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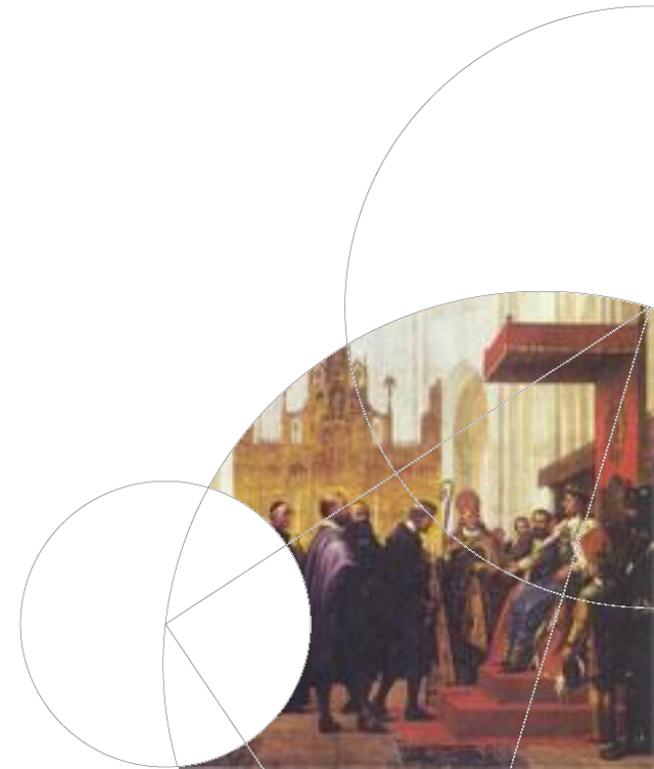


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ECL – Experiences in the Nordic countries (Denmark)

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What are ECLs

- NOT a homogeneous legal model BUT
 - normally ECL allow for agreements made by organisations of authors which represent a “substantial amount of authors” to have effect also for authors who are not members of the association or in other ways bound by the association.
 - Part of general trends in copyright
 - Collectivisation
 - but NOT compulsory
 - Institutionalization
 - Mixture of private ordering AND public regulation
 - It’s the outsider-effect that’s special
 - known also in (Nordic) labour law

Proposal for a Directive on Copyright in the Digital Single Market:

- The elephant test:
- Article 7 Use of out-of-commerce works by cultural heritage institutions
 - 1. Member States shall provide that when **a collective management organisation**, on behalf of its members, concludes a non-exclusive licence for non-commercial purposes with a cultural heritage institution for the digitisation, distribution, communication to the public or making available of out-of-commerce works or other subject-matter permanently in the collection of the institution, such a non-exclusive **licence may be extended** or presumed to apply to rightholders of the same category as those covered by the licence who are not represented by the collective management organisation, provided that:
 - (a) the collective management organisation is, on the basis of mandates from rightholders, **broadly representative of rightholders** in the category of works or other subject-matter and of the rights which are the subject of the licence;
 - (b) equal treatment is guaranteed to all rightholders in relation to the terms of the licence;
 - (c) all rightholders may at any time object to their works or other subject-matter being deemed to be out of commerce and exclude the application of the licence to their works or other subject-matter.

ECL in the DCA:

- First technology, then organizations (private ordering) then public regulation:
- Regulation first introduced in 1960/61 to deal with broadcasting.
- Now:
 - reproduction within educational institutions (DCA § 13) or by business enterprises (DCA § 14);
 - digital reproduction by libraries (DCA § 16b);
 - recordings of works in broadcasts for the visually impaired etc. (DCA § 17(4));
 - reproduction of works of art which have been made public (DCA § 24a) (opt out);
 - broadcasts by certain national Danish TV companies (DCA § 30) (opt out);
 - broadcast by certain national TV companies of works in their archives (DCA § 30a) (opt out);
 - cable retransmission to more than two connections (DCA § 35); and
 - “other forms of use” (DCA§ 50(2)) (opt out)

Examples

- Reproduction within Educational Activities (§ 13)
 - (1) For the purpose of educational activities copies may be made of published works and copies may be made by recording of works broadcast in radio and television provided the requirements regarding extended collective license according to section 50 have been met. The copies thus made may be used only in educational activities comprised by the agreement presumed in section 50.
- The “general provision” (§ 50(2))
 - Extended collective license 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. However, this does not apply, if the author has issued a prohibition against use of his work in relation to any of the contracting parties.
 - because of this ECL constitute a potential fall back within all areas where parties (i.e. organizations) are interested

Common Provisions on Extended Collective License

- DCA § 50
 - (1) Extended collective license ... may be invoked by users who have made an agreement on the exploitation of works in question with an organisation comprising a substantial number of authors of a certain type of works which are used in Denmark.
 - (4) Rightholder organisations which make agreements of the nature mentioned in subsection (1) and (2), shall be approved by the Minister for Culture to make agreements within specified fields.
 - (5) The Minister for Culture stipulates detailed provisions on the procedure for approval of the rightholder organisations, mentioned in subsection (4)
- DCA § 51
 - (1) For exploitation of works according to section 50 the rules laid down by the organisation with regard to the distribution of remuneration between the authors represented by the organisation shall apply correspondingly to unrepresented authors.
- DCA § 52: Mediation

Challenges

- Legal
 - The Berne Convention
 - The three-step-test
- Organisational /regulatory
 - Representativity
 - Control

Three-step-test

- BC Article 9(2) (WCT, Article 10; TRIPS, Article 13)
 - “Members shall confine *limitations or exceptions* to exclusive rights to (i) certain special cases which (ii) do not conflict with a normal exploitation of the work and (iii) do not unreasonably prejudice the legitimate interests of the right holder.”
 - Article 11*bis*: Compulsory licenses for broadcast rights allowed for

Are ECLs “limitations or exceptions”?

- Defining ECLs as “arrangements in the Member States concerning the management of rights” (as it has been done in Infosoc. and Orphan Works Directives) has not in itself any impact on the analysis
- The categorization is arguably debateable
 - Could draw a line between ECLs with or without out opt
- But maybe better to simply assume the worst
 - DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on copyright in the Digital Single Market
 - Points 23 and 24: “Licensing mechanisms” can include ECL and presumptions of representation
 - Point 26: “For reasons of ‘international comity’ ...”
 - J. Blomqvist: “International comity ... or triple error?” 1709 blog 31 January 2017: “... an ECL is probably the gentlest possible way of establishing a limitation to copyright and related rights ...”

General remarks on the interpretation of the three-step-test

- To simplify matters much two “schools” can be identified:
 1. The first school sees the test as a “limitation of limitations” and favours a narrow (“rigid”) interpretation of the test where in particular the three different steps are regarded as independent steps which apply on a cumulative basis, each constituting a discrete requirement that must be satisfied (WTO Panels)
 2. The second school favours a rounder and more purpose-bound interpretation of the test (“Declaration on the “Three-Step Test””)
- “The cultural background”:
 - It would seem to constitute a special difficulty that ECL-rules are till now mainly used in the Nordic countries. This may cause problems to the application of the three-step-test in so far as the evaluation uses international bench marking to determine e.g. what constitutes a “normal exploitation” and what are the “legitimate interests” of the author.
 - The EU Directive will mainstream ecl

ECLs and the three-step-test

1. "certain special cases"
 2. "normal exploitation"
 3. "no unreasonable prejudice of the legitimate interests of the author"
- Whereas the "specific" ECL-rules would seem to be consistent with international norms, this is more debateable for the *general* rule in CDA § 50(2).
 - According to the 2000-TRIPS Panel the requirement of "certain special cases" implies that limitations "should be the opposite of a non-special, i.e., a normal case" and "clearly defined and should be narrow in its scope and reach".
 - It could be argued that § 50(2) would not pass this test because of the broadness of the ECL-rule
 - On the other hand: Fair use in the US etc.
 - Sweden and Norway have implemented similar rules and didn't see a problem

Organisational: Representativity

- Representativity is about legitimacy
 - and about organisations rather than authors
- § 50: An organisation comprising **a substantial number of authors of a certain type of works which are used in Denmark**
 - used to be "Danish authors"
 - Issues
 - Acceptance of "indirect" representation?
 - Example: I am a member of DJØF (a trade union) which is a member of AC (a cartel of unions) which has a seat on COPY-DAN's board (the ECL-organisation) which negotiates deals with users (such as my university which uses the tax money levied from my salary to give me a fair remuneration for the copies I take of my books (including some on ECL)) ... (each society must declare that it is entitled to administer the rights of its members).
 - what if more than one organisation exists?
 - "substantial" amount isn't a "majority" but how much is it?
 - what about foreign rightholders?

Case: Norwegian *Kabeltvistnemda* (The Cable Dispute Tribunal) of 28 June 2011 (Nowarco)

- Norwaco manages the ECL concerning rights to cable retransmission
- Norwaco's standard agreement on cable retransmission includes approximately 200 broadcasting channels and among them only 14 are Norwegian
 - Prior to July 1st 2005 the representativity requirement implied that the management organisation should represent a '*substantial amount of Norwegian right holders*'
- The Tribunal found that Norwaco did not represent "a substantial number of authors of works used for cable retransmission in Norway" since
 - 'a substantial amount of right holders' means a plurality of right holders or approximately 50%; and an organisation that represents a substantial amount of Norwegian right holders, which Norwaco actually did, cannot be presumed to represent a substantial number of authors of works which are used in Norway as well ...
 - Solved in Norway by the legislator but do cable retransmission make a special case or is there a general problem here?

Regulatory Control

- Sorting out "authors'" interests from those of the ECL-organisation
- To what extent are ECLs "special" compared to other monopolies / CAO's?
 - Copyright / members rights / competition law
 - C-351/12, OSA (competition law)
 - DIRECTIVE 2014/26 on collective management point 18
- Institutional aspect
 - Competition law authorities or specialized agency?
- Practice (distribution) (heterogenous)
 - Direct individual
 - Indirect individual (via member organisations)
 - Collective

Specific issue: cross-border use

- ALAI Opinion 14.9.2016:
 - Current ECL mechanisms operating at national level cannot permit uses of works in other countries
 - True Cross border effects needs either bilateral or multilateral agreement or specific EU provision
- Article 8: Cross-border uses
 - 1. Works or other subject-matter covered by a licence granted in accordance with Article 7 may be used by the cultural heritage institution in accordance with the terms of the licence in all Member States.
- Representativity
 - Article 7(1)(a) the collective management organisation is, on the basis of mandates from rightholders, broadly representative of rightholders in the category of works ...;
 - in which country/ies should representability be established?
 - Reciprocal representation agreements a condition?
 - How much is needed and what level of control?
 - indirect representation and original mandate?
 - the specter of Nowaco!

Outlook

- Can the model be transplanted?
 - The broader background to the success of ECLs would seem to be societies which have traditionally been based on a high level of organisation and trust and with a tradition for collective agreements
- Will it continue to work?
 - "Double crunch":
 - Internationalization
 - Foreign right holders
 - cross-border use
 - Individualization
 - collectivization is only the second best option
 - C-301/15 (Doke/SOFIA)
 - 37 "However, the objective of increased protection of authors to which recital 9 of Directive 2001/29 refers implies that the circumstances in which implicit consent can be admitted must be strictly defined in order not to deprive of effect the very principle of the author's prior consent."

Read more

- J. Axhamn & L. Guibault, 'Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage?', Amsterdam: Institute for Information Law August 2011. Final report prepared for EuropeanaConnect.
- Z. Zhang, Transplantation of an Extended Collective Licensing System – Lessons from Denmark, IIC 2016 640-672
- F. Trimpke, *Exklusivität und Kollektivisierung – Das Skandinavische Modell der Erweiterten Kollektiven Lizenz (Extended Collective Licensing)*, Nomos 2015
- T Riis & J Schovsbo:
 - 'Extended Collective Licenses and the Nordic Experience: It's a Hybrid but is it a Volvo or a lemon?' (2010) 33 *Colum J L & Arts* 471
 - 'Extended Collective Licenses in Action", IIC 2012/930-950
- T Riis, O-A Rognstand & J Schovsbo
 - 'Collective agreements for the clearance of copyrights – the case of collective management and extended collective licenses' 55-76 in T Riis (ed.) *User Generated Law*, Elgar 2016

