



Faculty of Law



SFU den 3.6.2013

”Aftalelicens – muligheder og problemer”

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Sted og dato (Indsæt --> Diasnummer)
Dias 1



What are ECL's?

Extended Collective Licenses allow for agreements made by organisations of authors which represent a “substantial amount of authors” to have effect also for authors who are not members of the association or in other ways bound by the association.



ECL in the DCA

- reproduction within educational institutions (DCA § 13) or by business enterprises (DCA § 14);
- digital reproduction by libraries (DCA § 16b);
- recordings of works in broadcasts for the visually impaired etc. (DCA § 17(4));
- reproduction of works of art which have been made public (DCA § 24a) (opt out);
- broadcasts by certain national Danish tv companies (DCA § 30) (opt out);
- broadcast by certain national tv companies of works in their archives (DCA § 30a) (opt out);
- cable retransmission to more than two connections (DCA § 35); and
- “other forms of use” within specific areas covered by an agreement between an organisation which represents a significant number of authors and users (DCA § 50(2) (opt out).



§ 13: Reproduction within Educational Activities

- 1) For the purpose of educational activities copies may be made of published works and copies may be made by recording of works broadcast in radio and television provided the requirements regarding extended collective license according to section 50 have been met. The copies thus made may be used only in educational activities comprised by the agreement presumed in section 50.



§ 50: Common Provisions on Extended Collective License

- (1) Extended collective license ... may be invoked by users who have made an agreement on the exploitation of works in question with an organisation comprising a substantial number of authors of a certain type of works which are used in Denmark.
- (2) **Extended collective license may also be invoked by users who, within a specified field, have made an agreement on the exploitation of works with an organisation comprising a substantial number of authors of a certain type of works which are used in Denmark within the specified field.** However, this does not apply, if the author has issued prohibition against use of his work in relation to any of the contracting parties
- (4) Rightholder organisations which make agreements of the nature mentioned in subsection (1) and (2), shall be **approved by the Minister for Culture to make agreements within specified fields. ...**
- (5) The Minister for Culture stipulates detailed provisions on the procedure for approval of the rightholder organisations, mentioned in subsection (4).



Challenges

- Legal (the Berne Convention)
 - Formalities
 - The three-step-test
 - National treatment
- Organisational
 - Representativity
- Regulatory
 - Control
- Success
 - "System Export"
- Mental
 - Professor Rognstad has described as a "*mantra*" of Nordic copyright legislation that ECL-Rules are by definition "good" and uncontroversial as far as the international rules on limitations etc. are concerned
 - Infosoc.-Directive, Point 18: "A modality of rights administration"



Formalities

- Article 5(2) the “enjoyment and *exercise*” of copyright “shall not be subject to any formality”.
- Reviewers comment: “[If] individual exercise of the copyrights is subject to a formal prerequisite required by the State; why isn’t that a ‘formality’?”



Three-step-test

- BC Article 9(2) (WCT, Article 10; TRIPS, Article 13)
 - “Members shall confine *limitations or exceptions* to exclusive rights to (i) certain special cases which (ii) do not conflict with a normal exploitation of the work and (iii) do not unreasonably prejudice the legitimate interests of the right holder.”
 - Article 11*bis*: Compulsory licenses for broadcast rights allowed for



Are ECLs "limitations or exceptions"?

- Defining ECLs as "modalities of rights administration" etc. has not in itself any impact on the analysis
- Normally ECLs would *not* function as "limitations/exceptions".
- If however, ECLs limit exclusivity and the ability of authors to rely on their exclusivity then the mere characterization as the rule as an "ECL" does not bring it outside of the scope of the three-step-test.
- So: ECLs without opt out are "limitations"
 - and need to pass the test ...



General remarks on the interpretation of the three-step-test

- To simplify matters much two “schools” can be identified:
 1. The first school sees the test as a “limitation of limitations” and favours a narrow (“rigid”) interpretation of the test where in particular the three different steps are regarded as independent steps which apply on a cumulative basis, each constituting a discrete requirement that must be satisfied.
 2. The second school favours a rounder and more purpose-bound interpretation of the test.
- “The cultural background”:
 - It can be noted as a special difficulty that ECL-rules are till now only operated in the Nordic countries. This may cause problems to the application of the three-step-test in so far as the evaluation uses international bench marking to determine e.g. what constitutes a “normal exploitation” and what are the “legitimate interests” of the author.



ECLs and the three-step-test

1. "certain special cases"
 2. "normal exploitation"
 3. "no unreasonable prejudice of the legitimate interests of the author"
- Whereas the "specific" ECL-rules would seem to be consistent with international norms, this is not necessarily so for the *general* rule in CDA § 50(2).
 - According to the 2000-TRIPS Panel the requirement of "certain special cases" implies that limitations "should be the opposite of a non-special, i.e., a normal case" and "clearly defined and should be narrow in its scope and reach".
 - It could be argued that § 50(2) would not pass this test because of the broadness of the ECL-rule
 - *Schønning/Blomqvist*, p. 330: The test applies to § 50(2) and the "certain special cases-"step might be problematic.
 - On the other hand: Fair use in the US etc.



Organisational: Representativity

- § 50: An organisation comprising **a substantial number of authors of a certain type of works which are used in Denmark**
 - In practice:
 - "Indirect" representation accepted
 - A "substantial" amount does not mean a "majority"
 - Issues
 - How to achieve representativity?
 - Foreign rightholders
 - Competition btw organisations



Regulatory Control

- "Grund Frage"
 - To what extent are ECLs "special" compared to other monopolies / CAO's?
 - Copyright / members rights / competition law
- Institutional aspect
 - Competition law authorities or specialized agency?
- Issues
 - Foreign right holders
 - Multiple organisations
 - Right holders as members
- Practice (distribution)
 - Direct individual
 - Indirect individual (via member organisations)
 - Collective



System Export

- ECLs have been enormously successful in the Nordic countries!
 - Why don't we export the idea?
- Some cautions:
 - Issues of legality (BC)
 - The proliferation of ECLs in the Nordic copyright systems has fundamentally affected copyright law in unforeseen ways:
 - On the policy level: Since most problems with copyright protection can be “contracted away” general issues resulting from overprotection may be cloaked
 - Substantive law: The exclusivity system has been replaced with a liability system as the base line: This has put organisations in the driving seat instead of authors.
 - Cultural: The broader background to the success of ECLs would seem to be societies which have traditionally been based on a high level of organisation and trust and with a tradition for collective agreements
 - Is this found outside of the Nordic countries?



Read more

- T Riis & J Schovsbo:
 - 'Extended Collective Licenses and the Nordic Experience: It's a Hybrid but is it a Volvo or a lemon?' (2010) 33 *Colum J L & Arts* 471.
 - 'Extended Collective Licenses in Action", IIC 2012/930-950.
- J. Axhamn & L. Guibault, 'Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage?', Amsterdam: Institute for Information Law August 2011. Final report prepared for EuropeanaConnect.
- Peter Schønning & Jørgen Blomqvist: 'International ophavsret", 2011.



