Project Acronym: EAwareness
Grant Agreement number: 297261
Project Title: Europeana Awareness

D5.4: Report on the effectiveness of licensing systems for clearing content for Europeana use

Revision	Final version
Date of submission	15 September 2014
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Dissemination Level	Public

Project co-funded by the European Commission within the ICT Policy Support Programme

REVISION HISTORY AND STATEMENT OF ORIGINALITY

Revision History

Revision No.	Date	Author	Organisation	Description
1.0	15.09.2014	L. Guibault	IViR	Final version
0.9	13.09.2014	L. Guibault	IViR	Final version (incorporating reviewers' comments)
0.8	13.09.2014	L. Guibault	IViR	Draft for review
0.1	20.08.2014	L. Guibault	IViR	First draft

Statement of originality:

This deliverable contains original unpublished work except where clearly indicated otherwise. Acknowledgement of previously published material and of the work of others has been made through appropriate citation, quotation or both.

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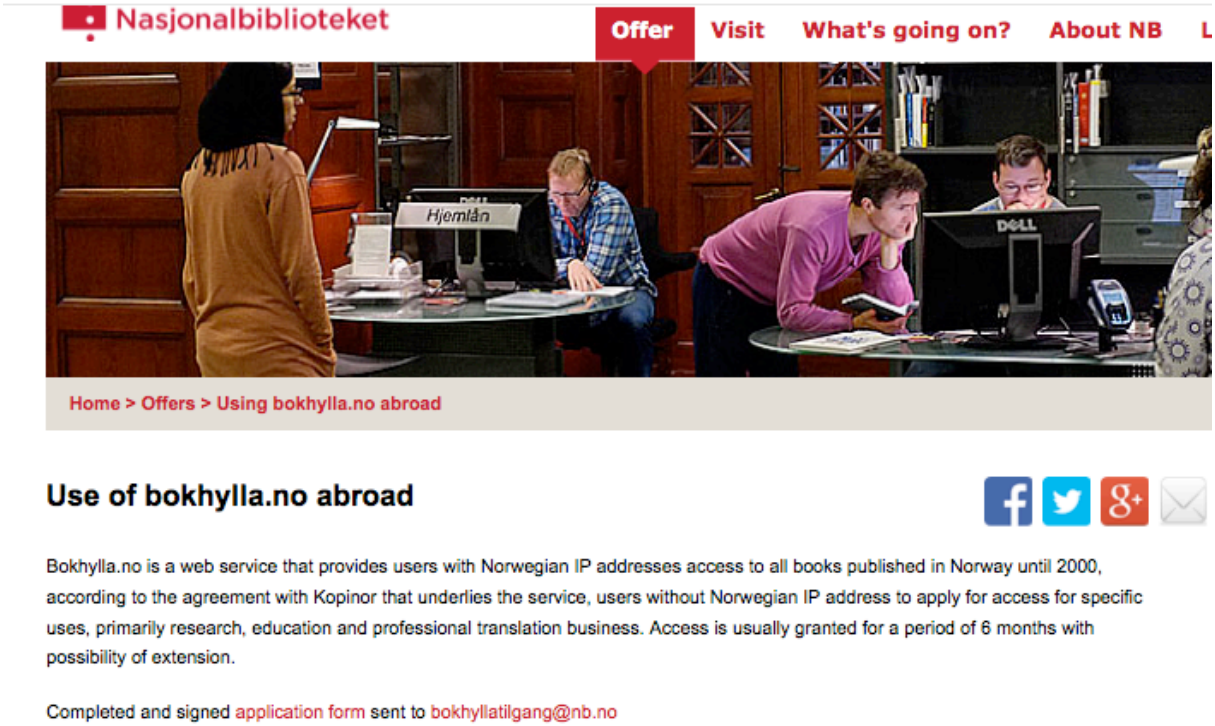

1. Introduction

After almost a decade of efforts towards the digitisation of the content of their collections, CHIs (CHIs) across Europe are still in search of a workable solution to the astronomical transaction costs related to the rights clearance on these works. In the same interval, several legal initiatives at the European level have been put forward in an attempt to address the problem. First, the representatives of rights holders and user organisations, respectively, signed in September 2011 the Memorandum of Understanding (MoU) on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works.[1] This MoU concerns the digitisation and dissemination of books and learned journals that are no longer available in commerce. Second, the European Parliament and the Council adopted Directive 2012/24/EC on certain permitted uses of orphan works, e.g. works for which the rights holder cannot be identified or located.[2] And third, the European Commission launched at the beginning of 2014 a vast public consultation on the reform of the European copyright regime, enquiring about the public's view on issues like the rights relevant for digital transmissions, the territoriality of exceptions and the mass-digitisation of works and other subject matter[3] by CHIs[4]. Until such time as the European Commission makes a proposal for a broader reform of the copyright system, the rapidly approaching deadline of 29 October 2014 for the implementation of Directive 2012/24/EC must still be met. Accordingly Member States must take appropriate action in this regard, if they have not done so already.

Because Directive 2012/24/EC is rather limited in scope (covering only orphan works) and involves a diligent search process that can be very cumbersome for institutions with larger collections[5], several Member States are looking for a more encompassing solution, beyond the transposition of the provisions of the Directive. Among the solutions considered as having the potential to address the broader and more general problem of rights clearance of works is the extended collective licensing (ECL) system. ECL is a form of collective rights management whereby the application of freely negotiated copyright licensing agreements between a user and a collective management organisation (CMO), is extended by law to non-members of the organisation. The Scandinavian countries a have long tradition with the use of ECL for the licensing of mass uses, including for the digitisation and making available of works contained in the collections of CHIs.[6] ECL systems were

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[1] Memorandum of Understanding on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works, Brussels, 20 September 2011, available at: ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm

[2] Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works (2012 OJ L 299/5).

[3] For ease of reading, the expression 'work' will be deemed to encompass other subject matter covered by neighbouring rights.

[4] European Commission, DG Internal Market, Report on the responses to the public consultation on the Review of EU Copyright Rules, Brussels, July 2014.

[5] Study "Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU – Analysis of specific policy options", Brussels, 23.06.2014, p. 18.

[6] R. Tryggvadottir, 'Digital Libraries, the Nordic system of extended collective licensing and cross-border use', Auteurs & Media 2014/5, pp. 314-325.

recently introduced in one form or another in France,[7] Germany[8], Hungary,[9] and the United Kingdom.[10] Other Member States, like Estonia[11] and the Netherlands[12], are seriously considering this option upon transposing the provisions of Directive 2012/24/EC in their national legal order.

Directive 2012/24/EC does not regulate the adoption of ECL systems, but it does leave the possibility open for Member States to do so. Knowing that the MoU is implicitly based on the establishment of an ECL regime, it is not surprising that Member States look in this direction for a solution to rights clearance in the context of mass-digitisation projects. From a European perspective, the situation becomes highly problematic, however, by the fact that some of the national solutions in place expressly restrict the online access to works licensed under these regimes, to citizens residing within their national territories. Among the few mass-digitisation initiatives based on ECL, the Norwegian 'Bookshelf' project is perhaps the most well known, since it has been online already for a few years. But anyone accessing the Bokhylla website from outside Norway will see the following notice appear on her computer screen: 'Bokhylla.no is a web service that provides users with Norwegian IP addresses access to all books published in Norway until 2000, according to the agreement with Kopinor that underlies the service, users without Norwegian IP address must apply for access for specific uses, primarily research, education and professional translation business. Access is usually granted for a period of 6 months with possibility of extension'.[13]

The 2011 Commission Staff Working Paper Impact Assessment On The Cross-Border Online Access To Orphan Works[14] may not be a stranger to the position adopted by the national legislators to restrict access beyond their borders. In this document, the European Commission clearly discards the ECL system as a valid solution for the making available of works throughout the European Union.[15] In the context of the adoption of Directive 2012/24/EC, it is true that an ECL solution does not require an upfront diligent search, and that as such, it does not allow for the positive determination of an orphan works status or the mutual recognition thereof across Europe. But by choosing the path of ECL instead of the more burdensome orphan works route, national legislators seem to be resolving the problem of rights clearance for contemporary cultural heritage material by locking it down for people outside of their own boundaries. This is a very worrying development for projects, like Europeana, but most importantly for European society as whole.[16]

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[7] Loi No. 2012-287 du 1er mars 2012 relative à l'exploitation numérique des livres indisponibles du xxe siècle

[8] Gesetzes zur Nutzung verwaister und vergriffener Werke und einer weiteren Änderung des Urheberrechtsgesetzes, Bundesgesetzblatt 8.10.2013, entered in force on 1st April 2014.

[9] Act CLVIX, of 17 October 2013, also known as 2013 II. IP Amendment Act, Government Decree (138/2014)

[10] Enterprise and Regulatory Reform Act 2013, 2013, c. 24, art. 77; Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014 http://www.legislation.gov.uk/ukdsi/2014/9780111116890

[11] E. Vasamäe, 'Sustainable Collective Management of Copyrights and Related rights', Dissertation, University of Tartu, 2014.

[12] Wijziging van de Auteurswet en de Wet op de naburige rechten in verband met de implementatie van de Richtlijn nr. 2012/28/EU inzake bepaalde toegestane gebruikswijzen van verweesde werken, Tweede Kamer, vergaderjaar 2013–2014, 33 892, nr. 6

[13] Translation via Google Translate - http://www.nb.no/Tilbud/Lese-lytte-se/Bruk-av-bokhylla.no-i-utlandet

[14] Commission Staff Working Paper Impact Assessment On The Cross-Border Online Access To Orphan Works and *Accompanying the document* Proposal for a Directive Of The European Parliament And Of The Council on certain permitted uses of orphan works, SEC(2011) 615/2.

[15] Id., p. 18.

[16] See recital 23 of Directive 2012/24/EC : 'In order to foster access by the Union's citizens to Europe's cultural heritage, it is

A pragmatic solution to rights clearance should not come at the expense of cross-border access to the digitised material, as emphasised in the fourth recital of Directive 2012/24/EC, 'this Directive is without prejudice to that Memorandum of Understanding, which calls on Member States and the Commission to ensure that voluntary agreements concluded between users, rightholders and collective rights management organisations to licence the use of out-of-commerce works on the basis of the principles contained therein benefit from the requisite legal certainty in a national and cross-border context'. How can this statement be reconciled with reality and how can the last part of the sentence be given practical application?

Admittedly, the means of broadening this type of licence scheme to other territories not covered by the national law that prescribes the 'extension effect' have yet to be found.[17] This question is therefore the central focus of this paper, which asks: 'under which conditions could a system allowing the use of copyright protected works contained in the collections of CHIs in the context of Europeana be workable on a cross-border basis?'

To answer this question, this study will follow a comparative legal analysis approach, where each element constituting the ECL system will be examined in the light of the imperatives of a multi-territorial application. These elements include an analysis of the requirement of representativeness of collective management organisations (CMO), the opt-out option, the subject matter covered by the ECL regime, the definition of user groups, the scope of the licence and the conditions of use. Other important characteristics of an ECL regime, such as the need for a CMO to obtain governmental approval for its operations, or the existence of a mediation mechanism for the negotiation of agreements, will not be examined here because of their less immediate bearing on cross-border rights clearance. For the purpose of this study, we will rely heavily on the relevant regulations adopted and in force in Scandinavia, France, Germany and the UK.[18] In the absence of any relevant case law and literature, the analysis will essentially take the legislative documents as a starting point for an examination of the similarities and discrepancies between the constituent elements of the ECL provisions in each Member State, in order to see how they could be reconciled with each other. This comparative analysis will allow us, in the next section, to make a proposal for a mechanism that would allow works licensed under an ECL system in one territory of the European Union to be made available in all the territories of the Union. Our proposal rests on the recognition of the 'country of origin' principle, as necessary and sufficient territory for the negotiation and application of an ECL solution for the rights clearance of works contained in the collection of a cultural heritage institution, including orphan works. This measure would need to be accompanied by a European-wide accessible register that would contain all necessary information for a legitimate and secure cross-border use of the copyright protected material.

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also necessary to ensure that orphan works which have been digitised and made available to the public in one Member State may also be made available to the public in other Member States'.

[17] Id., p. 27. See also : Study "Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU – Analysis of specific policy options", Brussels, 23.06.2014, p. 19.

[18] The texts of the relevant legislative provisions of Denmark, Finland, France, Norway, Sweden and the United Kingdom can be found in Annex to this report.

It is important to note at the outset that the analysis of the possible cross-border applicability of an ECL system and the proposals made in the following pages are designed to apply strictly to the specific purpose of allowing the mass-digitization and online making available of works by CHIs. It is not our intention to extend the analysis of the cross-border application of an ECL system to any other area than this one. This study builds on the two previous studies carried out in the past for Europeana, the first one written in 2011 by J. Axhamn and L. Guibault entitled 'Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage?'[19] and the second one written in 2013 by M. Oostveen and L. Guibault, 'Summary report on IPR issues faced by Europeana and its partners'.[20] This paper refers the reader to these prior studies for more information about the workings of ECL systems and their main characteristics, as well as about the compatibility of the ECL regime with the relevant European legal framework.[21] Because the issue is not directly related to the cross-border application of ECL systems, the paper also will not discuss the applicability or non-applicability of the Directive on Services to the services offered by CMOs in the European Union.[22]

2. Main characteristics of ECL systems

As mentioned in the introduction, an ECL system is a form of collective rights management whereby the application of freely negotiated copyright licensing agreements between a user and a CMO, is extended by law to non-members of the organisation. The mechanism of an ECL functions therefore in a two-tiered manner: 1) the law recognises the 'extended' application of agreements concluded between a CMO and a user to non-members of the CMO; and 2) the parties freely negotiate the content of the agreement. With respect to ECL systems created for the purpose of allowing the mass-digitization and online making available of works by CHIs, this can be achieved either through a general provision in the copyright act or through a specific provision detailing the purpose and intended beneficiaries. With the adoption of its new provision in the Enterprise and Regulatory Act 2013, the United Kingdom will follow the first approach. Denmark and Sweden have a mix of specific and generic provisions, the latter of which states for example that '[e]xtended 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 [the country] within the specified field'.[23] In Finland and Norway, the extension is operated through a more specific provision in the copyright act which allows an archive, a library or a museum open to the public by virtue of extended collective licence to reproduce and communicate the works in its collections to the public in cases other those specified in the act.[24] France and

[19] J. Axhamn and L. Guibault, Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage?, EuropeanaConnect, Milestone M.4.1.9, 2011

[20] M. Oostveen and L. Guibault, Summary report on IPR issues faced by Europeana and its partners, Europeana Awareness, Deliverable D5.2, June 2013.

[21] See also: A. Vuopala, Extended Collective Licensing – A solution for facilitating licensing of works through Europeana, including orphans?, Finnish Copyright Society, Helsinki, 2013.

[22] See : T. Riis, 'Collecting Societies, competition, and the Services Directive', Oxford Journal of Intellectual Property Law and Practice (2011) 6, pp. 482-493 ; Case C-351/12, Judgment of the Court of Justice of the European Union, 27 February 2014 (OSA vs. Czech Republic)

[23] Danish Copyright Act 2010, art. 50(2).

[24] Finnish Copyright Act 2005, art. 16d. See Norwegian Copyright Act, art. 16a.

Germany have developed specific rules pertaining to the use of out-of-commerce works that are extended to non-members of the CMO in charge.

This section provides a comparative law analysis of the main characteristics of ECL systems, more particularly of the requirement of representativeness of CMOs (2.1), the opt-out option (2.2), the subject matter covered by the agreements (2.3), the definition of user groups (2.4), the scope of the licence (2.5) and the conditions of use (2.6). To this end, we will consider the relevant regulations adopted and in force in Scandinavia (namely Norway, Denmark, Sweden and Finland), France, Germany and the UK. As will become clear below, some of these characteristics have been regulated by law or while others are left to be determined by the parties to the agreement, with the potential of increasing the occurrence of discrepancies between systems.

2.1. Representativeness of CMOs

Arguably, the first and foremost requirement of the entire ECL system is that the CMO be representative of the group of rights holders in the same category as the rights of whom it administers.[25] According to this requirement, a CMO can only negotiate an agreement with a cultural heritage institution with a degree of certainty if it can demonstrate that it does administer the rights on behalf a of a 'substantial' amount of rights owners in the same category than those it administers.[26] In the impact assessment to Directive 2012/24/EC, the Commission stressed that '[b]ecause the legal presumptions that a representative collecting societies also represents orphan works only applies in the national territories that introduce such a presumption, this option only allows the display of orphan works within the territory of a Member State. Digital libraries operating with an extended collective license would therefore only be accessible at national level'.[27]

The representative character of the CMO is a question of legitimacy towards the non-members and of legal certainty towards the users: 1) a 'representative' CMO will speak on behalf of a large enough number of rights holders to legitimize the application of the agreement to all rights owners, including non-members; 2) a representative CMO will be able to grant a licence with broad coverage of the repertoire which increases the legal certainty for the users. As evident in Figure 1 below, a CMO with a low representation rate cannot pretend negotiating a legitimate agreement with users of behalf all rights holders, nor can it give any assurance to the user that the repertoire covered is sufficiently important to reduce the risk of having a (large number of) non-members opt-out from the agreement.

[25] Tryggvadottir 2014, p. 317.

[26] P.B. Hugenholtz, S. van Gompel, L. Guibault and R. Obradovic, 'Extended Collective Licensing: panacee voor massadigitalisering?', Report written to the Dutch, Ministry of Education, Culture and Science, Amsterdam: Institute for Information Law, August 2014 – forthcoming, p. 16.

[27] Commission Staff Working Paper Impact Assessment On The Cross-Border Online Access To Orphan Works and *Accompanying the document* Proposal for a Directive Of The European Parliament And Of The Council on certain permitted uses of orphan works, SEC(2011) 615/2, p. 27.

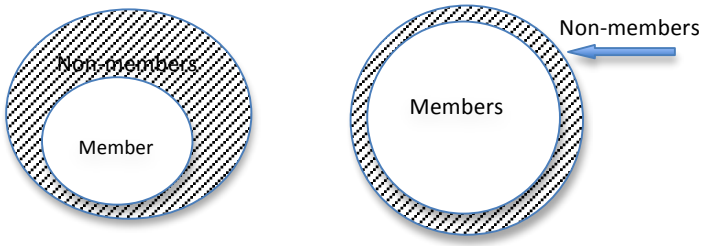

Figure 1 - Proportion 'Member' / 'Non-Member' of a CMO

When one looks at the body of works and performances that qualify as 'cultural heritage' and are contained in the institutions' collections, an important part of these may be quite old. How is the representative character of a CMO to be established? Following which criteria? Is a CMO deemed representative if it represents the rights of a substantial portion of rights holders whose works are currently being managed? Or should the representative character be determined in relation to the amount of rights holders whose works make up the body of the 'cultural heritage'? While the latter option would be in theory more logical in terms of legitimacy and legal certainty, it would entail an almost insurmountable burden of proof on the part of the CMO who would need to establish that it represents a sufficiently high number of heirs and other assignees on the old works and performances. This, in our opinion, would not reflect the intention of the legislator.

Assessment of representative character

There is no clear criterion for the assessment of the representative character of a CMO. Neither the French or the German copyright acts contain any specific requirement regarding the representative character of a CMO entrusted with licensing works under an ECL regime. However, in both countries the CMO engaged in ECL licensing must be authorised by a competent public authority: in France, by the Minister of Culture and in Germany, by the Patents and Trademark Office (*Bundespatentamt*). Pursuant to article 3 of the German Copyright Administration Act (*UrheberWarhnehmungsgesetz*), the Patents and Trademark Office must grant such authorisation upon submission of evidence of the amount of rights owners represented by the organisation. The consequence of a lack of proper evidence on this point is not clear from the Act, but it is reasonable to think that should the Patents and Trademarks Office entertain doubt as to the representative character of a CMO, it would withhold or withdraw the authorisation.[28]

By contrast, representativeness of CMOs is an important aspect of ECL regimes in Scandinavia, where the CMOs must represent a 'significant' (Sweden)[29] or 'substantial part of the authors' (Norway) or even 'numerous authors' (Finland)[30], of a certain type of works which are used in [the country] within the specified field'.[31] The Danish Copyright Act, for example, requires that the CMO engaging in ECL agreements present a 'substantial number of authors of a certain type of works which are used in Denmark within the specified field'. The law does not further specify what 'substantial number'

[28] Hugenholtz et al. 2014, p.

[29] Swedish Copyright Act, art. 42a.

[30] Article 26 of the Finnish Copyright Act requires that the organisation 'represents, in a given field, numerous authors of works used in Finland'.

[31] Tryggvadottir 2014, p. 318.

means in practice.[32] The legislative history of this provision indicates that the requirement of 'a substantial number of authors' does not mean that the CMO must represent a 'majority' of rights owners within the specified field. Rather, the amount of rights owners represented should be 'important' or refer to a 'plurality' of authors. The Danish Ministry of Culture assesses the representativeness of the CMO upon giving its approval of the agreement, as required by law, on the basis of the evidence submitted by the CMO. In Norway the law was modified in 2005 from its original text, which obliged CMOs to represent a 'substantial part of *Norwegian* authors of a certain type of works'. This formulation was deemed in conflict with the EU Treaty as a form of non-acceptable discrimination on the basis of nationality.[33]

The UK Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014[34] establish a system of government approval of ECL licences. Pursuant to article 4(4) of the Regulations, '[t]he Secretary of State may only grant an authorisation to a relevant licensing body if the Secretary of State is satisfied that — (b) the relevant licensing body's representation in the type of relevant works which are to be the subject of the proposed Extended Collective Licensing Scheme is significant'. This provision must be read in conjunction with the definition in article 2 of the Regulation of '"representation", which means the extent to which the relevant licensing body currently — (a) acts on behalf of right holders in respect of relevant works of the type which will be the subject of the proposed Extended Collective Licensing Scheme; and (b) holds right holders' rights in relevant works of the type which will be the subject of the proposed Extended Collective Licensing Scheme'.

Questions on the topic of representativeness were put to the public in a consultation prior to the adoption of the Regulations. In its response to the consultation, the UK government emitted the opinion that the representativeness test should be flexible, since requiring absolute thresholds could prevent ECL schemes to emerge where they are needed most. The government added that 'Collecting societies must show that they made all reasonable efforts to find out total numbers of rights holders and works, using a transparent methodology. A poor understanding of the total numbers of rights holders and works will necessarily entail an incomplete publicity campaign, which in turn will mean that rights holders who might want to opt out may not be able to.'[35] According to the Regulations, the CMO must also show that it has the support of a significant proportion of its members for the application ECL scheme.

How would one calculate the degree of representativeness of a CMO at the European level? Admittedly, it would be very difficult and depend on a few factors. Among the most important factors to help determine the representative character of a CMO is whether the CMO has signed

[32] Freudenberg 2014, WahrnG § 2, Rn. 6, in: H. Ahlberg & H.-P. Götting, Urheberrecht, Beck'scher Online Kommentar (ed. 4, 1 juli 2014).; Hugenholtz et al. 2014, p. 25.

[33] J. Axhamn & L. Guibault, 'Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage?', final report prepared for EuropeanaConnect, Amsterdam: Institute for Information Law, August 2011, p. 30-31; A. Vuopala, Extended Collective Licensing – A solution for facilitating licensing of works through Europeana, including orphans?, Finnish Copyright Society, Helsinki, 2013, p. 14.

[34] The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014, available at: http://www.legislation.gov.uk/ukdsi/2014/9780111116890

[35] Intellectual Property Office, Government response to the technical consultation on draft secondary legislation for extended collective licensing (ECL) schemes, UK, May 2014, p. 5.

reciprocal agreements with sister organisations abroad to represent their foreign repertoire on the CMO's own territory.[36] Knowing that in Europe rights holders sign exclusive representation agreements with the CMO of their choice, the situation with respect to non-members could be depicted as shown in Figure 2 below:

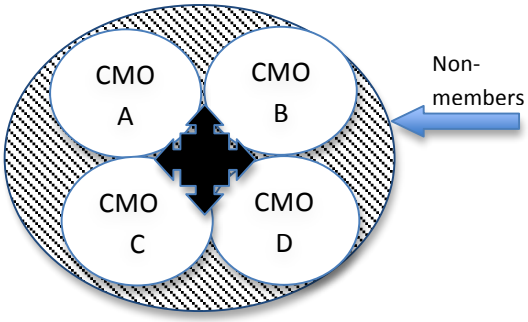

Figure 2 - Non-members of CMOs with reciprocal agreements

In the case where the CMO has signed no reciprocal arrangement with sister societies, it would be virtually impossible to determine the representative character of the CMO outside of its own boundaries. The situation with respect to non-members of two local CMOs without a reciprocal agreement could be depicted as shown in Figure 3 below:

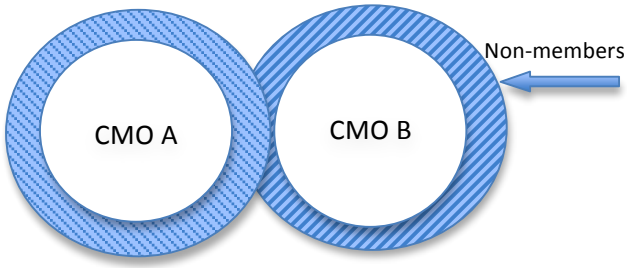

Figure 3 - Non-members of different CMOs without reciprocal arrangement

As we see in Figure 3 above, there is an overlap between the potential non-members of two organisations that do not have a reciprocal representation agreement. This essentially means in practice that non-members would be entitled to opt-out separately from both organisations and to claim remuneration for the use of their works at both organisations.

'in the same category of rights than those administered by the CMO'

For the purposes of authorizing an ECL regime, the representative character of a CMO is generally assessed in relation to the 'number of authors of a certain type of works which are used in [the country] within the specified field'. Article 50(3) of the Danish Copyright Act specifies that '[t]he extended collective license gives the user right to exploit other works of the same nature even though the authors of those works are not represented by the organisation'. The part of the representativeness criterion relating to the user's 'right to exploit other works of the same nature'

[36] Tryggvadottir 2014, p. 317.

directly concerns the CMOs mandate and its capacity to grant licenses with respect to the rights it administers. This aspect of the representative character of the CMO must be neither overlooked or underestimated, because it is at the core of the ECL system: to be entitled to grant licences in the first place, whether on behalf of non-members or not, the CMO must be entrusted by its members with an explicit mandate to represent specific rights. Although this question is not specific to the cross-border application of ECL arrangements, the issue of the mandate of a CMO is as crucial for the good functioning of an ECL scheme, as the number of authors represented. In the context of the digitisation and dissemination of presumably old(er) cultural heritage material, the question whether the CMO has obtained from the rights owners, their heirs or assignees, the necessary mandate to administer the digital rights on these older works is very relevant.

This problem arose in a particularly acute way in Germany where, prior to 2008, the copyright act expressly prohibited the transfer of rights in relation to new types of exploitation. It was therefore clear that the mandate of the German CMOs had an important gap in terms of digital exploitation rights on old(er) works.[37] This was solved in Germany with the adoption of section 137L of the German Copyright Act, which states:

> *(1) Where between 1 January 1966 and 1 January 2008, the author has granted another person all essential exploitation rights, exclusively as well as without limitation of place and time, the exploitation rights which were not known at the time the contract was concluded shall be deemed also to have been granted to the other person, so far as the author does not indicate to the other person that he objects to such exploitation. In respect of types of exploitation that were already known on 1 January 2008 the objection may be made only within one year. Otherwise the right of objection shall expire after three months have elapsed since the other person sent the author, at the address last known to the sender, the information concerning the intended commencement of the new type of exploitation of the author's work. The first to third sentences shall not apply to exploitation rights which have become known in the meantime and which the author has already granted to a third person.*[38]

Since the laws of the other countries examined in this paper did not expressly prohibit the transfer of rights relating to new forms of exploitation, the ownership of digital rights remains unclear. The French Government chose a rather controversial manner to solve the problem: Pursuant to article L. 134-6 of the Intellectual Property Code, as introduced by Act No. 2012-287, the burden of proof lies on the authors to establish that they are the sole rights owners of digital rights on non-available works.[39] The French scheme established by Act No. 2012-287 was challenged before, and upheld by, the Conseil Constitutionnel.[40] The UK legislator foresaw the possible occurrence of doubt regarding

[37] N. Klass, 'Die deutsche Gesetzesnovelle zur "Nutzung verwaister und vergriffener Werke und einer weiteren Änderung des Urheberrechtsgesetzes" im Kontext der Retrodigitalisierung in Europa', GRUR Int. 2013, p. 881-894; U. Fälsch, 'Verträge über unbekannte Nutzungsarten nach dem Zweiten Korb: die neuen Vorschriften § 31 a UrhG und § 137 l UrhG', Bibliotheksdienst 2008-4, p. 411-419.

[38] Zweiten Gesetzes zur Regelung des Urheberrechts in der Informationsgesellschaft" vom 26. Oktober 2007 (BGBl. I/2007, S. 2513 ff.); in force as of 1st January 2008.

[39] Loi No. 2012-287 du 1er mars 2012 relative à l'exploitation numérique des livres indisponibles du xxe siècle

[40] Conseil Constitutionnel Decision No. 2013-370 QPC of 28 February 2014.

the mandate of a CMO and this is why the Regulations (Extended Collective Licensing) 2014 demand that the CMO has obtained the required consent from its members to the proposed Extended Collective Licensing Scheme.[41] In view of the potential difficulties arising from a dubious mandate at the national level, the problem becomes unpalatable if amplified at the European level.

Another area of possible friction for the cross-border application of an ECL scheme concerns not the number of rights owners represented, nor the rights included in the mandate, but the category of rights owners represented. In the Netherlands, for example, the CMO in charge of administering the rights of authors of writings (books, newspaper/magazine articles, screenplays etc.) LIRA, exercises the rights of literary authors, but not those of publishers. The latter prefer exercising their rights individually. What would this mean in a cross-border setting? Certainly not that foreign publishers would be able to be considered as non-members, even if in other countries CMOs do administer the rights of publishers in this field. With respect to LIRA, only foreign authors would be able to claim this status. This example shows how fragmented the administration of rights is and how difficult it would be to extend the application of a particular ECL scheme beyond the boundaries of the national territory.

2.2. Opt-out option

A second key characteristic of ECL regimes is the possibility for non-member rights holders to withdraw from the scheme at will. Not all existing ECL schemes in Scandinavia offer this option to rights owners. In particular cases, such as broadcasting and cable retransmission, the legislator considered that it would be unwise to give non-members a right of withdrawal for it would create important wholes in the repertoire of the CMO and hinder the operations of the cable distributers.[42] Nevertheless, together with the free negotiation of ECL agreements between the CMO and the user(s), the opt-out option is recognised as the element making the difference between a mandatory licence and an ECL system. Without the possibility to withdraw from the regime, the non-members would loose control over the use of their works, e.g. would no longer be able to exercise their exclusive rights. An ECL system without opt-out would be akin to a remuneration right.

With respect to ECLs systems used for the digitisation and dissemination of cultural heritage, the law of all countries under review in this paper do grant non-members a right to opt-out. This is true in Sweden and Denmark where the ECL agreement concluded for this special purpose is based on a general ECL clause. Articles 42a and 42d of the Swedish Copyright Act states that 'the provisions of the first Paragraph do not apply if the author has filed a prohibition against the making of copies or the making available with any of the contracting parties or if there are otherwise specific reasons to assume that the author would object to the exploitation'. The Danish Copyright Act is to the same effect.[43] The observation is also true for Finland, where the ECL agreement is based on a specific provision in the copyright act that expressly declares the provisions not applicable 'to a work whose author has prohibited the reproduction or communication of the work'. In Norway, by contrast, the

[41] The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014, art. 4(4)f).
[42] J. Axhamn & L. Guibault, 'Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage?', final report prepared for EuropeanaConnect, Amsterdam: Institute for Information Law, August 2011, p.
[43] Hugenholtz et al. 2014, p. 25.

possibility to opt-out from an ECL arrangement is left to the determination of the contracting parties.[44]

The French and German ECL schemes for the digitisation and dissemination of out-of-commerce works also grant rights owners the possibility to withdraw from the regime. In both countries, authors have the right to oppose the inscription of their work in the register of out-of-commerce works within six months from the date of inscription. In addition the rights owner has the right to withdraw her works from the repertoire at all times, in France and Germany, although the procedure to be followed under French law appears to be more complex and detailed than in Germany.[45]

The UK Enterprise and Regulatory Reform Act 2013 confers on the copyright owner the right to limit or exclude the grant of licences by virtue of the regulations. The (Extended Collective Licensing) Regulations 2014 defines 'opt out arrangements' as the steps to be followed by a right holder to limit or exclude the grant of licences under an Extended Collective Licensing Scheme.[46] This statement is completed by two provisions in the Regulations: article 5 (1)(g), according to which 'the opt out arrangements that the relevant licensing body will adopt including the steps which a non-member right holder is required to take to opt out of a proposed Extended Collective Licensing Scheme before the scheme commences and whether the consent of the Secretary of State is sought as described in regulation 16(5)(b)'; and article 16 of the same Regulation which set out in great detail when and how a copyright owner may opt-out of an ECL scheme.

To sum-up an opt-out option for non-members is available in virtually all countries examined here, albeit not for every ECL scheme in force. All opt-outs must be recorded, either by the CMO itself (like in Germany) or by a competent authority (like in France), which in principle should ease cross-border consultation by users, as long as these registries are publicly accessible.

2.3. Subject matter

The subject matter covered by an ECL system is determined either in the law or by the parties to an ECL agreement, depending on the country examined. Of the seven countries studied here, France and Germany have the ECL system with the narrowest scope of application in terms of works covered, since these systems apply by law only to works that are no longer available in commerce, in line with the MoU. Hence, the German provision on out-of-commerce works, § 13d) of the Collective Administration Act, concerns exclusively books, journals, newspapers, magazines or other writings published before 1966. The French Act No. 2012-287 on non-available works applies even more strictly to books (excluding any other print material) published in France before 2001.

By contrast, where the ECL schemes in other countries are based on a generic ECL provision in the copyright act, the determination of the subject matter covered by the scheme is left for negotiation by the parties. This will be the case for example of any ECL scheme that will be established pursuant to the recently adopted UK (Extended Collective Licensing) Regulations 2014. The contracting parties to an ECL arrangement based on article 50(2) of the Danish Copyright Act or article 42h of the

[44] Id. p. 39.

[45] Urheberwahrnehmungsgesetz, section 13d (2) ; Code de la propriété intellectuelle, art. L.134-6.

[46] 2014 No. XXXX Copyright The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014.

Swedish act would also need to identify the subject matter covered by the extended licence. On the other hand, an ECL agreement concluded on the basis of article 16b of the Danish Act would only concern articles from newspapers, magazines and composite works, brief excerpts of books and other published literary works, as well as illustrations and music reproduced in connection with the text; while an ECL agreement based on article 30a of the act would cover works, which have been made public and are part of the own TV productions of the public broadcasters, provided these works were integrated in the broadcast productions before January 1, 2007.[47] Of course, the list of works can be shortened by the parties, if necessary. In Norway the Bokhylla project is the result of an agreement between the Norwegian CMO, Kopinor, and the National Library, based on article 16a of the Norwegian Copyright Act. Since the provision does not specify the exact type of works falling under the provision, the parties have concluded an agreement covering Norwegian books published in the periods between 1790-1799, 1890-1899, 1990-1999.

The diversity of provisions existing in the several jurisdictions leads in practice to the negotiation and conclusion of a variety of arrangements covering different types of works. Moreover, through law or contractual arrangements the coverage of certain subject matter under certain ECL schemes is subject to a particular cut off date.

2.4. Definition of user group

The general or specific character of the ECL enabling legal provision also affects the definition of the user group. The French Act No. 2012-287 creates a unique regime among the ones discussed in this paper, for it allows publishers to obtain a licence from the designated CMO to digitise and commercialise books that have been inscribed in the special register for 'unavailable' works maintained by the Bibliothèque nationale de France. In the absence of any publisher interested in digitising and commercialising the books, French public libraries will be allowed, after a delay of ten years, to obtain a free licence from the CMO to digitise and make these books available to the public.

Where, the digitisation and making available of works is made possible on the basis of a generic ECL provision, the user group will be determined by the contracting parties to the ECL agreement as part of the negotiations. The UK (Extended Collective Licensing) Regulations 2014 actually says nothing about the potential recipients of the licence – all rules and measures included therein are directed at the licensing body, e.g. the CMO, and the protection of the rights holders. As the UK Regulations have only been very recently adopted, no ECL regime has been put in place yet. Nonetheless, the user group will inevitably have to be defined inside a future ECL arrangement. The same holds also true in Germany, where § 13d) of the Collective Administration Act regulates what types of works are covered by the provision, but the identity of the user group can be inferred only indirectly from the list of institutions where the works are being held. These include libraries, educational institutions, museums, archives and in the field of audiovisual, film or audio heritage institutions. This enumeration is no doubt inspired by the list of beneficiaries of the exception for the use of orphan works under Directive 2012/24/EC.

As Danish and Swedish law contain both specific and generic provisions allowing the extension of negotiated agreements, the definition of the user group will depend on the provision used as a basis

[47] Hugenholtz et al. 2014, p. 28.

for the agreement. Only small-scale digitisation projects have so far been set up in Denmark on the basis of the generic ECL provision. These concern the digitisation of the Danish Biographic Lexicon, of a dictionary of old Norwegian prose, of issues of the scientific journal KRITIK published between 1967-2011 and of older versions of the journal 'Ingeniøren'.[48] The user groups in these cases were defined per agreement. Specific ECL provisions will tend to provide some indication of the intended user group: article 16b of the Danish Copyright Act, for example, is aimed at 'public libraries and other libraries financed in whole or in part by the public authorities'. In the case of article 30a of the Danish act the user group consists of the public broadcasting archives. Article 42d of the Swedish Copyright Act provides for the possibility to negotiate an extended collective license for certain archives and libraries. But this provision refers back to article 16 of the same act for further specification of the intended user group, where paragraphs 3 and 4 state:

> *Entitled to the making of copies, and to the distribution, pursuant to the provisions of this Article are*
> *1. governmental and municipal archival authorities,*
> *2. such scientific and research libraries that are operated by public authorities, and*
> *3. public libraries.*
> *The Government may in specific cases decide that also certain archives and libraries other than those mentioned in the third Paragraph shall be entitled to make copies pursuant to this Article. (Act 2013:691).*

Article 16a of the Norwegian Copyright Act is perhaps much less detailed than its Swedish counterpart – simply speaking of 'archives, libraries and museums' – but it is broader than the Swedish provision for it also includes museums. Article 16b of the Finnish Act is comparable to the Swedish provision in terms of detail but, like the Norwegian Act, it counts museums among the potential users:

> *provisions may be issued by Government Decree regarding the archives and the libraries and museums open to the public which are authorised under these sections to use works, or who may apply the provisions on extended collective license, if*
> *1. the activities or mission of the institution has been enacted by an Act;*
> *2. the institution has been assigned a specific archival, preservation or service function in legislation;*
> *3. the activities of the institution serve scientific research to a significant degree; or*
> *4. the institution is owned by the State.*

It is clear from the comparative analysis of the different ECL provisions in the national legislation that some overlap exists in the definition of the user groups benefitting from the application of ECL agreements for the digitisation and making available of works held in the collections of CHIs. But the overlap is not perfect and some jurisdictions set greater restrictions than others with respect to the same categories of users, while other jurisdictions choose to exclude certain categories of CHIs from the application of the ECL arrangements all together (Sweden for example). Also worth keeping in

[48] Id. p. 30.

mind is that some copyright acts leave the definition of the user group to the negotiation of the parties.

2.5. Scope of licence

Under the ECL regimes created on the basis of the generic ECL provision in the Danish, Swedish and British copyright act, it is up to the parties to the ECL agreement to negotiate the scope of the licences for the use of works by CHIs. Indeed according to the UK Regulations '"permitted use" means the acts restricted by copyright, or protected by neighbouring rights. This formulation can support a very broad application, depending on what the contracting parties agree to. At the extreme opposite of this spectrum is the French Act that allows publishers who have obtained a licence from the designated CMO to digitise and make digitised books available to the public under specific conditions.

In between these two extremes, lies the legislation of the other Member States. In Finland an ECL agreement based on article 16d authorizes the licensee to make a copy of a work in its collections and to communicate that work in cases other than those referred to in sections 16a-c. This essentially means that parties to an ECL arrangement will be able to conclude an agreement on a broad range of acts, including once digitised making available to the public of the works held in the archive, library or publicly accessible museum. The specific ECL provisions of Denmark, Norway and Sweden are to the same effect.[49] In Germany, a licence obtained from a CMO pursuant to § 13d of the Collective Administration Act will allow the licensee to reproduce and make the works available to the public. Any other specific restrictions on these acts will need to be negotiated by the parties.

2.6. Conditions of use

Conditions of use of works are commonly defined through negotiation, the most important conditions being the payment of a fee by the CHIs or other user group, the purpose of the use – whether commercial use is allowed or not – and the duration of the agreement.

Payment of a fee

Determining the proper level of remuneration for acts of digitisation and making available of works contained in the collections of CHIs is by no means an easy task. As Hugenholtz and Korteweg explain, there are essentially two modes of calculation for fixing the level of remuneration in this case: either the fee can be linked to the actual use by end users of the material made available online, or it can be linked to the expected usage by end users and the expected (social) value of that use.[50] In practice, it is not uncommon to see that the amount of remuneration is determined on the basis of the operating budget of the user institution. The remuneration can be established on the basis of a one-time payment or an annual fee. The moneys collected by the CMO from the payment of fees by the CHIs will be distributed to rights owners according to the usual distribution key.[51] Non-

[49] Hugenholtz et al. 2014, p. 26

[50] P.B. Hugenholtz, D.A. Korteweg, with the collaboration of J. Poort, Digitalisering van audiovisueel materiaal door erfgoedinstellingen: Modellen voor licenties en vergoedingen, report commissioned by Images for the Future/Knowledgeland, Amsterdam, April 2011.

[51] See UK (Extended Collective Licensing) Regulations 2014, art. 18.

members have in principle the same rights and obligations as authors represented by the organisation.

The only reference in the legislation to the remuneration aspect of ECL schemes concerns the rights of non-members.[52] The Norwegian and Swedish acts expressly recognise the right of the non-members to claim remuneration for the exploitation, provided he or she forwards the claims within three years from the year in which the work was exploited. Claims for remuneration may be directed only towards the organization. The UK (Extended Collective Licensing) Regulations 2014 is essentially to the same effect.

Leaving the French regime aside since it concerns the commercial exploitation of out-of-commerce books by publishers, no major digitisation project has emerged so far based on an ECL provision, certainly not from the UK and Germany where the provisions have been adopted so recently. Apart from the smaller-size projects set up in other Scandinavian countries, the main exception is the Norwegian Bokhylla project. In this project Kopinor receives an annual fee based on the number of digital pages made available. The actual degree of use by end users plays no role in the determination of the fee. Initially set at NOK 0,56 (for 2011) per page, the fee has been reduced constantly in subsequent agreements to NOL 0,36 (for 2013), NOK 0,35 (for 2014) and NOK 0,34 (for 2015 and following). For CHIs with very large collections, this amount may appear prohibitive. Even for smaller-size collections, this fee structure may be very expensive, if the institution has little financial means at its disposal. Taking the Bokhylla project as (only) example, the European Commission discarded ECL as a viable option in the Impact Assessment accompanying Directive 2012/24/EC in no unequivocal terms: 'it would be extremely costly for the libraries to purchase such a licence'.[53] One important element that the European Commission overlooked is that the Norwegian fee structure need not be the only fee structure for all digitisation and dissemination projects in every Member State and that parties to ECL agreements may very well come to different arrangements.

Non-commercial use

In a few cases, the national law will require – following the model of article 5(2)c) of Directive 2001/29/EC on copyright in the information society allowing acts of reproduction by publicly accessible libraries, archives and educational institutions – that the acts of digitisation and making available by CHIs pursuant to an ECL scheme not pursue any commercial purpose. For example, § 13d of the German Collective Administration Act sets as condition that the acts of reproduction and making available of the works to the public authorised pursuant to the ECL mechanism serve only non-commercial purposes. The laws of the Scandinavian countries make no reference to the commercial nature of the uses permitted on the basis of the generic or specific ECL provisions. The only consequence for the parties will be in the determination of the level of remuneration: if the user

[52] T. Koskinen-Olsson, 'Collective management in the Nordic countries', in: D. Gervais (ed.), *Collective Management of Copyright and Related Rights* (2nd ed.), Alphen aan den Rijn [etc.]: Kluwer Law International 2010, pp. 283-306, at p. 294-295.

[53] Commission Staff Working Paper Impact Assessment On The Cross-Border Online Access To Orphan Works and *Accompanying the document* Proposal for a Directive Of The European Parliament And Of The Council on certain permitted uses of orphan works, SEC(2011) 615/2, p. 28.

expects to make profit from the use of the work, then the fee should be set higher than if the use is purely for non-profit activities.

Duration of agreement

In the Impact Assessment on Directive 2012/24/EC the European Commission identified the limited duration of ECL systems, often around five years, as a disadvantage against the wide application of ECLs for purposes of digitizing and disseminating cultural heritage works. According to the Commission, CHIs would need licences that span a longer period of time to be able to spread the costs and plan their collections. Although the reasons for wanting a longer period of application of an ECL agreement can hardly be disputed, it is difficult to see why this fact would weigh so much against the introduction of an ECL system in the eyes of the Commission. And indeed, a fee calculated over a specific timeframe will allow parties to anticipate the expected use. As Hugenholtz and Korteweg explain 'the advantage of this method is the security it offers to both parties with regard to the duration of the license. The cultural heritage institution can then from the very start of a digitization project reserve the amount that reflects practical value for the relevant period'.[54] While the national laws are mostly silent on the duration of ECL arrangements, new article L. 134-3 of the French Intellectual Property Code allows the reproduction and making available of the unavailable work, provided remuneration is paid, that the licence is non-exclusive and that the agreement not exceed a duration of five years, renewable.

3. Making ECL's work across the EU

As mentioned in introduction, no method has been developed so far to broaden ECL systems to other territories not covered by the national law that prescribes the 'extension effect'.[55] This is no wonder in view of the countless differences and nuances in the already existing ECL mechanisms. The broadening of the 'extension' of a national ECL regime may actually not be necessary to achieve the purpose of allowing CHIs to digitise and make the works contained in their collections available to the public across Europe.

Based on the comparative analysis in the previous section we are now in a position to make a proposal for a mechanism that would allow works licensed under an ECL system in one territory of the European Union to be made available in all the territories of the Union. As further developed below, this proposal rests on the recognition of the 'country of origin' principle, as the necessary and sufficient territory for the rights clearance of works contained in the collection of a cultural heritage institution, including orphan and out-of-commerce works. This measure would need to be accompanied by a European-wide accessible register that would contain all necessary information for a legitimate and secure cross-border use of the copyright protected material. But first, a few preliminary remarks.

[54] P.B. Hugenholtz, D.A. Korteweg, with the collaboration of J. Poort, Digitalisering van audiovisueel materiaal door erfgoedinstellingen: Modellen voor licenties en vergoedingen, report commissioned by Images for the Future/Knowledgeland, Amsterdam, April 2011 – English summary.

[55] J.-P. Triaille et al. 2013, p. 306.

3.1. General remarks

Before turning to the core of our proposal, it is worth saying a few words about two other possible options to facilitate digitisation and making available of content for Europeana use: the first is a full harmonisation of exceptions in favour of CHIs, and the second is an improved system of multi-territorial licensing of rights.

Full harmonisation of exceptions
Directive 2001/29/EC on copyright in the information society establishes the main legal framework at the European level for the protection of works. This Directive only provides for narrow limitations for the benefit of cultural institutions. The two relevant provisions directed at the activities of these institutions are the following:

- a limitation to the reproduction right for specific acts of reproduction for non-commercial purposes (article 5(2)(c) of directive 2001/29/EC), and
- a narrowly formulated limitation to the communication to the public right and the making available right for the purpose of research or private study by means of dedicated terminals located on the premises of such establishments (article 5(3)(n) of directive 2001/29/EC).

Not all Member States have implemented the optional limitation of article 5(2)c) of Directive 2001/29/EC. And those that did have often chosen different ways to do it, subjecting the act of reproduction to different conditions of application and requirements. Some Member States only allow reproductions to be made in analogue format; others restrict the digitisation to certain types of works, while yet other Member States allow all categories of works to be reproduced in both analogue and digital form.[56] In addition, Member States have identified different beneficiaries of this limitation. The prevailing legal uncertainty regarding the manner, in which digitised material may be used and reproduced, has been known to constitute a disincentive to digitisation. This militates especially against cross-border exchange of material, and discourages cross-border cooperation.

In countries that chose to implement it, article 5(3)n) was transposed almost word-for-word in the national legislation. Several Member States have, however, decided not to incorporate this article into their law; the extent to which library patrons are allowed, in these Member States, to consult digital material on the library network is therefore unclear. However, considering the default nature of this provision and the fact that its application is most often overridden by contract, libraries advocate for specific contracts or licenses, which, without creating an imbalance, would take account of their specific role in the dissemination of knowledge.

In view of the uncertainty around the scope and workings of article 5(3)n) of Directive 2001/29/EC, the Court of Justice of the EU was asked to give its interpretation in a request for a preliminary ruling from the German Supreme Court.[57] The decision in the Darmstadt case came down at the time of

[56] L. Guibault, 'Why Cherry-Picking Never Leads to Harmonisation: The Case of the Limitations on Copyright under Directive 2001/29/EC', JIPITEC 2010-2.
[57] Case 117-13, Decision of the Court of Justice of the EU, 11 September 2014 (Technische Universität Darmstadt/Eugen Ulmer KG)

writing these lines. Essentially the Court ruled that where an establishment, such as a publicly accessible library gives access to a work contained in its collection to a 'public', namely all of the individual members of the public using the dedicated terminals installed on its premises for the purpose of research or private study, that must be considered to be 'making [that work] available' and, therefore, an 'act of communication' for the purposes of Article 3(1) of that directive. Such a right of communication of works enjoyed by the establishments covered by article 5(3)(n) of Directive 2001/29 would risk being rendered largely meaningless, or indeed ineffective, if those establishments did not have an ancillary right to digitise the works in question. Those establishments are recognised as having such a right pursuant to Article 5(2)(c) of Directive 2001/29, provided that 'specific acts of reproduction' are involved. That condition of specificity must be understood as meaning that, as a general rule, the establishments in question may not digitise their entire collections.[58]

Even if this decision confers on libraries a certain leeway to digitise some works in their collections, it does not permit to digitise entire collections. So the need for a solution for mass-digitisation and online making available of works held in the collections of CHIs is still present. In their study on the application of Directive 2001/29/EC on copyright and related rights in the information society, commissioned by the European Commission, de Wolf & Partners noted in relation to the scope of article 5(2)c) of the Directive:

> *Revising the exception in the directive 2001/29 might not be sufficient. Indeed the issues for digitisation of cultural heritage did not come mostly from the directive itself but of the discretion left to Member States in its transposition and in the ensuing discrepancies in the scope of authorized acts amongst the national copyright laws. Fundamentally, the leeway felt to Member States when implementing the exception has often yielded restrictive approach that made the promises of the directive in favour of libraries rather empty or intricate to apply in practice.*[59]

The same study considered the exception of article 5(3)n) only from the perspective of the on-site consultation requirement which receives severe criticism from library patrons, because of the narrowness of the authorised acts that can only take place in a spatially and technically closed environment. The criterion of licensing condition that excludes the application of the exception would also merit some clarification.[60] On this point, the study concluded:

> *(...) any extension of the notion of 'premises' beyond a strict physical location (the building or even the rooms occupied by the library), once abolished the requirement of dedicated terminals, would be a slippery slope. Opening the consultation at distance quickly steps over an unlimited act of making available that is generally not encompassed in the exceptions benefiting libraries and other CHIs, but covered by licensing agreements with copyright owners. Yet the evolving communication possibilities could equally induce that the notion of on-site consultation be relatively free of tangible and spatial restraints.*

[58] Id., para. 42-45.
[59] J.-P. Triaille et al. 2013, p. 300.
[60] Id., p. 294.

In view of the mixed bag of heterogeneous and opposing responses received on this issue in the context of the recent EC consultation on the copyright reform, any revision of the existing set of exceptions in favour of CHIs to facilitate their digitising and dissemination efforts seems to be far and away. Another solution must be envisaged. [61]

Multi-territorial licensing

Although the recently adopted Directive 2014/26/EC on collective management of rights[62] aims at increasing the general effectiveness, transparency and accountability of CMOs, it is unlikely to increase the capacity of CMOs across Europe to cater in any useful and systematic way to the needs of cross-border application of ECL schemes. Even if recital 7d) of Directive 2014/26/EC emphasises that CMOs should not be precluded from concluding representation agreements with other CMOs in order to offer multi-territorial licences also in areas other than online musical services.

The multi-territorial application of ECL schemes would stumble over the issue of representativeness: an aggregation of licences applicable to members and non-members or a 'one-stop-multi-territorial' licence from any Member State would yield a potentially very high and possibly conflicting amount of non-members. It would be as unmanageable for the CMO as unusable for the CHIs (see Figure 4). Moreover, it is virtually impossible to think that rights owners have reached such a degree of organisation in every field of copyright and in every country to make multi-territorial licensing based on a network of reciprocal agreements feasible.

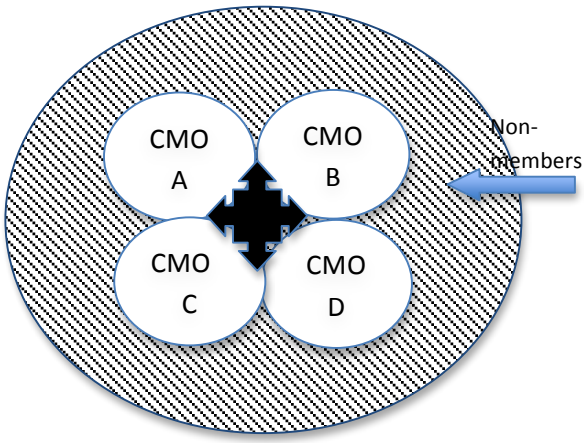

Figure 4 - Multi-territorial licensing and ECL

3.2. Country of first publication principle

As shown in section 2 of this study, there is an unmistakably growing interest among legislators and stakeholders in Europe towards ECL systems as a solution for the clearance of rights for the digitisation and making available of works contained in the collections of CHIs. Considering the mosaic of ECL solutions already in place, we believe that the only workable solution to the problem

[61] See : European Commission, Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, Directorate General Internal Market and Services Directorate D – Intellectual property D1 – Copyright July 2014

[62] Directive 2014/26/EU 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 uses in the internal market

of extra-territorial application of ECL schemes would be to formally establish a type of 'country of first publication' principle. This rule would in effect recognize the country of first publication, broadcast, or dissemination of a work contained in the collection of a cultural heritage institution as the necessary and sufficient territory for the clearance of rights throughout the European Union. For, as Triaille et al. summarize in their study, 'if a work is digitized by a library in a given country, it should be used by another library in the same country or in another Member State in order to achieve economies of scale to foster the development of digital libraries'.[63] This conclusion echoes the European Commission's Recommendation of 2011 on the digitisation and online accessibility of cultural material and digital preservation, which stressed the importance of 'pooling of digitisation efforts by cultural institutions and cross-border collaboration, building on competence centres for digitisation in Europe'.

The proposal is not entirely without precedent in European copyright law. A similar principle, that of 'country of emission', was already laid down in Directive 1993/83/EC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.[64] According to the emission theory, the law of the country of emission of the satellite signal applies for the clearance of rights within the European Union. This theory was developed by analogy with the law applicable to terrestrial broadcasting, which allows broadcasting organisations to easily obtain licenses for use of works from one country. [65]

In the specific context of the digitisation and making available of works held by CHIs, two other sets of rules are particularly relevant: the MoU on out-of-commerce works and Directive 2012/24/EC on certain permitted uses of orphan works. It is worth pointing out that, in its Recommendation of 2011, the Commission also had emphasised that the MoU should serve as a model for other sectors.[66] Admittedly the cross-border effect of voluntarily developed licensing solutions for the mass-digitisation of out-of-commerce works may necessitate legislative intervention. So would the proposed application of a 'country of first publication' principle. But In the MoU, conditions of use of the works are negotiated within a predefined framework. The collecting societies will issue collective licenses to libraries and other concerned institutions. These collective agreements are to be negotiated in the country of first publication of the work and provide for the type of permitted uses of works.

The MoU does not have a cross-border effect by default: Cross-border effect will be negotiated and agreed upon in the license. Moreover, the MoU determines in Principle No. 3 sub 1 that if an agreement has been concluded, the CMO may limit the cross-border effects of such a license to the works of the right holders that it represents. If this is done, the CHI could for example acquire a license for the digitisation and online dissemination for the out-of-commerce works that have been published for the first time in the country of CMO for the rights holders that it represents, but

[63] J.-P. Triaille p. 283; see also: European Commission, Study "Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU – Analysis of specific policy options", Brussels, 23.06.2014, p. 20.

[64] OJ L 248, 06.10.1993, p. 15–21.

[65] P.B. Hugenholtz, SatCab revisited: The past, present and future of the Satellite and Cable Directive, IRIS Plus 2009-8, p. 7-19.

[66] Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation, OJ, L 283 of 29 October 2011, p. 39, Recital 12.

territorially limited for the extended-effect works of non-represented rights holders.[67]

Directive 2012/24/EC also serves in some important aspects as a source of inspiration for this proposal. Not only does the Directive provide footing for the development of a predefined framework within which the negotiations on the relevant conditions of use of works will take place, but it also establishes the criterion of 'country of first publication' as the starting point for the conduct of a diligent search. With regard to the country of first publication, Recital 12 of declares that

> *'For reasons of international comity, this Directive should apply only to works and phonograms that are first published in the territory of a Member State or, in the absence of publication, first broadcast in the territory of a Member State or, in the absence of publication or broadcast, made publicly accessible by the beneficiaries of this Directive with the consent of the rightholders.*

Recital 15 further states that

> *In order to avoid duplication of search efforts, a diligent search should be carried out in the Member State where the work or phonogram was first published or, in cases where no publication has taken place, where it was first broadcast.*

To avoid any doubt it is also clear that the application of the principle of 'country of first publication' applies indeed to the 'country of origin' of the work and not to the country of nationality or residence of the author, as this would be contrary to the EU Treaty as a form of discrimination on the basis of nationality.

Representativeness of CMO

As a recent study conducted on behalf of the European Commission notes in relation to ECL schemes, 'it is difficult to imagine that a national CMO (all are) could be seen as being sufficiently representative to authorise the use of content (beyond its domestic repertoire) in territories outside its own country'.[68] We believe that by electing the 'country of first publication' as the criterion of reference, the problem of representativeness of the CMO would be solved. It is indeed reasonable to infer that the vast majority of authors who publish their works in their country of origin are also members of the CMO of that same country.[69] The few exceptions, particularly with regard to CMOs that represent the rights of authors belonging to a bigger linguistic community (such as France, in relation to Belgium and Switzerland), should not detract from the generality of the rule.

The application of a 'country of first publication' principle would also coincide with current practice where the mass-digitisation efforts of the CHIs concern the works contained in their collections, the vast majority of which are works published or broadcast nationally. The Bokhylla project concerns Norwegian books; the French Act No 2012-287 on non-available works expressly applies to French

[67] Oostveen & Guibault 2013, p. 6.

[68] Study "Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU – Analysis of specific policy options", Brussels, 23.06.2014, p. 19.

[69] See : Tryggvadottir 2014, p. 323.

books; the Danish public broadcasting archives contain national or regional Danish television productions.

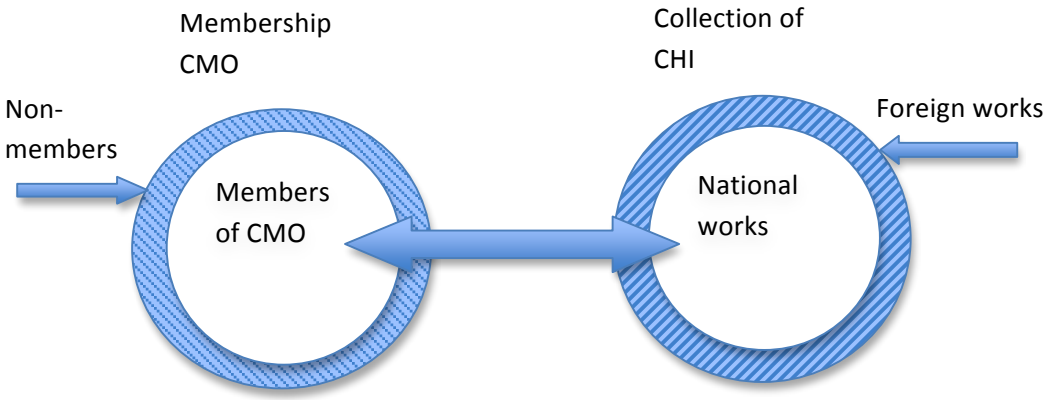

Figure 5 - Relationship membership CMO/Collection CHI

Unless contradicted by actual figures, we would tend to believe that the centre circle of each side of the chart in Figure 5 would overlap each other for the greater part, so that an ECL granted by a CMO to a CHI would be both legitimate vis-à-vis non-members and legally certain in terms of repertoire vis-à-vis the CHI.

Predefining a framework of national ECL

ECL schemes rest on a system of free negotiation between CMO and users. This principle is paramount and should not be interfered with. In other words, except for the possibility for non-members to opt-out of the regime, which should be laid down in the law, a definite degree of freedom contract should be the rule. The recognition of the 'country of first publication' principle would leave existing ECL regimes unaffected except for the recognition of their validity beyond the national boundaries. Nevertheless, for Member States that might consider introducing a new ECL provision in their legislation and have a fear of heights, Directive 2012/24/EC could provide some elements of inspiration for the design of a general ECL framework within which contracting parties would be allowed to negotiate. For instance, the definition of the user group could follow that of the Directive so as to apply to 'publicly accessible libraries, educational establishments and museums, as well as archives, film or audio heritage institutions and public-service broadcasting organisations, established in the Member States'. On the other hand, since ECL agreements are the fruit of free negotiations there would in principle be no need to restrict the categories of subject matter, nor the acts permitted to take place.

The thorniest issue deriving from the establishment of the 'country of first publication' principle would be the determination of the appropriate level of remuneration to be paid by CHIs for the digitisation and European-wide dissemination of the works in their collection. Recital 18 of Directive 2012/24/EC explains that 'For the purposes of determining the possible level of fair compensation, due account should be taken, inter alia, of Member States' cultural promotion objectives, of the non-commercial nature of the use made by the organisations in question in order to achieve aims related to their public-interest missions, such as promoting learning and disseminating culture, and of the possible harm to rightholders.' As we have seen in section 2.6 above, contracting parties to an ECL agreement may envisage different remuneration structures, based either on actual use or on

expected user or social benefit. While the first method of calculation always bears the risk of amounting to a prohibitive price, the second may be more palatable in this context. Small linguistic communities could take account of the relatively low level of international spill-over and fix the price accordingly. For bigger linguistic communities, like English, French or German, contracting parties could envisage an earlier cut-off date so that only older works would be widely accessible, with a corresponding price tag. Technical solutions could also be put in place to limit the possibilities of use of end users in other countries, for example by allowing streaming or viewing of works rather than downloading.[70]

3.3. Register

The 'country of first publication' principle would absolutely need to be accompanied by a European-wide accessible register that would contain all necessary information for a legitimate and secure cross-border use of the copyright protected material. The register would need to contain information about the exercise of the opt-out option, the subject matter covered, the definition of the user group, the scope of the licence and the conditions of use. Once implement in national law, the new rules laid down in Directive 2014/26/EC on collective management of copyright and related rights will provide extra support in laying down information obligations on CMOs. The national authorities created as part of the implementation of Directive 2012/24/EC, together with the Office for the Harmonisation of the Internal Market (OHIM), would be logical candidates to take on the task of administering this register and to become the competent authority keeping track of ECLs concluded in their territory.

4. Conclusion

There is currently an undeniable momentum among legislators and stakeholders in Europe towards the establishment of ECL systems as a solution for the clearance of rights for the digitisation and making available of works contained in the collection of a cultural heritage institution. This system has definite advantages as it significantly lowers transaction costs compared to individual right clearance or to the diligent search requirement of Directive 2012/24/EC. It can also serve as a "one-stop-shop" for digitisation projects, as CHIs may clear the rights over potentially large proportions of their collections at once. Also, thanks to a fixed fee structure CHIs can more easily plan expenses and operate in a more predictable environment.[71]

In the recent Commission consultation on the reform of the European copyright regime,[72] two questions were posed to the public directly concerning the issue of mass-digitisation. Question 40 asked whether legislation would be necessary to ensure that ECLs concluded as a result of the MoU on out-of-commerce works have a cross-border effect so that out of commerce works can be accessed across the EU. Question 41 enquired whether mechanisms would be necessary beyond those already agreed for other types of content (e.g. for audio- or audio-visual collections,

[70] Tryggvadottir 2014, p. 325.

[71] European Commission, Study "Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU – Analysis of specific policy options", Brussels, 23.06.2014, p. 19.

[72] European Commission, DG Internal Market, Report on the responses to the public consultation on the Review of EU Copyright Rules, Brussels, July 2014.

broadcasters' archives).[73] The answers submitted were quite diverse, reflecting the diverging interests of stakeholders involved. Interestingly, not only institutional users, but also some authors and authors' organisations invoked the need to give the MoU cross-border effect and to look for solutions for mass-digitisation for other types of works.

Considering the mosaic of ECL solutions already in place, we believe that the only workable solution to the problem of extra-territorial application of ECL schemes would be to formally establish a 'country of first publication' principle. This rule would in effect recognize the country of first publication, broadcast, or dissemination of a work contained in the collection of a cultural heritage institution as the necessary and sufficient territory for the clearance of rights throughout the European Union.

One of the major advantages of this proposal is that it leaves Member States entirely free to decide whether or not to follow the ECL path on their own territory. The recognition of the 'country of first publication' principle would leave existing ECL regimes unaffected except for the recognition of their validity beyond the national boundaries. Should a Member State choose to maintain its current regime or introduce a new one, then the result of the negotiations between the contracting parties to an ECL agreement would be recognised as a valid permission to digitise and make works available by a CHI throughout Europe. In practice, this would mean that there would no longer a need to block access to visitors without a national IP address. Of course, should this become reality, the parties to an existing contract would need to revisit the conditions of use, most particularly the price paid for foreign access. Another advantage would be that this solution is presumably less far-reaching and politically sensitive, than adopting an exception on copyright to allow CHI to digitise and make the works in their collections available to the public.

This measure would need to be accompanied by a Europe-wide accessible register that would contain all necessary information about ECLs for a legitimate and secure cross-border use of the copyright protected material. The register would need to contain information about the exercise of the opt-out option, the subject matter covered, the definition of the user group, the scope of the licence and the conditions of use. The national authorities created as part of the implementation of Directive 2012/24/EC, together with the Office for the Harmonisation of the Internal Market (OHIM), would be logical candidates to take on the task of administering this register and to become the competent authority keeping track of ECLs concluded in their territory.

Whether CHIs across Europe would be willing to disclose their treasures to a Europe-wide public would be a matter of setting the proper conditions of use, e.g. fixing a reasonable fee. CHIs might also be more inclined to share if there is certain degree of reciprocity among them in Europe, e.g. if more than one or two CHIs dip their toe in the system.

[73] Public Consultation on the review of the EU copyright rules, Brussels, November 2013, p. 22.

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Archives, Libraries and Museums
16b.-(1) Public libraries and other libraries financed in whole or in part by the public authorities may upon request in digital form reproduce articles from newspapers, magazines and composite works, brief excerpts of books and other published literary works, as well as illustrations and music reproduced in connection with the text, provided the requirements regarding the extended collective license according to section 50 have been met. The provision of the first sentence shall not comprise broadcast by radio or television or the making available to the public of works in such a way that members of the public may access them from a place and at a time individually chosen by them, cf. the second division of section 2 (4)(i).
(2) If disputes arise on whether, an organisation approved according to section 50(4) to make license agreements according to subsection (1), proposes unreasonable terms to such a license agreement, each party to the license agreement is entitled to bring the dispute before the Copyright License Tribunal cf. § 47. The Tribunal may lay down all the terms of the said license agreement, including terms relating to remuneration.

Use of Works of Fine Art, etc.
24a.-(1) A work of art that has been made public may be reproduced, if the terms regarding extend collective license according to section 50 have been met. This shall, however, not apply is the author has issued a prohibition against use of the work in relation to any of the parties to the license agreement.
(2) If disputes arise on whether, an organisation approved according to section 50(4) to make license agreements according to subsection (1), proposes unreasonable terms to such a license agreement, each party to the license agreement is entitled to bring the dispute before the Copyright License Tribunal cf. § 47. The Tribunal may lay down all the terms of the said license agreement, including terms relating to remuneration.

Special Provisions on Radio and Television
30a.–(1) Works which have been made public and are a part of DR, TV 2/DANMARK A/S and the regional TV 2 companies' own productions can, by the mentioned broadcasters, be repeated and made available in such a way that members of the public may access them from a place and at a time individually chosen by them, cf. the second division of section 2 (4)(i), provided that the requirements regarding extended collective license according to section 50 have been met. The provision the first sentence shall apply correspondingly to the making of copies, which are necessary for the reproduction. The provisions of the first and second sentences shall apply exclusively to works which are a part of productions broadcast before January 1, 2007.

(2) The author may issue a prohibition to the broadcaster against the reproduction of the work pursuant to subsection (1).

Common Provisions on Extended Collective License

50.–(1) Extended collective license according to sections 13, 14 and section 16b, section 17(4), and section 24a, 30, 30a and 35 may be invoked by users who have made an agreement on the exploitation of works in question with an organisation comprising a substantial number of authors of a certain type of works which are used in Denmark.

(2) Extended collective license may also be invoked by users who, within a specified field, have made an agreement on the exploitation of works with an organisation comprising a substantial number of authors of a certain type of works which are used in Denmark within the specified field. However, this does not apply, if the author has issued a prohibition against use of his work in relation to any of the contracting parties.

(3) The extended collective license gives the user right to exploit other works of the same nature even though the authors of those works are not represented by the organisation. The extended collective license gives the user right only to exploit the works of the unrepresented authors in the manner and on the terms that follow from the license agreement made with the organisation.

(4) Rightholder organisations which make agreements of the nature mentioned in subsection (1) and (2), shall be approved by the Minister for Culture to make agreements within specified fields. The Minister may decide that an approved organisation in certain fields shall be a joint organisation comprising several organisations which meet the conditions of subsection (1) or (2).

(5) The Minister for Culture stipulates detailed provisions on the procedure for approval of the rightholder organisations, mentioned in subsection (4).

51.–(1) For exploitation of works according to section 50 the rules laid down by the organisation with regard to the distribution of remuneration between the authors represented by the organisation shall apply correspondingly to unrepresented authors.

(2) Unrepresented authors may claim an individual remuneration although such a right appears neither from the agreement with the user nor from the organisation's rules on remuneration. The claim for individual remuneration shall be directed to the organisation only. If agreement cannot be made on the size of remuneration, each party is entitled to bring the dispute before the Copyright License Tribunal, cf. § 47.

(3) The claim for remuneration, which organisations approved according to section 50 (4) wish to present in relation to exploitation of works according to section 35, shall be presented simultaneously to the users.

(4) Section 49 shall apply correspondingly to claims for remuneration based on subsection (1) and (2).

52.–(1) In the absence of any result of negotiations on the making of agreements as mentioned in section 13(1), section 14, section 16b, section 17(4), section 24a and section 30a, each party may demand mediation.

(2) Demands for mediation shall be addressed to the Minister for Culture. The request may be made if one of the parties has broken off the negotiations or rejected a request for negotiations, or if the negotiations do not appear to lead to any result.

(3) The mediation shall be made by a mediator to be appointed by the Minister for Culture. The mediation negotiations shall be based on the parties' proposal for a solution, if any. The mediator may propose to the parties to have the dispute settled by arbitration and may participate in the appointment of arbitrators.

(4) The mediator may make proposals for the solution of the dispute and may demand that such a proposal be submitted to the competent bodies of the parties for adoption or rejection within a time-limit fixed by the mediator. The mediator shall notify the Minister for Culture of the outcome of the mediation.
(5) The mediator may decide that agreements shall remain in force although the agreement term has expired or will expire in the course of the negotiations. However, the agreement cannot be prolonged for more than two weeks after the parties have decided on a final mediation proposal or proposal for arbitration, or after the mediator has notified that there is no basis to make such proposals.
(6) The person who is or who has been mediator must not without authorisation disclose or utilize any knowledge obtained in his capacity of being a mediator.
(7) The Minister for Culture may lay down rules regarding the covering of expenses incurred in connection with the work of the mediator.

Finland

Copyright Act (Act No. 404 of July 8, 1961, as amended up to April 30, 2010)
http://www.wipo.int/wipolex/en/text.jsp?file_id=208100

Reproduction in archives, libraries and museums (24.3.1995/446)
Section 16 (14.10.2005/821)
An archive, and a library or a museum open to the public, to be determined in a Government Decree, may, unless the purpose is to produce direct or indirect financial gain, make copies of a work in its own collections:
1. for the purpose of preserving material and safeguarding its preservation;
2. for the purpose of technically restoring and repairing material;
3. for the purpose of administering and organising collections and for other internal purposes required by the maintenance of the collection;
4. for the purpose of supplementing a deficient item or completing a work published in several parts if the necessary complement is not available through commercial distribution or communication.

Reproduction of works for the public and communication of works to the public (14.10.2005/821)
Section 16a
(1) An archive, and a library open to the public, to be determined in a Government Decree, may, unless the purpose is to produce direct or indirect financial gain:
1. make copies of a work in its collections which is susceptible to damage by photocopying or by corresponding means and make them available to the public through lending if the work is not available through commercial distribution or communication;
2. where seen appropriate, make copies by photocopying or by corresponding means of individual articles in literary or artistic works of compilation, newspapers or periodicals and of short passages in other published works in its collections to be handed over to the borrowers for their private use in lieu of the volumes and booklets wherein they are contained.
(2) An archive, and a library or a museum open to the public, to be determined in a Government Decree, may, unless the purpose is to produce direct or indirect financial gain, communicate a work made public that it has in its collections, to a member of the public for purposes of research or

private study on a device reserved for communication to the public on the premises of the institution. This shall be subject to the provision that the communication can take place without prejudice to the purchasing, licensing and other terms governing the use of the work and that the digital reproduction of the work other than reproduction required for use referred to in this subsection is prevented, and provided that the further communication of the work is prevented.

Use of works in libraries preserving cultural material (28.12.2007/1436)
Section 16b
(1) A library entitled to a legal deposit of a copy of a work under the Act on Deposit and Preservation of Cultural Material (1433/2007) may:
1. use the copy it has in its collections in the manner referred to in sections 16 and 16a and subject to the terms laid down in these sections;
2. communicate a work made public that it has in its collections to a member of the public for purposes of research or private study on a device reserved for communication to the public, if the digital reproduction of the work other than reproduction required for use referred to in this paragraph is prevented and if the further communication of the work is prevented, on the premises of a library in whose collections the material is deposited under the Act on Deposit and Preservation of Cultural Material, and in the Library of Parliament and in the National Audiovisual Archive;
3. make copies of works made available to the public in information networks for inclusion in its collections;
4. make a copy for inclusion in its collections of a published work which it needs to acquire as part of the library collection but which is not available through commercial distribution or communication.
(2) The provisions of paragraphs 1 and 4 of subsection 1, shall also apply to libraries in whose collections the library referred to in subsection 1 deposits the material under the Act on Deposit and Preservation of Cultural Material.

Use of works in the National Audiovisual Archive (28.12.2007/1436)
Section 16c
(1) The National Audiovisual Archive may:
1. use a work in its collections in the manner referred to in sections 16 and 16a and subject to the terms laid down in these sections;
2. communicate a work in its collections to a member of the public for purposes of research or private study by means of a device reserved for communication to the public on devices located on the premises of a library referred to in section 16b, in the Library of Parliament, and in the Department of Journalism and Mass Communication of the University of Tampere, if the digital reproduction of the work other than reproduction required for the use is prevented and if the further communication of the work is prevented;
3. make copies of works made available to the public by transmission on radio or television for inclusion in its collections.
(2) The provisions of paragraphs 1 and 2 of subsection 1 shall not apply to a cinematographic work deposited by a foreign producer.
(3) A work in the collections of the National Audiovisual Archive, with the exception of a cinematographic work deposited by a foreign producer, may be used for purposes of research and higher education in cinematography.

(4) The provisions of subsections 1−3 shall also apply to material subject to legal deposit, stored in storage facilities approved in accordance with the Act on Deposit and Preservation of Cultural Material.

Use of works in archives, libraries and museums by virtue of extended collective licence (14.10.2005/821)
Section 16d
(1) An archive, and a library or a museum open to the public, to be determined in a Government Decree, may, by virtue of extended collective licence, as provided in section 26:
1. make a copy of a work in its collections in cases other than those referred to in sections 16 and 16a−16c;
2. communicate a work in its collections to the public in cases other than those referred to in sections 16a−16c.
(2) The provisions of subsection 1 shall not apply to a work whose author has prohibited the reproduction or communication of the work.

Further provisions concerning the use of works in archives, libraries and museums (14.10.2005/821)
Section 16e
(1) In cases referred to in sections 16, 16a and 16d, provisions may be issued by Government Decree regarding the archives and the libraries and museums open to the public which are authorised under these sections to use works, or who may apply the provisions on extended collective license, if
1. the activities or mission of the institution has been enacted by an Act;
2. the institution has been assigned a specific archival, preservation or service function in legislation;
3. the activities of the institution serve scientific research to a significant degree; or
4. the institution is owned by the State.
(2) Further provisions may be enacted by Government Decree concerning reproduction under section 16 and sections 16a−16c and the use of the copies thus made.
(3) Further provisions may be enacted by Government Decree concerning the communication of a work to a member of the public under sections 16a−16c.

Extended collective licence (24.3.1995/446)
Section 26
(1) The provisions of this Act regarding extended collective licences shall apply when the use of a work has been agreed upon between the user and the organisation which is approved by the Ministry of Education and which represents, in a given field, numerous authors of works used in Finland. A licensee authorised by virtue of extended collective licence may, under terms determined in the licence, use a work in the same field whose author the organisation does not represent.
(2) The Ministry of Education shall approve the organisation on application for a fixed period, for a maximum of five years. The organisation to be approved must have the financial and operational prerequisites and capacity to manage the affairs in accordance with the approval decision. The organisation shall annually submit an account to the Ministry of Education of the measures it has taken pursuant to the approval decision. The organisation, or organisations, where the representation of the authors can be achieved only through the approval of several organisations, must represent a substantial proportion of the authors of works of different fields whose works are used under a given provision on extended collective licence. When several organisations are

approved to grant licence for a given use of works, the terms of the approval decisions shall ensure, where needed, that the licences are granted simultaneously and on compatible terms. The approval decision may also lay down terms guiding practical licensing in general for the organisation.
(3) The decision of the Ministry of Education shall be complied with, notwithstanding an appeal pending until the matter has been resolved by means of a valid decision. The approval may be reversed if the organisation commits serious or substantial offences or dereliction of duty in breach of the approval decision and its terms and if notices to comply or warnings issued to the organisation have not led to the rectification of the shortcomings in its operation.
(4) Possible stipulations by the organisation referred to in subsection 1 concerning the distribution of remunerations for the reproduction, communication or transmission of works among the authors it represents or the use of the remunerations for the authors' common purposes shall also apply to authors whom the organisation does not represent.
(5) If the stipulations of the organisation referred to in subsection 3 do not provide the right to individual remuneration for the authors represented by the organisation, an author not represented by the organisation shall, however, have the right to claim an individual remuneration. The remuneration shall be paid by the organisation referred to in subsection 1. The right to individual remuneration shall expire if a claim concerning it has not verifiably been presented within three years from the end of the calendar year during which the reproduction, communication or transmission of the work took place.

France

JORF n°0053 du 2 mars 2012 page 3986
LOI n° 2012-287 du 1er mars 2012 relative à l'exploitation numérique des livres indisponibles du XXe siècle
http://www.legifrance.gouv.fr/affichTexte.do;jsessionid=12EA1641E167CD3C83DE2831ED431D3D.tpdjo08v_2?cidTexte=JORFTEXT000025422700&categorieLien=id

Article 1
Le titre III du livre Ier de la première partie du code de la propriété intellectuelle est complété par un chapitre IV ainsi rédigé :

« Chapitre IV
« Dispositions particulières relatives
à l'exploitation numérique des livres indisponibles

« Art. 134-1. - On entend par livre indisponible au sens du présent chapitre un livre publié en France avant le 1er janvier 2001 qui ne fait plus l'objet d'une diffusion commerciale par un éditeur et qui ne fait pas actuellement l'objet d'une publication sous une forme imprimée ou numérique.
« Art. 134-2. - Il est créé une base de données publique, mise à disposition en accès libre et gratuit par un service de communication au public en ligne, qui répertorie les livres indisponibles. La Bibliothèque nationale de France veille à sa mise en œuvre, à son actualisation et à l'inscription des mentions prévues aux articles L. 134-4, L. 134-5 et L. 134-6.
« Toute personne peut demander à la Bibliothèque nationale de France l'inscription d'un livre indisponible dans la base de données.

« L'inscription d'un livre dans la base de données ne préjuge pas de l'application des articles L. 132-12 et L. 132-17.
« Art. 134-3. - I. — Lorsqu'un livre est inscrit dans la base de données mentionnée à l'article L. 134-2 depuis plus de six mois, le droit d'autoriser sa reproduction et sa représentation sous une forme numérique est exercé par une société de perception et de répartition des droits régie par le titre II du livre III de la présente partie, agréée à cet effet par le ministre chargé de la culture.
« Sauf dans le cas prévu au troisième alinéa de l'article L. 134-5, la reproduction et la représentation du livre sous une forme numérique sont autorisées, moyennant une rémunération, à titre non exclusif et pour une durée limitée à cinq ans, renouvelable.
« II. — Les sociétés agréées ont qualité pour ester en justice pour la défense des droits dont elles ont la charge.
« III. — L'agrément prévu au I est délivré en considération :
« 1° De la diversité des associés de la société ;
« 2° De la représentation paritaire des auteurs et des éditeurs parmi les associés et au sein des organes dirigeants ;
« 3° De la qualification professionnelle des dirigeants de la société ;
« 4° Des moyens que la société propose de mettre en œuvre pour assurer la perception des droits et leur répartition ;
« 5° Du caractère équitable des règles de répartition des sommes perçues entre les ayants droit, qu'ils soient ou non parties au contrat d'édition. Le montant des sommes perçues par le ou les auteurs du livre ne peut être inférieur au montant des sommes perçues par l'éditeur ;
« 6° Des moyens probants que la société propose de mettre en œuvre afin d'identifier et de retrouver les titulaires de droits aux fins de répartir les sommes perçues ;
« 7° Des moyens que la société propose de mettre en œuvre pour développer des relations contractuelles permettant d'assurer la plus grande disponibilité possible des œuvres ;
« 8° Des moyens que la société propose de mettre en œuvre pour veiller à la défense des intérêts légitimes des ayants droit non parties au contrat d'édition.
« IV. — Les sociétés agréées remettent chaque année à la commission permanente de contrôle des sociétés de perception et de répartition des droits mentionnée à l'article L. 321-13 un rapport rendant compte des moyens mis en œuvre et des résultats obtenus dans la recherche des titulaires de droits, qu'ils soient ou non parties au contrat d'édition.
« La commission peut formuler toute observation ou recommandation d'amélioration des moyens mis en œuvre afin d'identifier et de retrouver les titulaires de droits.
« La commission est tenue informée, dans le délai qu'elle fixe, des suites données à ses observations et recommandations.
« La commission rend compte annuellement au Parlement, au Gouvernement et à l'assemblée générale des sociétés agréées, selon des modalités qu'elle détermine, des observations et recommandations qu'elle a formulées et des suites qui leur ont été données.
« Art. 134-4. - I. — L'auteur d'un livre indisponible ou l'éditeur disposant du droit de reproduction sous une forme imprimée de ce livre peut s'opposer à l'exercice du droit d'autorisation mentionné au premier alinéa du I de l'article L. 134-3 par une société de perception et de répartition des droits agréée. Cette opposition est notifiée par écrit à l'organisme mentionné au premier alinéa de l'article L. 134-2 au plus tard six mois après l'inscription du livre concerné dans la base de données mentionnée au même alinéa.
« Mention de cette opposition est faite dans la base de données mentionnée au même article L. 134-

2. « Après l'expiration du délai mentionné au premier alinéa du présent I, l'auteur d'un livre indisponible peut s'opposer à l'exercice du droit de reproduction ou de représentation de ce livre s'il juge que la reproduction ou la représentation de ce livre est susceptible de nuire à son honneur ou à sa réputation. Ce droit est exercé sans indemnisation.
« II. — L'éditeur ayant notifié son opposition dans les conditions prévues au premier alinéa du I du présent article est tenu d'exploiter dans les deux ans suivant cette notification le livre indisponible concerné. Il doit apporter par tout moyen la preuve de l'exploitation effective du livre à la société agréée en application de l'article L. 134-3. A défaut d'exploitation du livre dans le délai imparti, la mention de l'opposition est supprimée dans la base de données mentionnée à l'article L. 134-2 et le droit d'autoriser sa reproduction et sa représentation sous une forme numérique est exercé dans les conditions prévues au second alinéa du I de l'article L. 134-3.
« La preuve de l'exploitation effective du livre, apportée par l'éditeur dans les conditions prévues au premier alinéa du présent II, ne préjuge pas de l'application des articles L. 132-12 et L. 132-17.
« Art. 134-5. - A défaut d'opposition notifiée par l'auteur ou l'éditeur à l'expiration du délai prévu au I de l'article L. 134-4, la société de perception et de répartition des droits propose une autorisation de reproduction et de représentation sous une forme numérique d'un livre indisponible à l'éditeur disposant du droit de reproduction de ce livre sous une forme imprimée.
« Cette proposition est formulée par écrit. Elle est réputée avoir été refusée si l'éditeur n'a pas notifié sa décision par écrit dans un délai de deux mois à la société de perception et de répartition des droits.
« L'autorisation d'exploitation mentionnée au premier alinéa est délivrée par la société de perception et de répartition des droits à titre exclusif pour une durée de dix ans tacitement renouvelable, sauf dans le cas mentionné à l'article L. 134-8.
« Mention de l'acceptation de l'éditeur est faite dans la base de données mentionnée à l'article L. 134-2.
« A défaut d'opposition de l'auteur apportant par tout moyen la preuve que cet éditeur ne dispose pas du droit de reproduction d'un livre sous une forme imprimée, l'éditeur ayant notifié sa décision d'acceptation est tenu d'exploiter, dans les trois ans suivant cette notification, le livre indisponible concerné. Il doit apporter à cette société, par tout moyen, la preuve de l'exploitation effective du livre.
« A défaut d'acceptation de la proposition mentionnée au premier alinéa ou d'exploitation de l'œuvre dans le délai prévu au cinquième alinéa du présent article, la reproduction et la représentation du livre sous une forme numérique sont autorisées par la société de perception et de répartition des droits dans les conditions prévues au second alinéa du I de l'article L. 134-3.
« L'utilisateur auquel une société de perception et de répartition des droits a accordé une autorisation d'exploitation dans les conditions prévues au même second alinéa est considéré comme éditeur de livre numérique au sens de l'article 2 de la loi n° 2011-590 du 26 mai 2011 relative au prix du livre numérique.
« L'exploitation de l'œuvre dans les conditions prévues au présent article ne préjuge pas de l'application des articles L. 132-12 et L. 132-17.
« Art. L. 134-6. - L'auteur et l'éditeur disposant du droit de reproduction sous une forme imprimée d'un livre indisponible notifient conjointement à tout moment à la société de perception et de répartition des droits mentionnée à l'article L. 134-3 leur décision de lui retirer le droit d'autoriser la reproduction et la représentation dudit livre sous forme numérique.
« L'auteur d'un livre indisponible peut décider à tout moment de retirer à la société de perception et

de répartition des droits mentionnée au même article L. 134-3 le droit d'autoriser la reproduction et la représentation du livre sous une forme numérique s'il apporte la preuve qu'il est le seul titulaire des droits définis audit article L. 134-3. Il lui notifie cette décision.
« Mention des notifications prévues aux deux premiers alinéas du présent article est faite dans la base de données mentionnée à l'article L. 134-2.
« L'éditeur ayant notifié sa décision dans les conditions prévues au premier alinéa est tenu d'exploiter le livre concerné dans les dix-huit mois suivant cette notification. Il doit apporter à la société de perception et de répartition des droits, par tout moyen, la preuve de l'exploitation effective du livre.
« La société informe tous les utilisateurs auxquels elle a accordé une autorisation d'exploitation du livre concerné des décisions mentionnées aux deux premiers alinéas du présent article. Les ayants droit ne peuvent s'opposer à la poursuite de l'exploitation dudit livre engagée avant la notification pendant la durée restant à courir de l'autorisation mentionnée au second alinéa du I de l'article L. 134-3 ou au troisième alinéa de l'article L. 134-5, à concurrence de cinq ans maximum et à titre non exclusif.
« Art. 134-7. - Les modalités d'application du présent chapitre, notamment les modalités d'accès à la base de données prévue à l'article L. 134-2, la nature ainsi que le format des données collectées et les mesures de publicité les plus appropriées pour garantir la meilleure information possible des ayants droit, les conditions de délivrance et de retrait de l'agrément des sociétés de perception et de répartition des droits prévu à l'article L. 134-3, sont précisées par décret en Conseil d'Etat.
« Art. L. 134-8. - Sauf refus motivé, la société de perception et de répartition des droits mentionnée à l'article L. 134-3 autorise gratuitement les bibliothèques accessibles au public à reproduire et à diffuser sous forme numérique à leurs abonnés les livres indisponibles conservés dans leurs fonds dont aucun titulaire du droit de reproduction sous une forme imprimée n'a pu être trouvé dans un délai de dix ans à compter de la première autorisation d'exploitation.
« L'autorisation mentionnée au premier alinéa est délivrée sous réserve que l'institution bénéficiaire ne recherche aucun avantage économique ou commercial.
« Un titulaire du droit de reproduction du livre sous une forme imprimée obtient à tout moment de la société de perception et de répartition des droits le retrait immédiat de l'autorisation gratuite.
« Art. L. 134-9. - Par dérogation aux dispositions des trois premiers alinéas de l'article L. 321-9, les sociétés agréées mentionnées à l'article L. 134-3 utilisent à des actions d'aide à la création, à des actions de formation des auteurs de l'écrit et à des actions de promotion de la lecture publique mises en œuvre par les bibliothèques les sommes perçues au titre de l'exploitation des livres indisponibles et qui n'ont pu être réparties parce que leurs destinataires n'ont pu être identifiés ou retrouvés avant l'expiration du délai prévu au dernier alinéa de l'article L. 321-1.
« Le montant et l'utilisation de ces sommes font l'objet, chaque année, d'un rapport des sociétés de perception et de répartition des droits au ministre chargé de la culture. »

Germany

Gesetz über die Wahrnehmung von Urheberrechten und verwandten Schutzrechten (Urheberrechtswahrnehmungsgesetz) vom 9. September 1965 (*BGBl*. I, S. 1294) in der Fassung der Änderungen durch Artikel 2 des "Gesetzes zur Nutzung verwaister und vergriffener Werke und einer weiteren Änderung des Urheberrechtsgesetzes" vom 1. Oktober 2013 (BGBl. I/2013, Nr. 59

vom 8.10.2013, S. 3728 (3729 f.)); in Kraft ab 1. April 2014, <http://transpatent.com/gesetze/urhwg.html>.

§ 13d

Vergriffene Werke

(1) Es wird vermutet, dass eine Verwertungsgesellschaft, die Rechte der Vervielfältigung (§ 16 des Urheberrechtsgesetzes) und der öffentlichen Zugänglichmachung (§ 19a des Urheberrechtsgesetzes) an vergriffenen Werken wahrnimmt, berechtigt ist, für ihren Tätigkeitsbereich Dritten diese Rechte auch an Werken derjenigen Rechtsinhaber einzuräumen, die die Verwertungsgesellschaft nicht mit der Wahrnehmung ihrer Rechte beauftragt haben, wenn

es sich um vergriffene Werke handelt, die vor dem 1. Januar 1966 in Büchern, Fachzeitschriften, Zeitungen, Zeitschriften oder in anderen Schriften veröffentlicht wurden,

sich die Werke im Bestand von öffentlich zugänglichen Bibliotheken, Bildungseinrichtungen, Museen, Archiven und von im Bereich des Film- oder Tonerbes tätigen Einrichtungen befinden,

die Vervielfältigung und die öffentliche Zugänglichmachung nicht gewerblichen Zwecken dient,

die Werke auf Antrag der Verwertungsgesellschaft in das Register vergriffener Werke (§ 13e) eingetragen worden sind und

die Rechtsinhaber nicht innerhalb von sechs Wochen nach Bekanntmachung der Eintragung gegenüber dem Register ihren Widerspruch gegen die beabsichtigte Wahrnehmung ihrer Rechte durch die Verwertungsgesellschaft erklärt haben.

(2) Rechtsinhaber können der Wahrnehmung ihrer Rechte durch die Verwertungsgesellschaft jederzeit widersprechen.

(3) Nimmt mehr als eine Verwertungsgesellschaft die Rechte gemäß Absatz 1 wahr, so gilt die Vermutung nach Absatz 1 nur, wenn die Rechte von allen Verwertungsgesellschaften gemeinsam wahrgenommen werden.

(4) Soweit die Verwertungsgesellschaft Zahlungen auch für Rechtsinhaber erhält, die die Verwertungsgesellschaft nicht mit der Wahrnehmung ihrer Rechte beauftragt haben, hat sie den zur Zahlung Verpflichteten von Ansprüchen dieser Rechtsinhaber freizustellen. Wird vermutet, dass eine Verwertungsgesellschaft nach den Absätzen 1 und 2 zur Rechtewahrnehmung berechtigt ist, so hat ein Rechtsinhaber im Verhältnis zur Verwertungsgesellschaft die gleichen Rechte und Pflichten wie bei einer Übertragung der Rechte zur Wahrnehmung.

§ 13e

Register vergriffener Werke

(1) Das Register vergriffener Werke wird beim Deutschen Patent- und Markenamt geführt. Das Register enthält die folgenden Angaben:

Titel des Werkes,

Bezeichnung des Urhebers,

Verlag, von dem das Werk veröffentlicht worden ist,

Datum der Veröffentlichung des Werkes,

Bezeichnung der Verwertungsgesellschaft, die den Antrag nach § 13d Absatz 1 Nummer 4 gestellt hat, und

Angabe, ob der Rechtsinhaber der Wahrnehmung seiner Rechte durch die Verwertungsgesellschaft widersprochen hat.

(2) Das Deutsche Patent- und Markenamt bewirkt die Eintragungen, ohne die Berechtigung des Antragstellers oder die Richtigkeit der zur Eintragung angemeldeten Tatsachen zu prüfen. Die Kosten für die Eintragung sind im Voraus zu entrichten.
(3) Die Eintragungen werden auf der Internetseite des Deutschen Patent- und Markenamtes www.dpma.de bekannt gemacht.
(4) Die Einsicht in das Register steht jeder Person über die Internetseite des Deutschen Patent- und Markenamtes www.dpma.de frei.
(5) Das Bundesministerium der Justiz wird ermächtigt, durch Rechtsverordnung ohne Zustimmung des Bundesrates
Bestimmungen über die Form des Antrags auf Eintragung in das Register sowie über die Führung des Registers zu erlassen,
zur Deckung der Verwaltungskosten die Erhebung von Kosten (Gebühren und Auslagen) für die Eintragung anzuordnen sowie Bestimmungen über den Kostenschuldner, die Fälligkeit von Kosten, die Kostenvorschusspflicht, über Kostenbefreiungen, über die Verjährung, das Kostenfestsetzungsverfahren und die Rechtsbehelfe gegen die Kostenfestsetzung zu treffen.

Norway

Act No. 2 of 12 May 1961 Relating to Copyright in Literary, Scientific and Artistic Works, etc., With Subsequent Amendments, Latest Of 22 December 2006 (unofficial translation of the Norwegian Copyright Act, which does not include amendments made after 2007), <http://www.kopinor.no/en/copyright/copyright-act>.

Extended collective licence for the use of works in archives, libraries and museums
§ 16a
Archives, libraries and museums as described in section 16 first paragraph can make copies of published works in the collections and make such works available to the public if the conditions of the extended collective licence pursuant to section 36 first paragraph are fulfilled.

Extended collective licence for the use of works in the broadcasting organizations' collections
§ 32
The Norwegian Broadcasting Corporation and others who are licenced to operate a broadcasting organization have the right to use issued works in their collections in connection with
a) new broadcasts, or
b) transmission in such a way that the individual can choose the time and place of access to the work if the conditions for an extended collective licence pursuant to section 36 first paragraph are fulfilled. This paragraph applies only to works that were broadcasted prior to 1st January 1997 and that are part of the broadcasting organization's own productions. The paragraph does not apply if the author has prohibited such use of the work or there is otherwise special reason to believe that he is opposed to such use.

Common provisions regarding compulsory licences, extended collective licences, commissions, etc.
§ 36
When there is an agreement with an organization referred to in section 38a which allows such use of a work as is specified in sections 13b, 14, 16a, 17b, 30, 32 and 34, a user who is covered by the

agreement shall, in respect of rightholders who are not so covered, have the right to use in the same field and in the same manner works of the same kind as those to which the agreement (extended collective licence) applies. The provision shall only apply to use in accordance with the terms of the agreement. The provision shall not apply in relation to the rights that broadcasting organizations hold in their own broadcasts.
As regards the retransmission of works pursuant to section 34, where negotiations on an agreement as referred to in the first and second sentences of the first paragraph, or negotiations with a broadcasting organization concerning an agreement, are refused or no agreement has been entered into within six months after the commencement of negotiations, each of the parties may demand that permission and conditions for retransmission be determined in a binding manner by a commission pursuant to section 35, second paragraph. The provisions of the first paragraph shall apply correspondingly in such cases.

§ 37

In connection with the use of works pursuant to section 36, whatever the agreement, the commission or the organization receiving the remuneration for such use decides with regard to the collection and distribution of remuneration shall also be binding on the rightholders who are not represented by the organization. Non-member rightholders shall have the same rights as rightholders who are members of the organization to share in the funds and benefits that are distributed or largely financed from the remuneration.
Irrespective of the provision in the first paragraph, a non-member rightholder who can substantiate that his work has been used pursuant to section 36 may demand that remuneration for such use shall be paid to him. Such claim must be put forward within three years from the expiry of the year the use took place, and may only be directed to the organization which pursuant to section 36 has collected remuneration. Each party may demand that the amount of the remuneration be determined pursuant to rules laid down by the King.

§ 38

Should an agreement pursuant to sections 13b, 14, 16a, 17b, 30 and 32 not be concluded, each of the parties may demand mediation in accordance with rules laid down by the King. Where the parties so agree, permission and conditions for making copies may be determined in accordance with the rules prescribed pursuant to section 35, first paragraph. Such determination shall have the same effect as an agreement pursuant to section 36, first paragraph.
Where the parties to agreements pursuant to sections 13b, 14, 16a, 17b, 30 and 32, so agree, any dispute concerning the interpretation of an agreement may be decided in a binding manner in accordance with the rules prescribed pursuant to section 35, first paragraph.
Should an agreement with a broadcasting organization concerning permission to make fixations of the organization's broadcasts for such uses as are covered by sections 13b, 14 or 17b, not be concluded, the provision in the first and second sentences of the first paragraph shall apply correspondingly. In the event of a dispute regarding the interpretation of such an agreement, the provision in the second paragraph shall apply correspondingly.
Where the parties concerned so agree, a dispute regarding the interpretation of an agreement in respect of such retransmission as is specified in section 34 may in a binding manner be decided by the commission referred to in section 35, second paragraph.

§ 38a

Agreements intended to have an effect as specified in section 36, first paragraph, shall be entered into by an organization which in the field represents a substantial part of the authors of works used

in Norway, and which is approved by the Ministry. For use in certain specified fields, the King may decide that the organization which is approved shall be a joint organization for the rightholders concerned.
The King may issue further provisions regarding the supervision of the organizations and funds which receive remuneration for further distribution.

Sweden

ACT ON COPYRIGHT IN LITERARY AND ARTISTIC WORKS
(Swedish Statute Book, SFS, 1960:729, as amended up to November 1, 2013)
http://www.government.se/download/776893cd.pdf?major=1&minor=15195&cn=attachmentDuplicator_0_attachment

On the Making and Distribution of Copies within Certain Archives and Libraries
Article 16. Archives and libraries referred to in the third and fourth Paragraphs are entitled to make copies of works, with the exception of computer programs,
1. for purposes of preservation, completion or research,
2. in order to satisfy the desires of library borrowers for single articles or short extracts, or for material which, for security reasons, should not be given away in original form, or
3. for use in reading devices.
Copies that have been made on paper pursuant to the first Paragraph, item 2, may be distributed to library borrowers.
Entitled to the making of copies, and to the distribution, pursuant to the provisions of this Article are
1. governmental and municipal archival authorities,
2. such scientific and research libraries that are operated by public authorities, and
3. public libraries.
The Government may in specific cases decide that also certain archives and libraries other than those mentioned in the third Paragraph shall be entitled to make copies pursuant to this Article. (*Act 2013:691).*

CHAPTER 3 a. On the Extended Effect of Collective Licenses

Common Provisions concerning Extended Effect of Collective Licenses
Article 42 a. An extended collective license 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 organization that represents a significant number of authors of works in the field concerned that are being exploited in Sweden. The extended collective license confers to the user the right to exploit works of the kind referred to in the agreement despite the fact that the authors of those works are not represented by the organization, In order for a work to be exploited pursuant to Article 42 c, the agreement with the organization shall have been concluded by someone who carries out educational activities in organised forms.
The conditions concerning the exploitation of the work that follow from the agreement apply. In respect of the remuneration deriving from the agreement and in respect of other benefits from the organization that are essentially paid for out of the remuneration, the author shall be treated in the same way as those authors who are represented by the organization. Without prejudice to what has

been said now, the author has, however, always a right to remuneration for the exploitation, provided he or she forwards the claims within three years from the year in which the work was exploited. Claims for remuneration may be directed only towards the organization.
As against the user exploiting a work pursuant to Article 42 f, claims for remuneration may be forwarded only by the contracting organizations. All such claims shall be forwarded at the same time. *(Act 2013:691).*

Extended collective license for certain archives and libraries
Article 42 d. The archives and libraries referred to in Article 16, third and fourth Paragraphs, are entitled to make copies of works that form part of their own collections and make available to the public such works that have been made public, if an extended collective license applies pursuant to Article 42 a.
The provisions of the first Paragraph do not apply if the author has filed a prohibition against the making of copies or the making available with any of the contracting parties or if there are otherwise specific reasons to assume that the author would object to the exploitation. *(Act 2013:691).*

General extended collective license
Article 42 h. Anyone is entitled to, within a specifically delimited area of exploitation, make copies of works or make available to the public works that have been made public also in cases other than those referred to in Articles 42 b – 42 g if an extended collective license applies pursuant to Article 42 a and it is a prerequisite for the exploitation that the user through the agreement with the organisation is conferred a right to exploit works of the kind referred to in the agreement despite the fact that the authors of the works are not represented by the organisation.
The provisions of the first Paragraph do not apply if the author has filed with any of the contracting parties a prohibition against the reproduction or the making available or if there are otherwise specific reasons to assume that the author objects to the exploitation. (Act 2013:691).

United Kingdom

Enterprise and Regulatory Reform Act 2013
2013 c. 24 PART 6 Copyright and rights in performances Section 77
http://www.legislation.gov.uk/ukpga/2013/24/section/77

"Orphan works licensing and extended collective licensing

116B Extended collective licensing
(1) The Secretary of State may by regulations provide for a licensing body that applies to the Secretary of State under the regulations to be authorised to grant copyright licences in respect of works in which copyright is not owned by the body or a person on whose behalf the body acts.
(2) An authorisation must specify—
(a) the types of work to which it applies, and
(b) the acts restricted by copyright that the licensing body is authorised to license.
(3) The regulations must provide for the copyright owner to have a right to limit or exclude the grant of licences by virtue of the regulations.

(4) The regulations must provide for any licence not to give exclusive rights.
(5) In this section "copyright licences" has the same meaning as in section 116.
(6) Nothing in this section applies in relation to Crown copyright or Parliamentary copyright.

116C General provision about licensing under sections 116A and 116B
(1) This section and section 116D apply to regulations under sections 116A and 116B.
(2) The regulations may provide for a body to be or remain authorised to grant licences only if specified requirements are met, and for a question whether they are met to be determined by a person, and in a manner, specified in the regulations.

(3) The regulations may specify other matters to be taken into account in any decision to be made under the regulations as to whether to authorise a person to grant licences.
(4) The regulations must provide for the treatment of any royalties or other sums paid in respect of a licence, including—
(a) the deduction of administrative costs;
(b) the period for which sums must be held;
(c) the treatment of sums after that period (as bona vacantia or otherwise).
(5) The regulations must provide for circumstances in which an authorisation to grant licences may be withdrawn, and for determining the rights and obligations of any person if an authorisation is withdrawn.
(6) The regulations may include other provision for the purposes of authorisation and licensing, including in particular provision—
(a) for determining the rights and obligations of any person if a work ceases to qualify as an orphan work (or ceases to qualify by reference to any copyright owner), or if a rights owner exercises the right referred to in section 116B(3), while a licence is in force;
(b) about maintenance of registers and access to them;
(c) permitting the use of a work for incidental purposes including an application or search;
(d) for a right conferred by section 77 to be treated as having been asserted in accordance with section 78;
(e) for the payment of fees to cover administrative expenses.

116D Regulations under sections 116A and 116B
(1)The power to make regulations includes power—
(a)to make incidental, supplementary or consequential provision, including provision extending or restricting the jurisdiction of the Copyright Tribunal or conferring powers on it;
(b) to make transitional, transitory or saving provision;
(c) to make different provision for different purposes.
(2) Regulations under any provision may amend this Part, or any other enactment or subordinate legislation passed or made before that provision comes into force, for the purpose of making consequential provision or extending or restricting the jurisdiction of the Copyright Tribunal or conferring powers on it.
(3) Regulations may make provision by reference to guidance issued from time to time by any person.
(4) The power to make regulations is exercisable by statutory instrument.

(5) A statutory instrument containing regulations may not be made unless a draft of the instrument has been laid before and approved by a resolution of each House of Parliament."
(4) Schedule 22 (which inserts Schedule A1 to the Copyright, Designs and Patents Act 1988 and makes provision in relation to performers' rights corresponding to provision made by this section in relation to copyright) has effect.