Symposium: Collective Management of Copyright: Solution or Sacrifice?

The European "Extended Collective Licensing" Model

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Thank you for the invitation. It is a pleasure for me to speak on the topic of extended collective licenses ("ECL"), a model for managing copyright which is typical for Scandinavian countries. Although my Danish is a bit rusty—not to speak of my Swedish—I come from Belgium, a country which is neither a Nordic nor a Southern European country, but which at least has a strong experience with collective bargaining. It is difficult to understand the model of ECLs without the background of collective bargaining (in a country like the United States, private agreements rather than collective bargaining do play a prominent role). Belgian culture in the field of industrial relations is one in which labor issues are solved with collective agreements; this is possible because of the existence of very strong organizations representing employers and employees and the possibility for the collective agreements concluded between those organizations to be extended by law to third parties. The ECL model relies on the willingness and experience of parties to engage in collective bargaining.

My speech will cover three parts. First, I will briefly discuss the problems and some possible solutions. Second, I will explain what we have in the European Union concerning ECLs. Lastly, I will discuss whether ECLs are compatible with international norms—in particular with the norms of the Berne Convention—and the issues of formalities, rights and exceptions.

ECLs are a way to solve the problem of outsiders. I think that there are different types of outsiders. First, there are the nonmembers of collecting societies, meaning the third parties enjoying the same nationality as the collecting society. A second category of outsiders includes the foreigners and, because I come from the European Union, I will distinguish between foreigners from the European Union and foreigners from the rest of the world. Finally, there is the problem of unknown parents in the case of orphan works, which is of course very important in relation to the Google Book settlement. These three categories of persons are outsiders. To negotiate with nonmembers is easier than to approach foreigners, not to speak of

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unknown and sometimes dead parents. ECLs propose a solution to solve the problem of outsiders and a way to reduce the high transaction costs resulting from separate negotiations with all those outsiders.

How do we define an ECL? An ECL is a license agreement that is freely negotiated between a collective management organization and a user, and which is later extended by law to the works of outsiders. So, there are basically three elements. First, there is an agreement based on a negotiation; this is the voluntary aspect of ECLs. Second, there is the extension effect, which aims at integrating outsiders within the scope of the agreement. Third, this extension effect is realized by virtue of the law. It is important to stress that outsiders nevertheless retain their exclusive rights until the extension effect takes place. In certain ECLs—we will see that different types of ECLs exist—there is the possibility for outsiders to opt out.

Do we have a provision in E.U. law that provides for an ECL? We have some kind of ECL at the E.U. level for a special use—namely cable retransmissions of broadcasts. ECLs are now being discussed in Brussels as a possible legislative tool for the digitalization and online display or communication to the public of orphan works. Article 9 of the Cable and Satellite Directive provides an exclusive right for cable retransmission, but it is associated with a mandatory collective management system.[1] This cable retransmission right, which is an exclusive right, can only be exercised through a collecting society. The problem of the outsiders is resolved in the second part of article 9, where there is a presumption that "the collecting society which manages rights of the same category shall be deemed to be mandated to manage" the rights of outsiders, meaning the rights holders who have not transferred the management of their rights to a collecting society.[2] This provision on mandatory collective management preserves competition because the right owner keeps the possibility to choose among collecting societies.

Do we have another provision on ECLs at E.U. level? No. However, one recital of the "Information Society" Directive says, "[t]his Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licenses."[3] Thus, ECLs are presented as a management system in this Directive. Except for cable retransmission, the E.U. framework does not provide for ECLs, but admits their existence under national laws.

ECLs started in the 1960s in the Nordic countries and were designed for broadcasters. Today, we have a collection of different users which are covered in the Nordic countries by ECLs, including digital users for uses related to archiving, educational institutions, libraries, museums and so on. ECLs are specific. There is, however, one particular provision in Danish law that creates a general omnibus provision on ECLs.[4] This broad provision covers potentially different users, while

1. Council Directive 93/83, art. 9, 1993 O.J. (L 248) 15, 20 (EEC).
2. *Id.*
3. Council Directive 2001/29, 2001 O.J. (L 167) 10, 11 (EC).
4. Danish Copyright Act [DCA] § 50 (the current Danish Act is Lovbekendtgarelse No. 202 of Feb. 27, 2010). An English language version of the DCA is available at www.kum.dk.

usually Nordic countries only have ECLs for specific use and for specific users.

Now, you might have heard a few days ago that the European Commissioner in charge of the E.U. internal market—and thus in charge of the legislation concerning copyright—has announced that a proposal will be released in the next few months to solve the issue of orphan works in the European Union. Officials from the European Commission have already worked on different options to solve the orphan works issue. One such option is changing the rules on the copyright exceptions. I do not think that this is a good option because it would take at least ten years for the law to be enforced in E.U. member states—five years to adopt the directive and then five years to transpose it into the member states' legislation as is required for directives. Other options have been proposed, such as a specific pan-European cross border license for online display, or a system of mutual recognition of national systems, including of the national ECL systems that exist in the Nordic countries.[5] A fourth option would be to have an ECL at the E.U. level.

Can we have an ECL at the E.U. level for solving the problem of orphan books? The ECL model has been used already in one country, Norway, for a national digital library called Bokhylla.[6] The question is whether we can export that at the E.U. level. One of the issues relates to the extension effect. I mentioned that ECLs require an extension by law, but of course the extension by copyright law cannot go beyond the national borders as we do not have any European copyright, but only twenty-seven national copyrights. As long as there is no copyright title valid for the whole European Union, we cannot have an extension effect across borders.

Now, in this third and last part of this brief intervention, I will discuss whether ECLs respect the international norms on copyright. The first international norm to review is Article 5(2) of the Berne Convention, which prohibits any formality for the enjoyment or the exercise of rights to works of foreign origins.[7] Of course, ECLs do not affect the enjoyment of rights because exclusive rights are still in the hands of the authors, but ECLs affect the exercise of those rights. Do ECLs impose a formality on the exercise of the rights? I do not want to give a final answer here because it is quite a complicated issue. But let me just make some brief comments. Of course, a "formality" in the sense of Article 5(2) of the Berne Convention goes beyond written formalities.[8] In the ECL model, the authors do not have to become members of the collective management organization ("CMO"). The law-made extension effect for outsiders obviates the need for authors to be members of the CMO; thus, no requirement and no formality here. Now, the collective negotiations between the CMO and the user define the conditions for use, and those conditions are extended by law. Is it a formality? I have tried to find an answer in the best books on the Berne Convention. For instance, Jane Ginsburg and Sam

5. *See* Tilman Lueder, The "Orphan Works" Challenge (Apr. 8, 2010) (unpublished paper distributed at the 2010 Fordham Intellectual Property Law and Policy conference), *available at* http://fordhamipconference.com/wp-content/uploads/2010/08/TilmanLueder.pdf.

6. *See* BOKHYLLA, http://www.nb.no/bokhylla (last visited Mar. 15, 2011).

7. Berne Convention for the Protection of Literary and Artistic Works, art. 5(2), July 24, 1971, 25 U.S.T. 1341, 828 U.N.T.S. 221 [hereinafter Berne].

8. *Id.*

Ricketson consider that the statutory obligation to assert moral rights under the U.K. Copyright, Designs and Patents Act 1988 (s. 77(1)) is a formality, and thus probably not compatible with Article 5(2) of the Berne Convention.[9]

Now the question is, in relation to the Google Book settlement, whether the intervention of a judge who has to approve a class action settlement might be considered a formality under the Berne Convention. We can start the discussion today; I am not sure we will easily find an answer.

Next issue: which rights belonging to copyright are involved when books are digitized and included in digital libraries? Two issues must be distinguished. There is the reproduction issue, with the scanning of the book at the beginning of the process and later the downloading of the e-book, if downloading e-books is allowed. It is difficult to claim that Article 9 of the Berne Convention does not apply to those acts.[10] The applicability of the exceptions to the reproduction right is, however, more controversial. The issue of online display (notion of U.S. copyright law) or online communication to the public (notion of E.U. copyright law) is much more complicated. Again, I do not want to discuss this issue in detail because it is very complex under the Berne Convention. In brief: we do not have a "general communication to the public" right under the Berne Convention, so we have to play with the different types of rights of Article 11 and following of the Berne Convention, which apply to different types of works and are subject to complex restrictions.[11] But at least we have Article 8 of the WIPO Copyright Treaty, which clearly covers online display and communications.[12]

The next issue is whether ECLs are an exception or a limitation to those rights. With an ECL, exclusive rights are preserved, which indicates at first sight that an ECL should not be equated with an exception to copyright. However, at the same time, the author cannot exercise her rights; only the CMO can. The author cannot individually negotiate and the outsiders are affected in the absence of any express mandate. So, an ECL works in practice as an exception. If it is an exception, then the exception has to respect the international constraints, and for scanning and downloading, we have the three step test, which is a limitation for any exception to copyright.[13] For online display/communication to the public, it is perhaps a little more complicated because the argument can be made that because compulsory licenses are allowed under the Berne provision, ECLs should be allowed as well.

The three step test is my last point before the conclusion. This three step test

9. 1 SAM RICKETSON & JANE C. GINSBURG, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS: THE BERNE CONVENTION AND BEYOND 326 (2d ed. 2005).

10. Berne, *supra* note 7, art. 9.

11. *See* RICKETSON & GINSBURG, *supra* note 9, at 730.

12. World Intellectual Property Organization Copyright Treaty art. 8, Dec. 20, 1996, 36 I.L.M. 65.

13. *See* Berne, *supra* note 7, art. 9(2). Article 9(2) provides:

> It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works [1] in certain special cases, provided that such reproduction [2] does not conflict with a normal exploitation of the work and [3] does not unreasonably prejudice the legitimate interests of the author.

Id.

appears in different international instruments, such as in the Berne Convention and in Article 5(5) of the Information Society Directive.[14]

Under the test, limitations must firstly be limited to certain special cases. This means that the exceptions should be narrow in scope, exceptional and quite precise and clearly defined. It should be for some foreseeable scope and for specified purposes. So, it basically means that you probably have to know to which right it applies, what kinds of works are subject to it and then what kind of beneficiaries and persons are covered.

The commentaries on the second step of the test (no conflict with a normal exploitation of the work) are numerous. I think that the ECL likely does not conflict with the normal exploitation as a remuneration will be paid to the authors in exchange for the authorized use. This step will thus be more easily respected than the first one.

Finally, ECLs are likely to be compatible with the third prong of the test: that limitations shall not unreasonably prejudice the legitimate interest of the author.[15]

A few words to conclude. Under the ECL model, collective management becomes the normal exploitation of works. If we see the ECLs model expanding in the digital world, it becomes more important to have rules concerning CMOs ensuring they are representative, accountable and transparent. The possible adoption of ECLs for online issues and digital libraries thus also requires a fine regulation of the CMOs, which do play a key role in the ECL model.

The final point is that the outsider issue, and in particular the issue of orphan works (or unknown parents) is probably solved by ECLs, but in practice ECLs were not convincing in solving the foreigner issue. In most ECL schemes, foreigners do not get the remuneration they deserve for the use of their works. ECLs tend to work in favor of the local authors, including the nonmembers of CMOs. Therefore, the existing national ECLs that we have in Europe are not entirely satisfactory. Finally, with increasing online users, we have, at least in Europe, a terrible challenge linked to the territoriality of copyright because we do not have any E.U.-wide copyright title. As long as we lack such a pan-European copyright, the complex issues with online uses and with the licensing of works throughout the whole European Union will remain. Territoriality is definitely not adapted to the online world of copyright.

14. *See* Council Directive 2001/29, *supra* note 3, art. 5(5).

15. *See* Berne, *supra* note 7, art. 9(2) ("[S]uch reproduction . . . does not unreasonably prejudice the legitimate interests of the author.").