

## **Facilitating Transactions and Lawful Availability of Works of Authorship: Online Access to the Cultural Heritage and Extended Collective Licenses**

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The importance of providing access to the cultural heritage<sup>1</sup> is widely accepted. Digital technology has supplied powerful new tools to reproduce and disseminate works and at the same time has transformed the demands and expectations of end-users.<sup>2</sup> Nevertheless, there are several issues that cultural heritage institutions (“CHIs”) must resolve in order to maintain their role of preserving and disseminating cultural heritage in the digital age. Although some of those issues are budgetary rather than legal,<sup>3</sup> copyright is obviously a key consideration in the digital use of in-copyright works by CHIs. The largest copyright challenge for CHIs is the process of identification of right holders of copyright and clearance of rights, i.e. obtaining authorization or licenses for use of in-copyright works.

Stakeholders do not agree how best to facilitate CHIs in their important cultural role. Some advocate the establishment of legal exceptions whereas others favor licenses. My starting assumption is that, given the impact of online use, licensing is a more appropriate and flexible tool than exceptions. However, obtaining individual licenses for the use of in-copyright works held by CHIs is complicated, time-

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1. The term “cultural heritage” does not have a clear definition. When talking about “cultural heritage” here, I am simply referring to works contained in cultural heritage institutions such as libraries and museums.

2. Estelle Derclaye, *Conclusion*, in *COPYRIGHT AND CULTURAL HERITAGE; PRESERVATION AND ACCESS TO WORKS IN A DIGITAL WORLD* 233, 233 (Estelle Derclaye ed., 2010); Nadine Klass & Hajo Rupp, *Europeana, Arrow and Orphan Works: Bringing Europe’s Cultural Heritage Online*, in *EU COPYRIGHT LAW: A COMMENTARY* 946, 950 (Irina Stamatoudi & Paul Torremans eds., 2014).

3. Rep. on the Implementation of Comm’n Recommendation, EC, 2011/711/EU, 2013-2015, at 7 (June 2016); MAURIZIO BORGHI & STAVROULA KARAPAPA, *COPYRIGHT AND MASS DIGITIZATION* 104 (2013); Derclaye, *supra* note 2, at 233-34.

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consuming, and costly, in particular for cross-border online use.<sup>4</sup> Thus individual licensing is not a practical solution for CHIs except for the use of a few well-defined works. Even collective licensing does not fully solve the licensing issue because no collective management organization (“CMO”) has mandates from all right holders in a given field.<sup>5</sup> Hence, I propose that the solution is to be found through collective licenses with legislative support, such as the system of extended collective licenses (“ECL”).<sup>6</sup>

In this essay I will start by giving a brief account of the main strands which constitute an extended collective license in the Nordic countries, where it was first developed.<sup>7</sup> I will describe two examples where ECLs have been used to facilitate access to the cultural heritage, in Norway and Finland respectively. I will also discuss the compatibility of the system with international norms, in particular the Berne Convention,<sup>8</sup> and finish with some reflections on challenges and benefits of the system of ECLs in facilitating access to cultural heritage.

## I. THE NORDIC SYSTEM OF EXTENDED COLLECTIVE LICENSES

An ECL is a license for a specific use of in-copyright works in a specified field, based on a freely negotiated agreement between a CMO and a user, and extended to right holders that are not members of the CMO, commonly termed “outsiders”.<sup>9</sup> The legal effect of the extension is made possible by a provision in a copyright act.<sup>10</sup> This

4. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Creative Content Online in the Single Market*, at 23, COM (2007) 836 final (Jan. 3, 2008); *Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU: Analysis of specific policy options*, at 17 (May 2014), <https://perma.cc/PLN4-QCQ3>; *Cross-border extended collective licensing: A solution to online dissemination of Europe’s cultural heritage?*, at 70 (August 2011); Thomas Dreier et al., *Museen, Bibliotheken und Archive in der Europäischen Union; Plädoyer für die Schaffung des notwendigen urheberrechtlichen Freiraums*, 2012 ZUM 273, 280; Lucie Guibault, *Cultural Heritage Online? Settle It in the Country of Origin of the Work 2015*, (3), JIPITEC, 173-91, 173.

5. *Commission staff working document: Impact Assessment on the modernisation of EU copyright rules*, at 67-68, SWD (2016) 301 final (Sept. 14, 2016); Mihály Ficsor, *Collective Rights Management from the Viewpoint of International Treaties, with Special Attention to the EU ‘Acquis’*, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 66-67 (Wolters Kluwer ed., 3d edn. 2016).

6. See Rán Tryggvadóttir, *Copyright and cross-border online use of works by libraries in Europe: the case for extended collective licences* 21-23, 199, 365-67 (2017) (Ph.D. dissertation, KULeuven) (on file with KULeuven).

7. Here the term “Nordic countries” refers to Denmark, Finland, Iceland, Norway and Sweden.

8. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (1986).

9. See, e.g., Thomas Riis & Jens Schovsbo, *Extended Collective Licenses and the Nordic Experience: It’s a Hybrid but is it a VOLVO or a Lemon?*, 33 COLUM. J.L. & ARTS 471, 472 (2010); Felix Trumpke, *The Extended Collective License – A Matter of Exclusivity?*, 81(3) NORDISKT IMMATERIELLT RÄTTSSKYDD 264, 273 (2012).

10. See, e.g., Guibault, *supra* note 4, at 176; Tarja Koskinen-Olsson, *Collective Management in the Nordic Countries*, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 283, 290 (Daniel Gervais ed., 2d ed. 2010); Thomas Riis, Ole-Andreas Rognstad & Jens Hemmingsen Schovsbo, *Collective Agreements for the Clearance of Copyrights: The Case of Collective Management and Extended Collective Licenses*, in USER GENERATED LAW: RE-CONSTRUCTING INTELLECTUAL PROPERTY LAW IN A KNOWLEDGE SOCIETY 55, 58 (Thomas Riis ed., 2016); Alain Strowel, *The European “Extended*

extension effect can only be made effective by legislation.

The system is not a solution for all uses of in-copyright works, only for those uses which are otherwise difficult to facilitate. The ECL system has proven useful in the Nordic countries in various areas, mainly for secondary uses of in-copyright works. Thus specific ECL provisions exist in all of the countries for broadcasting;<sup>11</sup> for the retransmission of broadcasts;<sup>12</sup> for the use of archived broadcasts by broadcasting stations;<sup>13</sup> for institutional reproduction;<sup>14</sup> for use by libraries (and in some cases by other heritage institutions);<sup>15</sup> and for certain use of works by handicapped persons in Denmark, Iceland and Norway.<sup>16</sup> Furthermore, in Denmark and Finland there are specific ECL provisions for certain uses of works of visual fine art which can be used for CHIs.<sup>17</sup> In addition to the specific ECL provisions, general ECL provisions have been adopted in all the Nordic countries except Finland since 2008.<sup>18</sup> General ECL provisions are not limited to specific types of works, users, or uses, but ECL agreements based on general ECL provisions have to be specific with regard to what they cover. These general ECL provisions were introduced in part to respond to the needs of CHIs in the digital age.<sup>19</sup>

Although the ECL system is commonly referred to as the “Nordic ECLs system,” there are considerable differences in the ECL provisions of the five Nordic countries.<sup>20</sup> There are, however, three main elements of the Nordic ECLs which

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*Collective Licensing” Model*, 34, COLUMBIA J.L. & ARTS 665, 666 (2011); Rán Tryggvadóttir, *Digital libraries, the Nordic system of extended collective licenses and cross-border use*, 2014(5) CITIP 314, 315 (2014).

11. Consolidated Act on Copyright 1144 § 30(1) (2014) (Den.) [hereinafter DCA]; Copyright Act 404/1961 § 25(f) (1961) [hereinafter FCA] (amended 2010) (Fin.); Copyright Act 97 § 23(1) (1972) [hereinafter ICA] (amended 2006) (Ice.); Copyright Act (Consolidation) No. 2 § 30(1) (1961) [hereinafter NCA] (amended 1995) (Nor.); 2 ch. 26e § Act on Copyright in Literary and Artistic Works (SFS 1960:729) [hereinafter SCA] (amended 2000) (Swed.).

12. § 35 DCA (Den.); § 25(h) FCA (Fin.); § 12(a) ICA (Ice.); § 34 NCA (Nor.); § 26f SCA (1960:729) (Swed.).

13. § 30(a) DCA (Den.); § 25(g) FCA (Fin.); § 23 ICA (Ice.); § 32 NCA (Nor.); § 42g SCA (1960:729) (Swed.).

14. The ECL provisions for institutional reproductions are split between educational institutions on the one hand and other institutions on the other, such as public authorities and institutions, private enterprises, and organizations other than those established for educational purposes, except in Iceland. Compare § 13-14 DCA (Den.), § 13-14 FCA (Fin.), § 13-14 NCA (Nor.), and §§ 13, 16 SCA (1960:729) (Swed.); with § 18 ICA (Ice.).

15. § 16(1),(4) DCA (Den.); § 16(d) FCA (Fin.); § 12 ICA (Ice.); § 16 NCA (Nor.); §§ 16-17 SCA (1960:729) (Swed.).

16. § 17(4) DCA (Den.); § 19 ICA (Ice.); § 17 NCA (Nor.).

17. This is in addition to the ECL provision for broadcasting in these countries, which also covers works of fine art.

18. § 50(2) DCA (Den.); § 26 ICA (Ice.); § 36(2) NCA (Nor.); § 26(h) SCA (1960:729) (Swed.).

19. Guibault, *supra* note 4, at 176; Martin Kyst, *Aftalelicens - Quo Vadis?*, 2009(1) NORDISKT IMMATERIELLT RÄTTSSKYDD 44, 47, 50 (2009); PETER SCHÖNNING, OPHAVSRETSLOVEN MED KOMMENTARER 465-66 (Thomson Reuters 5th edn. 2011); Riis & Schovsbo, *supra* note 9, at 477.

20. AXHAMN & GUIBAULT, CROSS-BORDER EXTENDED COLLECTIVE LICENSING: A SOLUTION TO ONLINE DISSEMINATION OF EUROPE’S CULTURAL HERITAGE? 42 (2011); Riis, Rognstad & Schovsbo, *supra* note 10, at 59; Thomas Riis & Jens Schovsbo, *Extended Collective Licenses in Action*, 2012(8) INT’L REV. INTELL. PROP. & COMPETITION L. (IIC), 930, 930-31; Ole-Andreas Rognstad, *Avtalelicens som nordisk løsningsmodell – Noen refleksjoner, særlig knyttet til avtalelicensens legitimitet i utlandet*, 2012 NORDISKT IMMATERIELLT RÄTTSSKYDD 620, 621 (2012); Tryggvadóttir, *supra* note 10, at 316-17.

justify the joint grouping. First, ECLs are based on negotiations between CMOs that are representative of “a substantial number of authors of a certain type of works which are used” in each respective country and the prospective user.<sup>21</sup> Second, the application of the agreement is extended by a provision in copyright law to right holders not represented by the CMO.<sup>22</sup> The field and scope of application for ECLs is determined by the individual ECL provision in the copyright acts, but it is the agreement that sets out the actual use enabled by the license. The third element concerns measures to secure the rights of the outsiders of the CMOs who are bound by the agreement due to the ECL provision in law. Those measures are: first, that outsiders must be treated in the same way as members, which is particularly relevant with regard to remuneration; second, outsiders have the right to demand individual remuneration even under collective remuneration schemes; and third, in many cases, but not all, outsiders are given the possibility to opt-out of the license agreement.

#### A. REPRESENTATIVE CMOs

Central to the justification of the ECL system is that the relevant CMO is presumed to be a representative for the interest of the outsider as well as for its members.<sup>23</sup> Hence eligibility requirements for CMOs to conduct negotiations on ECLs are of paramount interest. These are laid out in specific provisions dealing with the common requirements of ECLs in the copyright act of each Nordic country. It then falls to the negotiating parties, i.e. the CMO and the user, to assess the representativeness of the CMO for licensing a specific use in a specific sector. If there is a requirement for governmental authorization of the CMO, the relevant authority will examine whether the requirement is fulfilled.<sup>24</sup>

The key eligibility requirement for a CMO is that it represents “a substantial number of authors of a certain type of works which are used” in the country concerned.<sup>25</sup> The representativeness requirement always relates to a specific territory.<sup>26</sup> The term “substantial number of authors” is understood first, to cover all relevant right holders, including derivative right holders, such as publishers;<sup>27</sup> and

21. This is the wording of the English translation of § 50(1) DCA (Den.).

22. ANNA VUOPALA, EXTENDED COLLECTIVE LICENSING—A SOLUTION FOR FACILITATING LICENSING OF WORKS THROUGH EUROPEANA, INCLUDING ORPHANS? 9 (2013).

23. Guibault, *supra* note 4, at 177; Rydning, *supra* note 10, at 77; Tryggvadóttir, *supra* note 10, at 317.

24. Opinion on the cross-border effect of licences granted for digitization and communication of out-of-commerce works by cultural heritage institutions under a regime of Extended Collective Licences (ECL), at 5, ALAI (Sept. 14, 2016).

25. See English translations of § 50(1) DCA (Den.); § 26(1) FCA (Fin.) (which uses the word “numerous” rather than “substantial” in the English translation); § 23 ICA (Ice.); § 38(a) NCA (Nor.); 26(k) § SCA (1960:729) (Swed.).

26. Felix Trimpke, *Exklusivität und Kollektivierung: Das skandinavische Modell der Erweiterten Kollektiven Lizenz (Extended Collective Licensing) 661 (2015)* (Ph.D. dissertation, Max-Planck-Institute für Innovation und Wettbewerb).

27. Except in Norway where the CMOs are, however, also representative of other relevant right holders. See Rydning, *supra* note 10, at 74; Ot.prp. nr. 15, *Om lov om endringer i straffegjennomføringsloven og straffeloven*, 146-47 (2006-2007); Ot.prp. nr. 46, *Om lov om endringer i åndsverkloven m.m.*, 55 (2004-2005).

second, to be substantial in regard to the specific type of works used in the country as a whole, rather than to mean a substantial number of right holders of works used by an individual licensee. Furthermore, preparatory documents clarify that “substantial” does not mean a majority of right holders or works, but rather substantial representation of the works or rights most commonly used in the specific field.<sup>28</sup> Securing representation of foreign right holders by a national CMO is normally done through reciprocity agreements with similar CMOs in other countries.<sup>29</sup>

A non-explicit but important prerequisite for the representativeness requirement is that the relevant CMO has the mandate from its members to negotiate the uses of works that an ECL provision covers.<sup>30</sup> There are, however, no provisions on the wording of such mandates. Thus they take different forms.<sup>31</sup> In the European Union (EU), the definition of a CMO encompasses both CMOs mandated by right holders directly as well as CMOs mandated by law.<sup>32</sup> However, in the EU, a legislative mandate on its own is not sufficient for a collective agreement to be considered an arrangement concerning management of rights,<sup>33</sup> which is an important consideration under EU legislation.<sup>34</sup> Thus it is a crucial part of the ECL requirement of representativeness that it is based on direct mandates from right holders.

Finally, a key requirement for representativeness is that the relevant CMO has the capacity to manage the rights of outsiders properly. This is not only determined by the number of members of the CMO, but also on other factors (e.g., how well the CMO is run and whether it fulfils requirements of good management and governance, as well as its financial capacity to manage the relevant affairs).<sup>35</sup>

28. Tryggvadóttir, *supra* note 6, at 161.

29. Daniel Gervais, *Collective Management of Copyright: Theory and Practice in the Digital Age*, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 1, 9 (Daniel Gervais ed., 3rd edn. 2016); Lucie Guibault & Stef van Gompel, *Collective Management in the European Union*, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS (Daniel Gervais ed., 3 edn., 2016), at 158; Robin Kerremans, Katleen Janssen & Peggy Valcke, *Collective Solutions for Cultural Collections Online: Search and Select!*, 6 J. INTELL. PROP. L. & PRAC. 638, 641 (2011); Adriana Moscoso, *Cross-Border Issues in Collective Management*, 34 COLUM. J.L. & ARTS 651, 651-56 (2011); Riis, Rognstad, & Schovsbo, *supra* note 10, at 57; Tryggvadóttir, *supra* note 10, at 317.

30. Proposition [Prop.] 2014:181 Regeringens proposition med förslag till ändring av upphovsrättslagen [government bill] (Swed.), at 11-12; Tarja Koskinen-Olsson & Vigdís Sigurðardóttir, *Collective Management in the Nordic Countries*, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS (Daniel Gervais ed., 3rd ed. 2016), at 250; Guibault, *supra* note 4, at 179; Rognstad, *supra* note 20, at 622; Vuopala, *supra* note 22, at 13-14.

31. JUKKA LIEDES, MEMORANDUM ON THE EXTENDED COLLECTIVE LICENCE 7 (2015), available at <https://perma.cc/3PA2-2NAN>.

32. Council Directive 2014/26, art. 3(a), 2014 O.J. (L 84), 72 (EU) [hereinafter CMO Directive]; Guibault & van Gompel, *supra* note 29, at 143.

33. Case C-301/15, Marc Soulier, Sara Doke v. Ministre de la Culture et de la Communication, Premier ministre, ECLI:EU:C:2016:878, para. 52; Opinion of Advocate General Wathelet, Marc Soulier, Sara Doke v. Ministre de la Culture et de la Communication, Premier ministre, Case C-301/15, ECLI:EU:C:2016:536, para. 57.

34. Compare the exhaustive list of exceptions in Council Directive 2001/29, art. 5, 2001 O.J. (L 167), 10 (EC), which states the Directive is without prejudice to arrangement of management of rights in the EU Member States. See discussion in Tryggvadóttir, *supra* note 2, at 220-23.

35. § 26(1)-(2) FCA 404/1961 (Fin.). See also, PETER SCHÖNNING, OPHAVSRETSLOVEN MED

## B. THE EXTENSION EFFECT

The fundamental defining feature of the ECL system, which differentiates ECLs from general collective licenses, is that the effect of an agreement between a CMO and a user is extended to outsiders. This extension effect is, as mentioned above, achieved with a provision in a copyright act, an ECL provision,<sup>36</sup> which makes a collective license valid for the user, such as a library or another type of CHIs, also in relation to right holders of the same type of works who are not CMO members. In other words, the legislation is the basis for the extension possibility.<sup>37</sup>

The field and scope of application of ECLs is determined by the individual ECL provision in the copyright acts.<sup>38</sup> These provide the outer limits of the subject matter for ECL agreements. Many ECL provisions have a wide scope for uses, but it is important to remember that they do not have an automatic effect. They only come into force if an agreement is reached between a relevant CMO and a user and the actual scope of the license is determined in that agreement (i.e., what use, by whom, and for which works).<sup>39</sup> In other words, the impact of the extension, which is provided by a legal provision, only comes into effect through conclusion of a contract (i.e., an ECL agreement).<sup>40</sup> An ECL agreement cannot allow wider use or apply to works other than those specified by the ECL provision, but can, and mostly does, stipulate a narrower use and narrower scope of works<sup>41</sup> or limit the categories of beneficiaries (users) or right holders to which it applies (e.g., only authors and not publishers).<sup>42</sup> If the agreement allows use outside the delimitations in the ECL provision, it cannot apply for the use of works of outsiders. The agreement in turn is dependent on the mandate that the CMO receives from its members (i.e., what capacity the CMO has to grant licenses with respect to the rights of its members that it administers).<sup>43</sup>

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KOMMENTARER 502-03 (6th ed. 2016); ALAI, *supra* note 26, at 3; Johan Axhamn & Lucie Guibault, *Solving Europeana's Mass-Digitization Issues through Extended Collective Licensing?*, 6 NORDIC INTELL. PROP. L. REV. 509, 516 (2011); Tryggvadóttir, *supra* note 6, at 148-50; Vappu Verronen, *Extended Collective Licence in Finland: A Legal Instrument for Balancing the Rights of the Author with the Interests of the User*, 49 J. Copyright Soc'y U.S.A. 1143, 1148 (2001-2002).

36. § 42a (SCA 1960:729) (Swed.); § 50(3) DCA 1144 (Den.); § 36(1) NCA 30/06/1995 (Nor.); § 26(1) FCA 404/1961 (Fin.); § 26.a ICA 73 (Ice.).

37. Jan Rosén, *Copyright Contracts — EU Solutions or National Concern? A Swedish Proposal to Amend the Copyright Act on Individual and Collective Contracts*, in NATIONAL DEVELOPMENTS IN THE INTERSECTION OF IPR AND COMPETITION LAW: FROM MAGLITE TO PIRATE BAY 155, 169 (Hans Henrik Lidgard ed., 2011).

38. Rognstad, *supra* note 22, at 276; Tryggvadóttir, *supra* note 2, at 163-65.

39. Licenskonstruktioner og fotokopiering, delbetænkning, Betænkning nr 912, (Stougaard Jensen, København ed., 1981) at 40; Rydning, *supra* note 10, at 20, 73; Trumpke, *supra* note 26, at 327; Tryggvadóttir, *supra* note 12, at 317.

40. Ysolde Gendreau, *What's in a Name? Extended Collective Licences in Canada*, in LIBER AMICORUM JAN ROSÉN 269, 283 (Gunnar Karnell ed., 2016).

41. Axhamn & Guibault, *supra* note 20, at 33; Rydning, *supra* note 10, at 16, 17, 50.

42. Kyst, *supra* note 19, at 48; Trumpke, *supra* note 26, at 461, 463.

43. J.A.L. STERLING, *STERLING ON WORLD COPYRIGHT LAW* 629-20 (Trevor Cook ed., 4th edn. 2015); Guibault, *supra* note 4, at 179; Tarja Koskinen-Olsson & Nicholas Lowe, *Educational Material on Collective Management of Copyright and Related Rights; Module 1: General Aspects of Collective Management*, 2012 WORLD INTELL. PROP. ORG. 28; Daniel Gervais, *Collective Management of Copyright*

### C. SAFEGUARD MEASURES FOR OUTSIDERS

An indispensable requirement in any ECL agreement is that outsiders should be treated in the same way as members under the agreement. This is especially relevant to remuneration and the distribution of the remuneration. The other main safeguard measure is the opt-out possibility for outsiders.<sup>44</sup>

Outsiders are guaranteed the same remuneration as members. Remuneration for uses of works under an ECL agreement is decided in the agreement.<sup>45</sup> As with all collective agreements, an ECL agreement is most often based on blanket licensing, which means a uniform pricing structure for all works.<sup>46</sup> Because of the increased negotiating power of the CMO,<sup>47</sup> it is generally agreed that the remuneration received under an ECL agreement is beneficial for outsiders, as they would normally not be able to negotiate a better deal on their own.<sup>48</sup> The distribution of remuneration to right holders, both members of the CMO in question and outsiders, is decided by the CMO.<sup>49</sup> The fact that CMOs take the responsibility for ensuring remuneration to outsiders is one of the main benefits of ECLs for users.<sup>50</sup> It has been ascertained that in the Nordic countries the CMOs are diligent in identifying and locating outsiders in order to remunerate them.<sup>51</sup> However, certain practices with regard to distribution of remuneration are not beneficial for outsiders, in particular for foreign outsiders, such as distribution of unclaimed remuneration to members only, no pay-out of remuneration below a certain minimum, and deductions for collective purposes.<sup>52</sup>

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*and Neighbouring Rights in Canada: An International Perspective*, 1 CAN. J.L. TECH. 21, 27-28 (2001).

44. Tryggvadóttir, *supra* note 6, at 181-98.

45. It is possible that negotiating parties will come to an agreement that there is no remuneration due for certain uses under an ECL agreement, as there is no stipulation obliging the parties to negotiate remuneration. *Cf.* Trumpke, *supra* note 26, at 327 n.1246. There is at least one agreement under the Danish General ECL provision that stipulates free use. *Cf.* Tryggvadóttir, *supra* note 6, at 175.

46. Riis, Rognstad & Schovsbo, *supra* note 10, at 63.

47. Johan Axhamn, *Exceptions, Limitations and Collective Management of Rights as Vehicles for Access to Information*, in ACCESS TO INFORMATION AND KNOWLEDGE: 21ST CENTURY CHALLENGES IN INTELLECTUAL PROPERTY AND KNOWLEDGE GOVERNANCE 164, 178 (Dana Beldiman ed., 2013); Christian Handke, 'Collective Administration,' in HANDBOOK ON THE ECONOMICS OF COPYRIGHT: A GUIDE FOR STUDENTS AND TEACHERS 179, 180-81 (Richard Watt ed., 2014); Koskinen-Olsson, *supra* note 10, at 291; Silke von Lewinski, *Collectivism and Its Role in the Frame of Individual Contracts*, in INDIVIDUALISM AND COLLECTIVENESS IN INTELLECTUAL PROPERTY LAW 117, 124 (Jan Rosén ed., 2012); Schønning, *supra* note 35, at 495; Jens Schovsbo, *The Necessity to Collectivize Copyright – and the Dangers Thereof*, in INDIVIDUALISM AND COLLECTIVENESS IN INTELLECTUAL PROPERTY LAW 166, 177 (Jan Rosén ed., 2012); Axhamn & Guibault, *supra* note 20, at 51; Terese Foged, *Danish Licences for Europe*, 37 EUR. INTEL. PROP. REV. 15, 17 (2015); U.S. COPYRIGHT OFFICE, ORPHAN WORKS AND MASS DIGITIZATION 82, 103 (2015); Verronen, *supra* note 35, at 1148.

48. Tryggvadóttir, *supra* note 6, at 196.

49. § 51(1) DCA 1144 (Den.); § 26(4) FCA 404/1961 (Fin.); § 37(1) NCA 30/06/1994 (Nor.); § 3a ch. 42a (SCA 1960:729) (Swed.). *See also* CMO Directive art. 13.

50. Tryggvadóttir, *supra* note 10, at 320.

51. COPYRIGHT INVESTIGATION COMMISSION, SOU 2010:24, AVTALAD UPPHOVSRÄTT: DELBETÄNKANDE AF UPPHOVSRÄTTSTUTREDNINGEN 217, 229 (2010) (Swed.), available at <https://perma.cc/8FZP-VKWQ>; Liedes, *supra* note 31, at 14; Axhamn & Guibault, *supra* note 20, at 35; Rosén, *supra* note 37, at 175; Tryggvadóttir, *supra* note 6, at 187; VUOPALA, *supra* note 22, at 34.

52. Axhamn & Guibault, *supra* note 20, at 45, 55; Jonathan Band & Brandon Butler, *Some Cautionary Tales About Collective Licensing*, 21 MICH. ST. INT'L. L. REV., 687, 698 (2013); Riis and

Another issue for outsiders concerning remuneration is the fact that under Nordic ECLs, compensation for use is often distributed collectively. In such instances outsiders have the right to individual remuneration. This is important, as rules regarding distribution of remuneration cannot be influenced by outsiders<sup>53</sup> and are hence not always in their best interests.<sup>54</sup> However, there are no guidelines as to how such individual payments should be calculated and the onus is on the outsider to prove the actual use. If users do not provide statistics for the works used it can indeed be very difficult to demonstrate the use of individual works.<sup>55</sup> Hence the right to individual remuneration may be more theoretical than real, especially for foreign outsiders residing abroad. This being said, there is an increasing number of technical solutions available to solve the issue of identifying and registering online uses of works used under an ECL agreement.<sup>56</sup> Such solutions will make the administration of individual remuneration practically feasible.

The “opt-out” possibility in the Nordic ECL system gives a right holder who is not a member of the CMO the possibility to ban the use of his or her work under an ECL license. Many but not all Nordic ECL provisions contain a mandatory opt-out possibility.<sup>57</sup> It is worth noting that an ECL agreement can contain an opt-out possibility even when it is not mandatory in the ECL provision of the relevant copyright act.<sup>58</sup> Such an opt-out provision in the actual ECL agreement can be applicable to all authors or right holders, both members of the CMO and outsiders,<sup>59</sup> as is the case in the Bokhylla (Bookshelf) ECL agreement, discussed below.

#### D. TWO NORDIC PROJECTS FOR ONLINE ACCESS TO THE CULTURAL HERITAGE

There are two Nordic projects I would like to mention that provide for online access to cultural heritage and are based on ECL agreements. These are the Norwegian Bokhylla Project,<sup>60</sup> which gives access to all books published in Norway before the year 2001<sup>61</sup>, and the Finnish National Gallery Project<sup>62</sup> which gives access

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Schovsbo, *supra* note 9, at 490-92; Tryggvadóttir, *supra* note 6, at 196.

53. SOU 2010:24, 225 (Swed.).

54. Riis & Schovsbo, *supra* note 9, at 491-492.

55. Rydning, *supra* note 10, at 79.

56. Sterling, *supra* note 43, at 629-30.

57. Koskinen-Olsson, *supra* note 10, at 292-94; Riis & Schovsbo, *supra* note 9, at 276; Trumpke, *supra* note 9, at 279-80; Tryggvadóttir, *supra* note 6, 188.

58. Ot.prp.nr.15 (1994-1995), Om lov om endringer i åndsverkloven m.m, at 29 (Nor.), Tillæg A Folketingstidende 1984-1985, Bind II, Lovforslag nr. L 113, at 1994 (Den.); Prop. 69 L (2014-2015), Proposisjon til Stortinget (forslag til lovvedtak): Endringer i åndsverkloven (gjennomføring av EUs hitteverkdirektiv og innføring av generell avtalelisens mv.), at 23 (Nor.).

59. Schönning, *supra* note 21, at 468; Trumpke, *supra* note 26, at 264-65, 306.

60. NATIONAL LIBRARY OF NORWAY, CONTRACT REGARDING THE DIGITAL DISSEMINATION OF BOOKS BETWEEN THE NATIONAL LIBRARY OF NORWAY AND KOPINOR [hereinafter Bokhylla agreement], available at <https://perma.cc/UN8A-DD8K>.

61. According to information from Kopinor, the CMO for reproduction rights in Norway, in September 2016, 211,454 book titles were available in the Bokhylla project.

62. Rån Tryggvadóttir, *Balancing of interests and cross-border use: Room for Nordic co-operation?*, 6 NORDISKT IMMATERIELLT RÄTTSSKYDD 652, 662 (2015); Koskinen-Olsson &



to visual artwork by Finnish artists.<sup>63</sup> Although both are based on extended collective licenses, they differ in many ways, which reflects the flexibility inherent in the ECL system.

Both agreements allow for opt-outs, but the Norwegian project allows both CMO members and outsiders to opt out whereas the Finnish allows only outsiders to opt-out. Fewer than two percent of the number of works made available under the Norwegian Bokhylla agreement have been opted-out<sup>64</sup>, and none from the Finnish National Gallery Project.<sup>65</sup> Remuneration under the Norwegian project is based on per page per year,<sup>66</sup> whereas in the Finnish project the CMOs receive a lump sum<sup>67</sup> from which the CMOs distribute a certain amount to the relevant right holders. Finally, the Norwegian project is only accessible to users with a Norwegian IP number<sup>68</sup>, whereas the Finnish project provides for worldwide access.<sup>69</sup>

These projects are examples of successful endeavors to enable online access to cultural heritage. The ECL system is widely accepted in all the Nordic countries and has functioned well since its introduction.<sup>70</sup> Thus the question has been posed of whether the system could be used elsewhere, in particular for digital use of works.<sup>71</sup>

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Sigurðardóttir, *supra* note 30 at 260-61; Press release, Finnish Ministry of Education and Culture (Nov. 20, 2014).

63. The agreement covers the works of around 930 Finnish artists, amounting in March 2015 to just over 37,000 works of which around 33,500 of which were accessible on the Internet.

64. Information from Kopinor in September 2016; *see also* SWD, *supra* note 5, at 75.

65. E-mail from Tommi Nilson, Executive Director, Kuvasto (one of the two CMOs that negotiated the ECL agreement) to author (Oct. 5, 2016) (on file with author).

66. Bokhylla agreement, *supra* note 60, at Art. 8-10. From 2015 and onwards it is NOK 0.33 (about USD \$0.04) index linked.

67. Around \$2.1 million (USD).

68. The Norwegian National Library may upon request give other users access, i.e. those without Norwegian IP numbers, for specific purposes, such as research and education; *cf.* Bokhylla agreement, *supra* note 60, at Art. 4. As of September 2016, fifty five individuals without a Norwegian IP number had had access to the service, *cf.* information from Kopinor, Oct. 31, 2016.

69. *See* further description of these two projects in Tryggvadóttir, *supra* note 6, at 167-68, 170-71.

70. Ds 2003:35, *Upphovsrätten i informationssamhället - genomförande av direktiv 2001/29/EG, m.m.*, 277; Riis and Schovsbo, *supra* note 9, at 496-97; Rognstad, *supra* note 20, at 621; Tryggvadóttir, *supra* note 10, at 316; Dinusha Mendis and Victoria Stobo, *Extended Collective Licensing in the UK - One Year On: A Review of the Law and a Look Ahead to the Future*, 4 EURO. INTELLECTUAL PROP. REV. 208, 208 (2014).

71. Kerremans, Janssen & Valcke, *supra* note 29, at 647-48; Pamela Samuelson, *Legislative Alternatives to the Google Book Settlement*, 4 COLUM. J.L. & ARTS 697, 709 (2011); Allard Ringnald, *Orphan Works, Mass Rights Clearance, and Online Libraries: The Flaws of the Draft Orphan Works Directive and Extended Collective Licensing as a Solution*, 1 MEDIEN UND RECHT INT'L 3-11 (2011); Stef van Gompel and P. Bernt Hugenholtz, *The Orphan Works Problem: The Copyright Conundrum of Digitizing Large-Scale Audiovisual Archives, and How to Solve It*, 1 POPULAR COMMUNICATION - THE INT'L J. OF MEDIA & CULTURE 61, 65 (2010); Stef van Gompel, *Unlocking the Potential of Pre-Existing Content: How to Address the Issue of Orphan Works in Europe?*, 6 INTERNATIONAL REVIEW OF INDUS. PROP. & COMPETITION L. (IIC) 669, 687 (2007); Gervais, *supra* note 43, at 38-45, 89; Daniel Gervais, *Collective Management of Copyright: Theory and Practice in the Digital Age*, in COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS 1, 21 (Daniel Gervais ed., 2nd edn. 2010); IAN HARGREAVES, *DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH* 37-38 (May 2011); Jia Wang, *Should China Adopt an Extended Licensing System to Facilitate Collective Copyright Administration: Preliminary Thoughts*, 6 EUROPEAN INTELLECTUAL PROPERTY REVIEW 283-89 (2010); Silke von Lewinski, *Certain Legal Problems Related to the Making Available of Literary and*

This has led to various attempts to adopt an ECL system as described below.

## II. ECLS OUTSIDE OF THE NORDIC COUNTRIES

Within Europe, the UK adopted an ECL system in 2014.<sup>72</sup> The Secretary of the State was given the power to authorize a licensing body to grant ECLs without limitations on which works, uses or to which beneficiaries an ECL scheme can apply.<sup>73</sup> Nevertheless, each authorization must specify to which types of works and to what uses the authorization applies.<sup>74</sup> Furthermore, any license under an authorization must be non-exclusive<sup>75</sup> and include an opt-out possibility.<sup>76</sup> Thus the UK ECL provision is similar to the general ECL provisions in the Nordic countries.<sup>77</sup> The first application for an authorization to operate an ECL scheme was announced in December 2017.<sup>78</sup> This hesitant start may partly be due to the complexity of the system, which CHIs think will hinder its use for any large scale digitization.<sup>79</sup> In particular, the requirements that CMO must fulfil to be authorized to manage an ECL scheme, especially with regard to representativeness and informed consent of members, seem to be more onerous than in the Nordic countries.<sup>80</sup>

Other European countries have introduced legislation based on collective management with legislative support to enable large-scale digitization and cross-border accessibility of out-of-commerce works, notably Croatia, Estonia, Hungary, Poland and the Slovak Republic.<sup>81</sup> The Netherlands<sup>82</sup> and the Czech Republic have proposed ECL schemes for out-of-commerce works.<sup>83</sup> Most importantly, in December 2016 the EU Commission proposed the introduction of an ECL solution with cross-border effect for the use of out-of-commerce works by cultural heritage institutions.<sup>84</sup> At the end of October 2017 a compromise proposal was tabled in the

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*Artistic Works and other Protected Subject Matter through Digital Networks*, UNESCO E-COPYRIGHT BULLETIN 15 (2005); Jane Ginsburg, *Fair Use for Free, or Permitted-but-paid*, 3 BERKELEY TECH. L. J. 1383, 1438 (2014).

72. Cf. Copyright and Rights in Performances (Extended Collective Licensing) Regulations (SI 2014/2588) (Sep. 11, 2014), based on the Enterprise and Regulatory Reform Act 2013, cf. Clause 77(3) of the Act with the inclusion of Section 116B into the Copyright and Designs Patents Act ("CDPA").

73. United States Copyright Office, *supra* note 47, at 89.

74. CDPA, *supra* note 74, at § 116B(2); CRPR, *supra* note 72, at Art. 4(2).

75. CDPA, *supra* note 74, at § 116B(4); CRPR, *supra* note 72, at Art. 17(1).

76. CDPA, *supra* note 74, at § 116B(3); CRPR, *supra* note 72, at Art. 4(4)(d).

77. Prop. 69 L, *Proposisjon*, *supra* note 58, at 15; Riis, Rognstad & Schovsbo, *supra* note 10 at 70.

78. See the notice for open consultation on the application, *available at* <https://perma.cc/48SC-VSBV>.

79. European Commission, *supra* note 3, at 39; Pamela Samuelson, Comment Letter on Notice of Inquiry regarding Mass Digitization 10 (6 Oct. 2015).

80. Tryggvadóttir, *supra* note 6, at 238-45.

81. European Commission, *supra* note 3, at 37-41.

82. Riis, Rognstad & Schovsbo, *supra* note 10, at 70.

83. European Commission, *supra* note 5, at 37-41. The introduction of ECLs in Switzerland has also been discussed, cf. Willi Egloff, *Extended Collective Licenses - ein Modell auch für die Schweiz?*, 11 ZEITSCHRIFT FÜR IMMATERIALGÜTER-, INFORMATIONS- UND WETTBEWERBSRECHT 671-86 (2014).

84. European Commission, *Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market*, (Sept. 14, 2016), Art. 7-9. For an account of the proposed solution, see Rán Tryggvadóttir, *The European Union's proposed measures to improve licensing practices*

EU Council that contained an additional provision on ECLs, expressly allowing national ECL agreements if they fulfill the three-step test<sup>85</sup> for uses limited to national territories.<sup>86</sup> However, it remains to be seen when and whether the Digital Single Market proposal will be adopted and which provisions and wording the final version will contain.

The ECL system has been under consideration in several countries outside Europe.<sup>87</sup> However, in Canada, Australia and the USA such considerations have not led to the adoption of an ECL system. A positive study on the implementation of ECLs in Canada<sup>88</sup> was ignored in favor of exceptions in 2012.<sup>89</sup> In Australia a form of ECLs for libraries for mass digitization purposes and use of orphan works was considered by the Australian Law Reform Commission (ALRC) in 2013.<sup>90</sup> Nevertheless, in the final report, the ALRC did not recommend the adoption of ECLs.<sup>91</sup> The ALRC concluded that the adoption of a fair use clause, a limitation on remedies for use of orphan works and the expansion of the preservation clause for cultural institutions would address the needs of CHIs and provide an adequate framework for mass digitization.<sup>92</sup> These recommendations have, however, not yet been incorporated into the Australian Copyright Act.<sup>93</sup> The US Copyright Office (USCO) proposed in 2015 the introduction of a limited pilot ECL scheme for mass digitization purposes.<sup>94</sup> The proposal was in many ways similar to the UK ECL scheme although the USCO proposed that the ECL solution should, unlike the UK scheme, be limited to certain works, i.e. published literary works, embedded images and photographs. Furthermore, it was proposed that the use under an ECL agreement

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*and ensure wider access to content in cultural heritage institutions and their compatibility with the Nordic ECL system*, NIR 6/2017, 615-628.

85. The three-step test is found in several international legal instruments: Berne Convention, *supra* note 8, at Art. 9(2); Agreement on the Trade-Related Aspects of Intellectual Property Rights of 15 April 1994, Art. 13; WIPO Copyright Treaty, Dec. 20, 1996, Art. 10(1) [hereinafter WCT]; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, Art. 16(2); Infosoc Directive, Art. 5(5); Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013, Art. 11.

86. *Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - Consolidated Presidency compromise proposal*, (30 Oct. 2017) 016/0280 (COD) 13842/17, Art. 9a, pp. 45-47. In the new provision it is stipulated that the cross-border effect of such national ECL agreements may be provided at later stage, *cf.* Art. 9a (5).

87. Daniel Gervais, *Extended Collective Licensing: A Significant Contribution to International Copyright Law and Policy*, in LIBER AMICORUM JAN ROSÉN 311, 318 (Gunnar Karnell ed., 2016); Gervais, *Collective Mangement*, *supra* note 43, at 21; Wang, *supra* note 71; Riis, Rognstad & Schovsbo, *supra* note 10, at 70.

88. Daniel Gervais, *Application of an Extended Collective Licensing Regime in Canada: Principles and Issues Related to Implementation*, Study Prepared for the Department of Canadian Heritage (June 2003).

89. Gendreau, *supra* note 40, at 278.

90. Australian Law Reform Commission, *Copyright and the Digital Economy: Discussion Paper* 229-34 (May 2013).

91. Australian Law Reform Commission, *Copyright and the Digital Economy (ALRC Report 122)* 274 (November 2013).

92. *Id.* at 16, 275.

93. *Cf.* the Australian Copyright Act No. 63, 1968 as subsequently amended up to Act No. 4, 2016.

94. U.S. Copyright Office, *Orphan Works and Mass Digitization*, 7-8, 72-105 (2015).

would only be for non-commercial purposes and limited to online use to certain end-users, i.e. not general online use. Several public comments were received during the consultation from inside and outside the USA.<sup>95</sup> However, the proposal was withdrawn in September 2017, mainly due to lack of interest by stakeholders.<sup>96</sup> Thus it seems unlikely that the system will be adopted outside of Europe (at least not in these countries) in the near future.

### III. COMPATIBILITY WITH INTERNATIONAL NORMS

There are legal challenges inherent in the ECL system which have raised questions as to the compatibility of the system with international legislation. These concern the question of the legal nature of the extension effect, the question whether the opt-out possibility may be a prohibited formality under the Berne Convention and whether the system is compatible with the Convention's principle of national treatment.

#### A. THE LEGAL NATURE OF THE ECL SYSTEM AND THE THREE-STEP TEST

The legal nature of the extension effect making an ECL agreement binding for outsiders is the subject of some controversy. Some commentators maintain that the extension is an exception or limitation on the outsider's exclusive right<sup>97</sup> and thus must fulfil international norms, such as the three-step test, whereas others claim that the ECL system is simply an arrangement of management of rights,<sup>98</sup> and thus does not constitute an exception or limitation with regards to outsiders.<sup>99</sup> One challenge for the discussion is that there is no clear definition in international treaties or elsewhere of the terms "exception" and "limitation," such that there are varying interpretations and uses of the terms in different forums.<sup>100</sup>

95. Eighty three public comments were received from various organizations and individuals, available at <https://perma.cc/3JFN-YRNM> (last viewed Sept. 27, 2016).

96. U.S. Copyright Office, *Mass Digitization Pilot Program*, available at <https://perma.cc/B7JA-3HK6> (last viewed Mar. 29, 2017).

97. Jane Ginsburg, *Berne-Forbidden Formalities and Mass Digitization*, B.U. L. REV., 745-75 (2016); Trumpke, *supra* note 26, at 340-42; Jane Ginsburg, *With Untired Spirits and Formal Constancy: Berne-Compatibility of Formal Declaratory Measures to Enhance Title-Searching*, BERKELEY TECH. L.J., 1583-622 (2013); Rognstad, *supra* note 20, at 631 (2012); Trumpke, *supra* note 9; Strowel, *supra* note 10, at 668; Axhamn & Guibault, *supra* note 20, at 48-9 (2011); Ole-Andreas Rognstad, *Avtalelisenser, NORDISKT IMMATERIELLT RÄTTSSKYDD*, 151-59 (2004).

98. See, e.g., VUOPALA, *supra* note 22, at 12-13; Foged, *supra* note 47, at 20; Schönning, *supra* note 21, at 495; Verronen, *supra* note 35, at 1159.

99. Cf. discussion in Tryggvadóttir, *supra* note 6, at 200-10.

100. Axhamn, *supra* note 47, at 172; Bernt Hugenholtz & Ruth L. Okediji, *Conceiving an international instrument on limitations and exceptions to copyright* 19 (2012) (unpublished manuscript) (on file with <https://perma.cc/4QHA-DFB4>); LUCIE GUIBAULT, *COPYRIGHT LIMITATIONS AND CONTRACTS. AN ANALYSIS OF THE CONTRACTUAL OVERRIDABILITY OF LIMITATIONS ON COPYRIGHT* 16 (2002); Trumpke, *supra* note 26, at 176, 426-27, 429; Martin Senftleben, *WIPO Copyright Treaty*, in THOMAS DREIER AND P. BERNDT HUGENHOLTZ, *CONCISE EUROPEAN COPYRIGHT LAW* 123-24 (2016); Pierre Sirinelli, *Exceptions and Limitations on Copyright and Neighboring Rights*, World Intellectual Property Organization 2 (Dec. 3, 1999); J.A.L. STERLING, *WORLD COPYRIGHT LAW*, 434 (2003); Axhamn & Guibault, *supra* note 20, at 47 fn. 240; Annette Kur, *Limitations and Exceptions Under the Three-Step-*

There are important differences between the system of ECLs and exceptions or limitations in the common understanding of the terms. First, traditionally, exceptions are understood as uses authorized by legislation making permission from right holders unnecessary, and which usually affect all relevant right holders of works to which that the exception applies. The ECL system, on the other hand, affects right holders differently depending on whether they are members of the relevant CMO or not. For members, the ECL agreement is a “normal” CMO agreement. The essential element of the ECL system is the voluntary membership of a substantial number of right holders of the relevant works.<sup>101</sup> Outsiders, for whom uses under an ECL agreement could be considered as exceptions to their exclusive rights, are a specific group, varying in size depending on how representative the CMO is.<sup>102</sup> Second, the ECL system is based on a two-tier system, i.e. the ECL provision and the actual ECL agreement. The provisions set out the conditions and parameters for ECL agreements and enable their extension effect. However, as explained above, it is the ECL agreement negotiated by a CMO on behalf of the relevant right holders which determines which uses are allowed,<sup>103</sup> within the scope of the ECL provisions and their own mandates from right holders. Third, although uses under exceptions are sometimes remunerated, the amount of remuneration is commonly decided by governmental authorities and not the stakeholders, whereas remuneration for uses under an ECL agreement is negotiated by the relevant CMO and the user.<sup>104</sup>

The primary argument for seeing the extension effect of the ECL system as an exception or limitation that needs to fulfil international norms is the fact that the licensing of authors’ works by a CMO without the author mandating the CMO to license those works is a significant restriction on the author’s exclusive right. Practically speaking it resembles a legal license. The inherent restriction, from the point of view of the outside author, is not ameliorated by the fact that it is only a restriction on non-members of a CMO. In fact, it can be seen as aggravating the restriction despite the right to remuneration, for example, if the outsider is in principle against CMOs or if the outsider does not have the right to become a member and has no way to influence decisions.<sup>105</sup> The inherent restriction is furthermore aggravated when there is not sufficient transparency with regard to concluded ECL agreements,<sup>106</sup> which is especially difficult to guarantee with regard to foreign

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*Test – How Much Room to Walk the Middle Ground?*, in ANNETTE KUR, *INTELLECTUAL PROPERTY RIGHTS IN A FAIR WORLD TRADE SYSTEM; PROPOSALS FOR REFORM OF TRIPS 210* (2011); Annette Kur, *Of Oceans, Islands, and Inland Water - How Much Room for Exceptions and Limitations Under the Three-Step Test?*, RICH. J. OF GLOBAL L. & BUS., 287-350 (2008).

101. Jean-Paul Triaille et. al., *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society* 305, (Oct. 2013); Riis & Schovsbo, *supra* note 9, at 930; Axhamn & Guibault, *supra* note 20, at 30.

102. Trumpke, *supra* note 26, at 687.

103. Trumpke, *supra* note 9, at 278; Trumpke, *supra* note 26, at 334.

104. Schönning, *supra* note 21, at 462; Koskinen-Olsson, *supra* note 10, at 293; Axhamn & Guibault, *supra* note 20, at 51; U.S. Copyright Office, *Orphan Works and Mass Digitization*, 7-8, 72-105 (2015); Foged, *supra* note 47, at 17.

105. For a discussion on the different categories of outsiders, see Tryggvadóttir, *supra* note 6, at 182-84.

106. Requirements for transparency have not been explicit in the Nordic ECL system. *Id.* at 194-

outsiders. Lack of transparency makes it difficult for outsiders, especially foreign outsiders, to make use of the safeguard measures in the system, whether it is to opt-out or to demand individual remuneration. Furthermore, if a national ECL agreement covers both national and foreign rights, the number of outsiders can far outnumber the number of members of the relevant CMO as very few foreigners would be members of the national CMO unless residing in the country of the agreement. Such foreign authors cannot influence the ECL agreements in the same way as members of the CMO negotiating the ECL agreement. Thus, even if there are reciprocal agreements with foreign CMOs in force that actually give a mandate for ECLs, the number of foreign authors will always outnumber national members of the relevant CMO. The representation of foreign authors and other right holders through reciprocal agreements is not always adequate and foreign outsiders are less likely than nationals to receive remuneration for use under an ECL agreement.<sup>107</sup> Finally, although ECLs facilitate uses that are in the public interest, such as in order to encourage the communication and distribution of information, such uses have traditionally not been seen as fundamental rights of users comparable to users' right to freedom of expression.<sup>108</sup> Thus it could be argued that restrictions on the exclusive right of authors in such areas should be carefully scrutinized, and at least as well as exceptions based on fundamental rights. One way to secure such scrutiny of restrictions is to check their compatibility with international norms, in particular with the three-step test.

Nordic ECL provisions applicable for CHIs give room for potentially wide online use of in-copyright works in CHIs. It is unlikely that unlimited online use for all works would be agreed upon by CMOs representing right holders. Nevertheless, in my view there needs to be a safety check to ensure that the system is not employed for too wide a use of outsider's works. Thus, I am of the opinion that the binding effect of an ECL agreement on outsiders should be regarded as a limitation or exception to the outsiders' exclusive rights that must fulfill international norms for the above-mentioned reasons. However, as the above account shows, the ECL system is of a hybrid character; an intricate mixture of freely negotiated agreements and exceptions. Therefore, I additionally maintain that the ECL system can also be seen as a system of rights management but only for uses that fulfill international norms. Whether international norms are deemed to be fulfilled will depend on individual ECL agreements as well as on how the safeguard aspects of the system are applied in relation to the areas of use. The area of use is therefore of importance as is the interplay of elements such as the opt-out possibility, transparency requirements and the method of remuneration. In my view, Nordic ECLs, assessed

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107. Riis & Schovsbo, *supra* note 9, at 490-92; Axhamn & Guibault, *supra* note 20, at 45, 55; Band & Butler, *supra* note 52, at 698; Tryggvadóttir, *supra* note 6, at 211-12.

108. See discussion in Guibault, *supra* note 4, at 105-07 on the influence of the justification on the limitation's nature. However, in the digital environment this classification of justifications may have shifted with the public policy objective to disseminate information emerging as the central justification for copyright limitations, cf. MARTIN R.F. SENFTLEBEN, *COPYRIGHT, LIMITATIONS AND THE THREE-STEP-TEST* 30-32 (2004).

on the basis of the actual agreements, generally fulfil international norms. First, they are for clearly defined uses in freely negotiated agreements; second, they apply for uses that are difficult to facilitate otherwise; third, uses are remunerated.<sup>109</sup> Hence in the majority of cases the Nordic ECL system could be considered a rights management system. In this way, the ECL system can be reconciled with the dichotomy between exception and management of rights.<sup>110</sup> The recently proposed ECL provision in the EU compromise proposal seems to support this hybrid approach.<sup>111</sup>

## B. OTHER INTERNATIONAL NORMS AND THE ECL SYSTEM

The Berne Convention is based on the principle of national treatment.<sup>112</sup> In theory the national treatment principle is respected in all ECL provisions,<sup>113</sup> although this may not be the practice in all instances. In particular, certain practices with regard to remuneration of foreign right holders might not be in conformity with the principle, as mentioned above. Nevertheless, it has been concluded that as the aim of the system is not to exclude foreigners, the objections can be overridden based on the fact that the practices are in place for practical reasons.<sup>114</sup>

The question has been raised of whether the opt-out possibility in the ECL system could be a formality incompatible with the Berne Convention.<sup>115</sup> However, the conclusion of most scholars is that the opt-out possibility is compatible as it relates to the administration of rights and not to the existence or scope of the rights.<sup>116</sup>

109. Tryggvadóttir, *supra* note 6, at 213-20. For a slightly more tentative view, see Axhamn and Guibault, *supra* note 20, at 49-52.

110. This is especially relevant with regard to E.U. legislation where the InfoSoc Directive has an exhaustive list of allowed exceptions and limitations (*see* Directive 2001/29/EC of the European Parliament and of the Council, Art. 5), but at the same time it is underlined that the Directive is without prejudice to the system of extended collective licenses, Recital (18). For a discussion on compatibility of the E.U. legislation and ECLs, *see* Tryggvadóttir, *supra* note 6, at 220-28.

111. Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - Consolidated Presidency Compromise Proposal, 2016/0280 (COD) 13842/17, Art. 9a, pp. 45-47.

112. Berne Convention, *supra* note 8, at Art. 5(1). Other international treaties have incorporated this provision, *cf.* Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Art. 9(1), 1869 U.N.T.S. 299; 33 I.L.M. 1197 (1994) [hereinafter TRIPS] and WCT, *supra* note 85, at Art. 1(4).

113. Axhamn & Guibault, *supra* note 20, at 46; Riis & Schovsbo, *supra* note 9, at 492.

114. *Cf. e.g.* NOU 1988:22, *Endringer i åndverksloven m.v.*, 24-25 with Tryggvadóttir, *supra* note 6, at 211-12.

115. Berne Convention, *supra* note 8, at Art. 5(2). Other international treaties have incorporated this provision, *cf.* TRIPS, *supra* note 112, at Art. 9(1), and WCT, *supra* note 85 Art. 1(4).

116. Riis & Schovsbo, *supra* note 9, at 483-84; Trumpke, *supra* note 9, at 280; Trumpke, *supra* note 26, at 691; Jonathan Band, *The Long and Winding Road to the Google Books Settlement*, REV. OF INT'L PROP. L., 227, 314 (2009); Axhamn & Guibault, *supra* note 20, at 46; Gervais, *supra* note 43, at 22-27; Gervais, *supra* note 87, at 24-29; Ginsburg, *Berne-Forbidden Formalities*, *supra* note 97, at 772-75; Gervais, *supra* note 88, at 319; Ficsor, *supra* note 5, at 75-77; Tryggvadóttir, *supra* note 6, at 212-13.

#### IV. CHALLENGES AND BENEFITS

The ECL system provides for a solution which addresses the need to make in-copyright works available in a way that affords flexibility and legal certainty to users, such as CHIs, and is at the same time not unacceptably intrusive on the exclusive right of the outside right holder. This balance is achieved through the negotiation of the ECL agreement between the stakeholders. The right holders' interests, both members' and outsiders', should be adequately protected by the relevant CMO, given the stronger negotiating power of CMOs compared to the individual right holders and assuming adequate representativeness by the CMO. Thus, the ECL system constitutes a pragmatic solution based on a hybrid theoretical model where the extension effect, although constituting an exception on the outsiders right, can be seen as an arrangement of management of rights based on legal presumption of mandate, depending on the area of use under an ECL agreement and the deployment of safeguard measures.

Nevertheless, the ECL system is not the answer for all uses of in-copyright works and as the above account shows it may not be a solution that fits all countries. This may be due to some of the challenges inherent in the ECL system as well as in varying internal legal and cultural structures.<sup>117</sup>

The main challenge is whether there are relevant CMOs that are representative for the works and uses that the system is supposed to facilitate.<sup>118</sup> This is less of a problem within Europe where there is a long tradition of collective management of certain rights, but it might be a problem in other jurisdictions. However, there may also be a chicken and egg issue here as the adoption of ECL systems for access to works in CHIs might well encourage the establishment of CMOs for that purpose.<sup>119</sup> A related challenge is the structure of CMOs which must be sufficiently transparent and capable of safeguarding the interests of right holders, members and outsiders alike.

Another challenge is the fact that as ECLs are based on freely negotiated agreements, and if an agreement is not reached, the particular use may not be facilitated. The likelihood of reaching an ECL agreement often depends on issues relating to the remuneration and the ability of stakeholders to reach a mutually agreed conclusion. However, that is not a challenge limited to the ECL system but to all

117. Riis & Schovsbo, *supra* note 9, at 495-97.

118. SWD(2016) 301 final, IA Part I, 2016, 67, 133; Samuelson, *supra* note 79, at 5-7 (2015); van Gompel and Hugenholtz, *The Orphan*, 65 (2010); Kerremans, Janssen and Valcke, *Collective solutions*, 646, 649 (2011); Manon A.A. Oostveen and Lucie Guibault, *Summary report on IPR issues faced by Europeana and its partners*, 27 (YEAR); Kyst, *Aftalelicens*, 51 (2009).

119. Riis, Rognstad & Schovsbo, *supra* note 10, at 67; Lucie Guibault, *Collective Rights Management Directive*, in IRINI STAMATOUDI AND PAUL TORREMANS, *EU COPYRIGHT LAW; A COMMENTARY* 787(2014); Intellectual Property Office, *Government response to the technical consultation on draft secondary legislation for extended collective licensing (ECL) schemes* 1, fn. 1 (2014); Koskinen-Olsson & Sigurðardóttir, *supra* note 30, at 244-47 (2016); VUOPALA, *supra* note 22, at 15 (2013); Tryggvadóttir, *Copyright and cross-border online use*, 308 (2017). This may, however, be more likely to happen in Europe where there is a culture of pre-existing CMOs than e.g. in the USA. See Jane C. Ginsburg and June M. Besek, *Comments Pursuant to Notice of Inquiry on Mass Digitization Pilot Program* (Oct. 8, 2015) 7; Samuelson, *supra* note 79, at (2015).



types of licensing.

A third important challenge relates to uses in cross-border situations as is the case with use on the Internet because of the territoriality of copyright. If there is no ECL system in the receiving countries, use of outsiders' work in such countries may be deemed infringement of their copyright. However, if ECL agreements that fulfill international norms are seen as arrangements of management of rights, this may imply that in infringement cases in countries other than the country of origin of the ECL agreement, the applicable laws might be judged as the laws of the contract which would thus make cross-border online uses possible if the CMO had the mandate to negotiate uses of its members for the relevant territories.<sup>120</sup> This is, however, not legally certain and would in my view only be possible with regard to ECL agreements that provide for the cross-border online use of national works, i.e. works that had a certain connection with the country where the ECL agreement was negotiated.<sup>121</sup>

These challenges represent important issues that have to be considered when adopting a solution based on an ECL system to provide access to cultural heritage. However, in my view they do not diminish the benefits of the ECL system for mass uses of in-copyright works where individual licensing would be impracticable. The benefits are first and foremost the flexibility of the system and the fact that uses under ECLs are mainly based on freely negotiated agreements. ECLs can enable uses of works that would otherwise not be legally possible. Thus the system can provide for enhanced legal access for end-users to cultural heritage, and remuneration which authors and other right holders might otherwise not receive. In my view the system of ECLs is an important tool for facilitating transactions and lawful availability of works of authorship in mass use situations such as for access to cultural heritage.

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120. Tryggvadóttir, *supra* note 6, at 282.

121. *Id.* at 315-17.