



# **The Nordic Model: Extended Collective Licenses**

## **And Its Relation to International Instruments**

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# Extended Collective Licenses (ECLs)

- Nordic model for rights clearance without needing to ask for consent from all right holders involved
- Basic elements
  - (i) Organization and user conclude an agreement on the basis of free negotiations.
  - (ii) If the organization is representative (e.g. represents a substantial number of right holders used in the relevant country),
  - (iii) the agreement is made legally binding also to non-represented right holders (the "outsider-effect").
  - (iv) On the basis of a statutory provision, the user may legally use all materials without needing to meet individual claims



# ECLs in the Nordic countries. Historical development

- Primary broadcasting (1960s)
- Reprography (photocopying) for educational and institutional purposes (1970s); extended to digital copying (2000s)
- Retransmissions of broadcasts (1980s)
- Use of broadcasters' archives (2000s)
- Use of libraries' archives (2000s)
- (+ some more)



# ECLs and "orphan works" / "out of print works"

- ECLs are the Nordic solution to the problems concerning "orphan works" and "out of print-works"
- Note: The ECL model was not *designed* in order to deal with these problems specifically
  - The ECLs also cover works with known/available authors and "in prints"
- But the ECL-model is capable of *solving* the problems



# Various types of ECLs

- (i) "Opt out"-licenses / "No opt out"-licenses
  - "Opt out". Example: Primary broadcasting under the Norwegian Copyright Act
    - "The extended license shall not apply ... if the author has prohibited broadcasting by the said organization, or there is otherwise special reason to assume that he is opposed to the work being broadcast" (NCA § 30)
  - "No opt out" – The general rule for Norwegian ECLs (NCA § 36) save for primary broadcasting and use of broadcasters' archives (NCA § 32)



# Various types of ECLs

- (ii) Individual or collective remuneration
  - Individual: Example. Primary broadcasting in Norway
    - “The Norwegian Broadcasting Corporation and other broadcasting organizations ... are entitled, *on payment of remuneration*, to broadcast a published work if the conditions for an extended collective licence ... are fulfilled” (NCA § 30)
  - Collective? General Norwegian rule: The CMO decides.
    - ” The organization receiving the remuneration for such use decides with regard to the collection and distribution of remuneration shall also be binding on the rightholders who are not represented by the organization” (NCA § 37(1))
    - However, “irrespective of the provision in the first paragraph, a non-represented rightholder who can substantiate that his work has been used ... may demand that remuneration for such use shall be paid to him” (NCA § 37(2))



# Various types of ECLs

- (iii) Specified vs. general ECLs
  - Traditionally: ECLs were granted for a field of use specified in the legislation
  - Danish Copyright Act (DCA): A general ECL was introduced into the act in 2008:
    - “ 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” (DCA § 50(2))
    - The specification is made in the agreement, not in the statutory provision
  - A similar general ECL is proposed in Sweden



# The relation ECL / international instruments

- Two references:
  - Christian Rydning: Extended collective licenses: the compatibility of the Nordic solution with the international conventions and EC law, Oslo 2010 (Complex 3/2010)
  - Thomas Riis/Jens Schovsbo: Extended Collective Licenses and the Nordic Experience, It's a Hybrid but is it a VOLVO or a Lemon?, to appear in Columbia Journal of Law and the Arts, Issue IV, Volume 33 (2010)  
available at  
[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1535230](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535230)





# Starting point: The Nature of ECLs

- Mere rights clearance or limitations/exceptions to exclusive rights?
- My opinion: The ECLs has undoubtedly *elements* of compulsory licenses (the "outsider effect"). The "opt out" solution is no relief in this respect
- However: Only *elements* of CLs. To be distinguished from ordinary CLs on several points.
- Still: Must be considered against international rules on exceptions and limitations



# Berne Convention (BC) art. 11bis(2)

- Rights to broadcasting, rebroadcasting, wire transmissions
- A matter for the legislation in the Union to determine the conditions under which the rights may be exercised
- However without prejudice to the right to equitable remuneration
- In other words: Extended collective licenses are permitted provided that the non-represented right holders receive individual remuneration



# ”The Three Step Test”

- BC art. 9(2); reproduction rights
- TRIPs art. 13; general application to exclusive rights
- WCT art. 10(2); for rights provided for in this treaty
- WPPT art. 16(2); for rights provided for in this treaty
- Infosoc art. 5(5); for rights provided for in the directive
  
- Allows for limitation to the rights
  - (i) In certain special cases
  - (ii) If the use does not conflict with the normal exploitation of the work (or other protected subject matter), and
  - (iii) It does not unreasonably prejudice the legitimate interests of the right holder



# ”The Three Step Test”. Some points

- (i) Strong arguments for permitting ECLs under the three step test
  - ECLs applies in situations where the alternative could be no (legal) exploitation at all
  - ECLs are based on negotiations with right holders; provides for balance of interests. Representativity requirement
  - The cultural context in the Nordic countries
- (ii) General ECLs may meet resistance from the first ”step” (certain special cases)
- (iii) Easier to accept ”opt out-licenses” than ”no opt outs”
- (iv) Easier to accept ECLs with individual remuneration than collective remuneration schemes



# ECLs under EU law specifically

- Accepted under the Sat/Cab Directive (Dir. 93/83)
  - Article 3(2): Simultaneous satellite transmission. "Opt out" requirement)
  - Artikkel 9(2): Cable retransmissions. Mandatory collective management (allows for ECLs)
- Infosoc-Directive (Dir. 01/29)
  - Recital 18: "This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences"
  - The scope of the statement depends on the definition of "extended collective licenses". The same considerations as under the three step test may apply



# Representativity requirements vs. national treatment /non-discrimination

- The requirement that the agreement is entered into by an organization representing a substantial part of authors of works used in the relevant territory is intended to comply with national treatment and non-discrimination rules
- Sufficient?



# Approval procedures for CMOs vs. the Services Directive

- Directive 2006/123 art. 16 and 17
- Article 16(2)b): Bans any obligation for service providers to obtain authorization unless it is justified for reasons of public policy, public security, public health or protection of environment
- Article 17(11): Exempts copyright and related rights, but disputed whether the exemption comprises services provided by CMOs



# Conclusion

- (i) The ECL model is not a totally homogeneous concept. Several variations
- (ii) International obligations raise certain issues, but the basic ECL features should pass the hurdles
- (iii) The controversial issue: Should the ECL model be exported to other countries/territories? Left for discussion