush seems to take the opposite route. Any other solution would lead to a severe distortion of competition within the EU and also provide an unjustified incentive for satellite broadcasters to relocate the centre of their activities to another Member State.<sup>305</sup> In practice it is rather likely that one single payable remuneration will be lower than the sum of single remunerations which a satellite broadcaster would have to pay according to the country of destination theory.<sup>306</sup> This is probably the case because an increase in geographical size of a market does not necessarily correlate to increased commercial value for the right holder. Other factors than geographical size are to be considered when deciding on the level of the tariff for the total market, e.g. language and cultural aspects.

The principle presupposes that remuneration paid in the country of transmission is distributed to foreign right holders. In situations where all national satellite broadcasting rights are united in one (natural or legal) person, no challenge arises either with regard to the amount or the distribution of the remuneration paid by the satellite broadcaster. In these situations the right holder may negotiate a level of remuneration which takes into account the audience in all countries in the footprint of the satellite. However, if the rights are divided along territorial lines, it is up to the right holders to see to a fair distribution of the remuneration among the persons entitled in each of the countries of destination. Such problems will have to be solved between the right holders and collecting societies through contractual provisions.<sup>307</sup>

This said, at least in theory, the principle of country of transmission in Directive 93/83/EEC creates a legal environment conducive to the development of pan-European satellite broadcasting. However, in practice this has not been the case. In a report from 2003, the Commission acknowledged that the market fragmentation that existed prior to the Directive's adoption had continued. The fragmentation along territorial borders is maintained mainly through a combination of encryption technology and territorial licensing – a practice the Directive does not hold back.<sup>308</sup> For example, film distributors have never allowed, except in rare cases, the licensing of broadcasts of their films at the pan-European level. Rather, movies are released at varying times and television broadcasts occur in “release windows” that differ from country to country due to cultural characteristics and audience preferences.

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<sup>305</sup> See e.g. Hugenholtz in *IRIS plus: Convergence, copyrights and Transfrontier Television* (2009), p. 9, Walter & von Lewinski, *European Copyright Law – A Commentary*, section 7.1.12 and 7.3.4, Hugenholtz in *Concise European Copyright Law* (ed. Dreier & Hugenholtz) p. 272 and Dreier in *The Future of Copyright in a Digital Environment* (ed. Hugenholtz), p. 64.

<sup>306</sup> Walter & von Lewinski, *European Copyright Law – A Commentary*, section 7.3.6 and Dreier in *The Future of Copyright in a Digital Environment* (ed. Hugenholtz), p. 64.

<sup>307</sup> Walter & von Lewinski, *European Copyright Law – A Commentary*, sections 7.1.12, 7.1.16 and 7.3.5.

<sup>308</sup> See article 1(2)(c) and recital 16 to Directive 93/83/EEC and Report from the Commission on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, COM/2002/0430 final, section 3.1.1. See also Hugenholtz in *IRIS plus: Convergence, Copyrights and Transfrontier Television* (2009) p. 7 ff., Hugenholtz et al, *Harmonizing European Copyright Law*, p. 314, Hugenholtz in *Concise European Copyright Law* (ed. Dreier & Hugenholtz) p. 272 and Walter & von Lewinski, *European Copyright Law – A Commentary*, section 7.1.17 and 7.3.8.

The fact that it is possible for right holders to restrict the territorial scope of satellite broadcasting through contractual provisions, together with the high licence fees that come with pan-European licensing and language barriers, has led to very low demand from broadcasters for pan-European satellite broadcasting licences.<sup>309</sup>

Having described the principle of country of transmission and its performance in practice, let us examine whether it could serve as a possible solution to simplified cross-border dissemination online in the context of Europeana.

### **5.1.2. Country of transmission rule in the context of Europeana**

The introduction of a country of transmission principle in relation to cultural institutions' making available online of their collections is a possible solution to difficulties arising from rights clearance. It could solve the inherent challenges related to the combination of the principles of territoriality and country of destination in the same way as the introduction of the country of transmission principle solved similar problems related to satellite broadcasting. In addition, it would also solve the problem that a national ECL provision cannot be given extraterritorial effect.

The introduction of a country of transmission principle to all forms of making available (and communication) to the public of copyrighted content online has been put forward by the European Commission on several occasions, e.g. in its 1995 Green Paper on "Copyright and Related Rights in the Information Society"<sup>310</sup>, the 2004 Communication on "the Management of copyright and Related rights in the Internal Market"<sup>311</sup>, a Commission Staff Working Paper accompanying the 2008 Communication on "Creative Content Online"<sup>312</sup>, and a "reflection document" of the Commission from 2009<sup>313</sup>. Although the principle has been identified as an interesting solution also for online cross-border dissemination, the Commission has deemed it as a not viable solution due to the difficulties of locating the relevant act of transmission in the digital environment, the risk of devaluation of copyright if a single tariff and licence were to be applied to the whole Internal Market, or the risk of a "race to the bottom" both regarding the emergence of the protection and the scope of the protection. The Commission has also highlighted the dysfunction of the principle in its satellite context as a reason why it would probably solve the territoriality problem only in theory, but not in practice.

The introduction of the principle of transmission for online dissemination has been discussed also in the legal literature. Some scholars have found it strange that no similar legislative solution has been introduced for online dissemination.<sup>314</sup> In addition to the arguments put forward by the Commission, other scholars have stressed that online dissemination is not merely an act of communication to the public, as is satellite broadcasting, but also concerns the right of reproduction. Works made available online are stored on servers and copied repeatedly on their way from the content provider to the end

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<sup>309</sup> See e.g. Hugenholtz in IRIS plus: Convergence, copyrights and Transfrontier Television (2009), p. 11.

<sup>310</sup> Commission Green Paper on Copyright and Related Rights in the Information Society, COM(1995) 382, p. 41 f.

<sup>311</sup> Communication from the Commission on the Management of Copyright and Related rights in the Internal Market, COM(2004) 261 final.

<sup>312</sup> Commission staff working document: Document accompanying the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creative Content Online in the Single Market, SEC(2007) 1710.

<sup>313</sup> Reflection document of DG INFSO and DG MARKT. Creative Content in a European Digital Single Market: Challenges for the Future, p. 12 and 17 f.

<sup>314</sup> See e.g. Hugenholtz et al, Harmonizing European Copyright Law, p. 314, Trettenbrein in IRIS special: Digitisation and Online Exploitation of Broadcasters' Archives (2010), p. 57 and Hugenholtz in IRIS special: Digitisation and Online Exploitation of Broadcasters' Archives (2010), p. 52.

user.<sup>315</sup> It has also been emphasized that satellite broadcasting differs from online dissemination in that it presupposes that copyright works and related subject matter are made available in “programmes”, characterized by the sequential order of the single parts of the programme as arranged by the provider. The situation is thus different from the way in which digital material is offered and accessed by users over the Internet on demand and, for this reason, the principle should not be introduced also for online dissemination.<sup>316</sup> An additional argument against it is that the rights for satellite broadcasting are normally in the hands of a few institutional film producers, broadcasting stations, and collecting societies and that this was decisive for the introduction of the country of transmission principle. In contrast, the right of making available online can be scattered among many right holders, who are often located in different territories. Hence, the argument is that the distribution of remuneration to right holders in different territories would become very burdensome for the CMOs.<sup>317</sup>

The arguments in favour of the introduction of a country of transmission principle also for online dissemination are quite compelling. The application of this principle would lead to obvious advantages for cultural institutions as it would provide them with a mechanism for simplified rights clearance compared with the current situation where a combination of the principles of territoriality and country of destination hampers the development of such services. As this mechanism would possibly lead to an increase in legal supply of content, it would also be for the benefit of right holders who would receive remuneration for the use. Finally, and maybe most importantly, it would benefit the users as they would be provided with more legal services of content online.

Arguments against the introduction of a country of transmission principle for online dissemination can also be put forward. The potentially most detrimental effect to the right holders’ interests resulting from the application of a country of transmission principle would seem to occur in situations where the right holders in the countries of destination are not (also) right holders in the country of transmission. In such cases, the right holders in the countries of destination are deprived of their legal claim. Related to this, is the risk that the copyright protection be devaluated if a single tariff is applied to the whole Internal Market. The principle in recital 17 of Directive 93/83/EEC aims at solving precisely this situation by stressing that the parties should take the total economic value of the satellite broadcast into consideration when determining the level of the tariff. Its application is not mandatory, however – it merely states that the parties “should” take into account “all aspects of the broadcast, such as the actual audience, the potential audience and the language version.” In any case, if a country of transmission principle were to be introduced also for online dissemination of the collections held by cultural institutions, it would have to be supplemented with a rule similar to the mentioned recital to clarify that the principle is a mechanism to simplify rights clearance, not a mechanism to prejudice or weaken the economic position of right holders. This would also reduce the risk that a national collecting society feel tempted to attract users by imposing tariffs which are lower than those of its foreign sister societies. However, to increase the trust and legitimacy of a country of transmission principle also for online dissemination, e.g. as regards the distribution of remuneration amongst collecting societies in different Member States, there may be a need to supplement it with common EU provisions on good governance and transparency of CMOs.

From the perspective of the cultural institutions, supplementing a principle of country of transmission for online dissemination with a principle similar to the one stated in recital 17 of Directive 83/93/EEC

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<sup>315</sup> Hugenholtz in IRIS plus: Convergence, copyrights and Transfrontier Television (2009), p. 18 and Hugenholtz in IRIS special: Digitisation and Online Exploitation of Broadcasters’ Archives (2010), p. 53.

<sup>316</sup> Dreier in The Future of Copyright in a Digital Environment (ed. Hugenholtz), p. 61 f. and Walter & von Lewinski, European Copyright Law – A Commentary, section 7.1.19.

<sup>317</sup> Walter & von Lewinski, European Copyright Law – A Commentary, section 7.1.19.



should not pose great risks to the cultural institutions in terms of the level of fees to be paid to the right holders. In practice, the market value of national cultural heritage content may be quite limited in other Member States than the country of origin of the content. Given that the definition of “country of transmission” in Directive 93/83/EEC is rather technical and deliberately designed to establish legal certainty, a similar approach could be carried out when defining “country of transmission” for the online environment. Hence, the fact that there is currently no consensus of what such a definition should encompass may be an indication that formulating such a definition could be difficult.

It has been argued that online dissemination is not purely an act of communication to the public, but also involves the making of temporary acts of reproduction that take place when content is transmitted over the Internet. This could pose problems for the application of a country of transmission principle, because the principle generally relates only to the right of making the content available online; it does not concern the scope of temporary acts of reproduction. The making of such reproductions would presumably require the consent of the right holder in every country where such reproductions take place, e.g. in every country where content is downloaded or streamed. However, temporary acts of reproduction that are carried out in the normal course of transmission (of legal content) over the Internet could fall under the exemption from the exclusive right of reproduction, if they meet the criteria of article 5.1 of Directive 2001/29/EC.<sup>318</sup> Hence, the only copyright relevant act which is carried out when (legal) content is disseminated over the Internet would be the act of communication to the public.

In sum, the principle of country of transmission would appear to be an interesting solution for the dissemination of content held by the cultural institutions. Combined with provisions similar to recital 17 in Directive 93/83/EC and principles of good governance and transparency of CMOs, it could operate for the benefit of content providers, right holders and users alike – at least regarding content with the same right holder in several Member States. The introduction of a country of transmission principle would “solve” the inherent challenges posed by the combination of the principles of territoriality and the country of reception. It would also solve the problem of the lack of extraterritorial effect of a national ECL provision. However the solution is far-reaching insofar as it would deprive the right holders in the country of reception of their right to authorize and prohibit use. To the extent that the right holder in the country of reception is different from the right holder in the country of transmission, it is uncertain whether the former would receive remuneration equating the value of the use. This problem does not arise in situations where the right holder is the same in both the country of transmission and the country of reception. However, where the rights are managed by a CMO in the country of transmission, the proper functioning of the model presupposes the existence of a sound CMO structure and culture.

## **5.2. Promoting multi-territorial licensing**

The cross-border rights clearance for the exploitation of non-domestic repertoire could also be realized on the basis of a network of reciprocal representation arrangements between CMOs. Through reciprocal agreements, the parties give each other the right, on a non-exclusive basis, to exploit the

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<sup>318</sup> Article 2 of Directive 2001/29/EC on the reproduction right encompasses “direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part”. Article 5.1 of the same Directive provides a mandatory exception to this right for certain forms of temporary reproduction: “Temporary acts of reproduction referred to in Article 2, which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable a) a transmission in a network between third parties by an intermediary, or b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.” Recital 33 to the Directive provides some guidance on the interpretation of article 5.1.

copyrights on their respective repertoire in their respective territories. According to settled jurisprudence, agreements between national CMOs with the effect of systematically refusing to grant direct access to their repertoires to foreign users must be regarded as amounting to a concerted practice restrictive of competition and capable of affecting trade between the Member States.<sup>319</sup> Such reciprocal agreements do not, as such, fall under article 101(1) TFEU (ex article 81(1) TEC), unless concerted action is demonstrated. With the advent of the digital network environment, the exploitation of copyright protected works can simultaneously reach the entire world and be monitored at a distance. As discussed in subsection 3.2.3, these technological developments emphasize the need for multi-repertoire, multi-territory licences, through a solid and transparent network of reciprocal agreements between CMOs.

For the purposes of European content providers, a multi-territory, multi-repertoire licensing model based on the IFPI Simulcasting Agreement model would probably provide a workable solution. This would allow CMOs to obtain a pan-European licence for making content available online, from any national CMO in each field. A cross-border solution based on the IFPI Simulcasting Agreement model would also be consistent with the ECL model, which is based on the presumption of existence of a (domestic) representative CMO. One drawback of any solution to the cross-border challenges based on the IFPI Simulcasting Agreement model is that it presupposes the voluntary effort on the part of the CMOs to conclude (unconcerted) agreements with each other.

So far, very few agreements with the aim of solving the multi-territory, multi-repertoire dilemma have been brought forward by the CMOs and accepted by the European Commission. The main difficulty stems from the demand that CMOs cease the practice of territorial exclusivity. So far, the CMOs have been reluctant to create such mechanisms. In this regard it is important to remember that the risk that the application of the IFPI Simulcasting Agreement model lead to a race to the bottom as regards the level of tariffs, does not seem to find support in practice. The IFPI Simulcasting Agreement model accepts that the local CMO decides the tariff for use carried out on its own territory, thus safeguarding the country of reception principle.

A related concern about the IFPI Simulcasting Agreement model is that, like the ECL model, it is based on collective management of rights. To the extent that there is no representative CMO, the IFPI Simulcasting Agreement model would not work as a cross-border solution and other solutions may have to be considered, such as mandatory collective licensing. It could be argued that the introduction of an ECL provision at national level could “stimulate” right holders into organizing themselves and setting up CMOs. However, the history behind the ECL model in the Nordic countries shows that the CMOs came first, then the agreements and later on, ECL provisions to give support to clear outsiders’ rights. Even if this course of action does not rule out that the introduction of ECL provisions could work as an incentive for right holders to organize themselves, it is not clear this outcome would follow. If the legislator wants to ensure that rights are managed collectively, other legislative measures than the ECL model should possibly be considered – such as mandatory collective licensing.

The cross-border challenges seem to be best addressed by “voluntary” activities on behalf of the CMOs, similar to the IFPI Simulcasting Agreement model, supplemented by legislative intervention both as regards the licensing framework and common rules on good governance and transparency. A similar assessment has been put forward by the Commission in its Communication on a Single Market for Intellectual Property Rights.<sup>320</sup> A legislative measure to stimulate the coming into being of

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<sup>319</sup> ECJ judgment in Case 395/87, *Ministère public v. Tournier*, (1989) E.C.R. 2521. at para. 23.

<sup>320</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and social committee and the Committee of the regions: A single market for intellectual property rights. Boosting

“voluntary” IFPI Simulcasting Agreement mandates could be to make the national ECL provision conditional on the issuing of such mandates. In other words, for a national CMO to be eligible to conclude an ECL agreement, the CMO should be required to give its sister CMOs in other Member States a mandate to clear rights in its own territory. In this way, a true one-stop shop for multi-repertoire, multi-territory licences would be created.

## 6. Conclusion

This report has focused on the Nordic Extended Collective Licensing (ECL) model as a possible solution for digitizing and making available online the collections held by Europeana content providers, with a brief look at possible solutions for cross-border dissemination of works through the Europeana portal.

High transaction costs are prevalent for cultural institutions all over Europe, such as Europeana content providers, that seek to digitize and disseminate their collections online. To the extent that the digital rights are not vested in one hand, it can be very burdensome for cultural institutions to clear the rights individually with every rights owner. Indeed, if the transaction costs for such rights clearance are higher than the expected value, the institution will probably not carry out any rights clearing efforts. This is reflected in practice in the material made available through Europeana, which shows significant imbalances with respect to the types of content and timeframe from which the content originates.

The Nordic extended collective licensing model could streamline rights clearance in cases like this for the mutual benefit of right holders, Europeana content providers and end-users alike. Content for which rights clearance would otherwise have been difficult or impossible is made available to end-users legally and right holders receive remuneration. From the perspective of the cultural institutions, the model gives them full legal certainty for their use. As the model is in most cases based on free negotiations the CMOs and the Europeana content providers can conclude agreements which best suit their needs. From the description of the different features of the ECL provisions in the Nordic countries follows that all provisions have a number of feature characteristics in common, the design of which differs between the Nordic countries. The common features of the model are the following:

- The model presupposes the existence of a representative CMO with a sound culture of good governance and transparency,
- The model extends a collective agreement concluded by a CMO to outsiders of the same categories of works,
- The agreement between the CMO and the user is normally based on free negotiations,
- The model has built-in safeguards for outsiders which include the principle of equal treatment of outsiders vis-à-vis members of the CMO,
- Provided that they can prove the extent of use, outsiders have a right to individual remuneration

In addition to these similarities, the ECL provisions differ regarding the following aspects: the need for government approval of the CMO; whether the ECL only applies to content that has been (previously) published, communicated or performed to the public; whether provisions on mediation or arbitration apply to stimulate the conclusion of ECL agreements; whether it is possible for outsiders to opt out; and whether the user must refrain from use if there is special reason to assume that the right holder would oppose the use.

The requirement of representativeness of the eligible CMO and other safeguards for outsiders such as the right to equal treatment, right to remuneration and possibility to opt out gives the ECL model legitimacy as a means of managing outsider's rights and makes it consistent with international and EU

copyright norms. To the extent that ECL provisions and their related agreements are deemed to be limitations within the meaning of the international conventions, their main features would arguably make them less likely to come into conflict with the three-step test. These features are the freely negotiated agreements between a representative CMO and the user, the principles of equal treatment and right to remuneration and the possibility to opt out. If there is a possibility to opt out, the ECL provision and agreement should in all likelihood pass the three-step test. It is worth emphasizing that the eligible CMOs' actual exercise of the free negotiation, the application of the principle of equal treatment and the right to remuneration determines to a large extent the ECL provision and agreement's conformity with the three-step test.

The ECL model could form a workable solution for the transaction cost challenges posed to Europeana content providers. In the context of Europeana, the eligible users could be defined along comparable lines as the beneficiaries of the limitations in articles 5(2)(c) and 5(3)(n) of Directive 2001/29/EC: certain museums, libraries and archives. However, to the extent they are not already covered by the notion "archive", broadcasters' archives and film heritage institutions should be included among the beneficiaries. The ECL provision should be broad enough to cover all forms of digitisation and making available online, but it could be restricted to content that is "not contemporarily commercially available". The precise legal definition of this notion would have to be decided by the EU legislature in consultation with the representative CMOs and all relevant stakeholders. In order to increase legal certainty for the content providers, the ECL provision could include a rule according to which content created before a certain date would be presumed to no longer be commercially available and therefore be encompassed in the ECL provision unless the right holder chooses to opt out. However, a prerequisite that the ECL be restricted to content that has been previously published or communicated to the public would be too burdensome for the Europeana content providers. The right holder's interest of not having his unpublished content digitized or made available online, would be dealt with by the possibility for the right holder to opt out and by a feature giving priority to existing agreements over any ECL agreement.

To stimulate the coming into being of agreements between Europeana content providers, an ECL provision for the benefit of cultural institutions should include rules on mediation. It would, however, be prejudicial to the right holders' interests to include a provision on mandatory arbitration. In addition, an outsider should have the right to submit any dispute against a CMO, e.g. regarding the level of remuneration, to a simplified arbitration mechanism. Such a provision would probably have a correlated effect on the contents of the agreements concluded by a CMO and the user. A CMO would presumably be reluctant to fix levels of remuneration that are in conflict with the interests of outsiders, if the outsiders have a right to have the issue solved by a simplified arbitration mechanism.

As has been emphasized throughout this report, the ECL model is based on the presumption of existence of a representative CMO in the intended field of use. The practical functioning of the model and its consistency with international and EU norms is also based on the presumption that the CMO carries out its activities in a transparent manner and in compliance with good governance. In other words the model presupposes an environment characterized by a solid structure and culture of CMOs.

Even if an ECL solution were to be introduced at national level to solve the problems of high transaction costs, for example an ECL solution, this legislative measure would have no effect in other territories. Because of the combination of the principles of *lex loci protectionis* and country of reception, a user must clear rights in every country where the content can be received. Thus, unless the legislator intervenes in the other territories of reception to overcome these challenges, and possibly supplements such a solution with a mechanism whereby a user can obtain a multi-repertoire, multi-

territory licence from one actor (such as a CMO), cultural institutions would have to restrict their online activities to their own territory.

With respect to cross-border dissemination of works through the Europeana portal, two main solutions are put forward. First, the introduction of a country of transmission principle, which would solve the inherent challenges posed by the combination of the principles of territoriality and the country of reception. It would also circumvent the problem of the lack of extraterritorial effect of a national ECL provision. However the solution would be far-reaching insofar as it would deprive right holders in the country of reception of their right to authorize and prohibit use. To the extent that the right holder in the country of reception is different from the right holder in the country of transmission, it is uncertain whether the former would receive remuneration equating the value of the use. This problem does not arise in situations where the right holder is the same in both the country of transmission and the country of reception. . It could also be argued that it does not solve the problem of territorial delineation, as the right holder may still, through contractual provisions, limit the use of the content to certain territories.

Second, the promotion of multi-territory licensing along the lines of the IFPI Simulcasting Agreement model could form a realistic solution to the cross-border challenges. For the purposes of Europeana content providers, a multi-territory licensing model based on the IFPI Simulcasting Agreement model would probably provide a workable solution. This would allow CMOs to obtain a pan-European licence for making content available online, from any national CMO in each field. A cross-border solution based on the IFPI Simulcasting Agreement model would also be consistent with the ECL model, which is based on the presumption of existence of a (domestic) representative CMO. One drawback of any solution to the cross-border challenges based on the IFPI Simulcasting Agreement model is that it presupposes the voluntary effort on the part of the CMOs to conclude (unconcerted) agreements with each other. To stimulate the coming into being of mandates between the CMOs similar to the IFPI Simulcasting Agreement model, it could be considered whether to make the national ECL provision conditional on such mandates.

Note that both proposed solutions are discussed globally and may have different outcomes depending on whether a uniform rights clearance system is introduced at the European level or whether Member States have some leeway in adopting a solution for the clearance of rights for the mass-digitisation and dissemination of works by cultural institutions. This report does not take a position on the desirability of either course of action. Further research will have to be carried out in the future to take account of the fact that if Member States adopt different solutions, this is bound to have an effect on the cross-border situation, e.g. because not every right is managed by a CMO in every country.

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