

Extended Collective Licensing not “a bridge too far” - a bridgehead to mass digitization and new business models enabling mass usage of copyright protected works in the 21st Century?

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Jerker Rydén
Senior Legal Adviser
National Library of Sweden

Need for flexible ECL enabling business, creators and consumers to use copyright protected works

- The problem Outsiders [non members as well as Orphan Works]
 - Commercial / cultural sector desires to make such works available
 - Research projects managed and performed on a global level
 - Economical potential for business models are significant - a world market
 - Traditional licensing solutions do not provide the means for such enterprises
- France, Sweden and UK has presented proposals such as ECL
 - ECL enables mass usage of copyright protected works including Outsiders to relatively low cost / deliver revenue to right holders
- EU and national governments encourage national libraries to enter into PPP
 - These efforts extremely costly - a private partner a prerequisite
 - Library / Private partner will need a license
 - One possible solution could be the Special ECL
- I.E. - There is a need for flexible ECL agreements apt to the 21st Century enabling business, creators and consumers to use copyright protected works.
 - Is that possible?
 - Could ECL be the solution?

What is an ECL? / ECL and international obligations

Dr. Mihály Ficsor's presentation Fordham 2011:

<http://fordhamipconference.com/wp-content/uploads/2011/04/Fiscor.ppt>

- Page 20 and 21 example of ECL under the acquis communautaire the Satellite and Cable Directive

Prof. Jan Rosén's presentation Fordham 2011:

– <http://fordhamipconference.com/wp-content/uploads/2011/04/Rosen.ppt>

- Page 5 and 6 examples of ECL under the acquis communautaire
 - Satellite and Cable Directive
 - Copyright Directive

Background

- EU's digital libraries initiative
 - all Europe's cultural resources and scientific records accessible to all
 - Europeana - a single access point
- Google Settlement 1.0 and 2.0 – in essence an ECL not underpinned by legislation
- How to reach the objective – Mass digitization
- Mass digitization would have to include outsiders [non members as well as Orphan Works]
- "Creative Content in a European Digital Single Market: Challenges for the Future. A Reflection Document of DG INFSO and DG MARKT" (22 October 2009)
http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf
- Digital Agenda for Europe 2010: Commission said it would convene a stakeholder dialogue on the interactive making available of out-of-print works <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2010:0245:FIN:EN:PDF>

MoU on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works

- The first meeting **16 November 2010**
- Initially all forms of media included
- Soon it became evident each media should be discussed separately
- In the next 8 months a MoU setting “Key Principles on the Digitisation and Making Available of Out-of-Commerce Works was negotiated

MoU on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works

- National projects presented
- The Swedish Writers' Union, The Swedish Publishers' Association, The National Library of Sweden and The Visual Arts Copyright Society in Sweden MOU 2009 concerning the digitization of the Swedish literary heritage – The Swedish Digital Library:
 - Access to digitized books that are not available in commerce [print or E-book].
 - Additional financial means will be necessary
 - *Government initiatives*
 - *Public Private Partnership will be essential to realize the Digital Library*

MoU on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works

- The best way to adapt the making availability of the Digital Library is for the Parties to:
 - negotiate an agreement [ECL] and
 - modulate such an agreement when needed
 - Heads Up / Early Warning [e.g. Advertise]

MoU on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works

- ECL prerequisite in law:
 - Collective Management Organization representative
 - Agreement on the basis of free negotiations.
 - Both exclusivity and contractual freedom are respected
 - Equal treatment
 - The agreement is by law made binding on non-represented rights holders. **But** non represented right holders have a right to:
 - *prohibition against the use of their works*
 - *individual remuneration on the basis of the law*
- As a consequence a library can use digitized books not running the risk facing individual claims from "outsiders" or having to face criminal sanctions – i.e. legal certainty

MoU on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works

- The scope books and journals
 - *Country of first publication*
 - *Digitised and made available by publicly accessible cultural institutions as contained within Art 5.2 (c) of the European Union Directive 2001/29/EC*
- Recommending the Agreement covers embedded images in literary works and dealt within the same Agreement as the literary work in which they are contained by CMO – *cp Google Settlement*

MoU on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works

- Recognising legislation might be required to create a legal basis to ensure legal certainty when the CMO:s represent Outsiders
- Recommending that MS give effect to the key principles in accordance with:
 - national legal mechanisms and
 - collective licensing traditions

MoU on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works :

- “Calling on the European Commission, to the extent required to ensure legal certainty in a cross-border context
 - to consider the type of legislation to be enacted to ensure that publicly accessible cultural institutions and CMO:s which enter into a licence in good faith applying these key principles are legally protected with regard to Outsiders”

The undersigned participants to the Stakeholder Dialogue agree to the following guiding principles:

- A work is out of commerce when:
 - the whole work, in all its versions and manifestations is no longer commercially available in customary channels of commerce,
 - regardless of the existence of tangible copies of the work in libraries and among the public (including through second hand bookshops or antiquarian bookshops)
- The method for the determination of commercial availability of a work depends on the specific availability of:
 - bibliographic data infrastructure and
 - therefore should be agreed upon in the country of first publication of the work

Principle No. 1 – Voluntary Agreements on Out-of-Commerce works

- Contracting parties agree on:
 - the type and number of works covered by the Agreement and
 - on the fact that these works are out of commerce
- Determination by parties whether a work is out of commerce or not shall be conducted according to the customary practices in the country of first publication of the work.

Principle No. 1 – Voluntary Agreements on Out-of-Commerce works

- Each Agreement stipulate the steps to be taken in order to verify whether a work is out of commerce.
- Without prejudice to existing exceptions and limitations in the copyright legislations of the MS in which the publicly accessible cultural institutions are located, each Agreement shall define commercial or non-commercial uses and shall specify which uses are authorised.

Principle No. 2 – Practical Implementation of Collective Agreements

- Recommended represented right holders are notified individually by right holders organisations and CMO:s
- Agreement includes translations:
 - a specific procedure should be undertaken in order to reach the right holders in translated works.
- Country of First Publication – Outsiders - Extended effect [the ECL]
- “In order to benefit from this presumption the CMO organisation shall make its best efforts to alert right holders in question in accordance with information procedure methods agreed upon with organisations representing right holders in the country where the CMO is based. The right holder organisations will commit to assist the CMO in the work to alert authors and publishers.”

Principle No. 3 – Cross Border Access to Digital Libraries



Commission Recommendation on the digitisation and online accessibility of cultural material and digital preservation

- October 2011 European Commission adopted a Recommendation
- The European Commission encourages the setting up of dialogues involving stakeholders to achieve similar results to those achieved in the print sector with the MoU of 20 September 2011 setting “Key Principles on the Digitisation and Making Available of Out-of-Commerce Works”:
http://ec.europa.eu/internal_market/copyright/docs/copyright-info/20110920-mou_en.pdf

The European Commission Recommends that Member States:

- Encourage partnerships between cultural institutions and the private sector to
 - create new ways of funding digitization of cultural material and
 - to stimulate innovative uses of the material
- Creating the legal framework to underpin licensing mechanisms identified and agreed by stakeholders in the MoU

Follow-up to this Recommendation

- The Recommendation is a non-binding act
- It aims at giving policy orientations and can prepare future legislation – *cp. the MoU on Orphan Works*
- MS are invited to report to the European Commission on action taken in response to this Recommendation 2 years after its publication and then every second year

Loose ends – Implications

- ECL no risk facing claims from "outsiders" to face criminal sanctions – MoU Risk Management?
- The MoU must be underpinned by national legislation
- Cross-border availability – the need for EU legislation
- Regulation on EU level of CMO:s – Good governance - framework Directive on collective rights management?
- If MS does not follow the Recommendation – EU legislation [cp. MoU on OW]?

Loose ends – Implications

- The US Copyright Office has indicated the need for an in depth report on mass digitization and ECL.
 - What if the Copyright Office suggest ECL for mass digitization for commercial use – e.g. Google.
 - Will the EU Commission tag along?
- How to finance the digitization – the MoU does not provide a license for a private partner in a Public Private Partnership

Implementation of the MoU – MoU Task Force

- MoU Task Force established identifying:
 - i. national projects to make cultural heritage which includes in-copyright works out of commerce available
 - ii. countries ready to make financial resources available to enable projects to make cultural heritage which includes in-copyright works out of commerce available
 - iii. candidate countries for special follow up include Austria, Denmark, France, Germany, Latvia, the Netherlands, Poland, the UK and Sweden - the list remains open

Recent Developments on ECL– Initiatives in MS

- Revision of Copyright Act in:
 - France [primary legislation]
 - Germany [primary legislation, first basket]
 - Sweden – revision completed – await a bill
 - UK [primary legislation]

Recent Developments on ECL in Sweden

The Special ECL

- The amended and new provisions on ECL aim to:
 - facilitate rights clearance in connection with various forms of mass use of works and performances protected by copyright
 - so as to make the great repertoire available in organised form and on terms that are acceptable to the users, authors and other rightholders.
- Cp. http://www.wipo.int/meetings/en/2010/wipo_cr_lic_ge_10/program.html

Recent Developments on ECL in Sweden

The Special ECL

- The National Library of Sweden negotiating a PPP:
 - digitization of 5 000 000 newspaper pages
 - approximately 50 000 000 copyright protected works
 - Special ECL is a prerequisite
- The National Library's intent is to provide Digital Interlibrary Loans based on the ECL for libraries and Archives – Cross border availability is a priority
- The Library and the Finnish National Library:
 - digitise newspapers of mutual interest first published in Sweden in the Finnish language
 - To make available in both MS – cross border availability
- Loose end - Cross border solution