



**Stockholm  
University**

**Master Thesis**

**Extended Collective Licensing: the Nordic model  
in-or-out of commerce?**

**by Oscar Lisshagen**

Supervisor: Professor Jan Rosén

Master of Laws in European Intellectual Property Law

Stockholm, June 2017

## Abstract

This thesis offers a comparative analysis of the Nordic Extended Collective Licensing (ECL) model. In the Nordic nations, the ECL model is widely hailed as successful, with good pedigree, offering workable solutions to some vexing copyright issues, both historically and in the present day's legal landscape of accelerated digital dependence. Questions now arise as to the model's efficacy elsewhere, as extended licensing was recently introduced in the United Kingdom, and is to be introduced at EU level. In the main, this thesis provides a critical analysis of the EU Commission proposal concerning out-of-commerce works – the first EU level expressly stated ECL provision – as contrasted with the existing Nordic ECL model. In addition, the same line of enquiry is applied to the UK ECL Regulations that similarly introduce ECL provisions in UK domestic law. Both the UK provisions and the Commission proposals differ in several ways to the Nordic model. UK law is examined and outlined in detail, with emphasis on whether collective alternatives such as ECL are a welcome and feasible solution in a legal and socio-economic landscape rather different to that of the Nordic nations. The same line of enquiry is followed in the EU proposals. At times, the CJEU delivers a judgment that creates uncertainty in the law, or expands it in ways not readily foreseen by the legislator. For the purposes of this thesis, the judgment in *Soulier and Doke* (C-301/15) represents an example of the former category. Although not a direct challenge to the viability and compatibility of Nordic ECLs with EU law, the judgment nevertheless contains several passages that could potentially be problematic for the Nordic model.

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## List of Abbreviations

<b>AG</b>	Advocate General
<b>BBC</b>	British Broadcasting Corporation
<b>Berne Convention</b>	Berne Convention for the Protection of Literary and Artistic Works 1886
<b>CDPA 1988</b>	Copyright, Designs, Patents Act 1988
<b>CJEU</b>	Court of Justice of the European Union
<b>CLA</b>	Copyright Licensing Agency
<b>CMO</b>	Collective Management Organisation
<b>CRM</b>	Collective Rights Management
<b>DACS</b>	Design and Artists Copyright Society
<b>DCA</b>	Denmark: The Consolidated Act on Copyright (Act No. 1144 of October 23, 2014)
<b>DSM</b>	Digital Single Market
<b>EC</b>	European Community
<b>ECL</b>	Extended Collective Licence
<b>EU</b>	European Union
<b>IP</b>	Intellectual Property
<b>IPR</b>	Intellectual Property Right
<b>IP-TV</b>	Internet Protocol Television (delivery of TV content over internet)
<b>MS</b>	Member State/s
<b>PLS</b>	Publishers Licensing Society
<b>PRS</b>	Performing Right Society
<b>SCA</b>	Sweden: Act on Copyright in Literary and Artistic Works (1960:729)
<b>SVT</b>	Swedish public service broadcaster
<b>TFEU</b>	Treaty on the Functioning of the European Union
<b>TRIPS</b>	Agreement on Trade-Related Aspects of Intellectual Property Rights
<b>UK</b>	United Kingdom
<b>UK IPO</b>	United Kingdom Intellectual Property Office
<b>VCL</b>	Voluntary Collective Licensing
<b>WCT</b>	WIPO Copyright Treaty 1996
<b>WIPO</b>	World Intellectual Property Organisation
<b>WPPT</b>	WIPO Performances and Phonograms Treaty 1996
<b>WTO</b>	World Trade Organization 1994

## 1. Introduction

### 1.1 Background

Few areas of law are as closely connected to, and firmly rooted in, technological advancements as intellectual property law generally, and copyright in particular. Since the days of the invention of the printing press, the launch of the first gramophone player, Edward H. Armstrong's FM radio, vinyl records, cassette tape, the advent of digital technology in the 1980s, arriving in today's all-encompassing information society, many of the fundamental and problematic questions related to use and licensing of copyright material persist – if they have not become even more complex. At the heart of the matter lies the paradox with which copyright wrestles: how to create an optimum balance between encouraging, remunerating, supporting and protecting the work of authors, musicians, creators, dramaturgs, photographers, scriptwriters and many other creatives who play an essential part in all societies, and at the same time ensuring that access to, and enjoyment of, works is secured for a mass audience, which today is global.

The use of the internet has brought profound changes to an ever-increasing array of fields and disciplines. It is evident that everything from societal interaction to policy making and communication – in short, much of day-to-day life – is, to a lesser or greater extent, taking place partly within an online context and being influenced, affected and shaped by the information society. In this, consumption of copyright material has been no exception: ongoing vast digitisation projects of books and articles, rapid increase in demand for streaming services, underpinned by a consumer-driven belief that everything could, and perhaps should, be accessible anytime, anywhere (and preferably at little to no cost). New ways of delivering content, such as web-TV, numerous Play-services and IP-TV, to name but a few, are steadily growing. It is undeniable that the speed with which developments have occurred over the last two decades, coupled with the range of new ways in which to access material and data, has posed significant challenges to the copyright legal framework.

Determined to meet the digital challenge, in 2010 the EU produced an array of policy documents, with the overarching 'Europe 2020: A Strategy for smart, sustainable and inclusive growth'<sup>1</sup> providing the direction. Part of the framework comprises the Digital Agenda for Europe<sup>2</sup> and the Digital Single Market Strategy,<sup>3</sup> which in September 2016 culminated in a wide-ranging IPR reform package, its breadth and width seldom seen at EU level.

The present EU copyright framework is still only partially harmonised, with the long-standing and deeply entrenched principle of territoriality at its heart. This central principle is stated in Article 5(2) of the Berne Convention<sup>4</sup> and restated and confirmed by the Court of

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<sup>1</sup> Europe 2020: A strategy for smart, sustainable and inclusive growth. COM(2010) 2020 final.

<sup>2</sup> A Digital Agenda for Europe. COM(2010) 245 final.

<sup>3</sup> A Digital Single Market Strategy for Europe. COM(2015) 192 final.

<sup>4</sup> Berne Convention for the Protection of Literary and Artistic Works, 1886. Latest amendment 28 September, 1979.

Justice of the European Union (CJEU) in cases such as *Lagardère Active Broadcast*,<sup>5</sup> where, at paragraph 46, in reference to copyright the Court says “[...] the principle of the territoriality of those rights, which is recognised in international law and also in the EC treaty. Those rights are therefore of a territorial nature and, moreover, domestic law can only penalise conduct engaged in within national territory.”<sup>6</sup>

Nevertheless, given the pending reforms and proposals, it is clear that there has for some time been a concerted push towards a borderless, open, ‘single market’ vision, where focus is shifted away from isolated national sovereign states in favour of a harmonised and frictionless internal market: any strict adherence to the territoriality principle is somewhat out of step with the aims of the EU in terms of copyright in the digital age.

Against this background, the focus of this thesis is on a particular difficulty in relation to rights clearance of copyright works: how to create a framework that efficiently and cost-effectively solves problems around rights clearance in situations of mass use, involving a vast number of rightholders, where an increasing amount of the use occurs in the digital arena. The Nordic countries have for decades utilised a model of extended collective licensing (ECL) to provide an answer, and it has worked remarkably well. Put simply, ECL is a freely negotiated licensing agreement between a representative CMO and a user, where said agreement has extended effect to also include non-member rightholders within a specific category of works. As the drive for further digitisation across a host of areas gathers pace, including cross-border use, can the Nordic ECL model provide a solution at EU level and in other jurisdictions?

The particular interest now, in the stream of numerous legislative changes, lies in that the Commission has for the first time included an ECL as part of the reforms, dealing with so called out-of-commerce works to be used by cultural heritage institutions. The aim is to digitise those books and other material that are not readily available through ordinary channels of commerce. Two other ECL-related developments form part of the enquiry in this thesis: firstly, the UK ECL Regulations that came into force on 1<sup>st</sup> October 2014, and secondly, the recent CJEU ruling in *Soulier and Doke*,<sup>7</sup> again concerning out-of-commerce legislation, which includes several passages that are of significance to the Nordic ECL model. The judgment raises concerns that the Nordic ECL construct, despite its good track-record and positive intentions, may be overstepping the mark in terms of balance between exclusive rights and collective uses. These three recent legal developments in the sphere of ECLs are compared and contrasted with the existing Nordic model, with particular focus on the requirement of representativeness on the part of the CMOs.

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<sup>5</sup> Case C-192/04, 14 July 2005. *Lagardère Active Broadcast v Société pour la perception de la rémunération équitable (SPRE) and Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL)*.

<sup>6</sup> *Ibid.* at para 46.

<sup>7</sup> Case C-301/15, 16 November 2016. *Marc Soulier, Sara Doke v Premier Ministre, Ministre de la Culture et de la Communication*.

## 1.2 Purpose and research questions

This thesis aims to investigate the efficiency of ECL as a feasible model solution to mass copyright uses within the EU. It does so by presenting a legal analysis of the Nordic ECL model as it currently functions and applies in primarily Sweden and Denmark. The enquiry then moves on to the three legal developments mentioned above, contrasting and comparing the newly introduced and proposed laws with the Nordic model. The aim is to highlight key substantive differences, assess the efficacy and to propose tentative conclusions at the end of each main section.

In order to give as full an account as possible, a critical assessment of ECLs is offered as a way to illustrate both legal and conceptual difficulties between the frameworks. The main purpose of this is to detect potential problems and obstacles as the ECL model is introduced at EU level, applying in all 28 MS.

In the main, the research questions that are addressed are as follows:

- In what way does the UK ECL model differ from the one found in the Nordic countries? What is the current uptake of ECLs in the UK?
- What is the efficacy of the EU ECL for out-of-commerce works proposed in the Digital Single Market Directive? How does it compare with the Nordic ECL model?
- Following the CJEU judgment in *Soulier and Dore*,<sup>8</sup> are there any implications for the scope of application of the Nordic ECL model?

In addition, what runs as a common thread through all research questions is the way in which the essential requirement of representativeness has been formulated in the different provisions. Much of the legitimacy and efficacy of the ECL model is tied with this requirement and is examined in detail.

## 1.3 Delimitations

Even though reference is made to the 'Nordic ECL model', and it is true that the practical application of its core principles produces results that are much the same, there are differences in each country both in scope and breadth of the model. For the purposes of this thesis, the focus lays primarily on the Swedish and Danish systems. Iceland, Finland and Norway are not included. In addition, there are several other countries in the EU and around the world that operate or are in the process of implementing ECL provisions, but these are not discussed here.

As a solution to particular market problems, ECLs have proven workability to solve many of the issues of rights clearance; they are not, however, the only licensing or legal option available – not addressed here are alternatives such as mandatory collective licensing, introduction of an exception or statutory licence, or a limitation-on-remedy rule. Within the

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<sup>8</sup> *Supra*, fn. 7.



confines of this thesis, as not every aspect can be addressed, references are made to material and texts offering further in-depth analysis.

The Nordic ECL applies across an increasing number of areas, initially in primary broadcasting, but lately also covering areas such as reprography, cable and internet re-transmissions, and digital reproductions by libraries. In the main, the focus in this thesis is on how ECLs work in reprography in educational institutions; the out-of-commerce context; and a brief discussion around broadcasting, in particular the new Danish provisions. Other fields of use are not addressed.

Much has been written about the model's compatibility with international legal obligations under the Berne Convention<sup>9</sup> and TRIPS Agreement,<sup>10</sup> and also potential conflicts with EU law. Save for the analysis of the *Soulier and Doke*<sup>11</sup> judgment, this important question of compatibility is not discussed at length, but several resources are referenced for further reading.

Finally, whether ECLs are an effective way of ensuring cross-border access of works is not discussed at length. Although a potentially fruitful ground for enquiry in future, at present the Nordic ECL model only has legal effect within national borders. Hence, such discussion is not a priority.

#### 1.4 Method and material

The principal research method applied in this thesis follows a legal dogmatic method in order to produce the analysis of current legislative proposals, to identify sources and hierarchy of laws and norms – the method having at its core the interpretation and systemisation of valid law.<sup>12</sup> With regards to the former, the use of the approach in this thesis is to critically evaluate the content of legal rules, highlighting potential difficulties in their application and assessing their efficacy. In relation to the systemisation element, it serves to gather relevant legal rules and contexts into manageable units, allowing for a more targeted research. This method applies to all research questions outlined above.

In addition, for the sections concerning UK law and the question of how the UK ECL Regulations compare to the Nordic model, a comparative approach will be taken. Zweigert and Kötz's<sup>13</sup> classification of legal families places the Nordic countries in one distinguished category and the Common law countries in another. Further, as far as the method is applied, what is followed here is the *micro comparison* – only looking at specific legal institutions or problems and how a particular problem is solved in a given jurisdiction. In tandem with the

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<sup>9</sup> *Supra*, fn. 4.

<sup>10</sup> Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994.

<sup>11</sup> *Supra*, fn. 7.

<sup>12</sup> E. Pattaro 'A Treatise of Legal Philosophy and General Jurisprudence.' Volume 4: Scientia Juris, Legal doctrine as Knowledge of law and as a Source of Law. Springer, (2005), Chapter 1, p. 1.

<sup>13</sup> K. Zweigert and H. Kötz 'An introduction to Comparative Law.' Translated by Tony Weir. Third edition. (1998), p. 5.

legal dogmatic approach, this is relevant in the main for the first research question in this thesis.

A main driver for the initial construct of ECLs was to bring down transaction costs in situations of mass use of works, effectively avoiding having to conclude numerous licensing contracts or conducting extensive searches for relevant rightholders. There is therefore an element of law and economics as well as a legal policy approach to the questions addressed in this thesis. However, the relevance of the familiar Coase theory<sup>14</sup> is of secondary nature, as the rationale behind the Commission proposals and the UK Regulations is rooted not only in transaction cost reduction. In the section outlining the Nordic model, transaction costs and the economic rationale behind the model form part of the research.

The primary sources of law drawn upon in this study are statutory provisions, legislative proposals, and case law from national and EU appeal courts. Although not of a great number, court judgments and judicial reasoning are of great significance. Added to this is a substantial number of secondary sources, including legal doctrine, academic commentary, reports, stakeholder views and Opinions of the Advocate General of the CJEU. Of lesser significance is a third category of materials which includes Impact Assessments, a small number of online specialist web sources and brief interviews with leading representatives in the field.

The aim of this study, applying equally to all materials used, is a critical evaluation and balanced presentation. Thus, there is a natural hierarchy in regard to the authority of materials: primary sources of law are at the top while the other follow. The breadth of sources used is motivated by wanting to deliver as accurate an assessment as possible, both in terms of legal theory and practical application. Although the ECL model discussed in this thesis is enjoying a time of heightened interest, it has to date only been in full operation to a significant degree in the Nordic nations. Therefore, materials and comments available in English are not as plentiful as in some other areas of law. Much of what is written on the subject has been referenced in this thesis.

## 1.5 Outline

Following the academic outline in Chapter 1, Chapter 2 presents the historical roots of the Nordic model, with particular emphasis on its application and current legal framework. Also included here is a brief but important section that shifts the emphasis from academic and theoretical to practical marketplace application, focusing on figures and turnover.

Chapter 3 is an account and critical comparison between the Nordic model and the UK ECL Regulations as implemented in that jurisdiction. This includes a detailed breakdown of the UK law, a discussion of how the representativeness criteria are formulated and an account of long-standing ECL-like practices already in existence in the UK.

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<sup>14</sup> Ronald Coase “*The Problem of Social Cost*” *Journal of Law and Economics*. Vol. 3. No. 1 (1960), pp. 1–44.

Chapter 4 outlines the current DSM Directive proposal, focusing exclusively on the out-of-commerce provisions in Articles 7–9. The focus is on efficacy of the proposals and potential problems in the formulation of the licensing provisions as envisaged by the Commission.

Chapter 5 provides an analysis of the CJEU judgment in *Soulier and Dore*.<sup>15</sup> Of potential concern for central elements of the Nordic model, the Opinion of Advocate General Wathelet is included as it is significant for a number of reasons, including views on the opt out mechanism and interpretation of EU law Recitals and preamble texts in relation to Articles.

## 1.6 Terminology

Throughout the literature, academic journals, law reports, legislation and so on, there are some variations and discrepancies in relation to some central concepts addressed in this thesis. For clarity, the following terms are used throughout:

- ECL – extended collective licence
- Rightholder/s

Variations in relation to describing ECLs include ‘extended repertoire system’<sup>16</sup>, ‘extended collective (and presumption-based) management’<sup>17</sup> or ‘extended legal licence’<sup>18</sup>, all of which refer to the same legal construct. At present time, the frequency with which ECL is referred to as ‘extended collective licence’ – in the international context by WIPO, at the European level, and further by its recent implementation in the UK – suggests that it now commands broad consensus, which is why it is used here. Similarly, although perhaps not of great significance, it is peculiar that three written options exist when referring to the central definition of the person or persons who are holders of copyright or related rights: ‘right-holder’, ‘right holder’, or ‘rightholder’.

EU legislation has for some time consistently used the ‘rightholder’ variation,<sup>19</sup> while in academic writing the two non-hyphenated variations appear frequently.<sup>20</sup> However, the ratio of use of the two variations is overwhelmingly in favour of ‘rightholder’. In line with the consistent use in EU law, the use of ‘rightholder’ is preferable and is used throughout.

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<sup>15</sup> *Supra*, fn. 7.

<sup>16</sup> Daniel Gervais (Ed.) ‘*Collective Management of Copyright and Related Rights*’, Wolters Kluwer, Third Edition (2016), p. 23.

<sup>17</sup> *Op. cit.*, p. 66.

<sup>18</sup> Jan Rosén ‘*Upphovsrättens avtal: regler för upphovsmäns, artisters, fonogram- film- och databasproducenters, radio- och Tv-bolags samt fotografers avtal*’ Norstedts Juridik, 3 upplagan, (2006), p. 90.

<sup>19</sup> See e.g. Satellite and Cable Directive 93/83/EEC, Recital 23, or Article 9(2); Directive 2014/26/EU On collective management of copyright and related right and multi-territorial licensing of rights in musical works for online use in the internal market, Recital 2, or Article 3(a); CJEU judgment in *GS Media* C–160/15 at para. 22.

<sup>20</sup> For example, Ingo Brinker, Tobias Holzmüller E.I.P.R. 2010, 32(11), 553–559. European Intellectual Property Review, 2010. *Competition law and copyright – observations from the world of collecting societies*. at \*553 for ‘right holder’; Ysolde Gendreau 28 I.P.J. 269 Intellectual Property Journal April, 2016. ‘*What’s in a Name? Extended Collective Licences in Canada*’ at \*274 for ‘rightholder’.

## 2. Extended Collective Licensing in the Nordic countries

The Nordic ECL model is a somewhat curious construct, particularly to those with knowledge and experience from other legal traditions, and it is therefore appropriate to present an overview of the model from a theoretical, historical and practical perspective. For those already familiar with the background and legal mechanisms of ECL, Chapters 3 or 4 may be of more immediate interest, but for the full benefit of the analysis, a more detailed grasp of the ECL model is desirable.

It is important to emphasise at the outset that ECL is not a theoretical construct or an academic model; neither is it a 'licence' in and of itself; the ECL provisions do not affect rightholders exclusive right merely by forming part of the law of the nation. ECL is best understood as an enabling legislation,<sup>21</sup> facilitating the option for two parties, typically a CMO and a user of some sort, to freely negotiate an agreement which upon conclusion has extended effect to cover also those rightholders who are not direct members of the CMO.

### 2.1 Origins

The 1960s heralded many societal changes across much of Europe and the wider world. The advent of TV brought numerous new possibilities and opportunities for communication, educational programmes, entertainment and so on, but also challenges and novel problems in relation to the legal framework regulating primary broadcasting.<sup>22</sup> During this early, and technologically relatively slow-moving analogue phase of broadcasting, the difficulty that arose is at its core much the same as the one today: how to secure access to works, and establishing legal certainty for users, in situations of mass use, some of which have multiple layers of copyright protection. In the Nordic countries, the initial ECL provisions related solely to rights clearance for literary and musical works used in primary broadcasting.<sup>23</sup> However, at the time, there were already collective agreements in place between broadcasting organisations and national CMOs<sup>24</sup> – the difficulty was represented by the large, and steadily increasing number of rightholders who were not affiliated or direct members of the CMO, but whose works were still being used. The principal issue thus became one where some works were being used by broadcasters perfectly legally, whereas others that were not in the catalogue of the CMO – works of non-member rightholders – were nonetheless being used, resulting in broadcasting organisations facing the potential risk of criminal sanctions for breach of copyright. The ECL sought to offer a solution to this core issue, sometimes framed as a problem of 'outsider's rights'. As the framework developed and was refined, it provided legal certainty by ensuring that *all* works under copyright protection used by a broadcaster

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<sup>21</sup> Tarja Koskinen-Olsson and Vigdís Sigurdardóttir, Chapter 8, '*Collective management in the Nordic countries.*' in Daniel Gervais (Ed.) '*Collective Management of Copyright and Related Rights*', Wolters Kluwer Third Edition (2016), p. 249.

<sup>22</sup> For more detailed and broader analysis of the current situation in the Nordic countries, see. Ulla Carlsson (ed.) '*Public Service Media from a Nordic Horizon. Politics, markets, programming and users.* Nordic Public Media Map 2, p. 18 *et seq.*

<sup>23</sup> Tarja Koskinen-Olsson and Vigdís Sigurdardóttir, *supra*, (2016), p. 249.

<sup>24</sup> Johan Axhamn and Lucie Guibalt '*Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage?*' Universiteit van Amsterdam. Amsterdam Law School Research Paper No. 2012–22, (2011), p. 26.

had sufficient rights clearance. In other words, any number below 100% of the works used would bring a risk of infringing copyright and potential liability. Even if the number were, say, 95%, the situation would still be unsatisfactory, unless it was accepted that a level of copyright infringement was somehow inevitable.

The underlying, practical difficulty in solving rights clearance in the traditional manner, namely to locate copyright owners and conclude an agreement on an individual basis, was not an option. The transaction costs involved would be prohibitively high, not to say impossible considering the increased portion of foreign rightholders in addition to the overwhelming number of rights needing to be cleared. The central problem which ECLs addressed, in the broadcasting sphere, can be succinctly stated as follows:

“The use of TV content involves clearance of a range of copyrights and related rights, for instance rights possessed by journalists, writers, actors, musicians and other performing artists, composers, scene instructors, film instructors, photographers, animators, graphic designers, record companies, producers, and – when a TV distributor is involved – rights possessed by the broadcaster itself. In other words: TV is an area with mass exploitation of rights.”<sup>25</sup>

Before finding favour with rightholders and within the Nordic legislators, an initial early 1960s proposal put forward by the public broadcasters,<sup>26</sup> which centred around a collectively managed compulsory licence, was rejected. The ECL model was seen as providing greater flexibility and being less intrusive, and was offered as a compromise.<sup>27</sup> Many of the essential characteristics and components of the initial ECL model remain today, and can be summarised as follows:

- An organisation, typically a CMO, concludes a freely negotiated agreement with a user;
- The organisation must be representative in its field of works used;
- Extended effect is given to the agreement to also encompass authors who are not direct members of the CMO, including foreign rightholders;
- The user may lawfully use all works without having to meet individual claims by outsiders and without risk of criminal sanctions;
- Non-member rightholders have individual right to remuneration;
- Non-member rightholders have a veto right (“opt out”) over the use of their works.<sup>28</sup>

Before moving on to the next section, which addresses the development of the ECL model in other fields of use, bringing the application of the provisions up to the present day, it is important to offer some more general observations about the context within which ECLs

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<sup>25</sup> Terese Foged ‘*Danish licences for Europe*’. E.I.P.R. 2015, 37(1), 15–24, p. 2. The quote describes the Danish context in modern times, but applies more or less equally to all Nordic countries, and captures the essence of the ECL mechanism at its inception.

European Intellectual Property Review.

<sup>26</sup> Johan Axhamn and Lucie Guibalt, *supra*, (2011), p. 26.

<sup>27</sup> Zijian Zhang ‘*Transplantation of an extended collective licensing system – lessons from Denmark*’ IIC 2016, 47(6), 640–672 at \*644.

<sup>28</sup> Tarja Koskinen-Olsson and Vigdís Sigurdardóttir, *supra*, (2016), p. 251.

have flourished, and become a legal instrument with merit and genuinely successful application.

### *Cultural aspects*

The ECL model is a Nordic-flavoured legal construct that, like all legal provisions in any given country or region, bears the hallmarks of a specific societal history and political reality. On one view, the model offers a “[...] subtle mixture of autonomy and state intervention.”<sup>29</sup> It is important to recognise the wider considerations and building blocks which contributes to the ECL model acquiring the status it enjoys today. To begin with, Nordic societies can be described as small in terms of population and relatively homogenous in their cultural make-up. These nations are often found in the top ranking of wealthiest countries in the world, with high technological advancement and generous welfare systems, often with a preference for broad, collective, tax-funded solutions and financing for many key areas of the public sector. This is of great significance as a backdrop against which the ECL model was firstly introduced. Nordic countries were no strangers to a common approach of “[...] pragmatism and finding workable solutions to problems [...]”<sup>30</sup> in their legal traditions.

### *Labour law and collective spirit*

The legal framework of the model is widely credited as being devised by Swedish law Professor Svante Bergström.<sup>31</sup> Noting the key weakness of the licensing provisions at the time, namely the inability to conclude agreements that involved works of authors who were non-members, he highlighted practices already in place within Swedish public radio and proposed these be made into law.<sup>32</sup> Professor Bergström was an expert not only in copyright and real estate law, but also in labour law, and his inspiration for the ECL model can without too much imagination be identified in the principles of labour law. Agreements in the labour market context, where unions, broadly representative of workers in a particular field, for example the Swedish Transport Workers Union,<sup>33</sup> negotiate terms of employment with an employer organisation. A contract is then concluded which will encompass all workers, whether union members or not. Of course, there are many differences in the detail between the two, but the underlying principle of collectivised rights, negotiations and extended effect of the agreements run through both strands of law.

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<sup>29</sup> Thomas Riis and Jens Schovsbo ‘*Extended Collective Licenses and the Nordic Experience – it’s a hybrid but is it a VOLVO or a Lemon?*’ Columbia Journal of Law and the Arts, Vol. 33 Issue IV (2010), p. 2.

<sup>30</sup> Thomas Riis and Jens Schovsbo, *supra*, (2010), p. 24.

<sup>31</sup> For a detailed account see Gunnar Karnell ‘*Avtalslicenskonstruktionen, principiella och praktiska frågor*. 50 nordiskt Immateriellt Rättsskydd (N.I.R.) 255 (1981); Thomas Riis and Jens Schovsbo, *supra*, (2010), p. 3.

<sup>32</sup> Svante Bergström ‘*Program för upphovsrätt, Rättsvetenskapliga studier ägnade minnet av Phillips Hult*.’ (1960), p. 58. See also N.I.R (2) 2011.

<sup>33</sup> For the main umbrella organisation, see <http://www.lo.se/english/startpage> (accessed 1 May 2017). And further Niklas Bruun ‘*The Nordic labour relations model: Labour law and trade unions in the Nordic countries, today and tomorrow*.’ Aldershot Hants, Dartmouth, 1992.

## 2.2 ECL expansion and the current framework

Having proved its workability in the field of primary broadcasting, ECL was in 1974 proposed<sup>34</sup> as a solution to address another area driven by technological advancements: photocopying for educational purposes.<sup>35</sup> The 1970s saw the domination of the world's leading photocopier manufacturer, Xerox, being challenged by a number of competitors vying for a share of the lucrative market.<sup>36</sup> Both IBM and Canon Inc. introduced well-designed machines aimed at the lower-end office market, which also became commonplace in schools and universities. The issue in the debate around photocopying at the time was “[...] a need to ‘do something’ about the explosion of photocopies in schools [...]”<sup>37</sup> To get a sense of the evolution of the ECL model, and why it continues to be a cornerstone in Nordic copyright law, it is important to note the additional features introduced by the photocopying provision.

Taking the Swedish context as illustration, the field of photocopying posed new problems as to how the ECL provision would apply compared to primary broadcasting. Despite the two areas having elements in common – already some existing collective agreements in place between users and CMOs, mass use of works, prohibitively high transaction costs in obtaining rights clearance<sup>38</sup> – there were also some significant differences. In summary, these can be stated as follows:

- no practical or accurate way of determining the extent of use of a particular work and accordingly provide individual remuneration;
- payment details of the remuneration scheme did not form part of the agreement between the CMO and the user (this was an internal matter for the CMO);
- lump sum payments from the user to the CMO relied only on basic statistical data regarding use.<sup>39</sup>

To address these concerns, the Swedish Government proposed a bill in 1979/80, introducing a new ECL provision which contained additions and modifications as compared with the broadcasting provision.<sup>40</sup> The bill again emphasised the inadequacy of agreements made under the existing framework: it did not include those authors who were not members of

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<sup>34</sup> For the initial proposal in a Nordic context, see ‘Upphovsrätt 1 – Fotokopiering och bandinspeling särskilt inom undervisningsverksamhet.’ Proposal by Nordic Copyright Committee. Utredningsserie 82–93 (NU) 21/73.

<sup>35</sup> Thomas Riis and Jens Schovsbo, *supra*, (2010), p. 3.

<sup>36</sup> <http://www.digipro.co.uk/print-news/history-of-the-photocopier-machine/> (accessed 30 April 2017)

<sup>37</sup> Thomas Riis and Jens Schovsbo, (2010), *ibid.* Taking a broader view encompassing other countries, it is fair to suggest that this debate is far from settled. A mere cursory investigation reveals a plethora of advice, guidelines, suggestions and the like for schools and educational institutions in order to comply with relevant copyright provisions. For the US context see e.g. Carol Ann Simpson ‘*Copyright for Schools: A Practical Guide.*’ Linworth, 5<sup>th</sup> edition, (2010); and in the UK the working group umbrella organisation: <http://www.copyrightandschools.org/> (accessed 2 May 2017).

<sup>38</sup> Johan Axhamn and Lucie Guibalt, *supra*, (2011), p. 27.

<sup>39</sup> *Op. cit.*, p. 28.

<sup>40</sup> Swedish Government bill 1979/80:132 available (in Swedish) at: <https://data.riksdagen.se/fil/D6A6C8ED-F822-4F95-A8AA-96C5931489CA> (accessed 4 May 2017). pp. 40–41 contain a brief summary of the proposals in English.

the relevant CMO, in particular foreign rightholders, but also some native ones. Pointing to the already existing ECL provision for radio and TV broadcasting, the bill proposed to create a new provision in the photocopying field, adding a paragraph regarding equal treatment of outsiders *vis-à-vis* CMO members: right to remuneration and other benefits should be equal, including an additional right of individual remuneration, should a rightholder wish to make a claim.<sup>41</sup>

What can be deduced from the reasoning by the legislature preceding the introduction of the photocopying provision, is the preference for a system that aims to preserve the exclusive rights of the author. As with the broadcasting provision, a compulsory licence was initially proposed, but the Government bill regarding photocopying makes clear that this would in fact place the rightholder in a particularly weak bargaining position.<sup>42</sup> This is because the right to exploit the work has already been granted one party in the negotiation and, as such, denies the rightholder the opportunity to leverage the exclusive rights against any collective agreement as to use of the work. There is force in this argument, and it makes the ECL provision, with its flexibility, safeguards and fairness a convincing proposition. Indeed, when considering another more far-reaching alternative – to create an exception to photocopying for education establishments – it becomes evident that not only would such a suggestion run contrary to the established international norms of the Berne Convention (specifically Article 9.1 and the exception in 9.2),<sup>43</sup> but that it would remove the benefits to rightholders and users that ECL offers. Complex situations, where numerous competing interests must be carefully considered, require nuanced and flexible solutions. The framework is therefore characterised, as far as possible, by fair and free negotiations which preserves exclusive rights.

To conclude this overview, the following is a table of the present Nordic ECL model as it exists in these countries (save for Iceland) at the time of writing in June, 2017. The table is an updated and slightly modified version of the one presented in the 2011 report ‘Cross-border extended collective licensing: a solution to online dissemination of Europe’s cultural heritage?’<sup>44</sup>

To note are the differences, in particular in relation to the opt out mechanism, that exists between the nations and the absence of Governmental oversight in Sweden compared to the other nations. Also, to note is that Norway in April 2017 proposed a new intellectual property code, which includes substantial changes to the framework, and represents the first major change of the law since the 1960s.<sup>45</sup>

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<sup>41</sup> Government bill 1979/80:132, p. 3 detailing the then newly proposed Article 15 a (currently found in the Swedish Copyright Act in Article 42 c).

<sup>42</sup> *Op. cit.*, p. 9.

<sup>43</sup> Article 9(1) containing the right of reproduction; 9(2) stating the conditions under which an exception to the 9(1) is possible for signatories, often referred to as the three-step test (also incorporated in the TRIPS agreement in Article 13).

<sup>44</sup> Johan Axhamn and Lucie Guibalt, *supra*, (2011), p. 43.

<sup>45</sup> Prop. 104 L. Proposisjon til Stortinget. Lov om opphavsrett til åndsverk mv. (åndsverksloven) 5 April 2017.



Legal paragraphs	ECL field of use	Government approval of OMO	Extended effect applicable only to content that has been published, communicated or performed to the public	Mechanism on (voluntary) mediation to assist in negotiations	Mechanism on mandatory arbitration if no agreement is concluded	Possibility for outsiders to opt-out	Users shall refrain from use if there is special reason to assume that the rightholder would oppose such use
Sweden	42 b §	Reprography for domestic (internal) use by public authorities, companies and other organisations					
	42 c §	Reproduction in educational institutions					
	42 d §	Making available and distribution of works in the collection of archives and libraries (in certain cases)					
	42 e §	Primary broadcasting					
	42 f §	Wireless or cable re-transmission of broadcast works					
	42 g §	Use of TV programs stored in broadcasting organisations' archives					
	42 h §	General ECL provision					
Norway	§ 30	Primary broadcasting					
	§ 14	Reproductions for domestic (internal) use by public authorities, companies and other organisations					
	§ 13b	Use in educational activities					
	§ 16a	Use in archives, libraries and museums					
	§ 34	Cable re-transmission of broadcast works					
	§ 32	Use of TV programs stored in broadcasting organisations' archives					
	§ 17b	Certain forms of reproduction for the benefit of persons with functional disabilities					
§ 36.2	General ECL provision						
Finland	25 f § (1)	Primary broadcasting					
	13 §	Photocopying (general)					
	14 § (1)	Use in educational activities and scientific research					
	13 a § (1)	Reproductions for domestic (internal) use by public authorities, companies and other organisations					
	16 d §	Certain uses by archives, libraries and museums					
	25 h § (1)	Cable re-transmission of broadcast works					
	25 g § (1)(2)	New transmission or making available of an archived TV program or newspaper materials					
	25 f § (3)	The making of ephemeral recordings					
25 i § (1)	Net-PVR services						
25 a § (2)	Use of works of fine art in collections						
Denmark	§ 30	Primary broadcasting					
	§ 14	Reproductions for domestic (internal) use by public authorities, companies and other organisations					
	§ 13(1)	Reproduction within educational activities					
	§ 24a	Use of works of fine art in collections					
	§ 35 (1)	Re-transmission of broadcast works, including from foreign broadcasts					
	§ 35 (4) and (5)	Other third-party use of TV content, including any online catch-up, on-demand, or other means, also including content from foreign broadcasters					
	§ 30 a	Use of TV programs stored in broadcasting organisations' archives					
	§ 16 b	Online distribution of articles by libraries					
	§ 17 (4)	Use for the benefit of persons with visual and hearing impairments					
§ 50(2)	General ECL provision						

## 2.3 The legal framework: Sweden and Denmark

This section provides some further detail of the legal framework and further analysis of the key points made in section 2.1, with particular focus on the representativeness requirement.

### 2.3.1 Sweden

Principles that apply to all ECL agreements are set out in Article 42 a of the Swedish Copyright Act (SCA)<sup>46</sup> and contain obligations for equal treatment of, and right to individual remuneration for, rightholders who are not direct members of the relevant CMO. In addition to the principles concerning ‘outsiders’, Article 42 a also contains a simple statement that any claim for remuneration may only be directed towards the organisation. The very first sentence of Article 42 a states the representativeness requirement as formulated in Swedish law, and reads as follows:

“An extended collective licence referred to in Articles 42 b – 42 h applies to the exploitation of works in a specific manner, when an agreement has been concluded concerning the exploitation of works in this manner with an organisation that represents a significant number of authors of works in the field concerned that are being exploited in Sweden.” (underline added.)

This latest formulation stems from changes made to the ECL provisions on 1 November 2013 and include an important change of juxtaposition of the term ‘Sweden’. Prior to the changes, the law referred to ‘Swedish authors’, indicating that an ECL agreement could only be concluded between authors of Swedish origin so as to, among other things, avoid a conflict of laws should a Swedish user conclude an agreement with a foreign licensing body.<sup>47</sup> This rather dubious position was changed after the Commission had challenged the same provision in Danish law on grounds of conflict with non-discriminatory obligations in the EC-treaty.<sup>48</sup> The effect of the change may be of little practical significance, but serves to point out that much like rightholders, whether members, non-members, foreign or native, CMOs and licensing bodies, both domestic and foreign, are now also treated equally in law.

### 2.3.2 Representativeness criteria and CMO authorisation

CMOs who conclude ECL agreements must represent “a significant number” of authors and rightholders in a particular category of works. The term in the Swedish language is “flertal” which is perhaps closer to “multiple” rather than “significant”. As always in law, precise wording matter. However, the SCA does not provide any further precision or guidance of exactly what is necessary to be deemed ‘significant’, neither can it be easily gleaned from other sources of law. The issue of representativeness did come to a head in a Swedish Supreme Court case, where two competing organisations claimed authority to collect revenue in situations of resale of original artwork, so called *droit de suite*. The Supreme Court in *BUS v*

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<sup>46</sup> Act on Copyright in Literary and Artistic Works (1960:729).

<sup>47</sup> Henry Olsson, Jan Rosén ‘*Upphovsrättslagstiftningen – en kommentar.*’ Wolters Kluwer Fourth edition 2016.

<sup>48</sup> Jan Rosén ‘*A Copyright Act in the Melting-pot: a New Setting for Copyright Matter, Individuality and Collectivisation of Contracts – a Swedish proposal.* 56 Scandinavian Stud. L 397, (2010), p. 411.

*DUR*<sup>49</sup> recognised that, although there could be some problems when several organisations wished to perform collective management in a field, such issues did not warrant a different reading and interpretation of the law as stated. Consequently, more than one organisation did have authority to perform collective management, with condition that they show good governance by financial and administrative stability.<sup>50</sup>

In relation to the representativeness criteria, the Supreme Court stated that “a significant number” should mean ‘an undetermined number that is rather large’ or ‘quite many’ or something similar.<sup>51</sup> With respect, it is difficult to see how these observations help clarify what representativeness should mean in practice, or whether “significant” could be given a more rigid interpretation, such as ‘a majority’. The issue surfaced again following a Government Enquiry in 2010, which proposed to solve the matter by introducing a novel phrase stating that “[...] an organisation that is the *most* representative and *best* represents the authors of the works in the area” should replace the current law.<sup>52</sup> Although a proposal with merit in terms of solving the prevailing uncertainties and providing clarity, it did not find favour with the Government, who argued that such an approach could have a negative impact on competition. Similar concerns were put forward by the Confederation of Swedish Enterprise (Svenskt Näringsliv).<sup>53</sup> The broader issue around monopoly status of some CMOs is a legitimate concern which is discussed in section 5.5.

The table on page 17 also shows that the other Nordic countries have handled the issue of what organisations can conclude ECL agreements differently by the additional requirement of prior authorisation by the relevant Ministry or Governmental Department.<sup>54</sup> The issue of plurality of CMOs within a particular field is in the Nordic countries treated differently: Denmark have adopted a position close to the Swedish 2010 proposal, namely that only one organisation per field is authorised (discussed further below at 2.4.2), whereas in Norway and Finland there is scope to authorise one or more organisations within the same field. In such an event, the grant to operate on the basis of ECL agreements must be given to the CMOs at the same time and under the same conditions.<sup>55</sup>

In this context, as there is an increasing amount of reciprocal agreements between CMOs across Europe and beyond in cross-border use situations, the potential for confusion or misunderstandings could increase, where a lack of clarity exists as to which CMO is responsible in a given country and category of works.

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<sup>49</sup> NJA 2000 p. 445. 6 October 2000.

<sup>50</sup> Jan Rosén, *supra*, (2010), p. 412.

<sup>51</sup> NJA 2000 p. 445 (my translation).

<sup>52</sup> See SOU2010:24, p. 190 *et seq.* Also, Jan Rosén (2010), p. 412.

<sup>53</sup> Prop. 2012/13:141. p. 32 *et seq.*

<sup>54</sup> See e.g. Article 50(1)–(2) of the Danish Copyright Act; Article 26 of the Norwegian Copyright Act; and Article 26(1)–(2) of the Finnish Copyright Act. URL references in the bibliography.

<sup>55</sup> SOU 2010:24, p. 193 *et seq.*

## 2.4 Denmark

Out of the Nordic countries, Denmark is where the ECL model is most developed and has come the furthest,<sup>56</sup> it is arguably the place where the latest additions of ECL provisions offer the most flexible and up-to-date rules to meet new technological developments, such as broadcasting online. Discussed below are the most recent developments in the Danish system and a closer look at the representativeness criteria as formulated in the Danish Copyright Act (DCA).<sup>57</sup>

### 2.4.1 Representativeness criteria

The DCA states the criteria in much the same way as in Swedish law – Article 50(1) in Denmark reads:

“[...] an organisation comprising a substantial number of authors of a certain type of works which are used in Denmark.”<sup>58</sup>

The preparatory works of the DCA make clear that equating “substantial number” with “majority” would be impractical and bring numerous difficulties.<sup>59</sup> Not least because all rightholders may not be members of the CMO and, in situations where there could be two organisations of similar size, none would be able to meet the criteria. Similarly, difficulties may arise for those categories of works, or same type of rights, where a number of different organisations are representing rightholders.<sup>60</sup>

In the same manner as changes of Swedish law were made in 2013 in regard of the nationality of authors vs. geographical indication of use of works, Denmark preceded this change by some years. Following changes to the DCA in 2001, the reference to “Danish authors” was deleted.<sup>61</sup> As referred to earlier, even though in theory the possibility of a foreign CMO being approved to operate an ECL in Denmark exists, the likelihood appears low. A fair assessment is that the strength and longevity of the established Danish CMOs are such that only in the case of a very narrow, specific category of rights with a vastly larger share of foreign rightholders, could a foreign CMO potentially enter the Danish market.

Until 2008, the DCA contained a specific provision stating that only one CMO could be approved for each type of work.<sup>62</sup> This, however, is a position that in academic circles has

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<sup>56</sup> Thomas Riis and Jens Schovsbo, *supra*, (2010), p. 4.

<sup>57</sup> Consolidated Act on Copyright 2014.

<sup>58</sup> Danish Copyright Act available at: [http://kum.dk/uploads/tx\\_templavoila/Lovbekendtgorelse\\_af\\_ophavsretsloven\\_2010\\_engelsk.pdf](http://kum.dk/uploads/tx_templavoila/Lovbekendtgorelse_af_ophavsretsloven_2010_engelsk.pdf) (accessed 18 May 2017).

<sup>59</sup> Thomas Riis and Jens Schovsbo ‘*Extended collective licenses in action*’ International Review of Intellectual Property and Competition Law. IIC 2012, 43(8) 930–950, (2012), p. 5.

<sup>60</sup> *Ibid.* An example given by the authors p. 6 is the Danish Actors Association who, due to the large number of foreign actors who have already assigned their rights to producers or broadcasting organisations, will not be able to reach the “substantial number” as required by law. However, as both the broadcasters and producers’ organisations form part of Copydan it does not present a significant practical problem.

<sup>61</sup> Thomas Riis and Jens Schovsbo, *supra*, (2010), p. 19.

<sup>62</sup> *Op. cit.*, p. 21.

caused some debate.<sup>63</sup> In light of Article 16 of the EU Services Directive,<sup>64</sup> the issue arose as whether or not the activities of CMOs were to be construed as falling within the remit of the Directive. In essence, the argument was that the Danish legislator ignored the details of the Commission's Handbook outlining how the implementation and application of Article 16 and the exemption in Article 17(11) should be carried out – the Commission's view being that the Directive should in fact apply to CMOs, whereas Denmark and Sweden argued that the mere *existence* of the right (its scope, exceptions and duration, etc.) should not be classed as a service, and therefore cannot be exempted a provision.<sup>65</sup>

However, in light of the CJEU judgment in the *OSA* case<sup>66</sup> of February 2014, the matter has now received a judicial ruling and is for the time being settled. The Court held that the Services Directive is not applicable in the field of CMOs activity, and also confirmed that a national law designating just a single CMO to operate in a particular country and category of works did not contravene EU law.<sup>67</sup> The Court recognised the territorial monopoly status granted the CMO, but held this to be justified as necessary and appropriate in order to effectively manage and protect intellectual property rights.<sup>68</sup> As such, the Danish and similar laws regarding monopoly status of CMOs are now *prima facie* compatible with EU law.

#### 2.4.2 An innovative step: the general use provision

The latest provision to be added in the ECL model family is of a somewhat different breed: rather than targeting a specific field of use, there now exists a general provision that can be applied to a specific delimited and well-defined area, which is determined by the negotiating parties themselves.<sup>69</sup> Denmark was the first country to introduce this provision in 2008, and since 2013 it now also exists in Sweden in Article 42 h SCA, and also in Norway. Since Denmark was the first country to introduce the provision, it is there that the most material for evaluation exists. As its introduction in 2008 marks a departure from hitherto legislative development, i.e. provisions that clearly defined the area of intended application, it is prudent to take stock of its application to date and highlight any difficulties.

Article 50(2) of the DCA reads as follows:

“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

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<sup>63</sup> *Op. cit.*, p. 23; and Johan Axhamn and Lucie Guibalt, *supra*, (2011), p. 56.

<sup>64</sup> European Parliament and Council Directive 2006/123 on services in the internal market, 2006 O.J. L376 36 EC.

<sup>65</sup> Thomas Riis and Jens Schovsbo, *supra*, (2010), p. 23. This also reflects the view of the European Parliament who wanted an expressly worded exemption to that effect in the Directive but did not succeed in incorporating it.

<sup>66</sup> Case C-351/12 *Ochranný svaz autorský pro práva k duševním o.s. (OSA) v Le 'cebne' lazne Mariánské Lázně a.s.*

<sup>67</sup> See paragraph 14 for the relevant question under point (3), then at para. 49 *et seq.* for the reasoning of the court. The compatibility of the Services Directive was measured against Articles 56 *et seq.* and 102 TFEU.

<sup>68</sup> *Op. cit.*, paras 73 and 78 of the judgment.

<sup>69</sup> Tarja Koskinen-Olsson and Vigdís Sigurdardóttir, *supra*, (2016), p. 261.

author has issued a prohibition against use of his work in relation to any of the contracting parties.”

The familiar components of representativeness of the organisation concluding the agreement, as well as opt out possibilities, are found in this provision. Further, there is a continued role in the general use provision for the Minister for Culture to approve the organisations that conclude ECLs under the provision. Section 50(4) states:

“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.”

In terms of uptake and agreements currently in effect, the Danish Ministry of Culture publishes all approved ECLs, whether under the specific or general provisions, on its website.<sup>70</sup> Unfortunately, and this is going to the heart of the issue of legitimacy of the ECL system, in particular in relation to foreign rightholders, the Ministry website has several sections available in English, but does not include the ECL agreements. This is a missed opportunity, as this would add transparency and allay some of the concerns that foreign rightholders have, who may be included in some of the ECLs currently in force. Finding out whether a work is potentially included in such an ECL is directly linked to two key features of the ECL model: the right to request individual remuneration and, in some instances, the possibility of opting out.

At the time of writing (June 2017), there are 22 approved ECL schemes under the general provision in Article 50(2). Nearly all involve the main collective organisation Copydan<sup>71</sup> and a host of users spanning a variety of works and uses; from text and image-based materials, AV works, to radio and TV programmes.<sup>72</sup> As one example of the 22, the Media House wished to digitise and make available magazines published 1937–2000 on the website of ‘Ingeniøren’ (The Engineer).<sup>73</sup> The agreement involves Copydan Writing and Copydan Pictorial Art and facilitates making these magazines available online.

As a catch all provision, the general clause raised some concerns from stakeholders: specifically, in relation to radio and TV broadcasting, it was felt that the general provision did not provide enough detail on what could be covered and what to exclude. In fact, there were calls for more targeted ECL provisions to address the type of transmissions that are now the fastest growing – namely online TV.

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<sup>70</sup> <http://kum.dk/kulturpolitik/ophavsret/aftalelicensgodkendelser/> (accessed 5 May 2017).

<sup>71</sup> COPYDAN is the main Danish CMO that cover a number of ECL agreements and is responsible for collection of royalties and remuneration distribution.

<sup>72</sup> Tarja Koskinen-Olsson and Vigdís Sigurdardóttir, *supra*, (2016), p. 261.

<sup>73</sup> The agreement is available here:

[http://kum.dk/fileadmin/KUM/Documents/Kulturpolitik/Ophavsret/Aftalelicensgodkendelser/Generelle\\_aftalelicenser/Copydan\\_TekstNode\\_Mediehuset\\_Ingenioeren.pdf](http://kum.dk/fileadmin/KUM/Documents/Kulturpolitik/Ophavsret/Aftalelicensgodkendelser/Generelle_aftalelicenser/Copydan_TekstNode_Mediehuset_Ingenioeren.pdf) (accessed 19 May 2017).

NB: this ECL is now wider in scope and includes printed editions of the magazine from 1892–2005.

Available here: <https://ing.dk/kulturarven/browse> (accessed 19 May 2017).

### 2.4.3 An even more innovative step – Danish licences for Europe?

Growth of online distribution of TV content is rapidly evolving and growing – new ways of accessing works include smart TVs, tablets and smartphones, HbbTV sets, different boxes connected to TV sets and gaming consoles.<sup>74</sup> Coupled with an ever-increasing amount of content offered primarily through online distribution – Netflix, Amazon Video, HBO, YouTube – in addition to the digital platforms now found at almost every major broadcasting organisation, such as BBC iPlayer, SVT play etc., these have caused a shift from linear TV to on demand and catch-up services. Several surveys and reports point to a similar trend in many countries, particularly in the Nordic region: overall time spent watching TV is increasing and, within that, online TV is taking a larger share, particularly among younger viewers.<sup>75</sup>

In light of this, two new ECL provisions came into force in October 2014 in Denmark to facilitate licensing for retransmission online and third-party use of TV content: Article 35(4) and (5) DCA. These provisions were essentially introduced to add clarity and to create additional support in law; prior to the enactment, licensing was done under either Article 35(1), which is the old standard provision for primary broadcasting, or Article 50(2), which was workable but lacked the specificity of a tailored provision. Further reasons included the need to differentiate “cable” from internet transmissions, and to ensure that primary broadcasts done solely by webcast or any other wire means could be included in an ECL agreement when exploited by third parties.<sup>76</sup> One leading legal practitioner in this field suggests that:

“On the whole, the players in the TV distribution sector wished for an update of the existing licensing possibilities so that the new ways in which TV content is being distributed and consumed today are taken into account.”<sup>77</sup>

This is a convincing view and what is noteworthy is the high level of agreement with the legislator, who stated that the need to legislate specifically in this area “[...] is deemed to be of great public importance.”<sup>78</sup> A new specific provision was warranted as it would bring greater openness and transparency for users and rightholders alike.

As previously mentioned, copyright protection is a strand of law that requires a level of adaptability to technological advancement. In this respect, the Danish laws are at the vanguard – leading from the front in a complex and fast-changing digital landscape. The latest provisions have not been in force long, but one would be hard pushed to find any particularly vocal critics of the new framework in Denmark; here lies the enviable achievement of maintaining a pragmatic, harmonious, mutually beneficial licensing

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<sup>74</sup> Terese Foged, *supra*, (2015), p. 2.

<sup>75</sup> For the most recent detailed report for the Swedish market, see MMS 2016 report here: [http://mms.se/wp-content/uploads/\\_dokument/rapporter/tv-tittande/ar/Arssrapporter/Arssrapport\\_2016.pdf](http://mms.se/wp-content/uploads/_dokument/rapporter/tv-tittande/ar/Arssrapporter/Arssrapport_2016.pdf) (accessed 20 May 2017) and for a very recent authoritative report on global internet use trends, see: <http://www.kpcb.com/internet-trends> (accessed 7 June 2017).

<sup>76</sup> Terese Foged, *supra*, (2015), p. 3.

<sup>77</sup> *Op. cit.*, p. 4.

<sup>78</sup> Danish Bill No L. 123 of January 2014 by the Ministry of Culture, p. 7.

framework that seems to work and enjoy support from all stakeholders. It is no mean feat to claim that:

“Thus, not only retransmission is encompassed, but also third-party store TV services and various catch-up and on-demand exploitation of broadcasters’ linear and on-demand offers, on all platforms, including from foreign broadcasters’ online.”<sup>79</sup>

The merits and success of this ECL provision in Denmark is clear, but whether it can serve as a model for other MS seeking to find solutions in this field is another matter. Danish organisations have experience over decades of negotiating fruitful agreements, in a country with a relatively small population and small domestic TV market, with clear public, stakeholder and Governmental support for collective solutions. Application of ECLs in this way may be a long way off for countries with a different legal, cultural, and different balance of strength between important stakeholders.

## 2.5 Comment

To be, or not to be, representative, that is the question – or at any rate, if answered in the negative, the reason why the Nordic ECL model would crumble. The analysis offered thus far highlights the crucial requirement that CMOs who have the ECL model at the centre of their business must be representative in order to legitimise the extended effect of agreements. In Sweden, so long as the market is left open, and lacking Governmental approval of CMOs, there is the chance of a repeat legal challenge should two organisations feel that they are both representative. Although the Swedish system of CMOs is very well organised and effective, there is a fine line between observing competition laws and maintaining clarity by keeping the number of CMOs low.<sup>80</sup> The practices of CMOs should be seen against the EU General Court landmark judgment in *CISAC v Commission*,<sup>81</sup> where the Court overturned the Commission and found in favour of CISAC and other CMOs.

The case centred on cross-border licensing and so has less application to the ECL model, but it illustrates again the difficulty in ensuring that existing structures of CMO practices do not come into conflict with anti-competitive laws, especially in light of new technological developments. Since the CISAC ruling, the coming into force of the Collective Rights Management Directive (CRM)<sup>82</sup> goes some way to address these issues. Concerns and Nordic case law involving CMO monopoly status is further discussed in section 5.5 below.

As far as representativeness goes, it has a distinctly *national* flavour even though foreign rightholders are included in the CMO’s headcount. As indicated by the Commission’s latest

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<sup>79</sup> Danish Bill No L. 123 of January 2014 by the Ministry of Culture, p. 15.

<sup>80</sup> And in turn keeping costs down for individual rightholders who do not need to be members of several CMOs in different countries. The amount of ‘spill’ of money being lost in international transfers between CMOs is only avoidable by direct membership.

<sup>81</sup> Case T-442/08 DEP (joined cases).

<sup>82</sup> Directive 2014/26 of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.



proposals, discussed in Chapter 4 below, there is on the whole legislative movement towards more cross-border access in the digital sphere. How the Nordic ECL model and the requirement of representativeness fares in a legal landscape, in the not too distant future, where cross-border licensing and increased use of international works becomes standard practice, remains to be seen.<sup>83</sup>

## 2.6 Facts, figures and opting out

Much of the writing on ECLs, and certainly what is available in English, focus on the legal framework and provisions from a theoretical and academic standpoint. Such discourse is important, but this brief final section focuses on agreements with extension effect that are the basis for substantial revenue streams, highlighting the genuine contribution the model in the Nordic countries is making. Notwithstanding the flaws and criticisms outlined earlier, on the whole, characterising the model as having an overwhelmingly positive track-record – for rightholders, users, access to works, efficiently securing rights clearance at a lower cost and so on – is a fair assessment.

### 2.6.1 Facts and figures – Sweden and Denmark

Quantifying an exact figure for the revenue based on ECL agreements involves separating out such parts of a licence that may also include non-ECL elements. As such, the following table is meant to indicate the kind of sums collected by the main CMOs on an annual basis. Below are the most recent available annual figures, taking into consideration three of the main Swedish and Danish CMOs in the fields of AV and radio retransmission, music, and licensing of reproduction rights in schools, companies and public authorities.

	CMO	Annual revenue (Mkr) in 2015
<b>Sweden</b>	<b>Copyswede</b>	<b>290.6</b>
	<b>STIM</b>	<b>1 811.0</b>
	<b>BONUS</b>	<b>230.1</b>
<b>Denmark</b>	<b>Copydan Verdens TV</b>	<b>1.031</b>
	<b>KODA</b>	<b>860.6</b>
	<b>Copydan Tekst &amp; Node</b>	<b>360.9</b>

Both countries' figures are in their respective national currencies and stated in millions of kronor.<sup>84</sup> There are numerous other figures that are of interest, but the simple point here is

<sup>83</sup> Thomas Riis and Jens Schovsbo, *supra*, (2012), p. 17.

<sup>84</sup> See the bibliography for reference to each CMO and additional figures.

to illustrate that CMO revenue is substantial and provides benefits to creators and rightholders in a stable and transparent manner. Questions do exist as to the exact way in which distribution is done (discussed below in section 5.5). What can also be added is that the Nordic CMOs traditionally run efficiently, often not exceeding 10 percent running costs of annual income.

### 2.6.2 Opting out in practice

Described as an “[...] indispensable condition of an extended collective management system [...]”<sup>85</sup> opting out mechanisms are widely regarded as central in any ECL arrangement. However, as demonstrated by the table on page 17 many provisions, particularly in Denmark and Norway, do not include such option. In instances of conflict, the rightholder is referred to a Tribunal that will assess the matter.

A more important point is the actual number of rightholders who avail themselves of this indispensable option once an ECL is in place: virtually zero, a negligible amount, trivial. Statements from leading organisations and users in the Swedish and Danish context<sup>86</sup> refer to a handful of opt outs, for instance in the case of SVT, over the course of three decades. The ease with which rightholders can in effect let the ECL and CMOs do the work on their behalf is attractive. It is testament to the success of the model that the opt out in practical terms becomes a moot point. In simple terms, ECLs in action provide genuine remuneration for rightholders, with ample safeguards, so that sensible reasons for opting out are by and large difficult to state.

## 2.7 Conclusion

ECLs in the Nordic countries demonstrate proven workability across many sectors over a long period of time. The reach has in the last few years expanded to include provisions that seem to offer a solution to the difficult area of online TV-services, with Denmark leading the way. Even though its success is evident, questions will undoubtedly be asked when the model is introduced in countries and jurisdictions that do not have the CMO structure, cultural cohesion and political history of the Nordic states. It can be stressed once again that the high level of CMO membership and acceptance of collective solutions lead to a representativeness that legitimises the model within the confines of each country. In sum, the finely balanced ECL system has evolved and been refined over decades, making it a central tenet of Nordic copyright law. In a much-changing legal landscape, for those with an interest to maintain the status of ECLs, the pending EU reforms and developments are of great importance.

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<sup>85</sup> Mihály Ficsor, Chapter 2, “*Collective Rights Management from the Viewpoint of International Treaties, with special attention to the EU Acquis.*” in Daniel Gervais (ed.) ‘*Collective Management of Copyright and Related Rights.*’ (2016), p. 71.

<sup>86</sup> Interviews conducted with SVT (Swedish public service broadcasting), Copyswede, Bonnier Broadcasting and a leading Danish attorney specialised in the broadcasting field.

### 3. United Kingdom – an unusual latecomer to the ECL table

#### 3.1 Introduction

Virtually every lawyer and law student is aware of the common law system, its origins in the United Kingdom and global reach through centuries of its wholesale or partial export around the world. In the European context, chiefly the development of the EU, the British legal tradition is the counterweight to the civil law continental countries and it is through this balancing act that the EU *acquis* owes much of its present appearance.<sup>87</sup>

The proposition that the common law tradition differs in some important aspects from the continental civil law systems should not attract controversy.<sup>88</sup> It is also fair to say that British law places individual liberty and matters of enterprise, economy and liberal values close to its heart; take Lord Steyn's observation when referring to the rule of law, that "It captures the spirit of liberty which is a major theme of the common law."<sup>89</sup>

The laws of copyright have been no exception to the general spirit of the common law system, one example of many being the requirement for every author, under sections 77–80 CDPA 1988, to assert their moral rights in order to be afforded such protection in law. On one view, when sketching the ideological differences between 'authors rights' and the common law copyright philosophy, it is suggested that "The Anglo-American approach to copyright reflects the strong (though not exclusive) commitment of the common law systems to the virtues of free contractual bargaining."<sup>90</sup> This is a convincing proposition, especially when reviewing judgments of the British courts in this area which, more often than not, take a business oriented line.<sup>91</sup>

Although the UK ECL Regulations is in its early days, in providing this brief backdrop to the legal landscape of which it forms part, it is important to reflect on some wider cultural aspects. In the same way as the ECL model in the Nordic countries is said to be underpinned by a culture of general acceptance of collective solutions, organisation, rational approach and so on, it is clear that the UK does not share some of these traits to the same extent. In fact, one could argue that on the whole, the UK is less inclined to favour broad, collective solutions, choosing instead a societal and legal model based on liberalism, lower taxation, higher level of private financing for infrastructure and substantial tuition fees in universities.

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<sup>87</sup> See SIEPS report '*Brexit: konsekvenser för EU och Sverige*' p. 38 for detailed analyses of the UK's contribution to the CJEU and EU *acquis*. Available at (in Swedish only): <http://www.sieps.se/sv/publikationer/occasional-papers/brexit-konsekvenser-f-r-eu-och-sverige-20171op> (accessed 10 May 2017).

<sup>88</sup> For an interesting account of legal systems cross-fertilisation, see Lord Toulson "*International Influence on the Common Law*" At the London Common Law and Commercial Bar Association" 11 November 2014. Available at <https://www.supremecourt.uk/docs/speech-141111.pdf> (accessed 5 May 2017).

<sup>89</sup> Lord Steyn "*Democracy through law*" E.H.R.L.R. 2002, 6, 723–736. European Human Rights Law Review 2002. at \*727.

<sup>90</sup> Cornish, Llewellyn & Aplin '*Intellectual property: patents, copyright, trade marks and allied rights*' 8<sup>th</sup> edition. at 13–02, p. 520.

<sup>91</sup> For an exhaustive source of UK case law, see <http://www.bailii.org/databases.html-uk> (accessed 6 May 2017).

In essence, whereas the ECL model sits comfortably in a Nordic context, given its longstanding application in those countries coupled with a *milieu* of cultural homogeneity, the same cannot be said for the UK ECL scheme.

Nevertheless, the UK is not exempt from the challenges of digitisation outlined in the introduction at the top of this thesis: the vexing questions around rights clearance in instances of mass use; finding an optimum balance of access to works while maintaining the rights and integrity of copyright owners; and ensuring and facilitating ways in which transaction costs for rights clearance can be significantly reduced. All of these questions apply with an equal sense of urgency in the UK. In the Impact Assessment from 2012, in stating the problem at hand and why government intervention was required, the UK IPO stated “The UK’s existing rights clearance system is complex, involving multiple users and rights holders seeking and granting permissions; Hargreaves<sup>92</sup> recommended that it be simplified.”<sup>93</sup> To illustrate the problem in direct practical terms, the Impact Assessment provides one example that serves to highlight the problem. Following conversations between the BBC and the UK IPO during August 2009 regarding BBC’s increasingly popular catch-up service, BBC iPlayer, it was observed that “[...] it took five years to create a framework in which the rights for 1000 hours of content are now potentially cleared to be made available weekly on the iPlayer across multiple platforms.”<sup>94</sup> This ratio of time spent vs. rights clearance actually achieved<sup>95</sup> is cumbersome and costly at best, and unworkable at worst. The case for legislative action appeared strong. However, some caution should be observed in the above example; even though the timeframe needed to achieve the desired results was too long, it is not clear whether this was down to a problem with a number of rightholders or whether a much smaller number, perhaps only a handful, of licensors withheld their consent with a view to extract an unfeasibly high price.

A principle driver of the legislative changes in the UK, and in all other MS, are the overarching Commission twin policies of the ‘Digital Agenda for Europe’ and the ‘Europe 2020: A Strategy for smart, sustainable and inclusive growth.’<sup>96</sup> In fact, it is now over 10 years since the Commission referred to the need to promote free movement of knowledge and innovation as a “Fifth Freedom” within the single market.<sup>97</sup> Specifically in relation to ECLs and the recognition of the need for an improved system for managing rights on a collective

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<sup>92</sup> The Hargreaves review made a number of proposals in order to update and ensure innovation and growth in the UK economy, particularly in the digital arena. Specifically, in relation to ECLs, the review, in Chapter 4, p. 36 *et seq.*, suggested that the model be introduced in order to address digitisation for libraries, BBC archives etc., and to also be applied to orphan works. The review is available at: [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/32563/ipreview-finalreport.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf) (accessed 6 May 2017).

<sup>93</sup> Impact Assessment 18/05/2012 on Extended Collective Licensing. (IA number: BIS1054), p. 1.

<sup>94</sup> UK IPO Impact Assessment, *supra*, Section 2, p. 4.

<sup>95</sup> Compared in the same unit, 5 years is 1825 days and 1000 hours is 42 days.

<sup>96</sup> Alexander Ross and Matthew Curran-Whitburn? *EU Directive on the collective management of copyright and multi-territorial licensing of online music rights in the internal market: the UK consultation and Government response.* Entertainment Law Review, (2016), p. 1.

<sup>97</sup> COM 2007 724 final “A single market for 21<sup>st</sup> century Europe”; and Jan Rosén (2010), p. 399.

basis, the CRM Directive<sup>98</sup> is an integral part to facilitate reaching some of the goals set out in the overarching 2020 strategy. The Directive came into force in the UK on 10 April 2016 and is an important component in the UK ECL scheme.<sup>99</sup>

### 3.2 The ECL scheme in UK law

Even prior to the clear recommendation to introduce ECLs in the Hargreaves Review, the model was discussed but not included in the final text of the preceding Gowers Review of 2006.<sup>100</sup> Again in 2010, following strong criticism from rightholder groups, ECLs did not succeed in being introduced onto the statute book by way of the Digital Economy Act 2010.<sup>101</sup> Between 2011 and 2014, a number of reviews and consultations were conducted. Of particular interest are the two Consultations that included numerous stakeholders: The Consultation on Copyright,<sup>102</sup> addressing the findings in Hargreaves, and the smaller Technical Consultation<sup>103</sup> on the actual draft ECL legislation. Taken together, the potential problems and risks identified by various stakeholders in the consultations can be summarised as follows:

- opt out arrangements should give rightholders every opportunity for such an opt-out;
- publicising the ECL schemes should be of high importance;
- special consideration given to foreign rightholders as well as estates and/or relatives of deceased authors (to ensure they are given the opportunity to consider opting out);
- suggestion that CMOs should be required to publish information on rightholders who opted out;
- five-year length of the validity of a scheme deemed appropriate or too long (by CMOs and rightholders), but too short by end-users and institutions who at times operate with longer funding-plan timescales.<sup>104</sup>

Some of these concerns are also familiar to the Nordic countries, but notwithstanding the issues raised, the UK legislature proceeded with the draft proposal and subsequently passed legislation. The legislative basis for the UK ECL scheme is found in the Enterprise and

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<sup>98</sup> Directive 2014/26 of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market.

<sup>99</sup>See UK Government guidelines on implementation, available here:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/518555/Guidance\\_on\\_CRM\\_Directive\\_implementing\\_regulations.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/518555/Guidance_on_CRM_Directive_implementing_regulations.pdf) (accessed 17 May 2017).

<sup>100</sup> Gowers Review of Intellectual Property 2006. Available at:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228849/0118404830.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf) (accessed 6 May 2017).

<sup>101</sup> Dr 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'. E.I.P.R. 2016, 38(4), 208–220 at 209, p. 3.

<sup>102</sup> Available at:

<http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/consult-2011-copyright.pdf> (accessed 6 May 2017).

<sup>103</sup> Available at: <https://www.gov.uk/government/consultations/extending-the-benefits-of-collective-licensing> (accessed 6 May 2017).

<sup>104</sup> This summary is on basis of material in the reports listed in fn. 99, 102–103.

Regulatory Reform Act 2013 (ERR) which came into force on 25 April, 2013. Among a number copyright provisions, s. 77(3) amended the CDPA 1988 by introducing s. 116B in that Act which, among other things, allows the Secretary of State by way of Regulations to provide for a licensing body that operates the ECL scheme.<sup>105</sup> The Regulation in question came into force on 1 October 2014: The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014 (ECL Regulations) introduced ECLs in UK law for the first time.

### 3.2.1 The legal framework

The representativeness requirement is discussed in detail below under section 3.5. That aside, there are several things to note in the UK framework. Firstly, the UK has implemented a general ECL provision. Contrasted with the Nordic model, it is interesting that the general ECL provision is what came last in the development in those countries; Denmark introducing theirs in 2008 with Sweden following in 2013. As discussed in section 2.4.2, the general provision is meant to offer the opportunity for parties to conclude an agreement with extended effect for specific uses that do not fall within any of the provisions already provided for. In the UK, the course taken is rather the opposite – any ECL scheme is run under the same broad and detailed rules in the ECL Regulations.

The following is a comprehensive summary of The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014<sup>106</sup> essential sections, followed by a comment section.

#### *Authorisation to operate, s. 4(1) –(3)*

The Secretary of State approves licensing bodies who may wish to operate an ECL scheme; any application must include the types of works intended for the scheme and their permitted use; therefore, a licensing body must abide by terms and conditions stipulated in the ECL authorisation, and, if doing so, may licence all rights within the scope of the scheme. Any Code of Practice stated by a licensing body must be followed in addition to the general requirements of the ECL Regulations.

#### *Representation, opt out arrangements, publicising, s. 4(4) –(6)*

The relevant licensing body must show significant representation in the type of works intended to be in the ECL scheme; non-member rightholders must be protected in accordance with the licensing bodies' code of practice; opt out arrangements are adequate to protect interests of rightholders; publicising the introduction of the scheme and distribution mechanisms must be appropriate for the proposed scheme; all authorisations are non-

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<sup>105</sup> Eleonora Rosati 'The orphan works provisions of the ERR Act: are they compatible with UK and EU laws?' European Intellectual Property Review, (2013), p. 2.

<sup>106</sup> The full text is available here:

[http://www.legislation.gov.uk/ukxi/2014/2588/pdfs/ukxi\\_20142588\\_en.pdf](http://www.legislation.gov.uk/ukxi/2014/2588/pdfs/ukxi_20142588_en.pdf) (accessed 17 May 2017).

transferable and last five years and, unless cancelled or revoked, have the option of being extended.

*Application process, response, authorisation, notice of decision s. 5(1) –8(6)*

Applications made to the Secretary of State must contain the following: a summary, contact details of the CMO and evidence that supports its status, the types of works to which the scheme will apply, the relationship between the rightholders rights' and the relevant works that the licensing body seeks to licence, and details of opt out arrangements, including for non-member rightholders prior to the scheme commencing. Further, the number of rightholders who have either already opted out, or have contracts with the licensing body that exclude them from the scope of the scheme, must be included, along with the number of works in which they have rights.

Evidence of the representation of a licensing body as well as evidence that the body has obtained required consent must be submitted. This includes information given to members by the licensing body when seeking consent. If the body at the time of application holds a collective licence, this should be submitted along with a code of practice should the application be successful, and a declaration that the licensing body in all material respects complies with the code. A copy of proposed terms and conditions of the ECL scheme, the intended distribution policy, and arrangements for publicising the scheme to non-member rightholders and third parties, including details on net licence fee distribution, must also be submitted.

Finally, should an application satisfy all the above requirements, the Secretary of State must within 14 days inform the licensing body that i) the application is received, ii) whether any additional information is required to facilitate consideration of the application, and iii) supply a date when the application will be determined. Should the application fall short of the stipulated requirements, the Secretary of State must within 14 days provide the reasons for rejecting it. Before final authorisation, the scheme must be publicised for a minimum of 28 days to give time to consider any comments. At the end of this period, a further 90 days follows during which the Secretary of State must inform the licensing body whether the authorisation is given. It is the responsibility of the Secretary of State to publish the decision in an appropriate way.

*Application to renew authorisation s.9(2) –(4) and s.10(1) –(3) and Review of the ECL scheme s.11(1) –(5)*

These sections specify how an authorisation may be renewed and what the licensing body must do. The timeframe when an application can be made is three years from the date of a previous authorisation up to three months prior to expiration. Essentially, the licensing body must show that the ECL scheme is working satisfactorily, demonstrating details of opt outs, number of rightholders intending to opt out, and number of works opted out. The same evidence as in the initial application must again be submitted (representation, required consent, information given to members, copies of any reports produced, details of

complaints from non-member rightholders.) Every three years, the licensing body must provide information identical to that given when applying for authorisation and renewal.

*Modification, revocation, cancellation of an authorisation ss. 12(1) –15(1)*

Power to modify or revoke an ECL authorisation rests with the Secretary of State. Grounds can be either by direction from the licensing body itself, following a review, or if the body fails in operating the scheme. The licensing body may also submit a cancellation notice to the Secretary of State. In each of these instances, notice periods of either 21 or 42 days apply, as does payment of possible administrative fees incurred.

*Opt out from the ECL scheme s.16(1) –(6)*

Following the opt out arrangements as authorised by the Secretary of State, a rightholder may exclude or limit the grant of licences under a proposed or running ECL scheme. A non-member rightholder needs to submit their name to the relevant licensing body in order to be listed as opted out; in both cases, this can be for all or some of their relevant works. If there is already an agreement between the rightholder and the licensing body, the rightholder may wish to opt out of either the ECL scheme, or collective licensing, or both. 14 days after receiving a notification of an opt out, the licensing body shall acknowledge the notification, inform the rightholder and any licensees of the effective date of the opt out and the termination date of the licence, and update their list of opt outs accordingly.

Following a receipt of a notification to opt out, licences should be terminated within six months, unless where the licensee is an educational establishment, in which case, a nine-month cancellation period applies.

Finally, for each ECL scheme, licensing bodies must maintain and make public a list containing i) names of non-member rightholders who have opted out, ii) works which are identified as opted out, and iii) names of those who have other contractual arrangements with the licensing body, making their works excluded from the scheme.

*Additional non-member safeguards, fees, and unclaimed fees s. 17(1) –(5); s.18(1) –(5); s.19(1) –(3); s. 20*

For works of non-member rightholders, the licensing body may only grant non-exclusive use of the work, but the effect is as if granted by the rightholder. The validity of the licence terminates on or before the expiration of authorisation, unless revoked or cancelled prior, or in case of works being opted out, the licence terminates as per s. 16(4)–(5) outlined above. Licences granted in accordance with rules in the Regulations do not constitute an infringement – neither by the licensing body or the licensee. Following a termination of a licence, the licensing body must remunerate non-member rightholders as soon as practicably possible.

A reasonable administration fee to cover general costs may be deducted by the licensing body, benefiting both members and non-members; the latter receiving their appropriate portion of the net licence fee no later than nine months from the end of the financial year when the fee was collected. Non-members have a three-year period from the end of that



financial year in which they can produce evidence of a reasonable fee or level of use of a work so as to receive remuneration. Any works for which no rightholder has been located shall be kept on record.

Any unclaimed licence fees relating to unidentified rightholders must be held in a designated account for three years from authorisation. Following a maximum period of eight years, any unclaimed fees may be directed at activities that benefit non-member rightholders. The Secretary of State can also request information from the licensing body about any aspect of the ECL scheme, which must be responded to within 14 days.

### 3.3 Comment

The UK ECL Regulations take a broad brush and paint a familiar basecoat: a licensing body, approved by the Secretary of State (cf. Ministry of Culture in Nordic model), conclude an ECL agreement with users; requirement of representatives; extended effect of the agreement to non-member rightholders with some safeguards; risk of copyright infringement and sanctions removed from the user; option to opt out. But on top of the foundation lies another, nuanced, layer of detail which is unfamiliar to an observer of ECLs steeped in the Nordic tradition. For instance, when compared with the Swedish provisions, it is striking that the entire ECL model, containing eight articles spanning a range of categories of works and fields of use, barely takes up two printed pages in the SCA.<sup>107</sup> The point here is that deference to the relevant CMOs and other collective organisations is not something that needs to be safeguarded against; on the contrary, it is from this that the Nordic ECL model draws strength. Freedom to negotiate in a flexible and as transparent as possible manner creates stability, a more level playing field and legal certainty. In the UK, the Secretary of State seems involved every step of the way, even years after an authorisation has terminated.

Against this it can be argued that any wholesale import of the Nordic model into other jurisdictions is likely to be problematic. For reasons outlined at the outset of this chapter, the legal tradition in the UK is such that introducing collective licensing instruments, particularly with extended effect, is likely to require appropriate time for adjustments in the market. It is not evident that the main actors likely to be seeking to benefit from the ECL scheme have the kind of influence and power to shift attitudes within fields and markets that operate under long-standing forms of licensing that do not involve ECLs. In other words, introducing such a scheme into already functioning licensing structures may not yield an instant positive response.

A drawback of how the UK ECL Regulations is drafted is that when opting for a broad, general, one-fits-all scheme, any opportunity to tailor an ECL provision to a specific field of use and category of works is lost. The table on page 17 clearly demonstrates the nuanced approach taken and options that legislatures have at their disposal in drafting provisions in the Nordic countries. Careful consideration is given to each parameter to maximise efficacy and application within a certain field. By way of illustration, affording outsiders opt out rights in primary broadcasting is a sensible and essential component in that field but it is

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<sup>107</sup> Swedish Copyright Act 1960:729. Articles 42 a – 42 h. Available in English at: <http://www.wipo.int/edocs/lexdocs/laws/en/se/se124en.pdf>

not required with the same urgency for reproduction within educational situations. A particularly clear example is the complex but smoothly operating Danish broadcasting sector described above at 2.4.3. Although entirely possible, it is arguably difficult to see that, weighed as a whole, the UK ECL Regulations are drafted with application in the broadcasting sector in mind.

The central question then is whether, in striking the balance between safeguards and application procedure on the one hand, and efficacy, workability and use of the model on the other, the UK scheme will prove that such balance is achieved. What is at stake here is whether the benefits of well-functioning ECL-based markets, such as the one in the Nordic countries, are likely to come to fruition through the UK ECL model. It must also be stressed that, at the time of writing, the enormous pressures on UK Government departments following the result of the EU referendum vote in June 2016 may cause the priorities and resources of the UK IPO and other departments to be taken up elsewhere.

### 3.4 The Copyright Licensing Agency (CLA)

Notwithstanding the analysis so far, there is evidence of ECL-like activities in the UK that are surprisingly long standing. Formed in 1983 as a non-profit organisation, the CLA is a CMO which deals with reproduction of text and image works primarily in the education sector, but also for businesses and the public sector.<sup>108</sup> The CLA currently comprise four separate CMOs whose members receive remuneration and royalties from it. These are: The Authors' Licensing and Collecting Society (ALCS), The Publishers' Licensing Society (PLS), PICSEL and The Design and Artists Copyright Society (DACS). Addressing similar concerns around the great amount of photocopying in the education sector, the CLA uses a licensing model called Voluntary Collective Licensing (VCL). Under this system, the CMO:

“[...] issues licences to copy content on behalf of copyright owners who have given their mandate. We receive our mandate via The Publishers Licensing Society (PLS) and The Authors Collecting and Licensing Society (ALCS) and other representatives of the copyright owners.”<sup>109</sup>

In other words, this is a voluntary opt in licensing model with possibility of opt out. But such a description does little justice to reflect how photocopying has been handled over time; there is ample evidence to suggest that licences offered by CLA are more akin to licences with extended effect.

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<sup>108</sup> See <https://www.cla.co.uk/who-we-are> (accessed 10 May 2017).

Some additional information about CLA in this thesis is based on telephone interviews with representatives of the organisation but do not necessarily represent an official CLA view.

<sup>109</sup> See <https://www.cla.co.uk/international> (accessed 10 May 2017).

For a thorough account of some of the difficulties in relation to photocopying in the educational field, see: Sol Picciotto “*Copyright licensing: the case of higher education photocopying in the United Kingdom.*” E.I.P.R. 2002, 24(9), 438–447, 2002.

Firstly, the PLS, one of the two main member organisations that make up the CLA, said the following in their 2014 biannual summer magazine:

“We have been working closely with the trade associations, CLA, ALCS, DACS and the IPO to find the right balance in the Extended Collective Licensing (ECL) provisions between the need on the part of right holders to proceed with caution, and the need to support CLA’s current de facto ECL which has generated important revenues for publishers, authors and artists for over 30 years.”<sup>110</sup> (underline added.)

Picking out the key words here, it is noteworthy that the PLS themselves describe the scheme as “de facto ECL” – words that confirm that, for this particular sector and from the perspective of the CMOs, the practical reality on the ground has, for three decades, been one of ECL application although without support in law.

Secondly, taking a look at the terms and conditions of the Higher Education Licence as offered by the CLA, as one example,<sup>111</sup> a close read of the definitions’ list reveal that ‘Material Licenced for Photocopying’ includes everything in the relevant territories, except that which is listed under ‘Excluded Material’ – strictly any works for which the CLA has not received an express opt in. But how would such a scheme ever be practical in schools, universities and other educational institutions around the country? The answer is that it would be impossible to manage in any practical sense: attempting to verify books by the school photocopy machine that may not be on the CLA register is virtually impossible and has no chance of being enforced. Instead, the works that may be photocopied under this licence have a much narrower realm of exclusions and are better seen as the converse of what the VCL system purports to do: as a starting point, works are all opted in. Accordingly, the ‘Excluded Material’ definition states that such works are those expressly listed on the CLA website and, in addition, the specific exceptions listed in Schedule 1 (these are printed music, maps, charts, newspapers, workbooks, workcard and assignment sheets, and any works where the copyright owner has expressly and prominently stipulated that it may not be copied).<sup>112</sup> However, the operation of collective rights management done through a private voluntary agreement can be achieved either in a scheme that has legislative support or one that does not. Every activity of a CMO or licensing body does not require express statutory permission. But it is quite another matter to have as your central business model to offer licences, which include rightholders unaware of such inclusion, and for that not to be based on express legal authority.

The licensing system for photocopying in education has historically been a troublesome area in the UK, and can be seen in *Universities UK Ltd v Copyright Licensing Agency Ltd*,<sup>113</sup> where some of the issues came to a head. A number of questions were brought to the Tribunal relating to, *inter alia*, remuneration for blanket licences, inclusion of artistic works in

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<sup>110</sup> See <https://www.pls.org.uk/pls-plus-summer-2014/?p=6> (accessed 14 May 2017).

<sup>111</sup> Available at: [https://www.cla.co.uk/sites/default/files/CLA\\_HE\\_Licence\\_2016\\_19-old.pdf](https://www.cla.co.uk/sites/default/files/CLA_HE_Licence_2016_19-old.pdf) (accessed 14 May 2017).

<sup>112</sup> See <https://www.cla.co.uk/international> (accessed 12 May 2017).

<sup>113</sup> [2002] E.M.L.R. 35 (Copyright Tribunal).

published editions, the status of ‘course packs’ and the difficult question around an appropriate interpretation of the UK’s fair dealing provision in the CDPA 1988.<sup>114</sup> The case settled some of these problems, but did nothing to affect CLA’s de facto ECL practice – one pointed observation following the case stating that “Although heavily disguised as a “voluntary” arrangement, this type of licensing scheme is in effect one required by statute.”<sup>115</sup>

In sum, the CLA is an organisation that stands to benefit from the introduction of the UK ECL Regulations should a successful application be approved. Indeed, reviewing the UK Government Impact Assessment,<sup>116</sup> it contains several references to the CLA and it would be right to assume that the organisation was one that the new ECL Regulations took aim at. The net effect of the introduction of the ECL scheme for the CLA boils down to two important changes to the licensing regime: i) the removal of risk of legal challenge for copyright infringement of works that may not have been expressly opted in, replacing that risk instead with legal certainty; and ii) a small increase in the repertoire available to include works from all foreign rightholders and not, as at present, only those territories within which the CLA has a reciprocal licensing agreement with a corresponding CMO.

### 3.5 The question of representativeness

One of the central and also most difficult aspects of any ECL legislation, is defining the representativeness criteria of the CMO. Being representative is what gives the whole model its legitimacy – without it, the main element of collectivised legal solutions falls away; namely, the notion that the organisation or CMO has a mandate to speak for (and bring benefits to) members and non-members alike. Conversely, if an organisation is deemed not to be representative enough, then the risk of criticism runs high, opt outs may follow, and instead of a broad, flexible solution, the ECL model would start to look more like a mandatory licence. In other words, strength in numbers. But what that number should in fact be is a source of much scrutiny and semantic analysis, as seen in the Nordic context discussed above.<sup>117</sup>

In the UK, during the technical consultation process, there were differing views in regard to s. 5(1)(i) of the ECL Regulations, stating that the application to operate an ECL scheme, directed at the Secretary of State, must include:

“(i) evidence of the representation provided by the relevant licensing body.”

One suggestion put forward by a large number of rightholders<sup>118</sup> has been to set a concrete and quantifiable threshold that would indicate representativeness of a CMO within a certain sector; the proposed level was suggested as 75 percent.<sup>119</sup> This view reflects the suspicion

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<sup>114</sup> Sol Picciotto, *supra*, (2002), at \*438.

<sup>115</sup> *Op. cit.*, at \*443.

<sup>116</sup> UK IPO Impact Assessment 2012, *supra*.

<sup>117</sup> See sections 2.3.2 and 2.4.1.

<sup>118</sup> Dr. Dinusha Mendis and Victoria Stobo, *supra*, (2016), p. 5.

<sup>119</sup> The figure reflects 75% CMO membership support.

and worry that without rigorous safeguards, the suggested high threshold being the prime example, the ECL scheme would seem to usurp or encroach too much on the exclusive rights of copyright owners. However, it is of course a matter of finding a balance so that the workability of the whole scheme is not jeopardised: too high a criterion and the risk is that ECL schemes never get off the ground in the first place. This, arguably, holds particularly true when CMOs and users attempt to conclude agreements for the first time: before any of the potential benefits can be enjoyed, if successfully implemented, one argument is that at the outset of an ECL scheme, the criteria should be revised somewhat downward.<sup>120</sup> However, the ECL Regulations' threshold of representativeness is even higher for those organisations who do not hold a pre-existing collective licence.<sup>121</sup> Exactly what this means in practical terms is unclear, but it would suggest that any collective organisation that presently does not hold a licence, say a smaller CMO, will find it difficult to run an ECL scheme.

In its response to the technical consultation, the UK Government opted for a solution centred on flexibility;<sup>122</sup> specifically addressing the 75 percent question, the Government saw it as “largely unachievable”, echoing the views of nearly all collective societies and potential licensees who deemed it unworkable. It is also noteworthy that, when contrasting this threshold suggestion with the ECL model in the Nordic countries, such a set figure finds no corresponding view or would likely not find much favour.

Section 2, Interpretations, of the ECL Regulations contains the definition of the representativeness criteria, which states:

“required consent” means the informed consent of a substantial proportion of the members of the relevant licensing body who vote on the proposal.”

The criteria then include a clear democratic condition without corresponding provision in the Nordic context: an ECL scheme in the UK is put to the ballot by the relevant CMOs, and only if a substantial proportion of members *vote* in favour of such proposal will it meet the requirement as stipulated in the Regulations. As no such polls to date have taken place, the lack of precedent leaves any evaluation of this crucial criteria wanting. What exactly a ‘substantial proportion’ is, with the added element of a vote, remains to be seen.

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<sup>120</sup> Daniel Gervais makes a similar point in relation the Nordic countries' ‘substantial number’ of rightholders criteria when arguing that a new CMO should have lower substantiality threshold but perhaps coupled with a higher degree of evidence of good governance compared with an established CMO seeking to obtain an ECL for a new scheme.

Daniel Gervais ‘*Extended Collective Licensing: a significant contribution to international copyright law and policy*’ in Liber Amicorum Jan Rosén, Eddy publishing, (2016), p. 8.

<sup>121</sup> *Op. cit.*, p. 6.

<sup>122</sup> The full Government response is available here:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/309894/government-response-ecl.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/309894/government-response-ecl.pdf) (accessed 6 May 2017) See especially, p. 5.

### 3.6 Uptake and evaluation

As of June 2017, there are no formal applications filed with the UK IPO for consideration to operate ECL schemes in the UK but, according to the UK IPO, there are a number of CMO who are “considering whether to proceed with such applications.”<sup>123</sup> Given that the Hargreaves review advanced ECLs as long ago as 2011, it is perhaps surprising that not a single scheme has been initiated some 2.5 years after the legislative framework came into force. A couple of reasons for this can be put forward. Chief among those being the two rather strict main criteria, out of a long list found in s. 5 ECL Regulations, which any CMO that wishes to make an application must first meet:

- “required consent” under s. 4(4)(f) and 5(1)(j) ECL Regulations, i.e. that the organisation must prove informed consent from a substantial proportion of members who vote on the ECL scheme proposal;
- “publicising arrangements” under s. 4(4)(e) and 5(1)(f) which ensure that the scheme is publicised to non-member rightholders and third parties that may wish to opt out prior or during its course.

There is no question that all requirements of a rigorous and robust application process should be met before any maiden UK ECL scheme is approved, but there is some cause for concern regarding the efficacy of the scheme, given the level of complexity and detail of the application process.<sup>124</sup> It is hard to determine whether this is a significant factor as to why no schemes are currently in operation – perhaps a new stakeholder and collective organisation survey is required – but the question is whether the views of a majority rightholders in all categories have shifted enough from their somewhat hostile 75 percent representativeness preference. It is plain to see that no ECL will ever come into existence unless rightholders, CMOs and users alike are all in agreement and see the mutual benefits of the scheme.

#### *The CLA application*

In a telephone interview with a senior representative of the CLA,<sup>125</sup> they confirmed that the poll asking to authorise their ECL scheme, is to be conducted during the summer of 2017. It is ALCS and PLS members who will cast their votes, with the organisations’ members totalling some 90,000 people. Although the impact of introducing an ‘official’ ECL scheme for those members will be negligible, and maybe go completely unnoticed, what is interesting is the outcome in terms of numbers. Should the poll go ahead in the coming months, it is the first time that the representativeness criteria can be assessed. The results of the vote will give some indication of whether the representativeness criterion will elicit the legitimacy it seeks: should only a low number of all 90,000 members return a ballot, say 5,000, and only

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<sup>123</sup> Email response from UK IPO on 21 February 2017.

<sup>124</sup> In 2016, the UK IPO issued an updated guidance for licensing bodies applying for ECL schemes. Available at:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/544362/extended-collective-licensing-application-guidance.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/544362/extended-collective-licensing-application-guidance.pdf) (accessed 6 May 2017).

<sup>125</sup> Interview conducted 10 May 2017.

3,000 of those vote in favour of the scheme, it becomes difficult to suggest that the CMO in this case is really representative in its field.

The reason put forward by the CLA as to why there has been a delay in getting the poll conducted and the ECL application submitted sooner, is to do with the changes to its membership structure which they had to implement following the introduction of the CRM Directive. These changes were mainly in relation to Articles 5 and 6 of the Directive on representation and membership rules of CMOs. Having made the necessary changes to fully comply with the Directive, the application only awaits the polling for it to be ready to be submitted.

### 3.7 Conclusion

The UK ECL scheme is at the halfway point between its introduction on 1 October 2014 and the five-year Post-Implementation Review that the UK Government intends to carry out of all measures implemented following the Hargreaves review. Attempting to pre-empt what the Post-Implementation Review might conclude is a task fraught with difficulty – not least given the potential seismic changes and enormous pressure on all UK Government departments following the result of the EU referendum on 23 June 2016<sup>126</sup> – but some tentative suggestions can be made.

The UK scheme opts for a general ECL provision from the outset, is heavy on detail in some aspects but lacking in others and contains plenty of safeguards, with a rather stringent requirement of representativeness. Its implementation differs from the Nordic model – upon which it is partly based – in this significant regard: rather than introducing an ECL scheme for a specific field of use, one where CMOs and users on the market are already in a good position to negotiate and conclude an ECL agreement, the UK Regulation is drafted to apply in all fields of potential ECL use. Other than the pending CLA application, it is not immediately clear what other CMOs and sectors would be likely to start the process of submitting an application. Take the broadcasting sector – one that in Denmark has benefitted greatly from the specific ECL provisions in the DCA,<sup>127</sup> it is not evident that the UK ECL scheme can be applied in this context. Lacking any real detail as to *how* rights clearance for broadcasters based on an ECL agreement should be obtained,<sup>128</sup> arguably the way the current ECL scheme is drafted suggests that licensing for broadcasting may in the first instance continue to be done by licensing options other than those with extended effect.

Despite the fact that reprography within education has for some time been partly underpinned by a *de facto* ECL model without statutory basis, the introduction of statutory

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<sup>126</sup> Depending on the outcome of the negotiations, the UK vote to leave the EU will bring fundamental changes to the UK's legal arrangements. The at present proposed 'great repeal bill' will incorporate all existing EU law into domestic law, after which a process of unpicking, repealing, and rewriting of laws will begin. What the UK's relationship with the EU in terms of intellectual property – where a clear push for cross-border access and further harmonisation of a number of IPR areas is now in motion – is an issue of great complexity and interest, not least for pan-European matters such as satellite cable transmissions and patent protection.

<sup>127</sup> Terese Foged, *supra*, (2015), p. 5 *et seq.*

<sup>128</sup> Dr. Dinusha Mendis and Victoria Stobo, *supra*, (2016), p. 14.

provisions is unlikely to herald a great surge in ECL licensing in the UK. It took the Nordic countries some 60 years for ECLs to cement their position and become part of the very fabric of copyright licensing. Such an evolution in other countries will arguably require time for organisations to adapt to the model. It is useful to remember that in countries other than the Nordic nations, a host of alternative licensing options exist; even though most native observers in the region have somewhat rose-tinted glasses when describing ECLs, to others the same benefits may not be as obvious. In addition, it is uncertain how UK courts may look upon ECLs in the case of a legal challenge as to validity, representativeness or any other aspect of the model. Given the traditionally more favourable view for private contractual bargaining and non-collective priorities, it will be interesting to monitor this development.

Finally, to paraphrase, and welcome the UK ECL Regulations into that well-known tradition of Nordic ECL quips, although not quite yet out of the garage, the UK scheme is neither a lemon or a Volvo<sup>129</sup> but rather more like a Jaguar – elaborately crafted, rich in detail, layered, but unavailable and out of reach to most drivers. Similarly, although the Nordic ECL model may in some regards offer “a real Nordic smorgasbord of problems”<sup>130</sup> the UK appear to have opted for the full English breakfast in their Regulations.

#### **4. Current EU proposals – copyright in the Digital Single Market**

##### 4.1 Introduction

Of the many proposed substantial changes to the current EU copyright framework, at the time of writing (June 2017), the DSM Directive is being negotiated and finalised at EU level. Interestingly in the present context is that the proposal contains an explicit ECL provision, with cross-border effect. In the ‘reasons and objectives’ of the DSM proposal, it is recognised that one obstacle to cross-border access to works is represented by situations of complicated rights clearance procedure. Thus, for so called ‘out-of-commerce’ works used by cultural heritage institutions, an ECL model is proposed, with its primary aim being the digitisation of such works “[...] to the ultimate advantage of the EU citizen.”<sup>131</sup>

The principles of licences with extended effect is not an entirely new concept at EU level. The following is a brief outline of already existing ECL-like provisions, followed by an assessment of the ECL proposal in the DSM Directive.

##### 4.2 Elements of ECL already established in EU law

Four Directives presently contain references to ECL elements. The first Directive gives the option to MS that allows them to introduce an ECL in the field of satellite broadcasting and cable re-transmissions. Subsequent Directives merely recognise the Nordic model and

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<sup>129</sup> Thomas Riis and Jens Schovsbo, *supra*, (2010), p. 1.

<sup>130</sup> Gunnar Karnell “*Extended Collective License Clauses and Agreements in Nordic Copyright Law*” 10 Column. VLA J.L & Arts Vol. 73, 73 (1985).

<sup>131</sup> Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market. 2016/593 (final), p. 2 of the Explanatory Memorandum.



safeguard its continued functioning by stating that legal changes through Articles in the Directives should have no effect on the continued application of ECLs. The relevant Directives are presented below in chronological order.

#### *Satellite and Cable Directive 93/83/EEC*

Providing MS with the option of introducing an ECL system for satellite broadcasting and cable retransmission, Article 3(2) of the Satellite and Cable Directive (Sat Cab) contains reference to agreements between a broadcasting organisation and a collecting society that “[...] may be extended to right holders of the same category who are not represented by the collecting society.” Non-members have the right to opt out and, under Article 3(4) there is a requirement to notify the Commission of proposed schemes, the record of which is to be kept in the Official Journal of the European Communities.<sup>132</sup>

In addition, Article 9(2) in the Sat Cab Directive contains a provision for mandatory collective management of rights in works that are being re-transmitted by cable. The concern addressed here is to avoid a situation where one or a small number of rightholders could, by exercising their exclusive right of re-transmission, potentially block programmes being broadcast, thus creating a ‘black-out’.<sup>133</sup> As stated in Recital 28 to the Directive “[...] smooth operation of contractual arrangements [...]” should not be disturbed by non-members of the CMO wanting to use their rights in an alternative way – therefore, there is no possibility of opting out. The argument that unlike the Nordic ECL model, which has lowering of transaction costs as a principle driver, the Sat Cab provisions are more concerned with attempting to correct a particular market failure, is convincing.<sup>134</sup> The root-causes of the market distortion stem from the familiar difficulties created by the multi-territorial nature of the internal market – something which a number of EU proposals now seek to in part address.

#### *Information Society (InfoSoc) Directive 2001/29/EC*

In Recital 18 of the InfoSoc Directive there is a reference to ECLs which states: “This Directive is without prejudice to the arrangements in the MS concerning the management of rights such as extended collective licences.” There has been considerable debate as to the extent of the Recital and how it relates to the exclusive rights stated in Articles 2 and 3 of the Directive; this point is discussed in detail in section 5.

#### *Orphan Works Directive 2012/28/EU*

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<sup>132</sup> Available at: <http://eur-lex.europa.eu/oj/direct-access.html?ojYear=2017&ojSeries=OJ-C> (accessed 29 May 2017).

<sup>133</sup> Annette Kur, Thomas Dreier *European Intellectual Property Law. Text, cases & materials*, Edward Elgar (2013), p. 258.

<sup>134</sup> Johan Axhamn and Lucie Guibalt, *supra*, (2011), p. 54; Annette Kur, Thomas Dreier, *supra*, (2013), p. 258 *et seq.*

The Orphan Works Directive similarly contains a simple reference to ECL in Recital 24 where almost verbatim the wording in InfoSoc is used. The Recital states that “This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences [...]” There is an interesting overlap here in that the Nordic ECL model and some existing agreements today deal with orphan works by way of an ECL. By acknowledging this practice in Recital 24, the EU preserves the functioning of ECLs for orphan works in the Nordic states. The key difference between an ECL dealing with orphan works and that which is provided for in the Directive, is the requirement of a ‘diligent search’ as to the authors’ location or status. This must be conducted by the CMO before any funds can be directed to the non-distributable funds.<sup>135</sup>

#### *Collective Rights Management Directive 2014/26/EU*

The move toward implementing collectivised solutions in certain areas of EU copyright law by the CRM Directive must as a pre-requisite have a well-functioning, or at any rate, more harmonised legal framework for CMOs. This is not least to facilitate the increased emphasis on cross-border use: should CMOs have widely varying ways of operating between MS, the difficulties are plain to see. As CMOs are what makes any ECL agreement possible, the potential impact of this Directive on ECL operation can be significant in some MS. However, no doubt after demands from the Nordic countries and with support of the European Parliament, the Directive contains in Recital 12 an assurance that ECLs would not be affected: “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 [...]”

In essence, the Directive sets standards that every CMO must meet, including an explicit right for rightholders to choose a CMO of their choice. The impact of the new standards and rules varies across MS, naturally bringing greater change to those with less emphasis on collective rights solutions. A fair comment is that the Directive is an important block in the building of the digital single market – without a more coherent CMO framework, the many cross-border proposals would struggle to be effective.

#### 4.3 The out-of-commerce provisions in Articles 7–9 DSM Directive

Although the term “extended collective licence” is not written *verbatim* in Articles 7–9 of the proposal (only appearing in Recital 23), there is no question that the intention is for an ECL

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<sup>135</sup> Mihály Ficsor, *supra*, (2016), p. 71. One argument is that the CMOs operating an ECL scheme should be under the obligation to conduct such a ‘diligent search’ so as to avoid the above scenario, where following an unsuccessful search, non-distributable funds would directly or indirectly be to the benefit of CMO members only. This view should be recognised and accounted for, but it presupposes that some CMOs may not be as trustworthy or have the kind of good governance and transparency that would militate against such argument. Another thing to consider is whether the amount of money that would be allocated to conduct these diligent searches is not better used being distributed to members and non-members. Without clear evidence that a large share of income from orphan works is non-distributable, there is less force in the argument supporting a diligent search requirement.

scheme to be in effect. The category of works in question are ‘out-of-commerce’ works to be used by cultural heritage institutions – libraries, archives, museums, historical societies and the like – to digitise, distribute and communicate to the public in a non-exclusive and non-commercial manner. When such a licence is confirmed, between a CMO and a cultural heritage institution, Article 7(1) states that such a 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 [...]”

The reference to “presumed to apply” is to those countries, for instance Germany, who utilise a legal mechanism similar to ECLs, called simply ‘legal presumption’. The German Copyright and Administration Act 1965 contains an out of commerce provision in Article 13d.<sup>136</sup> Hence why also in Recital 23 of the DSM proposal, the choice of mechanism to implement the out-of-commerce provisions is left to the MS in accordance with their legal traditions, practices and circumstances.

Focus is now on the ECL part of the DSM proposal, with a breakdown of the components of Articles 7 and 8. This is followed by a critical discussion, analysing how the representativeness requirement is formulated and providing tentative views on possible effects of the proposal, in particular in the Swedish context.

#### Article 7(1)(a)

Article 7 is broken down into three conditions that must be met before the extended licence may come into effect, the first under 7(1)(a) being that:

“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;

The representativeness requirement stated as the very first required condition of the Article indicates the significance of it. This is in line with those Nordic countries who, like Sweden, have their ECL provisions in sequential order. This requirement is discussed further in section 4.4.1.

#### Article 7(1)(b)

A short and concise requirement of equal treatment of rightholders is stipulated here, reading as follows:

“Equal treatment is guaranteed to all rightholders in relation to the terms of the licence.”

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<sup>136</sup> The relevant German provision available in English here: [https://www.vgwort.de/fileadmin/pdf/allgemeine\\_pdf/out\\_of\\_commerce\\_law\\_2013.pdf](https://www.vgwort.de/fileadmin/pdf/allgemeine_pdf/out_of_commerce_law_2013.pdf) (accessed 21 May 2017).

As shown in the analysis in the preceding pages, an omission of the equal treatment of CMO members and non-members would be contravening EU anti-discrimination laws and likely to run counter to established principles of international treaties.

#### Article 7(1)(c)

The opt out provision is formulated with slightly different language than what commonly found in ECL legislation. The proposed wording is as follows:

“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.”

As demonstrated in the previous analysis, the opt out is what gives the ECL model legitimacy – only for a select few categories of works should it by necessity be omitted; broadcasting via cable and re-transmissions being one of them. There is little that would warrant a mandatory application of a potential out-of-commerce scheme, were rightholders to be denied the opportunity to opt out.

#### Article 7(2)

Article 7(2) consists of two paragraphs; the first containing the legal definition of what an ‘out-of-commerce’ work is. According to the proposal:

“A work or other subject-matter shall be deemed to be out of commerce when the 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.”

Although a reasonably intelligible concept of what is aimed at, the central question is exactly who determines when a work is in or out of commerce. Paragraph two states that:

“Member States shall, in consultation with rightholders, collective management organisations and cultural heritage institutions, ensure that the requirements used to determine whether works and other subject-matter can be licenced in accordance with paragraph 1 do not extend beyond what is necessary and reasonable [...]”

It is thus up to each MS, together with the relevant institutions, to decide the status of each potential work.

#### Article 7(3)

Article 7(3) requires MS to ensure that appropriate publicity measures are in place during a reasonable time before works are used. Information to be publicised includes details of the licence, with particular reference to non-member rightholders, whose works are regarded as out-of-commerce, and details of the opt out provision (as stated in 7(1)(c)).

#### Article 7(4)

Further conditions relating to the MS where a particular CMO is representative, specifying the following criteria as determining factors:

- (a) “the works or phonograms were first published or, in the absence of publication, where they were first broadcast, except for cinematographic and audio-visual works;
- (b) the producers of the works have their headquarters or habitual residence, for cinematographic and audio-visual works; or
- (c) the cultural heritage institution is established, when a Member State or a third country could not be determined, after reasonable efforts, according to points (a) and (b).”

Stopping short of echoing the ‘diligent search’ requirement in the Orphan Works Directive, there is still a need for ‘reasonable efforts’ to be made in determining the appropriate MS of first publication.

#### Article 8 and 9

Article 8 states that works under a licence as envisioned in Article 7 may be used in all MS. There will also be a single online portal to be administered by the EU IPO, in much the same way as the current orphan works database, which will publicise works for at least six months prior to them being digitised, distributed, communicated and made available to the public.

Finally, Article 9 obliges MS to make sure that a regular dialogue takes place among all relevant stakeholders to ensure the effectiveness of the scheme, and assist in the establishment of requirements to determine the out-of-commerce status of works under Article 7(2) second paragraph.

#### 4.4 Critical analysis of the proposal

*Prima facie*, the notion of providing access to, and preservation of, culturally significant works across the Union in the digital age, should in the main be applauded. Utilising the Nordic ECL model as a template for the proposals is appropriate, as the model could be very useful in this category of works. However, some aspects are cause for concern, both in terms of impacting current ECL arrangements in the Nordic countries, and of whether the proposed EU ECL is constructed in a workable manner. Below are the main potential problem areas from the standpoint of a comparative perspective with the Nordic model.

#### The definition

Currently, the very concept of ‘out-of-commerce’ works lacks a corresponding notion in the Nordic countries, and perhaps in most other MS. The formulation in the first paragraph of Article 7(2) suggests that a rather exhaustive search need be completed in order to determine the in or out commercial status of a work. Together with the requirements of the second

paragraph, this raises two potential problems. Firstly, if no further guidance is provided, and it is up to each individual MS to determine the status of a work, there is the risk of not achieving a uniform interpretation and application of the central definition. In turn, this would be likely to generate varying level of protection of works throughout the MS. Should this turn out to be the case, it could cause some difficulties considering the cross-border aspect of the proposal – as what is deemed out-of-commerce in one MS may not be so in a neighbouring state. Secondly, the proposals do not indicate who exactly will carry out the necessary searches. Is it the CMO or the user, or a combination of the two? Notwithstanding that searches should not “extend beyond what is necessary and reasonable”, it remains unclear who would take on this extra workload and related costs.

#### Place of first publication or broadcast

Article 7(4)(a)–(c) lacks clarity as to which organisations, especially in MS where there are more than one in this field, are supposed to be involved in licensing agreements. Again, determining place of first publication or location of producers may in some cases require quite a bit of research effort. The scenario where a number of CMOs and other organisations criss-cross Europe in order to determine where a work belongs surely is not an option, neither is it plausible that the Commission intended it that way. But the lack of clarity gives rise to concerns.

#### Similar in name but different in spirit

The essential components of an ECL are to a degree incorporated in the new proposals, but the present drafting arguably disappoints in that it does not go far enough in places but goes too far in others. Where the proposal falls short is the clear delimitation to only out-of-commerce works that are permanently in the collection of the institution. This suggests a rather narrow field, missing out on works that may for one reason or other fall outside the definition. Examples here could be works or other materials that were never in commerce in the first place, but could be of interest to some members of the public, or works that were of private nature, such as collections of letters or similar, that do not form part of an institution’s permanent collection.

Comparing the EU proposals with the Nordic model, where in each country similar ECL provisions already exist in relation to making available library and museum archives, a fair assessment is to conclude that the Nordic model provisions offer more flexibility, are broader in scope but more precise in their aim, and crucially contain more emphasis on *how* works can and should be used under a freely negotiated and tailored agreement. The EU out-of-commerce ECL is layered with conditions and cumbersome obligations, probably the result of compromises during the negotiations, which may make it a difficult system to implement in practice. The success of the Nordic model relies clearly on the strength and cohesion of the sum of its parts: CMOs and users working together, clear but open-ended legislative provisions, in the spirit of a pragmatic and solution-oriented approach, aiming to create stability and clarity that is beneficial for all concerned parties.

The economic rationale of only providing an extended licensing option for the category of works deemed out-of-commerce may also be questioned. Should a cultural institution commence a digitisation project under the premise of the current proposals, would there not be a temptation to also include those works that could be classed as orphan works? The proposals contain no mention of the Orphan Works Directive,<sup>137</sup> or how the two may operate in tandem or any potential crossover. Again, for example in the Swedish context, Article 42 d already forms the basis for agreements of the kind envisioned in the DSM proposals where a broader selection of works, with cross-border effect, to a limited extent already exists.<sup>138</sup> This is a novel development, but shows that current ECL laws in the Nordic countries have potential to cater for cross-border situations in a more targeted way.<sup>139</sup>

Finally, in relation to the out-of-commerce proposal as a whole, what may also be queried is the issue of the level of actual demand for the type of digitised collections to be made available across the entire EU. Purely from an economic perspective, the question is whether the costs of digitising out-of-commerce works in cultural institutions, made accessible across the entire EU, is money put to best use. The spirit of the ‘Digital Single Market’ would of course point to an answer in the affirmative, but the many linguistic differences and regional characteristics across the EU should be considered in light of budget constraints and other priorities of the institutions. In short, the noble concept of making these works accessible for all EU citizens throughout the Union, is more convincing when genuine demand for it can be demonstrated.

#### 4.4.1 Representativeness criteria in Article 7(1)(a)

The criteria as formulated in the proposals have opted for a requirement that the relevant CMO is “broadly representative” of rightholders within the specific category of works. At first blush, this formulation is perhaps somewhat less demanding than how it is stated in the Nordic model: a “significant number of authors” suggests a substantiality that “broadly representative” does not. This could however be a question of semantics and, as the proposal is yet to be implemented, there is little need to delve deeper without the ability to assess its impact.

Nevertheless, what is left unspecified or omitted in the Articles may open the door to similar problems to the ones seen in some of the Nordic countries. The question of what will happen when there is more than one CMO in a category of work that fits the “broadly representative” criteria is left entirely unanswered. In the event of a substantial uptake of the intended digitisation possibilities in the proposal, a judicial ruling may be forthcoming to resolve this issue, much like the Swedish *DUR v BUS*<sup>140</sup> ruling discussed above.

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<sup>137</sup> Directive 2012/28/EU of The European Parliament and of The Council of 25 October 2012 on certain permitted uses of orphan works.

<sup>138</sup> A pilot scheme between the Swedish Royal Library on the one hand and Copyswede (Sweden) and Kopiosto (Finland) on the other primarily for audio-visual works.

<sup>139</sup> The agreement can be found here:

[https://www.ifro.org/sites/default/files/crossborder\\_pilot\\_eng3\\_kopioisto\\_final.pdf](https://www.ifro.org/sites/default/files/crossborder_pilot_eng3_kopioisto_final.pdf) (accessed 22 May 2017).

<sup>140</sup> NJA 2000 p. 445.

#### 4.4.2 Comment – Nordic ECLs in the EU?

Having been in the wings for some time, the ECL model is about to enter the European stage by way of the DSM Directive. The particular difficulties and potential problems with the current proposal are outlined above – now broadening the perspective, does the ECL model really offer a viable solution to licensing at EU level, in particular in regard to achieving cross-border effect?

From the discussion thus far, it is obvious that the effectiveness of ECLs is wholly dependent on a well-functioning system of CMOs, based on transparency and good governance, with clear and sophisticated systems for collection and distribution of revenue. In that respect, the CRM Directive goes some way to establishing uniform rules that in time will, as full implementation and adjustment to new rules of the Directive concludes, usher organisations in this direction. However, the level of CMO membership is crucial: as the model is introduced at EU level, it will not suddenly mean that all rightholders will rush to join an organisation. In all likelihood, such process will take some time.

Central to the DSM proposals is the desire for cross-border access of works. This is something that ECLs in the Nordic nations lack legal basis for, as such an effect must be prescribed in law. Put simply, ECLs at national level cannot permit or regulate uses of works that occur in other countries, save for bilateral agreements between states that have reciprocal and mirroring ECL provisions in their respective legislation.<sup>141</sup> The territorial nature of ECLs was also pointed out by the Swedish legislature when introducing changes to the framework in 2013.<sup>142</sup> The point here is that harmonisation that would create EU-wide recognition of a work's status is not possible through the Nordic ECL model.<sup>143</sup> However, the out-of-commerce proposal has, in Article 8, precisely such an aim with the important caveat in 7(4), establishing a link to the country of first publication. The outcome then would be that each MS will have a CMO and heritage institution ECL in place, accessible by all EU citizens.

#### 4.5 Conclusion

Proof of the efficacy of the out-of-commerce ECL is some way off. Once the Directive is fully implemented, the question in the main will be one of uptake amongst MS, relevant institutions and CMOs. The formulation of the various criteria of the Directive matters greatly: when assessing the Orphan Works Directive, it seems a fair comment to suggest that

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<sup>141</sup> ALAI Opinion on the cross-border effect of licences granted for digitisation and communication of out-of-commerce works by cultural heritage institutions under a regime of ECL. 14 September 2016. At p. 2.

<sup>142</sup> See Swedish Government proposition: Prop. 2013/12:141; and also, the pilot scheme referred to in fn. 138–139.

<sup>143</sup> Jan Rosén, *supra*, (2010), p. 418.



it has not been a riveting success.<sup>144</sup> Chief among the reasons is, certainly from the standpoint of the institutions, the prohibitively high costs accumulated in undertaking the required ‘diligent search.’ The parallel with the DSM proposal is the similar but seemingly less stringent requirement of ‘necessary and reasonable’ methods to determine the status of a work, including its country of first publication. This will be a joint effort among rightholders, CMOs, cultural institutions and Governmental bodies, and what the exact criteria end up being remains to be seen, but on the current proposal it may vary across MS.

The Nordic ECL systems differ in many respects to what is proposed at EU level – transplanting and scaling up of the model would naturally call for modifications to accommodate implementation among all 28 MS, including those with little to no ECL experience. Underlying these difficulties, and why the proposals are seen as overly complicated from a Nordic perspective, is the familiar problem of a lack of a unitary harmonised EU copyright legal system. The numerous differences in respective copyright laws between the MS militate against a wholesale import of the Nordic model at EU level.<sup>145</sup> But that greater recognition is given to the model, and a first Community-wide ECL provision proposed, should in the main be welcomed. The significant benefits of an ECL structure has not gone unnoticed at EU level – the question is whether it can work as proposed.

Finally, for the Nordic countries, there is again need for protecting the workability of current domestic ECL arrangements in light of this novel Commission proposal. Assurances in the past, discussed further below and above at 4.2, have come by way of Recitals to the relevant Directives. The DSM Directive does not include such a Recital and the impact of the Article 7 proposals, although arguably not extensive, could disturb some element of the finely tuned ECL-based market. What is included, however, is Recital 23 where MS are offered “...flexibility in choosing the specific type of mechanism allowing for licences for out-of-commerce works...”<sup>146</sup> This represents a departure from previous Recitals, outlined above, where there is a much clearer acknowledgement of the already existing and special status of Nordic ECLs. There is still time for the DSM proposal to be drafted differently, following amendment proposals by the Nordic (and perhaps some other) states. This question remains to be seen, but it would be surprising if such an option is not exhausted.

## 5. Potential challenges and critical points

### 5.1 Introduction

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<sup>144</sup> Familiar critiques are summarised here: <http://www.communia-association.org/tag/orphan-works-directive/> (accessed 29 May 2017) For the OWD implementation in the UK and a critical analysis, see: Kyrsten Elena Baker *It's a hard knock life: a critique of the legislative response to the orphan works problem in the UK* UCL J.L. and J. 2016, 5(1), 1–30.

<sup>145</sup> There has been much discussion around the aim to create an EU copyright code. See for example the Wittem Group's ‘European Copyright Code’ published 26 April 2010; Christophe Geiger ‘*Constructing European Intellectual Property – achievements and new perspectives.*’ Edward Elgar publishing, (2013).

<sup>146</sup> DSM Directive proposal, Recital 23.

To give a fuller and more balanced account of the ECL model, something should be said about the not trivial matter of whether the provisions are compatible with international as well as EU legal norms. This substantial topic involves lengthy and complex legal analysis, which fall outside the scope of this thesis. Many of the articles referenced throughout the text deal with the issues regarding the ECL model's compatibility with the Berne Convention,<sup>147</sup> obligations and effects of the TRIPS Agreement,<sup>148</sup> the WCT<sup>149</sup> and the WPPT<sup>150</sup> Treaties and the wider EU *acquis*.<sup>151</sup>

This section focuses on the CJEU ruling in *Soulier v Premier Ministre*<sup>152</sup> (hereafter *Soulier and Doke*) and the scope of impact on the Nordic ECL model. Several authors point to a widespread 'feel-good factor' within Nordic copyright law circles when mentioning ECLs: uncontroversial *vis-à-vis* international norms;<sup>153</sup> the model "certainly has proved to be successful"<sup>154</sup>; a collective (perhaps by extended effect) Nordic mantra hailing ECLs as by definition 'good' and without contention when submitted to international treaty obligation rules on limitations and exceptions.<sup>155</sup> Nevertheless, considerable uncertainty as to some central aspects of the ECL arrangements now exists following the judgment of the CJEU. Additional concerns are briefly addressed in the subsequent section, 5.5.

## 5.2 The CJEU judgment in *Soulier and Doke* – potential impact on ECLs

The recent CJEU judgment in *Soulier and Doke*<sup>156</sup> involves several matters relating to the ECL model and presumption-based licensing schemes in general. The brief background to the case was a French law, enacted in March 2012,<sup>157</sup> aiming to create a French database administered by the Bibliothèque Nationale de France, containing digitised versions of all out-of-commerce works, published in France prior to 2001, that were not available either in digital or printed format. When a book appears in the database, an author or publisher is given six months to oppose the work being digitised and made available. In the absence of opposition, the French collecting society SOFIA, approved by the Ministry of Culture, gains rights to exercise the use of the digital format of the work.<sup>158</sup> A number of additional features

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<sup>147</sup> *Supra*, fn. 4.

<sup>148</sup> *Supra*, fn. 10.

<sup>149</sup> WIPO copyright Treaty, 1996.

<sup>150</sup> WIPO Performances and Phonograms Treaty, 1996.

<sup>151</sup> For academic works that address this topic, see especially Christian Rydning 'Extended Collective Licences: the compatibility of the Nordic solution with the international conventions and EC law.' Norwegian Research Centre for Computers and Law [2010]; Daniel Gervais (Ed.) 'Collective Management of Copyright and Related Rights' Third Edition Wolters Kluwer [2016] in particular Chapters 1, 2, 8; Thomas Riis and Jens Schovsbo, *supra*, (2010), pp. 10–18 especially.

<sup>152</sup> Case C-301/15, 16 November 2016. *Marc Soulier, Sara Doke v Premier Ministre, Ministre de la Culture et de la Communication*.

<sup>153</sup> Thomas Riis and Jens Schovsbo, *supra*, (2010), p. 10.

<sup>154</sup> Jan Rosén, *supra*, (2010), p. 418.

<sup>155</sup> Ole-Andreas Rognstad 'Avtalelisenser' 73 NIR 152 (2004), p. 155.

<sup>156</sup> *Supra*, fn. 152.

<sup>157</sup> Loi 2012 - 287 du 1 mars 2012. Relative à l'exploitation numérique des livres indisponibles du XXe siècle [Law 2012 - 287 of 1 March, 2012 on the Digital Exploitation of Unavailable Books of the Twentieth Century].

<sup>158</sup> SOFIA is the 'Société française des intérêts des auteurs de l'écrit'. For a detailed analysis of the French law, see: Axel Paul Ringelhann and Dr. Marc Mimler 'Digital exploitation of out-of-print books and copyright law: French licensing mechanism for out-of-print books under CJEU scrutiny.' E.I.P.R. 2017, 39(3), 190-193, 2017 and further Jane

were put in place (for a detailed account, see articles listed in fn. 158), but on the whole the law was criticised as complicated and in places inconsistent,<sup>159</sup> much in favour of publishers and business interests at the expense of the authors' exclusive rights.

In May 2013, two authors, Marc Soulier and Sara Doke, challenged the law on grounds of unconstitutional interference with authors' property rights under French law. Both the *Council Constitutionnel* and the *Conseil d'État* rejected the arguments, holding that the law was non-excessive when balanced with the public interest. Neither was there reason to think that the opt out mechanism constituted a violation of the ban on formalities in Article 5(2) of the Berne Convention. The outstanding issue that the CJEU needed to address was whether the law was compatible with the InfoSoc Directive, in particular Articles 2(a) and 3(1), concerning the exclusive right of reproduction and of communication to the public.

The central question, formulated by the CJEU, was stated in the judgment as follows:

“[...] whether Article 2(a) and Article 3(1) of Directive 2001/29 must be interpreted as precluding national legislation, such as that at issue in the main proceedings, that gives an approved collecting society the right to authorise the reproduction and communication to the public, 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 that legislation lays down.”<sup>160</sup>

### 5.2.1 Advocate General Wathelet's Opinion

Handed down on 7 July 2016, the Opinion<sup>161</sup> contains forceful arguments that, if followed verbatim by the CJEU, would have caused serious problems for ECLs and other presumption-based laws throughout the EU. Having first discounted the relevance of Article 5 InfoSoc in the proceedings, the AG stated his views on the scope of the exclusive rights in Articles 2(a) and 3(1) InfoSoc. At point 39 of the Opinion, the AG said:

“[...] the author's express and prior consent for the reproduction or communication to the public of his work cannot be eliminated, assumed or limited by substituting it with tacit consent or a presumed transfer which the author must oppose within a fixed time limit [...].”

In the following point, the AG stated the mechanism for opting out “in no way alters” his requirement for prior express consent, and further in the same paragraph, that the opt out

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Ginsburg 'Fair Use for Free, or Permitted-but-Paid?' *Berklee Technology Law Journal*. Vol. 29, issue 3, Article 1 at 1425–1430 especially. And for a thorough account Caterina Sganga 'The eloquent silence of Soulier and Doke and its critical implications for EU copyright law' *Journal of Intellectual Property Law & Practice* (2017) 12 (4): 321–330.

<sup>159</sup> Caterina Sganga 'The eloquent silence of Soulier and Doke and its critical implications for EU copyright law' *Journal of Intellectual Property Law & Practice*. 12 (4): 321–330 (2017), p. 324.

<sup>160</sup> CJEU judgment in *Soulier and Doke* at para. 28. Initially, the question also related to Article 5 InfoSoc but as the Court deemed the Article not to be applicable in the circumstances, the question was restated with sole focus on Articles 2(a) and 3(1) InfoSoc.

<sup>161</sup> AG Wathelet's opinion available here:

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=181445&doclang=EN> (accessed 23 May 2017).

as prescribed in the French law, contrary to the conclusion of the French Courts, did in fact amount to a violation of Article 5(2) of the Berne Convention.<sup>162</sup> To substantiate its conclusions, the Opinion draws on several Recitals and Articles from the Orphan Works, Collective Management and InfoSoc Directives, in addition to previous CJEU jurisprudence. Arguing that a requirement of ‘prior express consent’ cannot be fulfilled by any form of tacit consent or other presumptions, the AG pointed to Article 6 and Recital 7 of the Orphan Works Directive. AG Wathelet argued that Recital 7 of OWD justifies absence of express consent as obtaining prior consent is impossible. Further, Article 6 of the OWD clearly states that MS “shall provide for an exception or limitation” to the rights under Articles 2(a) and 3(1) in InfoSoc. Coupled with the diligent search requirement in Article 3 of the OWD, the absence of all these elements in the French law – and the bold suggestion in the French law that non-use of a book in a commercial way would negatively impact the exclusive rights in InfoSoc – made it incompatible with EU law.

Piercing the armour of the hitherto relatively protective defence afforded to extended licensing by way of Recitals in a number of Directives seemed a small matter in the AG’s view.<sup>163</sup> Referencing the often quoted protection in Recital 18 in InfoSoc, the AG argued that the hierarchy of rights as intended by the EU legislator meant that the exclusive rights in Articles 2(a) and 3(1) of InfoSoc must take precedent over what is stated in the Recital; the outcome being that even the management of those rights would require express consent by the rightholder.<sup>164</sup> On this view, MS cannot ‘adopt management arrangements’ that would compromise any element of the exclusive rights in question.

Furthermore, there is ample precedent to support AG Wathelet’s position that the Recitals, or other Preamble texts, do not enjoy autonomous legal effect; rather, they are interpretative tools in the legal order, often read restrictively by the CJEU.<sup>165</sup> Two judgments can serve as examples: firstly the case of *Nilsson* (C–162/97) where at paragraph 54 it says: “[...] the preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question.”<sup>166</sup> Secondly, a more recent Opinion from Advocate General Léger restates the view in much the same way. In *Commission v Italy* at paragraphs 64–65 the AG says:

“It is clear from settled case-law that the preamble to a Community act has no binding legal force and cannot be relied on either as a ground for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner clearly contrary to their wording.”<sup>167</sup>

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<sup>162</sup> See further Sylvie Nérisson at: <http://kluwercopyrightblog.com/2016/08/15/opinion-ag-wathelet-soulier-doke-case-c-30115-licensing-exclusive-rights-requires-express-prior-consent-author-opt-doesnt-help/> (accessed 23 May 2017).

<sup>163</sup> See above section 4.2 for the relevant Recitals and Directives, and paras 56–57 of the AG’s Opinion *supra*.

<sup>164</sup> Caterina Sganga, *supra*, (2017), p. 327.

<sup>165</sup> Roberto Baratta ‘EU Legislative Drafting: Views from those applying EU law in the Member States’

19th Quality of Legislation Seminar. p. 8 *et seq.*

Available here: [http://ec.europa.eu/dgs/legal\\_service/seminars/20140703\\_baratta\\_speech.pdf](http://ec.europa.eu/dgs/legal_service/seminars/20140703_baratta_speech.pdf) (accessed 25 May 2017).

<sup>166</sup> Case C–162/97. *Criminal proceedings against Nilsson* [1998].

<sup>167</sup> Case C–110/05. *Commission v Italy* [2009]. Advocate General Léger Opinion, paras. 64–65.

Leaving AG Wathelet’s Opinion for a moment, the above brings into focus the central question of how ECLs should be classified, what the nature of the model is when applied, and what scope there is, considering Recital 18 in InfoSoc, to introduce new provisions with extended effect. One view offers that ECLs should, based on the language in the Recitals, clearly be taken as “an arrangement or a modality concerning management of rights.”<sup>168</sup> Further, that Recital 18 should be interpreted as applying to already existing ECL provisions without limiting the freedom of national legislators to introduce novel ones. As mentioned, the complex evaluation of the relationship between ECLs and international as well as EU norms does not yield a uniform response among commentators: one view holds that ECLs could be deemed to be limitations or even exceptions, while the converse suggestion, which commands broader support, states that such is not the case.<sup>169</sup> This classification matters, as the principal legal concern is whether or not ECLs fall within the closed list of exceptions and limitations of Article 5 InfoSoc. On the former view, this would suggest a conflict with Article 5, as ECL is not included in the permitted list of limitations and exceptions. The latter view, emphasising that ECL is merely a way in which to manage copyright and exclusive rights remain unaffected, would leave only the issue of compatibility with international norms.

### 5.2.2 CJEU judgment

The much-awaited judgment of the Court was handed down on 16 November 2016 – a wholesale adoption of AG Wathelet’s Opinion as outlined above may well have had the far-reaching consequences for the ECL model that were feared. However, although its tenet closely resembles AG Wathelet’s Opinion, the judgment nevertheless differs in some material aspects. Following the Opinion in concluding that the matter of reproduction and digitisation of out-of-print books did not fall within any of the permitted limitations or exceptions of Article 5 InfoSoc, the contended issues were decided on the basis of the French laws’ compatibility with Articles 2(a) and 3(1) of InfoSoc.

Addressing firstly the notion of “express prior consent”, the CJEU stated at paragraphs 35 and 36 of the judgment that the InfoSoc Articles at issue did not contain any precise wording about the way in which a consent must be expressed. Therefore, *in lieu* of any clear wording to that effect, the interpretation of those Articles must be understood to include consent being given *both* explicitly and implicitly. The Court made reference to the previous landmark case of *Svensson and Others v Retriever AB*<sup>170</sup> reiterating that in the situation where a prior, explicit consent had been given by an author to publicise newspaper articles online on the

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<sup>168</sup> Tarja Koskinen-Olsson and Vigdís Sigurdardóttir, *supra*, (2016), p. 252.

<sup>169</sup> For examples of the former, see Alain Strowel ‘The European “Extended Collective Licensing” Model’ 34 Colum. J.L. & Art 668 2010–201; Sam Ricketson ‘The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986.’ 919 Kluwer Law International 1986. For the latter view see in general Johan Axhamn and Lucie Guibalt (2011) *supra*; Mihály Ficsor, Chapter 2, in Daniel Gervias (Ed.) (2016), p. 69 *et seq.*; and; Tarja Koskinen-Olsson and Vigdís Sigurdardóttir, Chapter 8, in Daniel Gervais (Ed.) (2016).

<sup>170</sup> *Nils Svensson and Others v Retriever Sverige AB*. C-466/12, paras 28–28 and 31.

website of a newspaper publisher, then the author could in essence be regarded as having also given an implicit consent to make the articles available for the general online public.<sup>171</sup>

Secondly, turning to the issue of the level of information provided to authors regarding future use of their work, the CJEU stressed at paragraphs 38–40 that every author must “actually be informed” as to future third-party use of their work and what means are available to oppose it. Logically, in the eyes of the Court, if such information is not provided then the authors have no chance of making any decision on use of which they are simply unaware – the implicit consent then cannot have the plain meaning of the words as ordinarily understood.

Further, the Court emphasised that a lack of opposition does not equate to an expression of implicit consent and, in relation to the opt out mechanism, the Court stressed that this must not be subject to any formality. There was no question that the way in which the French opt out was formulated – giving an advantage to the publishing house by requiring the author to prove that nobody else holds rights in the work – contravened the Berne Convention prohibition on formalities in Article 5(2).

Finally, to reiterate the importance of this judgment, potential future problems for the Nordic ECL model could arise in relation to what is stated by the CJEU in the following paragraphs:

“In particular, every author must actually be informed of the future use of his work by a third party and the means at his disposal to prohibit it if he so wishes.” (para 38)

“Failing any actual prior information relating to that future use, the author is unable to adopt a position on it and, therefore, to prohibit it, if necessary, so that the very existence of his implicit consent appears purely hypothetical in that regard.” (para 39)

“It does not follow from the decision to refer that that legislation offers a mechanism ensuring authors are actually and individually informed. Therefore, it is not inconceivable that some of the authors concerned are not, in reality, even aware of the envisaged use of their works and, therefore, that they are not able to adopt a position, one way or the other, on it. In those circumstances, a mere lack of opposition on their part cannot be regarded as the expression of their implicit consent to that use.” (para 43)

### 5.3 Comment – scope of potential impact

What does this judgment signify for the Nordic ECL model? There are persuasive arguments making the case for and against any potential impact.

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<sup>171</sup> The fact that the articles were freely available online and not behind any paywall or other restriction is also emphasised in the Svensson case.

### *The case against ECLs*

There have for some time been academic discussions around whether the ECL construct is fully compliant with international and EU law obligations.<sup>172</sup> Although never tried in Court, be it national, international or at EU level,<sup>173</sup> the judgment in *Soulier and Doke* comes close in certain regards. Some have been keen to conclude that the judgment represents a weakening of the Nordic ECL model, stating that “[...] the position of collective right management organisations, in particular those operating with extended collective licence (ECL) arrangements, appears to have been weakened.”<sup>174</sup> This, conversely, is as the authors’ exclusive rights are strengthened. Another view offers the tentative conclusion that “[...] the requirement to inform individually each and every author [...] undermines the basis of the balanced mechanism through which ECLs facilitate the market-efficient licensing of whole repertoires by decreasing transaction costs.”<sup>175</sup> Such analyses is not without merit and there is force in the view that at least parts of the Nordic model may come under closer scrutiny, and perhaps even be perilously close to being incompatible with EU law.

Firstly, in relation to paragraph 38 above, when read in isolation, there is cause for concern as there is no such information or publication of use requirement in the Nordic model at the present time. How a particular CMO can meet such a requirement is not stated in any detail by the Court. Particularly for foreign rightholders, it is difficult to state with conviction that they are ‘actually informed’ of certain uses. In fact, quite the opposite is true in many cases.

Secondly, a crucial consideration is the exact scope of Recital 18 of InfoSoc. On this question, the AG Opinion is clear: Recital 18 is secondary to any interpretation and application of the Articles. The CJEU instead offers nothing but eerie silence – the judgment contains no reference or mention of Recital 18. In this respect, the matter must be brought to the Courts’ attention in future. For now, the notion that Recital 18 represents a guarantor for ECL operation in the Nordic states, or indeed other countries around Europe, seems a risky proposition.

Finally, the need for clarification of the legal status of ECLs *vis-à-vis* EU law is indicated by recent amendment proposals put forward by the European Parliament. In a report by the Committee on the Internal Market and Consumer Protection, relating to the proposed Regulation for online transmissions and retransmission of TV and radio programmes,<sup>176</sup> the rapporteur and MEP Julia Reda includes the following amendment with explicit reference to the *Soulier and Doke* judgment:

(14b) “In a number of Member States, rights clearance for the communication to the public or making available of television and radio programmes or related services, in a linear or non-linear form, is facilitated through extended collective licensing agreements. In order to take account of this situation and to improve

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<sup>172</sup> See 5.1 above and fn. 151.

<sup>173</sup> Terese Foged, *supra*, (2015), p. 9.

<sup>174</sup> Axel Paul Ringelhann and Dr. Marc Mimler, *supra*, (2017), p. 3.

<sup>175</sup> Caterina Sganga, *supra*, (2017), p. 330.

<sup>176</sup> COM(2016) 594.

legal certainty for all concerned parties in light of the judgment of the Court of Justice in Case C–301/15, this Regulation clarifies that such agreements are in line with the law of the European Union.<sup>177</sup> (underline added.)

It can be argued that the reliance on *Svensson*<sup>178</sup> as a way for the Court to counter the implicit/express consent analysis put forward by AG Wathelet is not entirely convincing. A close reading of the relevant paragraphs referred to in the *Svensson* judgment does not reveal a particularly strong position on this issue, and nowhere in the judgment does the Court make an explicit reference to this.<sup>179</sup> Therefore, the notion that implicit consent is somehow a longstanding principle of EU copyright law does not appear particularly well founded or convincingly argued by the Court.

#### *The case for ECLs*

Against the proposition that *Soulier and Doko* undermines Nordic ECLs is the view that the circumstances in the case and the way the French law was drafted differ in fundamental respects to that of the Nordic ECL model; crucial components absent in the French law make it difficult to read the judgment as applying in full to all parts of a Nordic ECL.

Firstly, there is an absence of representativeness on the part of the CMO, which in the French law is simply appointed by the French Ministry, as recognised in the Nordic model. The very essence of representativeness in the latter is that a significant number of rightholders, in this case authors, are represented by the CMO for the works used within a country. The French law offered a much more tenuous link between the representation of the authors and the intended use – ‘equal representation of authors and publishers’ in no way creates the kind of legitimacy sought by the requirement in the Nordic model. In fact, it offers an advantage to publishers, which is something not recognised under a Nordic ECL.

Secondly, the French law rather directs the activities of the appointed CMO in a way that leaves no room for an agreement based on free negotiation. The mandate and extent of use, even including stipulations on rights of use reverting in case of non-use, were set in law by the French legislator. This is in clear contrast with the Nordic provisions, which are merely enabling laws – there is a great deal to be done by the user and the CMO before any extension effect is achieved, not least stipulating the terms and extent of use under the agreement.

Finally, the opt out possibilities in the French law again markedly diverge from corresponding practice in the Nordic model. The procedural difficulties under the French

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<sup>177</sup> European Parliament report 2016/0284(COD) of 16 February 2017. Available here: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2F%2FEP%2F%2FNONSGML%2bCOMPARL%2bPE-599.760%2b01%2bDOC%2bPDF%2bV0%2F%2FEN> (accessed 26 May 2017).

<sup>178</sup> Case C–466/12 *Nils Svensson and Others v Retriever Sverige AB*.

<sup>179</sup> Paras 25–28 in *Svensson* addresses the issue of communicating a work to the public by way of linking. Although a link can constitute such communication, this is only so where there is a new public that the link and content targets. It is difficult to see that the out-of-commerce works database equates to such an implicit consent and the public for which the digitised books are intended are also to be deemed a new public.



law, including for example the burden of proof borne by a rightholder wishing to opt out and the impossibility to oppose use of the work if already licenced before the author's notification to opt out,<sup>180</sup> puts further distance between the French law and Nordic ECLs.

A reasonable description of the French law would be of a poorly drafted scheme, closely resembling mandatory licensing, but by virtue of an opt out possibility this is brought within the penumbra of an ECL model, all made possible by the apparent protection of Recital 18 in InfoSoc. However, the differences between the French scheme and the Nordic ECLs are so substantial that they cannot be compared like for like. It should also be noted that following the CJEU judgment, the French law was very recently declared invalid due to misuse of powers.<sup>181</sup>

This line of argument then concludes that the judgment only really applies to the French law and the case must be distinguished on its facts. It should of course be pointed out that at no point in the judgment is the legality or compatibility of Nordic ECLs at stake: the judgment only addresses the French law.

#### *The DSM proposal on out-of-commerce works*

Although the judgment in *Soulier and Doke* stops short of declaring ECLs in general incompatible with the InfoSoc Directive, what of the suggested solution for out-of-commerce works in Article 7, DSM Directive proposals? As the proposal is not yet finalised, only some tentative remarks can be offered. Central in the collective management landscape post-*Soulier and Doke* is the need for authors to be 'actually informed' as to future use of works (and the means available to prohibit such use). The DSM proposal contains in Article 7(3) a requirement of "appropriate publicity measures" provided by MS that go some way in meeting *Soulier and Doke*. Whether this is enough is open to debate, but the suggestion that the publicity measures may fail to actually inform each and every rightholder is a valid concern.

There are currently many questions around precisely what needs to be done, and by whom, in relation to the information requirement seemingly stipulated by the CJEU in *Soulier and Doke*. Does it fall on the CMOs to inform authors of new digitisation projects? If so, would information simply published on a website or other electronic format suffice? Or does the language used in *Soulier and Doke* call for an actual personal communication of some description? No doubt the Court will address these issues once the DSM Directive becomes effective in law.

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<sup>180</sup> Caterina Sganga, *supra*, (2017), p. 326.

<sup>181</sup> See <https://seafire.unistra.fr/f/962dbb6167/> (accessed 14 June 2017) for the French declaration of the Conseil d'Etat.

#### 5.4 Conclusion – a storm in an academic teacup, or genuine cause for concern?

Following the judgment in *Soulier and Dore*, the CJEU has once again created uncertainty in the field of copyright: this area is now added to the list of problematic points of IP law within the EU, owing in parts to the apparent readiness of the CJEU to deliver judgments that fill in legislative gaps, leave essential questions unanswered and offer novel substantive tests on legal application – all of which, to a varying degree, affects MS.<sup>182</sup> Marshalling arguments concerning fundamental principles of copyright law, and how they are to be weighed against one and other, AG Wathelet's Opinion is clear on the fact that the exclusive rights of reproduction and communication to the public require express consent by the rightholder. Such a view blows a seemingly irreparable hole in the sails of the ECL frigate – a continued voyage unfeasible, ending nearly six decades of smooth-sailing licensing adventures on the Baltic – but luckily the CJEU just about rescues vessel and crew. In lieu of any principle challenge as to the legality of central elements of the Nordic ECL regime, the judgment does contain worrying judicial remarks. Political intervention is therefore welcome in order to avoid continued uncertainty.

#### 5.5 Additional concerns: competition law (abuse of dominant position) and calculation of remuneration

##### *Competition law*

In the Nordic countries, there is on the whole a good working relationship between CMOs and users in terms of agreements reached, with or without ECL basis. But case law reveals difficulties when a particular CMO becomes dominant in one category of works. This relates back to the issue of which CMO should be deemed representative if there is more than one, and the preferred Danish solution of having just one CMO per category of work.

In Sweden, examples of court cases include: *TV3 v STIM*,<sup>183</sup> *SK & FFF v BONUS ACCESS*,<sup>184</sup> *SAMI v Hotel du Nord*<sup>185</sup> and at European level *Kanal 5 and TV4 AB v STIM*<sup>186</sup> In these cases, on the basis of national anti-competition laws as stated in the 2 Chap. s. 7 of the Swedish Competition Act (Konkurrenslagen<sup>187</sup>); at EU level TFEU 102 (ex EC 82), charges were brought against the CMOs. In short, the main point of contention in the majority of disputes concern the pricing structure that the CMOs utilise. In the *TV3 v STIM* case, the complaint was that different pricing plans was offered depending on whether the broadcaster was public service or commercial, whereas the *BONUS* case dealt with the

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<sup>182</sup> The ongoing problems around linking is one example, following the judgment in *GS Media* (C-160/15). For a thorough discussion and analysis of judicial activism within copyright by the CJEU, see: Marcella Favale, Martin Kretschmer and Paul C. Torremans, 'Is There a EU Copyright Jurisprudence? An Empirical Analysis of the Workings of the European Court of Justice' (August 13, 2015). *Modern Law Review* 79(1): 31–75 (January 2016).

<sup>183</sup> MD 1998:5 ('MD' is the Swedish 'Market Court' assigned to deal with most IP matters).

<sup>184</sup> MD 1999:13. SK is Svenska Konstnärsförbundet and FFF is Föreningen Förlagsutgiven Fackpress.

<sup>185</sup> NJA 2003 p. 465.

<sup>186</sup> Case C-52/07, 11 December 2008.

<sup>187</sup> Swedish law 2008:579.

membership of smaller organisations of larger CMOs and whether handling ECLs constituted a competitive advantage.

The point made here is that the *de facto* monopoly status of certain CMOs risk tipping the balance. It is often said that the strength of the ECL model lies in creating a more level playing field in negotiations – members come together within a CMO and have a stronger unified voice *vis-à-vis* a user. But the converse could of course also be true – that the CMO is the party of greater strength in a negotiation and, in the absence of any competing organisation, can dictate onerous conditions.

#### *Remuneration concerns*

Notwithstanding the generally high level of transparency and practices of good governance among the Nordic CMOs, concerns around distribution of remuneration exist, particularly for foreign rightholders.<sup>188</sup> Three main modes of distribution of remuneration are by: (i) individual distribution by CMO to rightholder; (ii) individual distribution by CMO to rightholder via a member organisation; and (iii) collective distribution.<sup>189</sup> The primary charge levelled against CMOs and ECLs is that unrepresented rightholders, especially foreign ones, do not enjoy the same benefits as domestic represented members: a certain percentage, typically 10%, of royalties collected are kept to be used for cultural and social purposes. Likewise, trivial amounts of money below a certain threshold fall back to the national CMO, again for the benefit of nationally located members.<sup>190</sup>

Further, in the Danish context, only where there is an ‘A-agreement’ between the national CMO – in most cases Copydan – and a foreign sister organisation will monies be paid from one national CMO to another. Conversely, under a ‘B-agreement’, monies stay in the country of collection.<sup>191</sup> Although true that these agreements exist only in “a limited number”<sup>192</sup> of cases, it can also be argued that as cross-border demand for works grows, especially given the impact of the CRM Directive, these types of agreements will increase at the European level. In addition, as computer systems and monitoring of works become more sophisticated, there is reason to suggest that the quality and accuracy of remuneration calculation will over time improve further.

#### 5.5.1 Comment

In relation to concerns around remuneration and CMO status, one question is whether some of these problems experienced in the Nordic ECL model will translate to the DSM proposal when effective in law. Correct remuneration distribution will be central to the success of the scheme, particularly in cross-border scenarios. Also, whether virtually non-existent opt out

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<sup>188</sup> Thomas Riis and Jens Schovsbo, *supra*, (2010), p. 19.

<sup>189</sup> Thomas Riis and Jens Schovsbo, *supra*, (2012), p. 13.

<sup>190</sup> *Ibid.*

<sup>191</sup> Taking the example of Copydan Writing, who deal with reprography in education and business, as of late April, 2017, there were a total of 19 A-agreements and 15 B-agreements. See: <https://www.ifrro.org/members/copydan-writing> (accessed 30 May 2017).

<sup>192</sup> *Op. cit.*, p. 21.

numbers in the Nordic nations will be replicated at EU level is of great interest. If the out-of-commerce scheme operates with reasonable uptake, its success will be reflected in the number of opt outs. A maiden journey to be closely followed in the near future.

## 6. Final conclusion

This thesis sought to analyse the Nordic ECL model and compare it with three recent developments in law: firstly, the introduction of ECL legislation in the United Kingdom on 1 October 2014; secondly, the Commission's proposal contained in the DSM Directive, which aims to create an ECL mechanism to facilitate the digitisation of out-of-commerce works by cultural heritage institutions; and finally, the CJEU judgment in *Soulier and Doke*,<sup>193</sup> which represents an important opinion by the Court with respect to some central features of the Nordic model. Throughout, particular attention has been given to the requirement of representativeness of the CMOs, as this represents the salient and indispensable feature of the model.

In the Nordic countries, over nearly 60 years, the ECL model has developed into a carefully balanced, nuanced and flexible framework that enables efficient licensing in areas of mass use of copyright materials. Historical success of the model has relied, and must rely in future, on well-functioning collective management organisations, with sophisticated methods and systems for collecting and distributing revenue, firmly rooted in organisational transparency and good governance. The level of rightholder membership of CMOs in the Nordic nations is high. Strong tradition and acceptance of broad, collective solutions make extended licensing sit well within the general cultural context of the Nordic nations; this is a crucial consideration, the gravity of which becomes more pronounced in the enquiry of the ECL schemes in the UK and at EU level.

The UK ECL Regulations differ from the Nordic model in several important ways. Firstly, the representativeness requirement in the UK Regulations stipulates that a poll regarding any proposed ECL scheme is to be conducted among CMO members. This is necessary to meet the 'required consent' as stated in the Regulations. In addition, the scheme includes a requirement for CMOs to demonstrate sufficient publicising arrangements of an ECL scheme, including any opt outs. On the whole, the UK model is heavy on detail, including a complicated application process and continued Governmental oversight. Unlike the Nordic countries' framework, the UK Regulations contain one single general ECL provision with numerous conditions and safeguards before a scheme is approved by the Secretary of State. The rather cumbersome and long-winded procedure, with a host of criteria to be fulfilled in connection with submitting an application, could be interpreted as reflecting the general scepticism – certainly when considering stakeholder responses – towards ECLs in the British context.

Although still at an early stage, it is difficult to make the case for widespread use of ECLs in the UK. A solitary application still awaits submission, as the halfway point before the five-year review date since implementation of the ECL Regulations is reached. The non-existent uptake to date is in part explained by changes required by the coming into force of the CRM Directive, slowing down the process of application for at least a prime ECL scheme candidate: The Copyright Licensing Agency. Ensuring the inclusion of plenty of safeguards

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<sup>193</sup> Case C-301/15, 16 November 2016.

in the ECL Regulations is understandable, given the novelty of this type of licensing in the UK legal tradition. Introducing new licensing mechanisms into already established markets is problematic. The UK has organised their licensing affairs differently, in the common law tradition, where on the whole collective solutions do not feature extensively. Uptake of the ECL scheme in future will be interesting to observe, not least in light of the impending political and legal changes in the UK.

At the EU level, Nordic style licensing has been on the radar for some time. With the proposed DSM Directive, a somewhat qualified and complicated ECL model is introduced. The fact that the ECL mechanism as envisioned by the EU legislator has cross-border effect marks a clear difference from the Nordic model provisions – the latter does not include such effect, although reciprocal agreements with foreign CMOs are often in place. The DSM proposal is narrow in scope, aiming only at works that are deemed out-of-commerce, and difficulties could arise at the very outset regarding the definition of such works. By leaving the classification task up to MS, the proposal opens up to discrepancies in the application of the ECL. Further, at least for some MS, including the Nordic countries, works that are ‘out-of-commerce’ are not a familiar concept in copyright law. Therefore, the requirement of ensuring that a potential work falls on the right line of in or out of commerce will require a fair amount of research, including first country of publication of a work.

The efficacy of the DSM proposal will be directly mirrored in future uptake, where the workability of the provisions among cultural heritage institutions will be put to the test. Questions as to the actual demand for pan-European access to these works in light of budget restrictions among the organisations and institutions are important. The hitherto relatively unsuccessful record of the Orphan Works Directive may indicate what changes are required to construct a useful framework. For the Nordic countries, there are few clear advantages in the new proposals that the existing Nordic ECL model does not currently cater for. In that, there is also a need to ensure the continued status of Nordic ECLs at EU level.

The longstanding, mostly academic debate around the Nordic ECL model’s compatibility with EU law and international norms has come into sharp focus following the CJEU judgment in *Soulier and Doke*. Nothing in the judgment refers to Nordic ECLs explicitly, but the uncertainty it created is a cause for concern: the course set by the judiciary appears in the direction of strengthening exclusive rights *vis-à-vis* collective uses. The status of Recital 18 in InfoSoc is unclear, but it is suggested that it cannot now bear the full weight of Nordic ECL model protection. EU legislative reassurances are needed as to the full legal compatibility of central aspects of the model, such as the absence of consent in many cases and what the novel need for rightholders to be ‘actually informed’ precisely means. Dismissing the concerns raised by the judgment as applicable only to the particular circumstances of the French law seems a risky proposition. Within an ever-closer Union, there should be room for peculiar national models, suited to a particular cultural and economic context – even in a digital single market.

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