



Extended Collective Licensing in the Member States

VvA meeting 10 February 2017

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ECLs options for the Member States

- 1) Proposal for a Directive on Copyright in the Digital Single Market COM(2016)593
- 2) Different models in different Member States
 - a) The United Kingdom
 - b) Germany (Poland, Slovakia)
 - c) France



Brussels, 14.9.2016
COM(2016) 593 final

2016/0280 (COD)

Proposal for a
DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on copyright in the Digital Single Market

(Text with EEA relevance)

{SWD(2016) 301}
{SWD(2016) 302}

CHAPTER 1

Out-of-commerce works

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.

Key features of EC Proposal

- Would apply to any category of work or other subject matter
- Would allow conclusion of non-exclusive, non-commercial licenses by cultural heritage institutions
- Would extend or create a presumption of application of license to non-members

Key features of EC Proposal ... 2/

- Definition of out-of-commerce works:
 - “whole work or other subject-matter, in all its translations, versions and manifestations, is not available to the public through customary channels of commerce and cannot be reasonably expected to become so”

Key features of EC Proposal

... 3/

- Licenses to be obtained from the collective management organisation that is representative for the Member State
 - In the country of first publication; or
 - In the country where the film producer has headquarters; or
 - In the country of the cultural heritage institution

Enterprise and Regulatory Reform Act (2013) (UK)

- Extended Collective Licensing (ECL) Regulations 2014
- Collective Management of Copyright (EU Directive) Regulations 2016
- Applicable to any category of work, not just out-of-commerce
- Complex process of application by CMOs to 'operate an ECL scheme'
- Permission granted to CMOs only for a period of 5 years
- No application known so far

Gesetze zur Nutzung verwaister und vergriffener Werke (Germany) (2013)

- Collective Administration Act, 13d(1)
 - Presumption of extension of the CMO's mandate to represent non-members
- Only applies to books and printed material published in Germany before 31 December 1965
- Possibility to opt-out



The screenshot shows a web browser window with the address bar displaying the URL: http://www.vgwort.de/fileadmin/pdf/pressemitteilungen/DNB_VG_WORT_Vergriffene_Werke.pdf. The browser's address bar also shows the text "VG WORT - Suchen" and "VG http://www.v...ne_Werke.pdf". The browser's toolbar includes links to "Most Visited", "Facebook", "Blackboard", "IViR", "GoogleDocs", "BOEK9.nl", "IE-Forum", "ITenRecht", "Basecamp", "Google Drive", "Collabto", "Europe DG", "UbuVA", and "JB-UBA".

The main content of the page is a press release titled "VG WORT" and "DEUTSCHE NATIONAL BIBLIOTHEK". The title "VG WORT" is in a large, bold, sans-serif font. The title "DEUTSCHE NATIONAL BIBLIOTHEK" is in a smaller, bold, sans-serif font, with each letter of "DEUTSCHE" and "BIBLIOTHEK" enclosed in a vertical rectangular box. The title "PRESSEMITTEILUNG" is in a large, bold, sans-serif font.

The date "8. Oktober 2015" is displayed below the title.

The main heading of the press release is "Lizenzierungsservice Vergriffene Werke erfolgreich gestartet".

The text of the press release reads: "Als Beitrag zur Digitalisierung der Literatur des 20. Jahrhunderts ist der Lizenzierungsservice Vergriffene Werke (VW-LIS) der Deutschen Nationalbibliothek erfolgreich gestartet. Für die ersten 352 Titel wurden im September Nutzungslizenzen durch die VG Wort erteilt. Die Deutsche Nationalbibliothek kann diese Werke nun digitalisiert im Internet zugänglich machen."

The text continues: "Der Lizenzierungsservice richtet sich auch an andere Bibliotheken und Archive, die vergriffene Werke aus ihrem Bestand im Rahmen von digitalen Sammlungen nutzen möchten. Erste Lizenzierungsanträge sind sofort nach dem Start des Dienstes durch Bibliotheken gestellt".

The browser's status bar at the bottom shows the time "12:41" and the date "10-2-2017". The taskbar at the bottom of the screen shows icons for the Windows Start button, Internet Explorer, Firefox, Google Chrome, and several other applications.

French Act of 1st March 2012 *sur les livres indisponibles*

- Creates a registry of out-of commerce books published in France before 2001, held by the National Library (BNF)
- Published annually on 21st March
- The author (and the publisher, if owner of rights in printed books) may oppose any time under certain conditions
- In absence of opposition, a CMO (SOFIA) administers the digital rights in the books still in the register for commercial exploitation





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(BnF) Bibliothèque nationale de France

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ReLIRE

REGISTRE DES LIVRES INDISPONIBLES EN RÉÉDITION ÉLECTRONIQUE

Le projet ReLIRE Le registre Vos droits

Rechercher dans le registre

Titre, Auteur, Éditeur, ISBN... OK +

A+ A- Print

auteurs, ayants droit, éditeurs d'un livre indisponible du XX^e siècle

Loi n° 2012-287 du 1^{er} mars 2012

PAUSE

Auteur Ayant droit

Vous êtes auteur : vous avez écrit ou co-écrit un livre ou bien vous avez collaboré à un livre...

> En savoir plus

Editeur

Vous êtes éditeur et détenez les droits de reproduction et de représentation sous forme imprimée de livres...

> En savoir plus

Entrée en gestion collective des livres de la liste 2016

21 SEPT

OCT NOV DEC JAN FEV MARS AVRIL MAI JUIN JUIL AOÛT

Entrée en gestion collective des livres indisponibles

204 000

œuvres en gestion collective dans ReLIRE

DES LIVRES INDISPONIBLES ?

Act 1st March 2012 *sur les livres indisponibles*

- 2013 first publication of the register
2 writers *Soulier & Doke* challenge the system
- 2014 Conseil constitutionnel rejects the plea relying on property right
- 2015 Conseil d'Etat rejects all pleas (incl. BC) and refers to CJEU about art. 2, 3 and 5 Directive 2001/29
- 2016 AG Wathelet and CJEU answer against the Act
- 23 Nov. 2016 SOFIA stops granting licenses

Case C-301/15, Soulier and Doke case

■ Question:

- Do Article 2(a) and Article 3(1) of Directive 2001/29 preclude legislation, such as that [established in Articles L. 134-1 to L. 134-9 of the Intellectual Property Code], that gives approved collecting societies the right to authorise the reproduction and the representation in digital form of “out-of-print books”, while allowing the authors of those books, or their successors in title, to oppose or put an end to that practice, on the conditions that it lays down



Licensing requires a PRIOR CONSENT

- Broad interpretation of Art. 2(a) and 3(1), Infopaq and Painer, w/r to enjoyment AND exercise of exclusive rights
- Any reproduction or communication to the public of a work by a third party requires the prior consent of its author (at 33)
- Prior consent can be tacit, but must follow conditions
- French system rejected on the implementation of author's consent



Summary

- Currently many types of ECL regimes for the licensing of out-of-commerce works
 - Different ‘extension mechanism’
 - Different scope in terms of works
 - Different application conditions
- ECL system does not provide sufficient and effective solution for mass digitisation and dissemination of cultural heritage