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Cross-Border Extended Collective Licensing: A Solution to Online Dissemination of Europe's Cultural Heritage?

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An issue which recently has gained increased attention from legislators is how to stimulate the digitization and online availability of the collections held by libraries, museums and other cultural institutions – sometimes referred to as our “common heritage” – and at the same time give full respect to established copyright norms. At European level, this attention is evident in the Digital Libraries Initiative, the Communication from the European Commission on Copyright in the Knowledge Economy, the Commission's Digital Agenda for Europe and its recent Communication on a Single Market for Intellectual Property Rights. Inherent in these policy documents is the recognition that the new information technologies have created vast opportunities to make the common heritage of Europe more accessible for users online. It is also a shared belief that such access – if coherent with basic copyright principles – will be for the mutual benefit of users, right holders and the society at large. In line with this the Commission has supported the creation and development of a common access point for Europe's cultural heritage, *Europeana*.

However, several issues from a copyright perspective have to be solved before undertaking mass-digitization and online dissemination of the collections held by these institutions. One of them is how to make the said digitization and online dissemination lawful from a copyright perspective. To the extent that an item in a cultural institution's collection is (still) protected by copyright, those acts fall under the author's exclusive right to authorize and prohibit use of his or her work. As the administrative (“transaction”) costs of finding and negotiating an individual license with every right holder would rise to astronomical levels, there is an obvious risk that major parts of the collections will not be digitized and disseminated online. For this reason, the most practical solution would probably lie in the area of collective rights management.

A way forward is the extended collective license (ECL) model as established and developed in the Nordic countries. The essential component of the ECL model is that it extends a freely negotiated agreement between a Collective Management Organization (CMO) and a user so that it binds also non-members' rights, sometimes referred to as “outsiders' rights”. 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 that 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 representative-

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ness and supervision of the eligible CMOs. The ECL model has been under consideration by the Commission as a possible solution to stimulate the digitization and online availability of the collections held by cultural institutions.

An additional challenge is to make the collections available cross-border, i.e. also to other countries (territories) than the one where the cultural institution is located. It is inherent in the policy documents of the European commission and also the establishment of *Europeana* that there is a clear political aim to stimulate such cross-border dissemination. According to prevalent copyright rules, rights for dissemination online have to be cleared in every country where the content can be accessed. Applied to cultural institutions this means that they would have to get a license from CMOs in every EU member state. This would of course lead to substantial administrative costs for the institutions. However, so far no solution have been brought forward which takes into account and could be acceptable by both cultural institutions and right holders.

Two viable cross-border solutions are a country of transmission principle or a solution based on voluntary measures by the national CMOs. A country of transmission principle holds that cultural institutions should only be obliged to obtain a license in the country where the institution initiated the online dissemination. This solution would require legislative intervention at EU level. The other solution essentially means that national CMOs would give each other a mandate to issue multi-territory licenses.

At first glance, an ECL provision combined with either of the cross-border solutions outlined above may be regarded as favoring the cultural institutions' interests, as it gives them the privilege of both an ECL provision and a simplified measure for cross-border rights clearance. However, the scope of an ECL provision for the benefit of these institutions would primarily be to make available content that is not of a contemporary commercial nature. Hence, the model would aim at establishing a mechanism which would create a supply of cultural heritage content. It is in the interest of the society as a whole that also this content is made available online.

Against this background, the panel will discuss pros and cons of a cross-border ECL model in relation to the digitization and online cross-border availability of the collections held by national cultural institutions. The panelists are representatives of different interests (stakeholders).

Moderator

Patrick Peiffer is project manager for the Services électroniques at the National Library of Luxembourg, managing licences for the national consortium and specialising in copyright issues, currently for retro-digitisation of newspapers and digital legal deposit. He is member of the EU Member States Expert Group on Digitisation and within the EuropeanaConnect project, task leader for the Europeana Licensing Framework.

Panelists

Annemarie Beunen is the copyright lawyer of the National Library of the Netherlands, and an assistant professor at Leiden University (department of eLaw). Here, she lec-

tures and publishes on copyright issues relating to digitised cultural heritage. Anne-marie read Dutch Law (specializing in copyright) and History of Art at Nijmegen University in the Netherlands. In 2007 in Leiden, she finished her PhD thesis on the sui generis protection for database producers under the European Database Directive. In 1999-2000 she edited the first Dutch legal guidebook for museums. She also held former positions at the Dutch Council for Culture, and the Dutch Council of State.

Johan Axhamn is a PhD candidate in intellectual property law at the Faculty of Law, Stockholm University, where he conducts research and is a teacher in intellectual property law. His PhD project deals with the EU database directive, especially the sui generis database right and its interfaces with competition law and fundamental rights. Between November 2010 and May 2011 Johan conducted research at the Institute for Information Law (IViR) at the University of Amsterdam on the Nordic ECL model in relation to the Europeana project. This research has resulted in a EuropeanaConnect ECL report on practical solutions for cross-border access, available in Q3 2011. Johan is a former special adviser to the Ministry of Justice in Sweden, with special focus on copyright and enforcement issues and is currently Sweden's expert and delegate to the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.

Silke von Lewinski is tenured at the Max Planck Institute for Intellectual Property, Munich and specialises in international and European copyright law. She is also an adjunct professor at Franklin Pierce Center for IP at the University of New Hampshire Law School, Concord, N.H., USA. Dr. von Lewinski frequently has been an expert consulting the European Commission, e.g. on the EC Rental Rights Directive, and regarding the WIPO Diplomatic Conference 1996. At the WIPO Diplomatic Conference 2000 on Audiovisual Performances, she was a delegate for Germany. She has been the chief legal expert consulting the governments of Eastern and Central European and former Soviet countries on their copyright legislation in the framework of the initial EC's TA programs from 1995 and works under subsequent programs, including in Asia. Numerous publications and lectures worldwide have focussed on copyright law, primarily international and European. Main publications: "The WIPO Treaties 1996" (2002, with Reinbothe), "International Copyright Law and Policy" (OUP, 2008), "European Copyright Law" (OUP, 2010, with MM Walter et al.); edited: "Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore" (2nd edn. 2008); "Copyright throughout the World" (West, from 2008).

Mette Møller is the Secretary General of the Norwegian Authors' Union. She graduated from the University of Oslo in 1991 and has worked within the copyright field ever since. Møller participated in the working group for the test case to bokhylla.no ("Bookshelf"), a project aiming at making all Norwegian books from the 1790s, 1890s and 1990s available on the Internet. To the extent that books are still under copyright, they are encompassed by an extended collective licensing agreement between the Norwegian collective management organization Kopinor and the National Library of Norway. Møller has followed bokhylla.no closely since it was launched in 2009. Møller also has experience from working at the Norwegian Ministry of Cultural Affairs with copyright policy issues in both a Nordic and European framework, con-

tributing to a revision of the Norwegian Copyright Act in 1995. She has also worked as a Legal Manager at Norwaco (a collective management organization clearing rights and collecting remuneration for retransmission of broadcasting signals with legal basis in an extended collective license agreement). Between 1996 and 2006 she worked as an IPR business lawyer. Between 2005 and 2009 she was a Board member of the Norwegian Film Fund.