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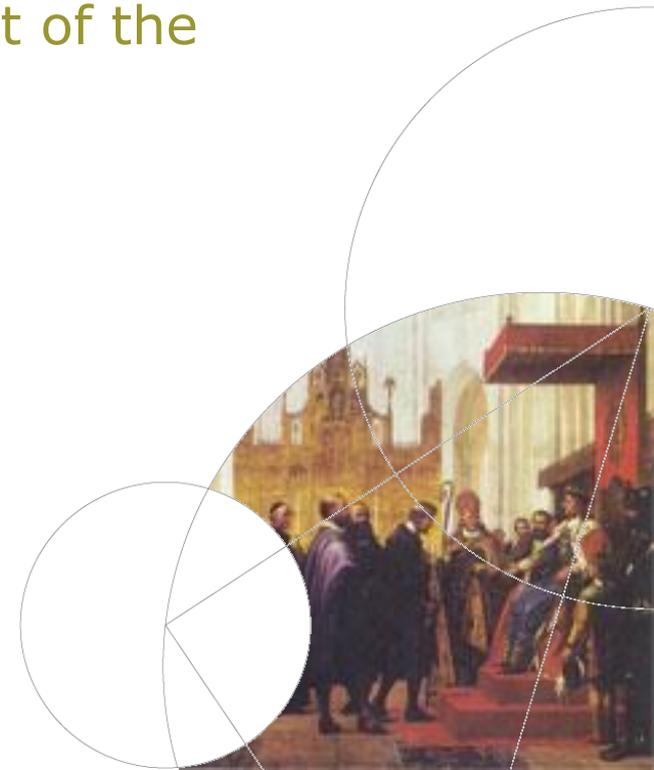


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# Extended collective licensing in copyright: The experiences from Denmark - or: "Revisiting old concerns in the light of the DSM Directive"

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## What are ECL's?

- Extended Collective Licenses allow for **agreements made by collective management organisations (CMOs) 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
- It the **outsider-effect** ("extended effect") that is special
  - For non-members it is a compulsory rather than voluntarily system
  - It is originally "Nordic design"
    - Swedish to be fair
    - known also in (scandinavian) labour law
    - complicated mixture of private ordering backed up by public regulation
  - But is becoming a household item of EU copyright too

## ECL in the DKCA: Technology push

- First introduced in 1960/61 to deal with broadcasting.
- Now:
  - **Specific ECLs**
    - reproduction within **educational institutions** (DKCA § 13) or by business enterprises (DKCA § 14);
      - digital reproduction by libraries (DCA § 16b);
      - recordings of works in broadcasts for the hearing and visually impaired etc. (DKCA § 17(4));
      - reproduction of works of art which have been made public (DKCA § 24a) (opt out);
      - broadcasts by certain national Danish TV companies (DKCA § 30) (opt out);
      - broadcast by certain national TV companies of works in their archives (DKCA § 30a) (opt out);
      - cable retransmission to more than two connections (DKCA § 35); and
  - **General ECL**
    - “**other forms of use**” within specific areas covered by an agreement between an organisation which represents a significant number of authors and users (DCA § 50(2) (opt out))

## ECL in the DKCA: Ideology

- “Making copyright work”
- The “corporate” state/society
  - ECLS is the organisations’ and trade unions’ copyright
  - \$\$\$\$\$\$\$
- “Second best”: only to be used if individual licensing is overly onerous and impractical

## ECL in EU law: Step 1: Tolerance

- Infosoc-Directive
  - (18) This Directive is **without prejudice to** the arrangements in the Member States concerning the management of rights such as **extended collective licences**
  - Orphan works Directive
    - (24) This Directive is **without prejudice to** the arrangements in the Member States concerning the management of rights such as extended collective licences, legal presumptions of representation or transfer, collective management or similar arrangements or a combination of them, including for mass digitisation.
  - Collective management of copyright and related rights Directive
    - (12) This Directive ... **does not interfere with** arrangements concerning the management of rights in the Member States such as individual management, the extended effect of an agreement between a representative collective management organisation and a user, i.e. extended collective licensing ...
  - Broadcast Directive Article 4 Exercise of the rights in retransmission by rightholders other than broadcasting organisations
    - 1. Acts of retransmission of programmes have to be authorised by the holders of the exclusive right of communication to the public. Member States shall ensure that rightholders may exercise their right to grant or refuse the authorisation for a retransmission only through a collective management organisation

## Step 2: Embrace: the DSM Directive Art. 8 ("shall")

- Article 8 (**out-of-commerce works and other subject matter by cultural heritage institutions**)
  - 1. Member States **shall** provide **that a collective management organisation**, in accordance with its mandates from rightholders, **may conclude a non-exclusive licence for non-commercial purposes** with a cultural heritage institution for the reproduction, distribution, communication to the public or making available to the public of out-of-commerce works or other subject matter that are permanently in the collection of the institution, **irrespective of whether all rightholders covered by the licence have mandated the collective management organisation, on condition that:**
    - (a) **the collective management organisation is**, on the basis of its mandates, **sufficiently representative of rightholders** in the relevant type of works or other subject matter and of the rights that are the subject of the licence; **and**
    - (b) **all rightholders are guaranteed equal treatment** in relation to the terms of the licence.
  - 2. Member States shall provide for an exception or limitation for cultural heritage institutions
  - 3 ... the exception or limitation only applies to types of works or other subject matter for which no collective management organisation that fulfils the condition set out in point (a) of paragraph 1 exists.

## DSM Directive Art 12 (“may”)

- CHAPTER 2 Measures to facilitate collective licensing
  - Article 12 Collective licensing with an extended effect
    - 1. Member States **may provide**, as far as the use on their territory is concerned and subject to the safeguards provided for in this Article, **that where a collective management organisation** that is subject to the national rules implementing Directive 2014/26/EU, **in accordance with its mandates from rightholders, enters into a licensing agreement for the exploitation of works or other subject matter:**
      - (a) **such an agreement can be extended to apply to the rights of rightholders who have not authorised** that collective management organisation to represent them by way of assignment, licence or any other contractual arrangement; **or**
      - (b) with respect to such an agreement, **the organisation has a legal mandate or is presumed to represent rightholders who have not authorised the organisation accordingly.**
  - 2) Member States shall ensure that the licensing mechanism referred to in paragraph 1 **is only applied within well-defined areas of use, where obtaining authorisations from rightholders on an individual basis is typically onerous and impractical to a degree that makes the required licensing transaction unlikely ...**

## Revisiting old concerns ...

- ECLs and the Berne Convention (for licences in foreign works or cross border)
  - Formalities?
  - Three-step test?
- The DSM Directive and Danish Law
  - Level of specificity
  - Opt out
- Generally
  - Representativity

## Berne Convention: Formalities

- BC Article 5(2) the “enjoyment and *exercise*” of copyright “shall not be subject to any formality”.
- Schovsbo & Riis: If a use is covered by an ECL and opt out is necessary to allow for individual enforcement then that could be considered as a “formality”
- Ginsburg: The declaratory obligation imposes obligations on **who** may enjoy or exercise rights; nor **whether** they exist



No problem?

Does a right that cannot be “exercised” “exist”?

## Three-step-test (limitations and exceptions)

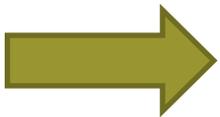
- BC Article 9(2) (WCT, Article 10; TRIPS, Article 13)
  - “Members shall confine *limitations or exceptions* to exclusive rights to (i) certain special cases which (ii) do not conflict with a normal exploitation of the work and (iii) do not unreasonably prejudice the legitimate interests of the right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

## Are ECLs “limitations or exceptions”?

- The effect of the EU harmonisation on BC
  - The embrace and acceptance by Infosoc point 18 and DSM: I don't think the EU regulation as such determines the categorization of ECLs under the BC
    - But it may affect the assessment, cf. below
- For non-members it is hard to see why ECLs would NOT constitute a limitation/exception
- Ginsburg: Non-consensual (or inadequately consensual) ECLs imposes involuntary transfers from authors to CMOs and is tantamount to an exception or limitation
- So: **ECLs without effective and transparent systems for opting out are probably “limitations/exceptions”**
  - and need to pass the test ...

## 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 (“the Declaration”)
- “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



With the EU’s embrace this has changed: ECLs are a “new normal”

## DSM and Danish law

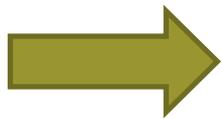
- DCA § 50: Common Provisions on Extended Collective License
  - (1) **Extended collective license following §§ 13, 14 og § 16 b, § 17, stk. 4, og §§ 24 a, 30, 30 a and 35** may be invoked by users who have made an agreement on the exploitation of works in question with an organisation comprising a substantial number of authors of a certain type of works which are used in Denmark.
  - (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 organisation 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 prohibition against use of his work in relation to any of the contracting parties**
  - (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).

## Example: Specific ECL - reproduction within Educational Activities (§ 13)

- **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.
- NB: No opt out

## Opt out?

- DKCA does not always allow for opting out (not for the important ones)
  - And so opens the door to BC
  - And to challenge from DSM Art 12(3).
    - For the purposes of paragraph 1, **Member States shall provide for the following safeguards:**
      - (c) **rightholders who have not authorised the organisation granting the licence may at any time easily and effectively exclude their works** or other subject matter from the licensing mechanism established in accordance with this Article; and
      - (d) appropriate publicity measures are taken ...
        - Similarly Art. 8(4)



DKCA needs to be amended to provide for a system for opting out

## Example: DCA § 50(2): The “general ECL”

- DKCA § 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 organisation** comprising a substantial number of authors of a certain type of works which are used in Denmark within the specified field.
    - Orphan works

- What is the scope for the “general ECL”?
  - A general fall back or even a “first choice”?
- NB DMS Art 12(2)

(47) It is important that mechanisms of collective licensing with an extended effect are only applied in well-defined areas of use, in which obtaining authorisation from rightholders on an individual basis is **typically onerous and impractical to a degree that makes the required licensing transaction**, namely one involving a licence that covers all rightholders concerned, unlikely to occur due to the nature of the use or of the types of works or other subject matter concerned. ... **In particular, the mere fact that the rightholders affected are not nationals or residents of, or established in, the Member State of the user who is seeking a licence, should not be in itself a reason to consider the clearance of rights to be so onerous and impractical as to justify the use of such mechanisms.**



DKCA general ECL seems to be borderline problematic

## Organisational: Representativity

- Representativity is about legitimacy and legality
  - It's what makes an "ECL" an "ECL" and not a "compulsory licensing rule"
- DKCA § 50: .... An organisation comprising **a substantial number of authors of a certain type of works which are used in Denmark**

## DSM

- (33) **Member States should**, within the framework provided for in this Directive, **have flexibility in choosing the specific type of licensing mechanism, such as extended collective licensing ... [and] in determining what the requirements for collective management organisations to be sufficiently representative are, as long as that determination is based on a significant number of rightholders in the relevant type of works or other subject matter having given a mandate allowing the licensing of the relevant type of use.** Member States should be free to **establish specific rules applicable to cases in which more than one collective management organisation is representative** for the relevant works or other subject matter, requiring for example joint licences or an agreement between the relevant organisations.
- (48) ... **Member States should determine the requirements to be satisfied for those organisations to be considered sufficiently representative, taking into account the category of rights managed by the organisation, the ability of the organisation to manage the rights effectively, the creative sector in which it operates, and whether the organisation covers a significant number of rightholders in the relevant type of works or other subject matter who have given a mandate allowing the licensing of the relevant type of use ...**
- (39) For reasons of international comity, the licensing mechanism and the exception or limitation provided for in this Directive for the digitisation and dissemination of out-of-commerce works or other subject matter should not apply to sets **of out-of-commerce** works or other subject matter where there is evidence available to presume that they predominantly consist of works or other subject matter of **third countries, unless the collective management organisation concerned is sufficiently representative for that third country, for example via a representation agreement.**

## ECS Comment

- Comment of the European Copyright Society on the Implementation of the Extended Collective Licensing Rules (Arts. 8 and 12) of the Directive (EU) 2019/790 on Copyright in the Digital Single Market of 11 June 2020
  - P. 7-8: "The representativeness requirement should be a flexible tool that, on the one hand, safeguards the interests of rightholders and, on the other, guarantees the effectiveness of collective licensing where such "licensing based on an authorisation by rightholders does not provide an exhaustive solution for covering all works or other subject matters to be used (DSMD, recital 45)."
  - Sounds good!
    - Would the CJEU accept different national solutions/thresholds?

# Issues

- "Indirect" representation accepted in DK
  - 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 CMO) which negotiates deals with users (such as my university)
- A "substantial" amount does not mean a "majority" but how much does it take?
- What about foreign rightholders?
  - How much should be done to check if the "chain of rights transfers" is in order?
- What if more than one organisation exists?

## Summing up

- Issues of legality (BC)
  - Formalities and three-step-test: Problems solved or just sleeping?
- Can the model be transplanted?
  - The broader background to the success of ECLs in the Nordic countries is cultural: societies been based on a high level of trust and with a tradition for collective agreements and unionizing
- Extension effect of ECL is normally limited to the territory of the MS that has adopted the ECL (*lex protectionis*)
  - Internationalisation, commercialisation and on-line uses: How to achieve representativity world/EU wide?
    - ECS Comment: A cumulative effect is needed to allow for EU cross border use
  - ECL have been developed to and worked really well within small and transparent markets
  - From there is has expanded remarkably. But is there an in-built-limit?

## References for the present talk (non-exhaustive for the topic)

- 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.
- Jane C. Ginsburg: Extended Collective Licenses in International Treaty Perspective: Issues and Statutory Implementation, *Nordiske Immaterielt Rättskydd* 2019/215-227
- Comment of the European Copyright Society on the Implementation of the Extended Collective Licensing Rules (Arts. 8 and 12) of the Directive (EU) 2019/790 on Copyright in the Digital Single Market of 11 June 2020

