

# Cultural Heritage Online? Settle it in the Country of Origin of the Work

by **Lucie Guibault\***

**Abstract:** This article examines the conditions under which a system of extended collective licensing (ECL) for the use of works contained in the collections of cultural heritage institutions (CHIs) participating in Europeana could function within a cross-border basis. ECL is understood as 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. ECL regimes have already been put in place in a

few Member States and so far, all have the ability to apply only on a national basis. This article proposes 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. The proposal rests on the statutory 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.

**Keywords:** copyright; cultural heritage; extended collective licensing; cross-border access

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## A. Introduction

1 After almost a decade of efforts towards the digitisation of the content of their collections, cultural heritage institutions (“CHIs”) across Europe are still in search of a workable solution to the astronomical transaction costs related to the rights clearance for making these works available to the public. In the same time, 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, signed in September 2011 the Memorandum of Understanding (MoU) on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works.<sup>1</sup> 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 2012/28/EC on certain permitted

uses of orphan works (“OWD” or “Directive 2012/28/EC”), e.g. works for which the rights holder cannot be identified or located.<sup>2</sup> And third, at the beginning of 2014, the European Commission launched a vast public consultation on the reform of the European copyright regime, enquiring about the public’s view on issues such as the rights relevant for digital transmissions, the territoriality of exceptions and the mass-digitisation of works and other subject matter<sup>3</sup> by CHIs<sup>4</sup>. Until the time comes when the European Commission puts forth a proposal for a broader reform of the copyright system, solutions

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](http://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). See: A.M. Beunen & L. Guibault, ‘Brussels Memorandum of Understanding inzake digitalisering en online beschikbaarstelling van out-of-commerce boeken en tijdschriften’, AMI 2011-6, p. 221-226.

3 For ease of reading, the expression ‘work’ will be deemed in the remainder of this article to encompass other subject matter covered by neighbouring rights, such as first fixations of performances, phonograms, first fixation of films and broadcast signals.

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

for lawful dissemination of cultural heritage must emerge within the existing legal framework.<sup>5</sup>

- 2 As Directive 2012/28/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<sup>6</sup>, several Member States are looking for a more encompassing solution beyond the transposition of the provisions of the Directive. Among a number of 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. Compared to standard collective rights management, the “extension” of agreements to non-members of a CMO significantly facilitates the licensing process to the benefit of rights owners and users alike: even if not all rights owners are identified, license agreements can still be concluded and remuneration paid, allowing the use to take place under specific conditions. In principle, non-members retain the right to withdraw their rights from the scope of the agreement and to obtain remuneration for the use made of their works at all times.
- 3 The Scandinavian countries (Norway, Denmark, Sweden and Finland) have a 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.<sup>7</sup> ECL-type systems were recently introduced in one form or another in France,<sup>8</sup> Germany<sup>9</sup>, Slovakia<sup>10</sup>, and the

United Kingdom.<sup>11</sup> Other Member States, like Estonia<sup>12</sup> and the Netherlands<sup>13</sup>, are seriously considering this option upon transposing the provisions of Directive 2012/28/EC in their national legal order.

- 4 Directive 2012/28/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 towards 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 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.<sup>14</sup> But anyone accessing the Bokhylla website from outside Norway will see the following notice appear on their 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”.<sup>15</sup>
- 5 The 2011 Commission Staff Working Paper “Impact Assessment On The Cross-Border Online Access To Orphan Works”<sup>16</sup> may not be a stranger to the position adopted by the national legislators to restrict access beyond their borders or at the very

5 European Commission’s Report on Digitisation, Online Accessibility and Digital Preservation of Cultural Material, Brussels, September 2014, p. 33.

6 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.

7 R. Tryggvadottir, ‘Digital Libraries, the Nordic system of extended collective licensing and cross-border use’, *Auteurs & Media* 2014/5, pp. 314-325.

8 Loi No. 2012-287 du 1er mars 2012 relative à l’exploitation numérique des livres indisponibles du XXe siècle, available at : [http://www.legifrance.gouv.fr/affichLoiPubliee.do?sessionid=8327BDD080F8720E7E999784A16219C1.tpdila24v\\_1?idDocument=JORFDOLE000024946198&type=general&legislature=13](http://www.legifrance.gouv.fr/affichLoiPubliee.do?sessionid=8327BDD080F8720E7E999784A16219C1.tpdila24v_1?idDocument=JORFDOLE000024946198&type=general&legislature=13).

9 Gesetz zur Nutzung verwaister und vergriffener Werke, Bundesgesetzblatt 8.10.2013, entered into force on 1st April 2014, available at: [http://www.dpma.de/service/e\\_dienstleistungen/register\\_vergriffener\\_werke/index.html](http://www.dpma.de/service/e_dienstleistungen/register_vergriffener_werke/index.html).

10 Act 283/2014 of 12 September 2014, amending Act No 618/2003 on copyright and rights related to copyright (the Copyright Act), as amended, art. 12c, entered into force on 29 October 2014, available at: [http://www.ifrro.org/sites/default/files/2014-283\\_copyright\\_act\\_amendment\\_orpha-](http://www.ifrro.org/sites/default/files/2014-283_copyright_act_amendment_orpha-)

[nooc\\_works.pdf](#).

11 Enterprise and Regulatory Reform Act 2013, 2013, c. 24, art. 77; Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014, No. 2588, available at: <http://www.legislation.gov.uk/ukdsi/2014/9780111116890>.

12 E. Vasamäe, ‘Sustainable Collective Management of Copyrights and Related rights’, Dissertation, University of Tartu, 2014.

13 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.

14 V.M. Skarstein, ‘The Bookshelf: digitisation and access to copyright items in Norway’, Program: electronic library and information systems (44) 2010, p. 48-58.

15 Translation via Google Translate - <http://www.nb.no/Tilbud/Lese-lytte-se/Bruk-av-bokhylla.no-i-utlandet>.

16 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.

least to keep silent on the issue. 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.<sup>17</sup> In the context of the adoption of Directive 2012/28/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. However, by choosing the path of ECL instead of the more burdensome orphan works route, CHIs appear to be resolving the problem of rights clearance for contemporary cultural heritage material by blocking access to people located outside of their own territories. Alleviating the transaction costs associated with the rights clearance of works in the collections of CHIs should not be at the expense of cross-border access to digitised material, as this would have negative consequences for projects such as Europeana, and most importantly for European society as a whole.<sup>18</sup>

- 6 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 2012/28/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 license 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 applied practically?
- 7 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.<sup>19</sup> This question therefore forms the central focus of this paper: can the application of the principle of “country of origin” constitute a workable basis for the cross-border use of copyright protected works contained in the collections of CHIs in the context of Europeana which is licensed under an extended collective licensing system?

<sup>17</sup> Id., p. 18.

<sup>18</sup> 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 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’.

<sup>19</sup> 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.

- 8 To answer this question, this study will compare in section B each element constituting the ECL system in the light of the imperatives of a multi-territorial application. These elements include an analysis of nature of the extension mechanism, requirement of representativeness of CMOs, the opt-out option, the subject matter covered by the agreements, 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 consequences 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, Slovakia and the UK.<sup>20</sup> 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 can be reconciled with each other.
- 9 This comparative analysis will allow us, in section C, 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. The proposal rests on the statutory 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. To set this proposal into context, section C. I briefly highlights the advantages and drawbacks of two alternative options to the recognition of the “country of origin” principle, namely the full harmonisation of exceptions to the benefit of cultural heritage institutions and the multi-territorial licensing of works. The following section explains how the principle of “country of origin” could be applied on a cross-border basis so as to give every European citizen access to cultural material that is licensed by the CMO of the country that first published the material. Section C.II.1 briefly examines how this proposal would fit within the existing legal framework, both international and European, while section C. II. 2 looks into the practical aspects of the application of the country of origin principle for ECLs. This proposal would need to be implemented at the European level and be accompanied by transparency measures to ensure that potential users have the necessary information

<sup>20</sup> 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.

for a legitimate and secure cross-border use of the copyright protected material.

- 10 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-digitisation 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, as the respective stakeholder interests may play out quite differently in the context of other types of uses. This article builds on prior studies carried out for Europeana,<sup>21</sup> on the workings of ECL systems and their main characteristics, and the compatibility of the ECL regime with the relevant European legal framework.<sup>22</sup> Because the issue is not directly related to the cross-border application of ECL systems, the article will not discuss the applicability or non-applicability of the Directive on Services to the services offered by CMOs in the European Union.<sup>23</sup>

## B. Main characteristics of ECL systems

- 11 In order to answer the research question, e.g. under which conditions could an ECL system for the use of works contained in the collections of CHIs be workable on a cross-border basis, we must first examine which essential characteristics of an ECL system would likely be significant in a transnational setting in order to allow effective cross border use of cultural heritage collections. This section provides a comparative law analysis of the main characteristics of ECL systems, in particular, the nature of the extension mechanism, the requirement of representativeness of CMOs, the opt-out option, the subject matter covered by the agreement, the definition of user groups, the scope of the licence and the conditions of use. To this end, we will consider the relevant regulations adopted and in force in Scandinavia (namely Norway, Denmark, Sweden and Finland), France, Germany, Slovakia

and the UK. As it will become clear below, some of these characteristics have been regulated by law, while others are left to be determined by the parties to the agreement, with the potential of increasing the occurrence of discrepancies between systems.

## I. Extension mechanisms

- 12 Following the Scandinavian model, ECL 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. Therefore, this mechanism of ECL functions 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-digitisation 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.<sup>24</sup> 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”.<sup>25</sup>
- 13 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.<sup>26</sup> Section 26(1) of the Finnish Copyright Act provides that “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

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

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

23 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).

24 E. Rosati, The orphan works provisions of the ERR Act: are they compatible with UK and EU laws?, *E.I.P.R.* 2013, 35(12), 724-740.

25 Danish Copyright Act 2010, art. 50(2).

26 Finnish Copyright Act 2005, art. 16d. See Norwegian Copyright Act, art. 16a.

represent”.

- 14 The Slovakian system follows a similar system, as article 12c(6)(6) of the Slovakian Copyright Act states that:

*If an author has not explicitly opted out of collective management of his rights, the user is entitled to use the out-of-commerce work by making copies, making the work available to the public or publicly distributing copies by sale or other forms of assignment of title under an agreement concluded with the relevant collective management organisation representing a significant number of authors for works under paragraph (1), even if the collective management organisation does not represent the author for the out-of-commerce work.*

- 15 By contrast, the systems established in Germany and Slovakia do not explicitly extend the application of collective licensing agreements concluded between the CMO and the user to non-members. Section 13d(1) of the Collective Administration Act establishes an ECL-type system for the licensing of out-of-commerce books by extending the CMO’s mandate to represent non-members. Through this provision, a collecting society entrusted with the exploitation of the rights of reproduction (§ 16 of the Copyright Act) and making available to the public (§ 19a of the Copyright Act) of out-of-print books, is presumed authorised to license to third parties within the scope of their activities the rights of right holders who have not entrusted the collecting society with the exercise of their rights.
- 16 The French mechanism mandates the *Société française des intérêts des auteurs de l’écrit* (SOFIA) with respect to the rights of authors and publishers on unavailable books published in France before 1st January 2001 on the basis of article L. 134-3 and adherence to the Intellectual Property Code. Books are unavailable if they are no longer subject to commercial distribution by a publisher and are not currently the subject of a publication in print or digital. The Sofia is entrusted with administering the rights on the unavailable books that are placed on a list drawn up annually and held by the National Library of France. The Sofia was established in 1999 by the merger of the *Société des Gens de Lettres* (SGDL) and the *Syndicat National de l’Édition* (SNE). As such, the Sofia is likely to partly represent the rights of the authors and publishers of these unavailable books, but most likely also of non-members.
- 17 Whether the extension is effectuated at the level of the licensing agreement or at the level of the CMO’s mandate, the effect on a non-member is presumably the same as long as the conditions of representativeness of CMOs, the right to opt-out, and the right to obtain separate remuneration are guaranteed.

## II. Representativeness of CMOs

- 18 Arguably, the primary 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.<sup>27</sup> 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 of a “substantial” amount of rights owners in the same category than those it administers.<sup>28</sup> In the impact assessment to Directive 2012/28/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 licence would therefore only be accessible at national level”.<sup>29</sup>
- 19 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 legitimise 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. A CMO with a low representation rate cannot feign negotiating a legitimate agreement with users on behalf of 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.
- 20 When one examines 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? Which criteria should it follow? 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

27 Tryggvadottir 2014, p. 317.

28 P.B. Hugenholtz, S. van Gompel, L. Guibault and R. Obradovic, ‘Extended Collective Licensing: panacee voor massadigitalisering?’, Report commissioned by the Dutch, Ministry of Education, Culture and Science, Amsterdam: Institute for Information Law, August 2014, p. 16.

29 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.

to the amount of rights holders whose works make up the body of the “cultural heritage”? While the latter option would in theory be 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.

## 1. Assessment of representative character

21 There is no clear criterion for the assessment of the representative character of a CMO. Neither the French nor the German copyright acts contain any specific requirements 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). The French Code requires that the mandate to manage the rights on unavailable books be given to a collective management organisation that can attest to a diversity of the members of the organisation as well as of an equal representation of authors and publishers among the partners and within the governing bodies of the organisation. The Sofia declares that it brings together nearly 8,000 authors and 400 publishers representing 85% of sales of the French edition.<sup>30</sup> Pursuant to article 3 of the German Copyright Administration Act (UrheberWahrnehmungsgesetz), 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 regarding this point is not clear from the Act, but it is reasonable to assume that should the Patents and Trademarks Office entertain doubt as to the representative character of a CMO, it would withhold or withdraw the authorisation.<sup>31</sup>

22 Arguably, as the “extension effect” is operated at the level of the CMO’s mandate, rather than at the level of the agreement, the requirement of representativeness is perhaps less important. But even if the CMO is the only one active in the specific territory, it would be an error, in my opinion, to take

the representative character of that CMO for granted: in the interest of legitimacy towards non-members and legal certainty towards users, a CMO should at all times be able to establish its representative character. Being the sole CMO in the territory is no guarantee.

- 23 By contrast, representativeness of CMOs is an important aspect of ECL regimes in Scandinavia, where the CMOs must represent a “significant” (Sweden)<sup>32</sup> or “substantial part of the authors” (Norway) or even “numerous authors” (Finland)<sup>33</sup>, “of a certain type of works which are used in [the country] within the specified field”.<sup>34</sup> 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” means in practice.<sup>35</sup> 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 to 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 to be in conflict with the EU Treaty as a form of non-acceptable discrimination on the basis of nationality.<sup>36</sup>
- 24 On the model of the Scandinavian provisions, the Slovakian Copyright Act also refers to a “relevant collective management organisation representing a significant number of authors for works”. As this provision has only recently been introduced in the Copyright Act, little information is known regarding

32 Swedish Copyright Act, art. 42a.

33 Article 26 of the Finnish Copyright Act requires that the organisation ‘represents, in a given field, numerous authors of works used in Finland’.

34 Tryggvadottir ‘Digital Libraries, the Nordic system of extended collective licensing and cross-border use’, *Auteurs & Media* 2014/5, p. 318.

35 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.

36 J. Axhamn & L. Guibault, ‘Cross-border extended collective licensing: a solution to online dissemination of Europe’s cultural heritage?’, final report prepared for Europeana-Connect, 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.

30 <http://www.la-sofialivresindisponibles.org/2015/index.php>.

31 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, p. 54.

its actual workings.

- 25 The UK Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014<sup>37</sup> 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.
- 26 Questions regarding 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 were of the opinion that the representativeness test should be flexible, since requiring absolute thresholds could prevent ECL schemes from emerging 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.”<sup>38</sup> 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.
- 27 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 reciprocal agreements with sister organisations abroad to represent their foreign repertoire on the CMO’s own

territory.<sup>39</sup>

- 28 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. There would likely be 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 claim remuneration for the use of their works at both organisations.

## 2. Scope of mandate of CMO

- 29 For the purposes of authorising 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 licence 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” directly concerns the CMOs mandate and its capacity to grant licences with respect to the rights it administers. This aspect of the representative character of the CMO must be neither overlooked nor 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 is. 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.
- 30 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 there was a significant gap in the mandate of the German CMOs in terms of digital exploitation

37 The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014, available at: <http://www.legislation.gov.uk/ukdsi/2014/978011116890>.

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

39 Tryggvadottir ‘Digital Libraries, the Nordic system of extended collective licensing and cross-border use’, *Auteurs & Media* 2014/5, p. 317.

rights on old(er) works.<sup>40</sup> 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.<sup>41</sup>*

- 31 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 route 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.<sup>42</sup> While the legal validity of the French scheme established by Act No. 2012-287 was upheld by the Conseil Constitutionnel,<sup>43</sup> two French authors pursued the litigation by presenting the case to the Conseil d'état, who then filed a request for preliminary ruling with the Court of Justice of the EU. The case is still pending.<sup>44</sup> The UK legislator foresaw the possible

occurrence of doubt regarding 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.<sup>45</sup> 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.

- 32 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? It would certainly not indicate 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 demonstrates 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.

### III. Opt-out option

- 33 A second key element of a legitimate ECL regime 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 as it would create important holes in the repertoire of the CMO and hinder the operations of the cable distributors.<sup>46</sup> 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 that makes the difference between a mandatory licence and an ECL system. Without the possibility to withdraw from the regime, the non-members would lose control over the use of their

end to that practice, on the conditions that it lays down?'

40 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.

41 Zweites Gesetz zur Regelung des Urheberrechts in der Informationsgesellschaft" vom 26. Oktober 2007 (BGBl. I/2007, S. 2513 ff.); in force as of 1st January 2008.

42 Loi No. 2012-287 du 1er mars 2012 relative à l'exploitation numérique des livres indisponibles du XXe siècle.

43 Conseil Constitutionnel Decision No. 2013-370 QPC of 28 February 2014.

44 Case C-301/15, Court of Justice of the EU, pending - where the French Conseil d'état asked: 'Do the provisions, referred to above, of Directive 2001/29/EC of 22 May 2001, 1 preclude legislation, such as that analysed in paragraph 1 of this decision, that gives approved collecting societies the right to authorise the reproduction and the representation in digital form of 'out-of-print books', while allowing the authors of those books, or their successors in title, to oppose or put an

45 The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014, art. 4(4)f.

46 J. Axhamn & L. Guibault, 'Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage?', final report prepared for Europeana-Connect, Amsterdam: Institute for Information Law, August 2011, p. 28.

works, meaning that they would no longer be able to exercise their exclusive rights. An ECL system without the possibility to opt-out would be akin to a mandatory licence.

- 34 With respect to ECL systems that are used for the digitisation and dissemination of cultural heritage, the law of all countries under review in this article do grant non-members a right to opt-out. This is the case in Sweden and Denmark, where the ECL agreement concluded for this special purpose, is based on a generic ECL provision in the Copyright Act. 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.<sup>47</sup> This observation is also the case in Finland, where the ECL agreement is based on a specific provision in the Copyright Act, which expressly declares that the provisions are not applicable “to a work whose author has prohibited the reproduction or communication of the work”. In Norway, by contrast, the possibility to opt-out from an ECL arrangement is left to the determination of the contracting parties.<sup>48</sup>
- 35 The Slovakian provision also specifically sets as a condition for the application of the regime for out-of-commerce books, that the author has not explicitly opted out of collective management of his rights. Authors must object within three months of the filing of the proposal for insertion into the Slovak National Library list. At all times, an author may request to remove an out-of-commerce work from the list. The Slovak National Library shall remove an out-of-commerce work without undue delay from delivery of the written request from an author pursuant to the first sentence, or after delivery of notification by a collective management organisation on an author’s opting out of collective rights management pursuant to paragraph (6).
- 36 The French and German ECL schemes for the digitisation and dissemination of out-of-commerce books 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. However, in France the permissible time-frame is within six months from the date of inscription, while in Germany it is six weeks. In addition, the rights

owner has the right to withdraw their 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.<sup>49</sup>

- 37 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.<sup>50</sup> 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.
- 38 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 this information is publicly accessible.

#### IV. Subject matter

- 39 Depending on the country examined, the subject matter covered by an ECL system is determined either in the law or by the parties to an ECL agreement. Of the eight countries studied here, France, Germany and Slovakia have the ECL system with the narrowest scope of application in terms of works covered, since by law these systems apply 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 exclusively concerns 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

47 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, p. 25.

48 Id. p. 39.

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

50 The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014 No. 2588.

in France before 2001. The Slovakian ECL system applies, like the German and French mechanisms, to “out-of-commerce works”, defined in article 12c(1) as a published literary work in written form, in particular a book, magazine or newspaper, copies of which can no longer be acquired through paid transfer of ownership rights and are held by a library, archive or museum, and are inscribed in the publicly accessible list of out-of-commerce works kept by the Slovak National Library.

- 40 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 up to negotiation by the parties. For example, this will be the case 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 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.<sup>51</sup> 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.
- 41 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 dependent on a particular cut off date.

42 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.

43 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 true in Slovakia and Germany, where the identity of the user group is unclear. The user group may or may not be identical to the institutions that keep the works. These would include libraries, educational institutions, museums, archives and in the field of audiovisual, film or audio heritage institutions. This enumeration would coincide with the list of beneficiaries with the exception of the use of orphan works under Directive 2012/28/EC; however, the Slovakian Act speaks of an undefined “user”.

44 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 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”.<sup>52</sup> 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 licence for certain archives and libraries. But this provision refers back to article 16 of the

## V. Definition of user group

51 P.B. Hugenholtz, S. van Gompel, L. Guibault and R. Obradovic, ‘Extended Collective Licensing: panacee voor massadigitalisering?’, Report written for the Dutch, Ministry of Education, Culture and Science, Amsterdam: Institute for Information Law, August 2014, p. 28.

52 Id., p. 30.

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).*

- 45 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 as 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.*

- 46 It is clear from the above description 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 flawless 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 bearing in mind is that some copyright acts leave the definition of the user group up to the negotiation of the parties.

47 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 of 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.

48 In between these two extremes lies the legislation of the other Member States. In Finland an ECL agreement based on article 16d authorises 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.<sup>53</sup> In Germany, a licence obtained from a CMO pursuant to § 13d) of the Collective Administration Act will allow the licensee to replicate and make the works available to the public. Any other specific restrictions on these acts will need to be negotiated by the parties.

## VII. Conditions of use

49 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.

### 1. Payment of a fee

50 Determining the appropriate level of remuneration for acts of digitisation and making available of works contained in the collections of CHIs is by no means a straightforward 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 is based upon the actual use by end users of the material made available online, or it is based upon the expected usage by

## VI. Scope of licence

<sup>53</sup> Id., p. 26.

end users and the expected (social) value of that use.<sup>54</sup> 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 amount of money collected by the CMO from the payment of fees by the CHIs will be distributed to rights owners according to the usual distribution key.<sup>55</sup> Non-members have in principle the same rights and obligations as authors represented by the organisation. This principle is in fact confirmed by article 7 of Directive 2014/28/EC on the collective management of copyright and related rights.<sup>56</sup>

- 51 The only reference in the national legislation to the aspect of remuneration in an ECL scheme concerns the rights of non-members.<sup>57</sup> 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 organisation. The UK (Extended Collective Licensing) Regulations 2014 are essentially to the same effect.
- 52 Leaving the French regime aside since it concerns the commercial exploitation of out-of-commerce books by publishers, a digitisation project based on an ECL provision must still be established in the UK and Slovakia. The two relevant German collective rights management organisations, VG Wort and VG Bild-Kunst, signed a collective agreement at the end of 2014 with the Federal Government and the government of every local state.<sup>58</sup> According to this agreement, the public libraries concerned must pay remuneration for the use of the books once, following an upwards scale starting at € 5 for books published before 31st December 1920, € 10 for

books published between 1st January 1921 and 31st December 1945 and € 15 for books published between 1st January 1946 and 31st December 1965 (excluding 7% tax). Works in the public domain are exempt from payment.

- 53 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 excessive. 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 an (only) example, the European Commission discarded ECL as a viable option in the Impact Assessment accompanying Directive 2012/28/EC in no unequivocal terms: “it would be extremely costly for the libraries to purchase such a licence”.<sup>59</sup> 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.

## 2. Non-commercial use

- 54 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 do not pursue any commercial purpose. For example, § 13d) of the German Collective Administration Act sets as a 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 Finnish Copyright Act also limits the application of ECL mechanism to non-commercial purposes. The laws of the other Scandinavian countries, by contrast, 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

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/Knowledge-land, Amsterdam, April 2011.

55 See UK (Extended Collective Licensing) Regulations 2014, art. 18.

56 Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market Text with EEA relevance, OJ L 84, 20.3.2014, p. 72–98.

57 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.

58 Rahmenvertrag zur Nutzung von Vergriffenen Werken in Büchern, 16 December 2014, available at: [http://www.bibliotheksverband.de/fileadmin/user\\_upload/DBV/vereinbarung/2015\\_01\\_RV\\_vergriffene\\_Werke.pdf](http://www.bibliotheksverband.de/fileadmin/user_upload/DBV/vereinbarung/2015_01_RV_vergriffene_Werke.pdf).

59 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.

will be regarding the determination of the level of remuneration: if the user expects to make a profit from the use of the work, then the fee should be set higher than if the use is purely for non-profit activities.

### 3. Duration of agreement

- 55 In the Impact Assessment on Directive 2012/28/EC, the European Commission identified the limited duration of ECL systems, which are often around five years, as a disadvantage against the broad application of ECLs for purposes of digitising and disseminating cultural heritage works. According to the Commission, CHIs would need licences that span over 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. 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 licence. The cultural heritage institution can then from the very start of a digitisation project reserve the amount that reflects the practical value for the relevant period”.<sup>60</sup>
- 56 As the duration of the agreement is commonly determined through negotiation, the national laws are mostly silent regarding the duration of ECL arrangements. By contrast, 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 does not exceed a duration of five years. Similarly, the permission granted by the Secretary of State under the new UK (Extended Collective Licensing) Regulations 2014 is in principle valid for a maximum of five years.

60 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/Knowledge-land, Amsterdam, April 2011 – English summary.

## C. Making ECL systems work across the EU

- 57 Considering the countless differences and nuances in the already existing ECL mechanisms it is not surprising that no mechanism has been developed to broaden ECL systems to other territories, which are not covered by the national law that prescribes the “extension effect”.<sup>61</sup> On the other hand, the problem of the cross-border application of ECL regimes partly lies in the fact that ECLs commonly cover all works “used by” or “contained in the collection” of a CHI. All works “used” or “contained in the collection” encompass not only works of which the rights are owned by the nationals of that country, but also by foreigners. The “extension” of an agreement between a CMO and a CHI therefore also applies to works of foreign rights holders who may or may not be member of that CMO, or even member of a sister CMO with which a reciprocal agreement has been concluded. This relates to the issue of the representative character of the CMO. The uncertainty arising from the possibility that “foreign non-members” could be included constitutes a calculated risk for a representative CMO when applied on a national scale; however, this risk would become too great when applied on a cross-border basis. Moreover, the cross-border application of an ECL agreement is only feasible as long as the CMO has obtained a global transfer of rights allowing it to license on a worldwide scale from the rights owner, not if the CMO is only entrusted with the management of rights within its own national territory.
- 58 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. An alternative to existing ECL systems that encompass works “used” or “contained in the collection” would be to narrow the scope of ECL agreements to the “works first published in the country” that are contained in the collection of the CHIs. 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 transparency measures to ensure that potential users have the necessary information for legitimate and secure cross-border use of the copyright protected material. But first, a few preliminary remarks.

61 J.-P. Triaille, S. Dusollier, et al., ‘Study on the application of Directive 2001/29/EC on copyright and related rights in the information society’, De Wolf and partners, PN/2009-35/D, Brussels, December 2013, p. 306.

## I. General remarks

59 Before turning to the core of our proposal, it is worth mentioning 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.

### 1. Full harmonisation of exceptions

60 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 on 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 on 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).

61 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 other Member States allow all categories of works to be reproduced in both analogue and digital form.<sup>62</sup> 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 works especially against cross-border exchange of material and discourages cross-border cooperation.

62 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 to consult digital material on the library network in these Member States is therefore unclear. Not only is the implementation of this provision, just like the previous one, not mandatory, but even where it has been implemented, its scope remains extremely narrow: a work may only be communicated or made available to individual members of the public, if each patron establishes that the use is for their exclusive research or private study. The works may only be communicated or made available by means of dedicated terminals on the premise of non-commercial establishments, which excludes any access via an extranet or other protected network connection that users can access at a distance. 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 licences, which, without creating an imbalance, would take account of their specific role in the dissemination of knowledge.

63 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.<sup>63</sup> In the *Technische Universität Darmstadt* case, 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.<sup>64</sup>

64 Even if the CJEU decision in the *Technische Universität Darmstadt* case confers a certain leeway on libraries to digitise some works in their collections, it does not permit the digitisation of entire collections. So the need for a solution for mass-digitisation and online

62 L. Guibault, ‘Why Cherry-Picking Never Leads to Harmonisation: The Case of the Limitations on Copyright under Directive 2001/29/EC’, JIPITEC 2010-2.

63 Case 117-13, Decision of the Court of Justice of the EU, 11 September 2014 (*Technische Universität Darmstadt/Eugen Ulmer KG*).

64 Id., para. 42-45.

making available of works held in the collections of CHIs is still present.<sup>65</sup> A well-crafted, mandatory exception or limitation to the benefit of CHIs would in fact offer the greatest level of certainty for all parties involved in the digitisation and online making available of cultural heritage on a European-wide level. It remains to be seen, whether the ongoing European copyright reform will achieve this.

## 2. Multi-territorial licensing

65 Although the recently adopted Directive 2014/26/EC on collective management of rights<sup>66</sup> 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. While Title III of Directive 2014/26/EC is meant to cure the uncertainty that prevailed until then concerning the rights clearance for legitimate online music services, the rules on multi-territorial licensing are limited to online uses of musical works and to authors' rights, excluding neighbouring rights.<sup>67</sup> Even if recital 7d) of the Directive 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 reality is that the level of collective organisation varies significantly per sector of the copyright industry and per country; thus it is hardly feasible to accept multi-territorial licensing based on a network of reciprocal agreements. Without the support of the Directive, the likelihood that other sectors of the copyright industry will organise themselves to a sufficient degree as to enable effective multi-territorial licensing or even the establishment of a network of reciprocal licenses is small.

## II. Country of origin principle

66 There is a distinctive interest among legislators and stakeholders in Europe towards ECL systems as a solution for the clearance of rights of the digitisation and making available of works contained in the

65 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.

66 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.

67 Explanatory Memorandum to Proposal for a Directive on collective management, 8.

collections of CHIs. Considering the mosaic of ECL solutions already in place, a mechanism is needed to ensure that the schemes put forward at the national level can benefit citizens across the European Union. A potential solution to the problem of extra-territorial application of ECL agreements could be to formally declare the “country of origin of the work” as necessary and sufficient territory where permission should be sought prior to disseminating the works throughout the European Union. For, as Triaille et al. summarise 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”.<sup>68</sup> 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”.

## 1. Existing legal framework

67 The principle of country of origin is the cornerstone of the international copyright framework under the Berne Convention. Article 5 of the Convention governs the rights guaranteed under the Convention to authors, being either nationals or foreigners of the country of origin of the work for which protection is sought. This provision of the Convention specifies which rules are applicable to the enjoyment and exercise of the rights guaranteed, depending on whether the author is a national of the country of origin of the work for which protection is sought or not. The definition of the “country of origin” is therefore paramount to the grant and exercise of the rights granted by the Convention. Paragraph 4 of the Convention defines the “country of origin” as follows:

*(a) in the case of works first published in a country of the Union, that country; in the case of works published simultaneously in several countries of the Union which grant different terms of protection, the country whose legislation grants the shortest term of protection.*

68 J.-P. Triaille, S. Dusollier, et al., ‘Study on the application of Directive 2001/29/EC on copyright and related rights in the information society’, De Wolf and partners, PN/2009-35/D, Brussels, December 2013, 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.

(b) in the case of works published simultaneously in a country outside the Union and in a country of the Union, the latter country;

(c) in the case of unpublished works or of works first published in a country outside the Union, without simultaneous publication in a country of the Union, the country of the Union of which the author is a national, provided that:

(i) when these are cinematographic works the maker of which has his headquarters or his habitual residence in a country of the Union, the country of origin shall be that country, and

(ii) when these are works of architecture erected in a country of the Union or other artistic works incorporated in a building or other structure located in a country of the Union, the country of origin shall be that country.

68 The definition should be read in conjunction with article 3(3) of the Convention which defines the expression “published works” as meaning works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work. According to the same provision however, “the performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication”. Acts of communication to the public in principle do not qualify as acts of publication under the Berne Convention, but as we shall see in the context of Directive 2012/28/EC on certain permitted uses of orphan works, the legislator can specify otherwise.

69 The determination of the principle of the “country of origin” as a unique point of attachment for the exercise of rights is not entirely without precedent in European copyright law. A similar principle, “country of emission”, was already laid down in Directive 1993/83/EC based on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.<sup>69</sup> 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 licences for use of works from one country.<sup>70</sup>

69 OJ L 248, 06.10.1993, p. 15–21.

70 P.B. Hugenholtz, ‘SatCab revisited: The past, present and future of the Satellite and Cable Directive’, IRIS Plus 2009–8, p.

70 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 2012/28/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.<sup>71</sup> Admittedly the cross-border effect of voluntarily developed licensing solutions for the mass-digitisation of out-of-commerce works may necessitate legislative intervention. As would the application of a “country of origin” principle. According to the MoU, conditions of use of the works are negotiated within a predefined framework. The collecting societies will issue collective licences 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.

71 The MoU does not have a crossborder effect by default: Crossborder effect will be negotiated and agreed upon in the licence. Moreover, the MoU determines in Principle No. 3 sub 1, that if an agreement has been concluded, the CMO may limit the crossborder effects of such a licence to the works of the right holders that it represents. If this is done, the CHI could for example acquire a licence 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 territorially limited for the extended effect works of non represented rights holders.<sup>72</sup>

72 Directive 2012/28/EC also serves - in some important respects - 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 origin” as the starting point for the conduct of a diligent search. With regard to the country of first publication, Recital 12 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*

7–19.

71 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.

72 Oostveen & Guibault 2013, p. 6.

*the consent of the rightholders.*

73 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.*

74 In other words, both the legislative and the consensual instruments dealing with the digitisation and making available of cultural heritage material point to the country of first publication as valid point of attachment.

## 2. Application of country of origin principle to ECLs

75 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”.<sup>73</sup> We believe that by electing the “country of origin” as the criterion of reference, the problem of representativeness of the CMO would most likely be solved. It is indeed reasonable to infer that the vast majority of authors and publishers of works in a country are also members of the CMO of that same country.<sup>74</sup> The few exceptions, particularly with regard to CMOs that represent the rights of authors belonging to a bigger linguistic community (such as Germany, in relation to Austria and Switzerland), should not detract from the generality of the rule.

76 The application of a “country of origin” 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 books; the Danish public broadcasting archives contain national or regional Danish television productions. The assumption that underpins this proposal is that the digitisation and making available of works contained in the collection of CHIs concerns, for the greater part, works that are no longer in commercial circulation, e.g. out-of-commerce or even orphan. We believe

that an ECL agreement negotiated in the country of first publication of an out-of-commerce book (such as the ECL-type scheme set up in Germany) would not affect the normal exploitation of the work, nor would it cause prejudice to the legitimate interests of the rights owner. Should the collections of a CHI contain commercially exploitable works, then the ECL agreement could exclude these from the scope of the licence for example by fixing a cut-off date (such as the German and French regimes, e.g. 1966 and 2001). Moreover, the rights owner would, at all times, retain his right to opt-out from the regime.

77 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 of contract should be the rule. The recognition of the “country of origin” 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 2012/28/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.

78 The thorniest issue deriving from the establishment of the “country of origin” 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 2012/28/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 B 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,

73 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.

74 See: Tryggvadottir ‘Digital Libraries, the Nordic system of extended collective licensing and cross-border use’, Auteurs & Media 2014/5, p. 323.

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 larger 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 located in other countries, for example by allowing streaming or viewing of works rather than downloading.<sup>75</sup>

- 79 The application of the “country of origin” principle to give cross-border effect to the extended collective licensing agreements concluded between European CHIs and their national CMO would require legislative intervention from the European legislator. At the national level, the ECL provision or agreement would need to clarify that it is restricted to works first published in that country. At the European level, the legislator would need to introduce a provision, by way of a directive, to specify that an ECL agreement concluded with respect to the works first published in one Member State is valid in all Member States. A European statutory provision could read as follows:

*(1) For the purpose of the conclusion of agreements between a collective management organisation and a user, a Member State may introduce a mechanism by which the work of a rightholder who has not transferred the management of his rights to a collective management organisation, shall be presumed to be managed by the collective management organisation which manages rights of the same category of works in that Member State, unless he has expressly advised otherwise.*

*(2) Where such a mechanism has been established in a Member State for the making available by publicly accessible cultural heritage institutions of works first published in that Member State, the works may be made available to the public in all Member States.*

- 80 Such a provision would ensure that the key elements of the ECL systems are respected (the negotiation of agreements, the restriction to the cultural heritage sector, the extension to non-members, the possibility to opt out), while recognising the cross-border application of the agreement.

### 3. Transparency measures

- 81 In view of the diversity of regimes put in place in the Member States for the making available of works by cultural heritage institutions, an effective cross-border application of ECL agreements would need to be accompanied by transparency measures, to ensure that potential users have the necessary information for legitimate and secure cross-border use of the copyright protected material.
- 82 The creation of yet another Europe-wide register, in addition to the orphan works register kept by the Office of Harmonisation in the Internal Market, would be quite cumbersome and probably not even necessary to convey the required information. Most importantly, the national libraries, archives or museum wishing to conclude an ECL agreement with a CMO for the making available of works first published in their country would need to make the terms of the agreement accessible to the public. The National Library of Norway and the Association of libraries (Bibliothekerverband)<sup>76</sup> in Germany already do so, as the text of their governing agreement can be easily located on their respective websites.
- 83 Potential users would need to be informed about the subject matter covered (does the agreement relate only to books or to other types of content?), the duration and scope of the licence (what acts are allowed under the agreement?), the definition of the user group (are only CHIs targeted by the agreement or are other types of users allowed to use the works?), the conditions of use (are commercial uses permitted or not?), and exercise of the opt-out option by certain rights holders. Only if the parties to an ECL agreement are transparent about the terms, can the application of the “country of origin” principle make sense in practice and be meaningful to users outside the national territory.

### D. Conclusion

- 84 There is currently a certain 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 2012/28/EC. It can also serve as a “one-stop-shop” for digitisation projects, as CHIs may clear the

75 Tryggvadottir ‘Digital Libraries, the Nordic system of extended collective licensing and cross-border use’, Auteurs & Media 2014/5, p. 325.

76 [http://www.bibliothekerverband.de/fileadmin/user\\_upload/DBV/vereinbarungen/2015\\_01\\_RV\\_vergriffene\\_Werke.pdf](http://www.bibliothekerverband.de/fileadmin/user_upload/DBV/vereinbarungen/2015_01_RV_vergriffene_Werke.pdf).

rights over potentially large proportions of their collections at once. Additionally, thanks to a fixed fee structure, CHIs can more easily plan expenses and operate in a more predictable environment.<sup>77</sup>

- 85** In the 2014 Commission consultation on the reform of the European copyright regime,<sup>78</sup> 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 audiovisual collections, broadcasters' archives).<sup>79</sup> 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.
- 86** 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 origin" principle. The application of the "country of origin" principle to give cross-border effect to the extended collective licensing agreements concluded between European CHIs and their national CMO would require legislative intervention from the European legislator. In principle, there would be no need for national implementation of this rule. As a result of the introduction of a statutory provision, as soon as the rights on a work contained in the collection of a CHI would be cleared in the country of first publication, broadcast, or dissemination, they would be also cleared for the entire territory of the European Union.
- 87** 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 origin" 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, 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 be 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.

- 88** 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. If no one does, however, then an exception or limitation on copyright will turn out to be the only solution to allow CHIs to digitise and make available the works in their collections.

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77 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.

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

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