

REPORT

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A16 Clearing rights, developing best practice guidelines for IPR clearance and instructional material

Report on D16b Best practice model contracts for pan-European access; D16c Best practice models for open or restricted access; and D16d Best practice workflow for clearing rights, digitisation and making available of 20th and 21st century literary works

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EODOPEN PROJECT SUMMARY

Libraries all over Europe face the difficult challenge of managing tremendous amounts of 20th and 21st century textual materials which have not yet been digitised because of the complex copyright situation. These works cannot be accessed by the general public and are slumbering deep in library stacks, as they are often out-of-print or have never even been in-print at all and reprints or facsimiles are out of sight.

The **EODOPEN** project focuses on making 20th and 21st century library collections digitally visible by **directly engaging with communities** in the selection, digitisation and dissemination processes. As leading partner, the University Library of Innsbruck, joined by 14 European libraries from 11 nations, has set itself the goal to make 15 000 textual materials digitally available and to reach more than 1 million people in Europe by 2024.

Among other goals such as building a common portal to display the project outcomes, EODOPEN aims to stimulate interest in and improve access to 20th and 21st century textual

material, including grey and scientific literature. EODOPEN continuously carries out social media campaigns in order to attract new audiences. Furthermore, libraries establish contacts with commemorative institutions all over Europe as well as with researchers and doctoral study boards, history associations and local publishing houses to ask broad audiences for their suggestions.

In collaboration with local institutions all project partners select hidden library treasures, **deal with rights clearance questions** and put new content online. Dissemination activities display the digital content via international channels.

In addition, EODOPEN aims to provide alternative delivery formats, especially adequate **for blind or visually impaired users**. An international survey asks a broad European public about the use of e-books. Evaluating the survey's outcome, the project broadens the scope to alternative delivery formats in order to fulfil the needs of **blind or visually impaired users**.

To promote best practice in rights clearance among the library community, EODOPEN provides handouts and tools to make 20th and 21st century books available beyond the project's lifetime. In this sense, project partners closely cooperate to develop an online tool for the documentation of rights clearance, especially suited for out-of-print and orphan works. Interactive workshops enquire about the needs when **dealing with rights clearance** questions in order to set up the tool by implementing the requirements of an international community.

ABSTRACT

This report explores the challenges and opportunities faced by European libraries in digitizing and providing cross-border access to copyrighted materials through the EODOPEN project, a collaborative initiative involving 15 libraries from 11 European countries. The project aimed to extend the EOD (Ebooks-On-Demand) service to include 20th and 21st-century primary source materials - “books from the library stacks “- while navigating the complexities of copyright laws, particularly in the context of the EU's Digital Single Market (DSM) Directive. Working Group 5 (WG5) was tasked with developing best practices for copyright management, emphasizing the potential of Extended Collective Licensing (ECL) mechanisms as outlined in DSM Directive Article 12. The report examines the limitations of national ECL schemes, which currently lack extraterritorial applicability, and suggests that reciprocal agreements or EU legislation may be needed to support cross-border access. It advocates for coordinated efforts, including sharing costs for pan-European and global models, pilot testing cross-border access, and fostering interoperability between national frameworks. It stresses the added value in providing a digital copy of a copyright protected work and other subject matter, means also providing a product workable for users to leverage modern technologies such as Text and Data Mining (TDM) and Artificial Intelligence (AI) applications. Commitment to the development of digital access services underscores libraries' pivotal role in fostering knowledge dissemination and scholarly research across Europe, bridging gaps and advancing learning in a compliant and innovative manner. The findings highlight the potential for innovative licensing models to achieve global library access, envisioning a future where technology and political will converge to make global knowledge accessible.

Statement of originality:

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

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1. Introduction

1.1. The library as a publicly funded institution

The mission of the library generally is to ensure equitable access to collections for a range of users, emphasizing inclusivity and accessibility. Libraries strive to meet users' needs on their terms, whether accessing materials in-person onsite or remotely digitally. As publicly funded institutions, libraries must balance offering high-quality, diverse services while efficiently managing its budget and resources including personnel.

The option of providing on-demand digital access to collections is a democratic method of providing access, potentially saving both the library and user time and resources while promoting environmental sustainability. The added value in providing a digital copy of a work means also providing a product workable for users to leverage modern technologies such as Text and Data Mining (TDM) and AI applications. Commitment to the development of digital access services underscores libraries' pivotal role in fostering knowledge dissemination and scholarly research across Europe, bridging gaps and advancing learning in a compliant and innovative manner.

1.2. WG5 work on copyright “best practices”

The project EODOPEN (eBooks-On-Demand-network Opening Publications for European Netizens) (2019-2024) is the Creative Europe program follow-up of the project eBooks on Demand (EOD) (2009-2014). In both projects, networks of national and research libraries have cooperated in the digitization of library materials, making the collections available to a broader public.

In the EOD project, a common service was developed – today a service provided by nearly 40 European national and research libraries and networks – in order to administrate on-demand digitization and delivery of public domain library materials. These materials are categorized roughly as primary source books from stacks collections produced until the end of the 19th century. These volumes are scanned and delivered to the user requesting the work for a nominal fee (a cost model with a starting fee and additionally nominal fee per scanned page), the administration of which is supported by University and State Library of Tyrol (University of Innsbruck). Upon delivery of the scanned book in pdf-format directly to the user, the source library then adds this pdf-file to complement the

resource information for the book in the main library catalogue. As the majority of EOD-produced materials currently consist of public domain works or works otherwise cleared for broad sharing, the EOD service provided by partner European national and research libraries is globally available to users anywhere in the world.

WG5 was additionally tasked with focusing on the complex circumstances of digital access across borders. Since experience in clearing rights for cross-border access was very limited within the WG5, much of the work done during the EODOPEN project period was necessarily focused on gaining a better professional understanding of what legal options exist for potentially providing access across borders. Very few libraries in Europe are at present in a position to gather the necessary expertise and resources to implement such mechanisms.

In the EODOPEN project, some 15 libraries from 11 European countries¹ collaborated to continue development of this Ebooks-On-Demand “EOD” service, with the goal of providing access even to more recent 20th and 21st century text-based materials resting in library stacks but still of public interest. These more recent library materials may broadly be considered to still be in copyright, are out-of-print or perhaps never have been published in print previously with no known reprints or facsimiles in existence. In order to digitize and make copies or otherwise provide access to new works not yet in the public domain, library professionals must first clear the rights for these works. The EODOPEN project aimed to find ways to make these types of library materials available to the broad public while at the same time doing so with full respect to current copyright rules. In addition, more accessible alternative delivery formats were examined, in particular those suited to mobile devices, with the aim at recommending fully accessible formats for inclusive usage by readers with disabilities. In this context it is relevant to stress the importance of technologies such as AI that can be used for inclusive usage by people with disabilities.

As primary objectives of Working Group 5 (WG5) were to enhance understanding amongst participants and peer library professionals on the scope of copyright laws as they pertain to library goals of providing access, the group culminated

¹ EODOPEN partners are (by country alphabetical order): University of Innsbruck (Austria) (coordinator), Czech Academy of Sciences Library (Czech Republic), Moravian Library (Czech Republic), Research Library Olomouc (Czech Republic), National Library of Estonia (Estonia), University of Tartu (Estonia), University of Greifswald (Germany), University of Regensburg (Germany), National Széchényi Library (Hungary), University of Vilnius (Lithuania), Nicolaus Copernicus University in Torun (Poland), National Library of Portugal (Portugal), Slovak Centre of Scientific and Technical Information (Slovakia), National and University Library, Ljubljana (Slovenia), and National Library of Sweden (Sweden).

knowledge to identify best practices for copyright management that might inspire libraries across Europe. Facilitating bettered access to library collections and thereby a wider dissemination of knowledge requires confident knowledge to do so within the permitted legal framework, ensuring that the access provided is in balance with creators' rights regarding the broadened access to their works. Sharing this knowledge fostered collaboration between national and research libraries across Europe and also included initiating new contacts with different types of stakeholders who are essential to new initiatives where cross-border access could be explored in pilot-form.

The WG5 group comprised senior library professionals specializing in collections management and user services. Few had formal legal academic background, expertise or regular access to legal counsel, which if not is daunting in itself requires at the very least that great care be taken in ensuring copyright law is optimally applied. Recognizing that many librarians lack the resources to stay updated on copyright law developments or access in-house legal support, the EODOPEN collaboration aimed to provide support for handling digital access inquiries as they are handled today in partner libraries. As outlined in the project application, one overall goal is to establish a common understanding of creators' rights regarding library collections and clarify permissible usage under current copyright laws. This initiative aimed to empower library professionals to navigate copyright complexities effectively, reducing anxiety and uncertainty in providing access to materials but not limited to only materials as requested by the EOD on-demand digitization service.

WG5 provided a collegial forum to share institutional best practices, boosting the confidence of library professionals both within the partnership and in broader national and pan-European contexts. This collaborative effort aimed to support librarians offering optimal service to users, ensuring that provided access did not expose their institutions to copyright infringement risks.

The EODOPEN project objectives and goals were defined and the grant contract signed in late 2018, with the actual start of the project set for November 1, 2019. Parallel to this, the new copyright law Digital Single Market Directive (“the DSM Directive”)² was adopted in April 2019, stipulating Member States implement the

² The Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, see <https://www.europarl.europa.eu/news/en/press-room/20190321PR32110/european-parliament-approves-new-copyright-rules-for-the-internet>. The final text of Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives

rules established in it by June 2021. Additionally, the COVID-19 pandemic 2020-2023³ was a period of much uncertainty in the European workplace which affected the general logistics of the project first outlined in 2019. The implementation of the DSM Directive into national legislatures was a lengthy, staggered process spanning some 36 months, resulting in with minor but still prevalent differences in interpretation from country to country. WG5 provided a platform for each partner country to gather expertise and organize national workshops (D15a) at its own pace – generally delayed compared to the original planned time frame from the project application’s description of work in order to follow the official implementation in each country respectively – to review the legislation, engage librarians in discussions about their country's specific application, and compare approaches and workflows with peers in the library community. Additionally, this forum facilitated the sharing of these approaches within the broader library context by organizing pan-European workshops (D15c) and included other stakeholders such as rights holders, collective management organizations, and various user groups.

Partners in the EODOPEN project were additionally tasked with performing rights clearance activities during the project's lifespan, with each institution committing to make available a minimum of 1,000 works each.

Furthermore, WG5 aimed to explore best practices for providing access to library collections across European borders, contributing to the EU's goals of cultural sharing and in line with the DSM-directive’s objective to harmonize copyright law and subsequently its interpretation. The work focused on cross-border access represents the WG5's most advanced and complex task on a legal-technical level. This complexity arises from the varying degrees of copyright clearance traditions and experience for the project partners involved, and again uncertainties regarding the territorial reach of the applied copyright law. To first identify legal technicalities of options for cross-border access to library materials and subsequently implement those findings in an actual EOD library workflow to effectively provide users abroad with access requires institutional commitment and pilot testing well beyond the scope of the EODOPEN project framework to define and apply resources to a business model to support it.

96/9/EC and 2001/29/EC [2019] OJ L130/92 is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0790&from=EN>. [All accessed 28 July 2024].

³ https://commission.europa.eu/strategy-and-policy/coronavirus-response_en

1.3. Scope of this report

This report outlines the comprehensive efforts undertaken specifically by the WG5 members and within the context of the EODOPEN project to understand, identify, compare, and provide forums for discussing best practices in copyright management while strategizing on possible models of application in order to provide improved access.

This report summarizes the findings of WG5 to aid member libraries and other libraries outside the consortium in order to promote long-term IPR policy solutions and inspire continued network-building for the realization of policy implementation. This report aims also to provide some feedback to the European Commission on practical examples of rights clearance activities at European national and research libraries today, how current laws are applied and some thoughts on how continued development in the area could be conducted.

Other parallel or overlapping efforts and initiatives made by other parties and with possible bearing on the WG5 objectives have in many cases been monitored by the WG5 but are beyond the scope of this report.

1.4. Methodology

Members for the working group were recruited from each of the EODOPEN partner libraries and the WG5 was formed, bringing together library professionals with diverse expertise in library systems, digital resource management, user services, and project management. Additional support from in-house legal counsel at partner libraries was added as needed. Roles and responsibilities within the working group were established, and the goals and scope of the work as outlined by the Activities and Deliverables in the EODOPEN project plan were reviewed.

A group email list was established for easy communication and sharing resources, literature and news articles of interest, links to research findings, case studies of interest, and parallel initiatives in progress on the same topics. The project wiki provided a platform for documentation of results.

Regular monthly working meetings were scheduled to structure and follow up on the collaborative work on the deliverables D14-D16 which mainly were planned, implemented and carried out in chronological order due to the increased complexity of the issues at hand, which additionally were to culminate in an understanding of what might constitute “best practices” for the sector.

Extended working meetings for WG5 were integrated into the latter half of the project's partner network meetings, these opportunities for in-person meetups were beneficial for the collaborative nature of the work.

Activity A14 ("Building up an internal knowledge database for rights clearance") was implemented and completed by WG5 at an early stage in the EODOPEN project duration, giving partner library professionals a solid base of knowledge with its survey of review of IPR limitations and applications current at that time.

Activity A15 ("Organizing preparatory workshops and hands-on-workshops for construction of best practices of rights clearance") was more outreach-oriented by nature. Part of the work required partners in WG5 to identify and approach experts, networks and varying types of stakeholders with a presentation of the EODOPEN objective and initiate dialogue. Email exchanges, web-based calls, and in-person meetings were arranged.

At the national level, the D15b (national hands-on workshops in each country) provided the format to structure open dialogue, identify and possibly explore any potential interest building relationships with new types of stakeholders. WG5 held working meetings to map out suggested format, suggested appropriate key issues to be covered in these national workshops. Each partner country was then responsible for the planning and implementation of their own workshop activity, respectively. The preparation for these national workshops began during the pandemic and finally were held throughout 2022 and fully completed by end 2023; some were web-based and some were in-person. Marketing of these events was supported by partner's colleagues involved in WG2. Progress on planning and implementation was reported during the regular monthly WG5 meetings, and findings were shared within the WG5 in a shared reporting template on the project wiki. The cumulative findings and testing of workshop formats gave WG5 more confidence in the next phase of A15 deliverables.

With the national workshops well underway, efforts focused more and more on gathering insights and identifying common challenges amongst WG5's growing map of stakeholder connections between EODOPEN partner countries, but also in other EOD-consortium countries not included in the EODOPEN project and collaboratively across EU-borders, additionally within the UK and USA. A number of activities in meeting with library professionals were arranged together with colleagues in WG2. Experts, networks and varying types of stakeholders in other sectors were identified, introductions were made for more first contacts and the stakeholders approached, existing relationships maintained. Introductory meetings were set up to describe EODOPEN objectives and to discuss ideas for

how bettered access to library collections might be achievable, how to start to incorporate making accessible more recent works still in copyright into the workflows for providing access to public domain materials, and what legal mechanisms might be required to do so while fully recognizing rightsholders' rights. In many cases it was possible to invite these new stakeholder contacts to participate in an open dialogue in the series of EODOPEN Europe-wide workshops, with the intention to gather all interested parties in an even broader exchange of ideas on the topic of "best practices" within copyright and how visions of bettered access might be realized. Format, themes, key issues and potential speakers were discussed during the regular monthly WG5 meetings, but the bulk of the planning, implementation, and handling of expenses was done by the partner who took initiative to host the event. Support to raise awareness and spread the invitation for participation at the events was made by WG5 partners but special assistance in marketing in appropriate channels was additionally provided by members of the WG2. The planning and implementation of deliverables of D15c (four Europe-wide hands-on workshops) were successfully completed the following activity details:

- "Digital Frontiers: Access to Library Collections through Cross Border Management of Copyright", 2021-05-28, online
- "Impact of the DSM Directive on Copyright Law in EU and Slovenia", 2021-09-28, Ljubljana
- "The Global Library – a Vision or Utopia?", 2023-03-14, side event at World Intellectual Property Organization (WIPO) Standing Committee on Copyright and Related Rights (SCCR) meeting, Genève
- "Steps Toward a Global Library – Copyright & Cross-Border Access", 2023-04-20, Paris
- "Copyright solutions: sustainable digital access to library stacks abroad", 2024-05-02, London
- "Remunerated cross-border access to research materials, EODOPEN...", 2024-06-13, London

During the period of hosting these Europe-wide workshops, EODOPEN enjoyed much exposure and drew considerable interest amongst new stakeholders. Exploratory activities such as fact finding and free exchange of ideas took place in various ways, web-calls and in-person meetings both formal and informal. At the same it became evident that the integrally related topics as defined Activity A16 with its deliverables D16b, D16c, D16d (best practices for model contracts for pan-European access, for open or restricted access, and for rights clearance workflows, respectively) could advantageously be addressed in the both the workshop setting but also in dialogue directly with stakeholders, rather than as separately conducted and unconnected inquiries. Consultations were made with experts invited to join WG5 meetings as needed. WG5 members were

additionally invited to participate in other network forums where similar work on copyright and cross-border access to library collections were on the agenda, activities which gave opportunity for knowledge sharing in both directions (that is, beneficial to EODOPEN, and beneficial to others). This report constitutes the final and joint reporting of the findings of these three deliverables together.

Post-pandemic, EODOPEN partners note increasing demand for remote digital access in library services generally, and it became clear to WG5 that more evidential input from users would be beneficial in dialogue with stakeholders to support answers to the question “why is this important to prioritize?”. To more clearly articulate the scope of the need for digital remote access to library collections across borders, and how improved access might impact research opportunities and the quality of research results, WG5 developed a global survey. A pilot version of it was conducted in one member country with satisfactory response and findings folded into subsequent ongoing dialogue with stakeholders and the final Europe-wide workshop dialogue, findings from which also support of the final three deliverable results here, D16b, D16c, and D16d. The survey is described more in detail under the heading 2. As a complement to the findings from the completed survey, numerous meetings both online and in-person were arranged with university professors of foreign language and culture to gather further input and better understand the needs of researchers and students at universities regarding needs for access to library materials abroad.

A suggested model for a pilot collaboration was developed in the WG5 which served as an example in WG5 dialogue, for how a national library in one country might enter into a Memorandum of Understanding (MoU) with a university library in another country with particular academic institutional interest in that first country’s main language and culture and perhaps additionally the ministries of culture, education and/or research in the respective countries.

As the work in WG5 progressed and the network of interested parties in discussing cross-border issues increased, permission was granted for WG5 to use project funding for activities taking place beyond the EU. Study visits for fact-finding and assessment of stakeholder interests and perspectives took place with libraries, universities and rights holders’ organizations in London (UK), Washington DC and New York City (USA).

The European Commission’s (EC) *Study on Copyright in distance education and research: exploring the role of copyright in facilitating access to digital collections*

*of libraries and other public interest institutions*⁴ was launched for the duration of 2024. WG5 sought contact with the consultancy offices conducting it, participated in in-depth interviews as well as the in-person and online validation workshops. An in-person meeting was additionally arranged with EC's Director General office for Communications Networks, Content and Technology (DG CNECT) leadership to describe project work and ideas for collaborations to demonstrate cross border application. The initial work in the EC study aimed to identify key challenges and solutions faced by cultural heritage institutions as well as learn more through practical examples about how these challenges ought to be prioritized; the work continues past the end of EODOPEN until year end 2024.

WG5 actively sought opportunity and was successful in sharing the library perspective on cross-border possibilities and engage in dialogue with various stakeholders about the legal-technical alternatives in a number of international forums. One notable even was the D15c event planned as a side-event to WIPO'S 43rd meeting of the SCCR⁵ in Genève. Networking opportunities through the American-based Copyright Society's only European satellite conference in 2023 provided numerous contacts with parties interested in sharing ideas about cross border access for later follow-up. Leadership at the International Federation of Reproduction Rights Organisations (IFRRO) has consistently been helpful in facilitating contacts with both national country representatives and European representatives for various creative industry rights holders' collecting societies to reach out about EODOPEN work, including promotion within the WIPO-IFRRO reprography project group in collaboration with the African Regional Intellectual Property Organization (ARIPO).

WG5 is proud to have been involved in the planning and partial sponsorship of a conference suitably slated as the project concludes, "*Digital Knowledge – The Library and Copyright in a Global Digital Economy*"⁶ hosted by the National Library of Sweden (NLS) partner in Stockholm in September 2024. This international conference may be regarded as a culmination of the extensive networking made possible due to the EODOPEN project and brought together as speaking contributors the leadership from the U.S. Copyright Office, Copyright Clearance Center (CCC), US Patent and Trade Mark Office (USPTO), EC's DG CNECT, IFRRO, Ministry of Culture in France, various rights holder organizations as well as both prominent academics from universities and legal experts. More or less all sessions incorporated a global dimension, in other words a cross-border

⁴ <https://www.visionary.it/wp-content/uploads/2024/05/Letter-of-support-Study-on-the-role-of-copyright-in-facilitating-distance-learning-and-research-final.pdf> (Accessed 8 August 2024)

⁵ https://www.wipo.int/edocs/mdocs/copyright/en/sccr_43/sccr_43_inf_1.pdf

⁶ <https://delegia.com/app/netattm/attendeepage/124850>

perspective on access to source material. One session in particular was dedicated to “*Cross-Border Access to Source Material for Research*”. Another one to “*Flexible Norms Facilitating AI in Research in Digital Economy*”. In summary the following was concluded or expressed:

- Article 3 of the DSM Directive was during the negotiations suggested to be revised to encompass CHI and the reason for this initiative was two folded:
 - o TDM is essential for research on a large digital library corpus and
 - o A national library’s AI-models serve as a way to transfer the full potential of its collection to the Commons, thereby contributing to the digital transformation of society, and ultimately supporting high-quality research and democratic development.
- The DSM Directive does not address the challenge posed to researchers and libraries regarding how to access source material across borders on a global scale, which is the relevant perspective since research does not recognize borders.
- Digital usage of text and other copyright protected materials in libraries contains huge potential for innovation, contributing to economic growth, but it also presents challenges.
- The task of policymakers to strike a balance between the exclusive right on the one hand and exceptions and limitations on the other, is a challenge in a rapidly changing world with regional differences as well as different needs depending on sectoral use.
- Comprehensive exceptions may impede right holders’ ability to exercise their rights. Narrow exceptions on the other hand may be less useful because they do not encompass the entire scope of research to be performed or diversified needs. In addition, exceptions take time to legislate and in the digital realm they rarely stand the test of time. From the user perspective exceptions may be less attractive since they demand the user to adapt to the exception
- It has become more evident than ever that the legislature cannot keep up with the rapid technological developments and its impact on copyright. Current systems of public policy and decision-making evolved alongside the Second Industrial Revolution, when decision-makers had time to study a specific issue and develop the necessary response or appropriate regulatory framework. The whole process was designed to be linear and mechanistic, following a strict “top down” approach. But such an approach is no longer feasible⁷ and Recital (3) of the DSM Directive confirms this:

⁷ <https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/>

“Rapid technological developments continue to transform the way works and other subject matter are created, produced, distributed and exploited. New business models and new actors continue to emerge. Relevant legislation needs to be future-proof so as not to restrict technological development.”

- How can the EU Commission, or any other policymaker, preserve the interest of the public at large while continuing to support creativity, innovation and technological development? What is the recipe for innovation? Some steps have been taken to provide a mechanism which facilitates an equilibrium from a social welfare perspective as well as flexibility – Article 12 of the DSM Directive. The recently published *Study on emerging issues on collective licensing management in the digital environment*⁸ suggests that could be the case:

“In general terms, particularly from a social welfare perspective, CLEE (ECL) reinforces the impact of collective management of copyright and related rights. CLEE strengthens the market power of CMOs, as a consequence of more complete market coverage.... CLEE amplifies the cost-saving rationale of collective management of copyright, resulting from a reduction in the number of transactions, standardisation of terms, economies of scale in the enforcement of rights and reduced search costs. Where non-membership is rarely a rightholder’s active choice, but rather results from transaction costs of registration or a lack of awareness, CLEE with a right to opt-out appears to be more efficient from a social welfare perspective than collective licensing relying only on explicit authorisations from rightholders.”

Digitization and mass utilization of text and other copyright protected materials require a solution which balances the aforementioned interests. In addition to carefully crafted exceptions, extended collective licensing (ECL) provide the flexibility, which the exceptions lack, whilst ensuring right holders the ability to exercise their rights and receiving fair remuneration. Could Article 12 on ECL be the advent of a new era in EU policy making on copyright? From a non-EU centric perspective, ECL can facilitate cross-border access without introducing legal fictions. Fair use as a vehicle to establish an equilibrium determined by a Court of Law which act as a policy maker is advocated by many. But Fair Use cannot enable cross-border access to source material nor enable the use of AI, Machine

⁸ <https://digital-strategy.ec.europa.eu/en/library/reports-collective-management-and-extended-licensing>

Learning (ML) and TDM across borders. Article 12 of the DSM Directive provide a flexible “tool”, although for some uses a compulsory licence would be preferred since many uses of AI and TDM will be of fundamental importance and an intrinsic part of many societal activities which cannot be based on negotiations. The challenge though is how to provide adequate compulsory licences which of course require legislation.

A draft of this report was written by WG5 members and shared for review and revisions in August 2024. Feedback was collected and incorporated in August – October 2024. The report was later submitted for formal peer review in October 2024.

2. User Perspective: survey on needs for access to library materials abroad

In 2020 the EODOPEN WG4 conducted two surveys on e-book users and on blind and partially sighted e-book users, respectively⁹. WG4s work has additionally included deliverables with educational materials with one module on copyright.

Post-pandemic, partner libraries note generally users’ growing expectations on library services to provide access to more materials in more accessible formats, remotely and more quickly. From February to May 2024, WG5 conducted a survey entitled “Exploring Researchers’ Needs for Access to Library Materials Abroad”.

As a complement to WG4’s findings on e-books usage, WG5 developed a survey aimed to gather comprehensive insights on needs of users with regard to cross-border access to library collections, including a comparison of physical inter-library loans (ILLs) and on-demand digitization of collections for usage across borders.

The survey was formed to reach a potentially global audience of researchers and university level students, where respondents could indicate the country where they are enrolled (any country), in which countries they seek library materials (any countries), and which languages (any languages) of publication are useful for them to gain access to. The objectives were to determine to what degree current library services like the on-demand EOD-service meet the needs of researchers and students at the university level, in gaining access to materials

⁹ See EODOPEN reports, D11.

held in collections of libraries in another country. Background questions about the user such as areas of academic interest, frequency of contact with and familiarity with library services, types of materials generally required and in which formats, and what types of uses the user applies to materials acquired digitally. Questions included whether access limited only to portions or extracts of works are sufficient or if entire works are consistently required instead. Questions also included feedback on physical ILL services, and the degree to which remote digital access as an alternative might be desirable, if it hypothetically was an option.

WG5 agreed that it would be advantageous for the study to be conducted first by one partner country, in doing so targeting a group of respondents abroad with particular interest in gaining access to that particular country's library materials, as a first pilot exercise to gather input. The NLS partner worked together with The Swedish Institute (SI), a public agency that promotes interest and trust in Sweden around the world, to locate suitable respondents. SI maintains a robust network of 200+ contact persons at universities and higher education institutions in some 34 countries where Swedish language, history, culture and other Scandinavian languages are offered. These contact points were invited to share the survey with researchers and students in their academic setting and encouraged to contact WG5 members upon interest in providing more in-depth reflections on needs with regard to library services across borders. Despite good efforts, the response rate was lower than anticipated, which limits the statistical robustness of the findings – until a later date, if other partnering countries are able to conduct their own series of the same survey, in which case the respondent pool may be broad enough to extract statistics. However, the responses received to date do offer valuable reflections and highlight some key trends and opinions that merit attention.

The results consist of collected data from 37 respondents who provided at least 50% of the questions. Most of the respondents were affiliated with academic institutions in Europe or North America at the doctorate or post-doctorate level and only a few were undergraduate. The respondents were interested in library materials published in mainly Scandinavian languages, Baltic languages, and English but in a few cases other European languages.

Only one respondent claimed that a portion or extract of a work was sufficient to meet their needs, the majority of respondents claimed sometimes it was sufficient but sometimes they required the entire work, and a third of respondents claimed that the entire work was consistently what they needed.

The vast majority of respondents made regular in-person visits and had additionally regular remote interactions with their main research library every month, and most felt they had basic-good knowledge of the range of digital services on offer. The most frequently needed types of materials were e-books and e-journals, followed by printed books, digital newspapers, printed journals, additionally printed newspapers and digital serials. About half of users felt accessibility of digital resources they needed abroad was difficult or very difficult. Once accessed, respondents collectively ranked the following types of uses applied to requested material as most desirable: download, view only, annotate/comment, copy/multiples, with only a couple indicating AI-applications or other.

While most respondents regularly requested ILLs domestically and generally were satisfied with those services, only about half had made requests for loans beyond their home country of academic affiliation. Comments on the regularity of use of these services, respondents remarked the long waiting times and costs related to ILLs, but that libraries often were unable to send the works or copies of the works requested.

All respondents indicated remote, digital access services would be desirable (mostly very much desirable) if that was an option, regardless current obstacles and barriers. The most prevalent reasons why that would be desirable were for global access and convenience, together with 24/7 availability. Additionally common reasons for that were costs savings, sustainability, and increased usage. Only a few respondents prioritized reasons of resource diversity and collaboration & sharing, while a couple cited digital usage added values and pandemic preparedness as important reasons.

When asked what kinds of impacts remote, digital access to the required library items would make on the outcome and quality of their research results, respondents indicated they expect depth of research, time efficiency, and access to expanded resources as the most important. Additionally, quality of citations, diverse perspectives, improved literature reviews, international collaboration, and continued learning and skill development were ranked generally high. Some respondents felt innovation & creativity, interdisciplinary aspects, support for varied research methods, career advancement, validation of results and general enhancement were important possible impacts.

Some general reflections on the low response rate are that it likely would have been better to conduct the survey during the middle of the academic year rather than in the last few weeks of spring academic term. A number of contact persons with expected particular interest in the topic who had received the email and

newsletter with information on the survey still had missed the information when contact by direct email or telephone, and more than gladly provided verbal feedback conducted in subsequent online or in-person meetings. Perhaps other methods of presenting the survey or providing some incentive could have added to broader participation. Most surveys were fully completed by respondents, indicating the length and complexity was within a satisfactory range for respondents to complete it fully.

3. Understanding Copyright in the Library Context

3.1. The Copyright Conundrum

Digitization has transformed our world. Information is made available over the Internet and we carry the world in our pockets. Digital access to knowledge by means of the Internet is possible in a wide range of forms and from numerous electronic resources, blogs, newspapers, radio, television, and more. This development is remarkable, to say the least.

The growth of information on the internet and unlimited access to it creates new opportunities. Generations of adults, children, and young people are now accustomed to gaining access to information and knowledge at any time with just the click of a button. On the other hand, the greater part of access to libraries is limited in terms of time and space – in the case of national libraries and research libraries, predominantly to the premises of these libraries during opening hours.

The commercial force behind this development is that of global, technology-oriented, American-based companies. Google and others have developed global business models, which further the development of various services. Unlike Google, the national and research libraries are limited to the country within which they operate. For the public at large, the possibilities offered by Google are sufficient much of the time, but any claim that Google gives access to the world's body of knowledge would be misleading.

This trend presents a great challenge to the national and research libraries. Is there any possibility whatsoever for the national and research libraries to perform the function which they have had for centuries? It is clear that digital access to knowledge is possible, so why do national and research libraries have such a sparse Internet presence? There are a number of reasons, but the primary

reasons are restrictions imposed in terms of copyright, as well as a lack of financing.

The EOD consortium with its nearly 40 national and research libraries and networks in Europe have created a business model for digital public availability of those books, which are not protected by copyright: anyone in the world can order a digital copy. The principle is one of digitization upon the request of the person who is interested in reading the book. During the foreseeable future, there is no financing readily available to European national and research libraries which enables mass digitization of complete collections on the same scale and using the Google model. Instead, the EOD consortium intends to focus on a user-controlled model, scanning per individual request. This type of model is cost-effective and focuses on user benefit.

3.2. The Infinite Web and National and Research Libraries

An exact quantification of all existing digital information is unknown. On the other hand, a collection in an analogue library is built on publications such as books, which are delivered to most national libraries pursuant to legislation governing legal deposits, which in turn provides a clear understanding of the available quantity of information. The legislation has not been without problems, but as compared with the digital world, which we have entered, the difference is striking.

This means that researchers, students, journalists, and other interested parties in society face a challenge in respect of their relationship to sources and criticism of sources. Sometimes a person can be satisfied using Google for research, which can lead to the risk of libraries becoming marginalized. How is the library to liberate itself from its inherent temporal and spatial restrictions, and thus be able to “compete” with Google and other similar parties? Public libraries, which primarily make current collections of books and other materials available, are not bound in time and space, provided the books have been published in electronic form. Publishers can consent to the library “lending” e-books to a certain extent. Universities and university colleges have a long history of acquiring licences from publishers and companies, which provide databases. Is it reasonable to assume that the physical collections of academic work do not increase, but rather instead shrink?

However, this creates a large blind spot. The parties, which make information and databases available, have no obligation to preserve digitally published material. When the information is taken out of commerce, it creates a hole. This is where the national library and research library comes into the picture.

To the extent possible, the national library and research library expands its collection with material which is published and distributed in analogue and digital form. Since other libraries will be increasingly advised to purchase subscriptions in order to provide researchers and students with access to information, the national library (with mandatory copy, legal deposit holdings) is increasingly becoming the only library in the traditional sense – a library with a physical collection of analogue and digital media. This development will be amplified as books, newspapers and more become available only in digital form. As a result, they will only be stored and, in many cases, exclusively available, at the national library.

Since the national libraries generally fall within the purview of the country's government, their mandate is limited to material, which is in the national interest. However, the mandate has always made clear that the collection cannot be limited to domestic material only. Acquisitions of foreign material are a recurring theme through history, and today's national libraries actively acquire foreign literature. However, the national library's ability to purchase (for example) foreign literature can never meet the needs of (for example) researchers. Is there any solution to this problem?

3.3. National Libraries and Research Libraries in the Age of AI - Artificial Intelligence (AI), Machine Learning (ML) and TDM

At the center of humanity has been a concept of the human mind's relationship to reality. Even if we humans have had the insight to understand that human reason to be limited, we have perceived ourselves as being the most capable of understanding the world. In the Age of AI this perception is challenged.

AI has by many said to be another means of freedom of expression, as much as the printing press. But AI is very different from the printing press. AI may be used to augment the human mind or even replace it. AI can be used by humans to understand reality, e.g., what humans have created, such as books, newspapers etc., but also other aspects of reality.

In the Age of AI there is an insight that we humans need AI to achieve better insight about reality. In some instances, AI is critical because without it we cannot even grasp some aspects of the reality. Languages is one aspect of reality.

We argue language is a profound aspect that define us as humans. No one is born into a language. You can move between languages. No one can claim to own a language, or claim copyright to one. In the near future languages will most likely change through the use of AI. When machines and humans become more and more integrated through the use of AI, it is of critical importance that library collections can be used for various kind of research and study also in cross-border situations.

Without doubt languages are a prerequisite for libraries: no language, no library. And to “read” what is in a digital library without AI is not possible, or at least not very meaningful. In cross-border research access to source material in another language may not be a challenge, as it is today, if AI is used to translate source material. AI may not only be used to structure source material but also make it much more accessible. This is very much true for persons with disabilities.

Once information is digital it is many ways the information as such that is useful for society and how each piece of information can together with other pieces of information be understood. And if the information has previously been confined to a physical format, it is by being digitized freed to be analysed together with other information. With millions and millions of pages being digitized, it is impossible for a human to grasp what can be found in a digital library. But with AI humans can understand reality that is not visible for the human eye.

National and research libraries alike hold large amounts of documents in their collections. TDM is essential for research on a large digital library corpus. AI-models serve as a way to transfer the full potential of the collections to the Commons, thereby contributing to the digital transformation of society, and ultimately supporting high-quality research and democratic development. But the potential is not without legal challenges. Digital use of text and other copyright protected materials in libraries contains huge potential for innovation, contributing to economic growth. But it also presents challenges.

We argue that AI is essential for a society in the digital realm. In our view, what cultural heritage institutions create through research is a “digital twin” of languages, or differently expressed a “digital tongue”. You could ask yourself if without such a digital tongue, a society is “digitally mute”, or for that matter “digitally blind” and “digitally deaf”? If what we suggest is true, could it be argued that AI is an existential issue. Could it be argued that a national AI model is a national infrastructure which no nation can be without? Is access to an AI model a fundamental right and a matter of democracy for any and all to have

access to their digital language? If the answer to these questions is yes, it has profound implications on future policymaking on copyright and libraries.

Since large language models find their corpus within the collections of a national library, the library is very much part of the digital transformation and the increasingly complex interrelationship across sectors and countries. This complex weave has been described in May 2021 by The Swedish Post and Telecom Authority in its comments on the Draft EU Regulation on AI submitted to the Swedish Government:

“The digital transformation is driven and shaped by deeply intertwined factors and processes linked to technology, infrastructure, innovation, intangible assets, privacy, ethics, security, law, international relations and geopolitics. The digital structural transformation is fundamentally borderless in an increasingly complex interrelationship across countries, sector and industry boundaries as well as knowledge and policy areas. To a large extent, this depends on the parallel and mutually reinforcing development of data, networks and new technologies as AI.”

The digital transformation is a complex weave, and we are all intrinsically linked across borders. So, what are the implications for a library, and especially a national library and a research library? Cross-border access to enable research on language models and research on source material is of vital importance. Unfortunately, Article 3 of the DSM Directive and its recitals are vague on many aspects of cross-border use.

Today, the words that exist in books can be more than simply read: they can be sliced, diced, and mined in ways never before imagined in order to extract limitless amounts of new knowledge through the application of advanced technologies like AI, ML and TDM. Libraries must be able to make themselves relevant in the digital realm through the use of AI, ML and TDM while at the same time complying with applicable legislation. This requires policy work and at the same time as much power delegated to stakeholders so they can themselves establish best practices within a given policy framework. To what extent should the legislator intervene in the market and by what means? These and other questions are addressed in this report.

3.4. Copyright

Copyright is territorial, that is the legislation on exceptions and limitations to copyright overall create geographically bound “silos” – that is, source material is confined to one jurisdiction because exceptions and limitations may only be

applied in the jurisdiction of the country which introduced the exception and limitation in its national legislation. There are exceptions though, for example if there is an international treaty on copyright enabling cross-border access or as in the EU “legal fictions” enable cross-border access under a certain exceptions and limitations to copyright. Creating these silos however fragmentizes research and vital information will not be accessed: as a consequence, research will be asymmetrical and less reliable for example using TDM in research with less than sufficient sets of data may prove to be not scientific. Collective licensing is a legal mechanism that is however not confined to one jurisdiction. Therefore, any attractive solution should enable cross-border access through collective licensing.

A library that wants to digitise its collections and make them publicly available over the internet must clear any copyright-protected works. Clearing one work at a time is not conducive to larger scale access. Hence, when a library wants to digitise large quantities of material and make it publicly available on the Internet, the library needs a collective licence. Historically, licences have only covered works of rights holders who have mandated a collective rights management organization (CMO) to represent them, which has excluded works authored by rights holders who have not provided such a mandate as well as so called “Orphan Works” (OW), meaning works for which none of the rights holders are identified.

In this context, it is important to go back several years to look at a major dispute in the United States between Google on the one hand, and publishers and authors on the other. Google had commenced comprehensive digitization of books in copyright at US universities without the approval of the rights holders. The (US) Authors Guild and the Association of American Publishers sued Google¹⁰ for damages, but the parties ultimately drafted a proposed settlement with inspiration from an unexpected source – Scandinavia.

The problem facing the parties was that it was not possible to identify all rights holders and obtain their approval for the digitization and making available to the public. In Sweden, however, this problem was solved more than 60 years ago by introducing the collective licence with an extended effect in the Swedish Copyright Act in 1963. Soon this licensing modality was introduced into all of Scandinavian, and as of now it is part of the EU Copyright Acquis. For the sake of simplicity, we will refer to the collective licence with an extended effect as extended collective licence (ECL).

¹⁰ Authors Guild, Inc. v. Google, Inc., Case 804 F.3d 202 (2nd Cir. 2005)
https://en.wikipedia.org/wiki/Authors_Guild,_Inc._v._Google,_Inc.

ECL appealed to Google, which, together with the Authors Guild and the Association of American Publishers, presented a proposed settlement. However, the judge rejected the proposed settlement; one reason for the rejection was that it was contingent upon amendment of the US Copyright Act. One requirement for ECL is that it is extended to non-mandated rights holders by law, and that kind of legislation did not exist in the US.

At the same time, a long-term discussion began in the EU regarding the problem of OW. One should ask why the EU and other countries have focused on OW for so many years instead of resolving the issue of mass use of the libraries' collections. How did it come to pass that the EC spent years on a process which focused on OW and which resulted in EU legislation (the Directive on certain permitted uses of OW) which did not enable the goal, mass use of library collections? The answer is that a mistake was made in defining the problem as OWs. The focus on OWs did for many years divert attention and a very significant and more important issue – the great number of rights, which must be cleared – was for some time lost. The question, which instead should have been answered, was how to clear rights, orphan or otherwise, in conjunction with mass use. The failure of the EU Orphan Works Directive to resolve the issue of mass use underscored the importance of effective systems for collective rights clearance. This is absolutely crucial to reach the goal of digital libraries.

At the beginning of 2010, the EC realised that the Orphan Works Directive, which was intended to be a solution to the problem of copyright and mass use, didn't solve the problem. Accordingly, the EC initiated a dialogue between the libraries in the EU and the rights holders. The dialogue addressed how books and scientific journals, which were no longer available in commerce, could be digitised and made available to the public – called “out-of-commerce works”. The dialogue led to a Memorandum of Understanding Key Principles on the Digitisation and Making Available of Out-of-Commerce Works (the MoU), which was signed in Brussels on 20 September 2011.¹¹ The purpose was to promote the implementation of legislation regarding ECL in the EU Member States and for the MoU to be viewed as a model for additional discussions which would facilitate agreements for the digitization of as many out-of-commerce works as possible. One could, in fact, already do this in the EU since EU copyright legislation

¹¹ Memorandum of Understanding Key Principles on the Digitisation and Making Available of Out-of-Commerce Works: <https://www.jipitec.eu/archive/issues/jipitec-2-3-2011/3180/mou.pdf>

provided legal support. However, from a political perspective, the MoU was necessary for countries to commence a review of their legislation.

Does this mean that what Google did was completely unimportant? Certainly not!, it opened the door to political processes, which now, more than 20 years later, have resulted in work in different nations to amend legislation and implement ECL and, in the EU that MoU has resulted in amended legislation in Member States. The MoU did however call (11) ...”*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 collective management organisations which enter into a license in good faith applying these key principles are legally protected with regard to licensed uses of works of rightholders who have been presumed to be within the scope of the license.*” As a result, the MoU has since then in essence been transposed into the DSM Directive, ensuring that publicly accessible cultural institutions and collective management organisations which enter into a such a licence are legally protected with regard to licenced uses of works of rights holders who have been presumed to be within the scope of the licence (Article 8-11 DSM Directive). In addition, the DSM Directive also include an article on ECL (Article 12 DSM Directive).

3.5. A Global Digital Library?

Among the best practises and pilot projects elaborated on below, one entailed that NLS digitised and provided material to the extent requested by researchers. This is also required in EOD’s endeavour to extend the existing service comprising of public domain works to include in copyright works. The pilots which provide access over the internet using streaming methods, requires copyright authorisation pursuant to a specific procedure: ECL. The natural next step is then to test the legal principles from a cross-border perspective, which, in time, will become a global perspective. Since the legal principles on which ECL is based have made inroads in the EU and a number of other countries elsewhere in the world, many countries share common ground on which a global library can be built. And even if ECL is not available in all countries, collective licensing is making inroads in countries where it previously had not been in use. In other words, the idea of a global digital library is a viable concept.

3.6. Overview of copyright law

3.6.1. International Norms; Exclusive Rights, Licensing, Collective Licensing, Extended Collective Licensing; Exceptions & Limitations

3.6.1.1. International Norms

International copyright norms are primarily governed by treaties and agreements facilitated by organizations like the WIPO including:

- Berne Convention¹²: Establishes the basis for international copyright protection, ensuring that works are protected in all member countries without the need for formal registration;
- TRIPS Agreement¹³: Administered by the World Trade Organization (WTO), it sets minimum standards for copyright protection and enforcement;
- WIPO Copyright Treaty (WCT)¹⁴: Addresses issues related to digital technology and the internet, complementing the Berne Convention.

3.6.1.2. Exclusive Rights and Licensing, Collective Licensing and Extended Collective Licensing

Copyright grants creators a bundle of exclusive rights, which typically include:

- reproduction right: the right to make copies of the work;
- distribution right: the right to distribute copies to the public;
- right of communication to the public (public performance right): the right to perform the work publicly;
- adaptation right: the right to create derivative works based on the original;
- public display right: the right to display the work publicly.

3.6.1.3. Exceptions and Limitations (“fair use” and “fair dealing”)

Copyright is an exclusive right which means it belongs to the rights holder, therefore a library will always need consent of the rights holder in order to make copies (reproductions) and give access to copies unless there is an exception or limitation. There is an exhaustive list of certain exceptions and limitations to balance the interests of rights holders and various public interests (users) elaborated below.

¹² Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979) (Authentic text) <https://www.wipo.int/wipolex/en/text/283698>

¹³ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) <https://www.wipo.int/wipolex/en/treaties/details/231>

¹⁴ World Intellectual Property Organization (WIPO) TRT/WCT/001 WIPO Copyright Treaty (WCT) (Authentic text) <https://www.wipo.int/wipolex/en/text/295157>

Exceptions and limitations allows limited use of copyrighted material without permission for purposes such as criticism, comment, news reporting, teaching, scholarship, or research, educational and library use, for example allows libraries to make copies of works for preservation, and other internal use, as well as make them available to the public.

The “Three-Step Test” is a framework used to determine the legitimacy of exceptions and limitations. It states that exceptions should be confined to special cases, not conflict with the normal exploitation of the work, and not unreasonably prejudice the legitimate interests of the author. These norms and rules ensure a balance between protecting creators’ rights and allowing reasonable use of copyrighted materials for the public good. In the US there is in addition to exceptions and limitations in the legislation also “fair use”

Fair use is a US legal doctrine that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances. Section 107 of the US Copyright Act¹⁵ provides the statutory framework for determining whether something is a fair use and identifies certain types of uses—such as criticism, comment, news reporting, teaching, scholarship, and research—as examples of activities that may qualify as fair use. Section 107 calls for consideration of the following four factors in evaluating a question of fair use:

1. Purpose and character of the use, including whether the use is of a commercial nature or is for nonprofit educational purposes
2. Nature of the copyrighted work
3. Amount and substantiality of the portion used in relation to the copyrighted work as a whole
4. Effect of the use upon the potential market for or value of the copyrighted work:

In addition to the above, other factors may also be considered by a court in weighing a fair use question, depending upon the circumstances. Courts evaluate fair use claims on a case-by case basis, and the outcome of any given case depends on a fact-specific inquiry¹⁶.

¹⁵ <https://www.copyright.gov/title17/92chap1.html#107>

¹⁶ <https://www.copyright.gov/fair-use/#:~:text=Section%20107%20of%20the%20Copyright%20Act%20provides%20the,of%20activities%20that%20may%20qualify%20as%20fair%20use.>

Marrakesh Treaty application

The Marrakesh Treaty¹⁷ aims to improve the availability and cross-border exchanges of certain works and other protected subject matter in accessible formats for persons who are blind, visually impaired or otherwise print-disabled.

The beneficiary persons under the treaty are those affected by a range of disabilities that interfere with the effective reading of printed material. They comprise persons who are blind, or have a learning, physical or visual disability that prevents them from reading and understanding printed material, or holding or manipulating books or other printed works (“beneficiary persons” under the treaty).

This includes works “in the form of text, notation and/or related illustrations, whether published or otherwise made publicly available in any media”, including audiobooks.

The treaty also recognises the role of authorised entities which may, on a non-profit basis, make accessible format copies of published works, for non-commercial lending or electronic distribution, as long as access to the work is lawful, making only those changes needed to make the work accessible, and supplying the copies only for use by beneficiary persons.

The treaty requires the parties to introduce an exception or a limitation to national copyright laws to allow the reproduction and dissemination of accessible format copies.

In addition, in order to facilitate international circulation of books available in accessible format copies, the treaty requires parties to allow the import and export of accessible format copies under certain conditions:

- a copy may be imported without rightsholder authorisation;
- accessible format copies can be exported by an authorised entity to a beneficiary person or other authorised entity for the exclusive use of the works by beneficiary persons.

On 13 September 2017, Regulation (EU) 2017/1563 and Directive (EU) 2017/1564 introduced into EU law the new mandatory exception to copyright rules, in line with the treaty. On 15 February 2018, Council Decision (EU) 2018/254 approved the conclusion of the treaty prior to full ratification.

¹⁷ Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled <https://www.wipo.int/wipolex/en/text/301019>

3.6.2. The EU copyright legislation

The EU copyright law consists of 13 directives and 2 regulations, harmonising the essential rights of authors, performers, producers and broadcasters. By setting harmonised standards, EU copyright law reduces national discrepancies, and guarantees the level of protection needed to foster creativity and investment in creativity. Harmonised standards promote cultural diversity and bring better access for consumers and business to digital content and services across Europe.

3.6.3. The EU *acquis*

The EU's regulatory framework for copyright and neighbouring rights (the *acquis*¹⁸) consists of the:

- Directive on the harmonisation of certain aspects of copyright and related rights in the information society ('InfoSoc Directive'), 22 May 2001;
- Directive on rental right and lending right and on certain rights related to copyright in the field of intellectual property ('Rental and Lending Directive'), 12 December 2006;
- Directive on the resale right for the benefit of the author of an original work of art ('Resale Right Directive'), 27 September 2001;
- Directive on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission ('Satellite and Cable Directive'), 27 September 1993;
- Directive on the legal protection of computer programs ('Software Directive'), 23 April 2009;
- Directive on the enforcement of intellectual property right ('IPRED'), 29 April 2004;
- Directive on the legal protection of databases ('Database Directive'), 11 March 1996;
- Directive on the term of protection of copyright and certain related rights amending the previous 2006 Directive ('Term Directive'), 27 September 2011;
- Directive on certain permitted uses of orphan works ('Orphan Works Directive'), 25 October 2012;
- Directive on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market ('CRM Directive'), 26 February 2014;
- Directive on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled

¹⁸ The *acquis* is the body of common rights and obligations that is binding on all the EU member states https://neighbourhood-enlargement.ec.europa.eu/enlargement-policy/glossary/acquis_en

(Directive implementing the Marrakech Treaty in the EU), 13 September 2017;

- Regulation on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled (Regulation implementing the Marrakech Treaty in the EU), 13 September 2017;
- Regulation on cross-border portability of online content services in the internal market ('Portability Regulation'), 14 June 2017;
- Directive on copyright and related rights in the Digital Single Market ('DSM Directive'), 17 April 2019;
- Directive on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes ('Satellite and Cable II'), 17 April 2019.

Three additional instruments (Directive 87/54/EC, Council Decision 94/824/EC and Council Decision 96/644/EC) harmonise the legal protection of topographies of semiconductor products. Moreover, the E-commerce Directive and the Conditional Access Directive also contain provisions relevant to the exercise and the enforcement of copyright.

The overall goal in the EU harmonisation efforts is to enable copyright protected goods (for example books, music, films, software etc.) and services (for example, services offering access to these goods) to move freely within the internal market.

3.6.3.1. The International Framework

Many of the EU directives reflect Member States' obligations under the Berne Convention and the Rome Convention, as well as the obligations of the EU and its Member States under the World Trade Organisation 'TRIPS' Agreement and the two 1996 WIPO Internet Treaties (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty).

In the last years the EU has signed two other WIPO Treaties: the Beijing Treaty on the Protection of Audiovisual Performances and the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired or otherwise Print Disabled.

Moreover, free-trade agreements, which the EU concluded with a large number of third countries, reflect many provisions of EU law.

3.6.3.2. Implementation of the EU framework

The EC monitors the timely and correct implementation of the EU copyright law and, in the last years, the Court of Justice of the European Union (CJEU) has developed a substantive body of case law interpreting the provisions of the Directives.

This has significantly contributed to the consistent application of the copyright rules across the EU.

3.6.3.3. Protection of authors' rights and neighbouring rights (the InfoSoc Directive)

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society¹⁹, also known as the InfoSoc Directive, is a key piece of EU legislation on copyright aimed at harmonizing copyright and related rights in the information society. Here are some of its main points:

- reproduction right: authors and neighbouring right holders (performers, phonogram producers, film producers, and broadcasting organizations) have the exclusive right to authorize or prohibit the reproduction of their works, whether direct or indirect, temporary or permanent, by any means and in any form;
- right of communication to the public: authors have the exclusive right to authorize or prohibit any communication of their works to the public, including making their works available in such a way that the public can access them at any time and place of their choosing;
- distribution right: authors have the exclusive right to authorize or prohibit the distribution of their works or copies of their works to the public.

The directive also outlines certain exceptions and limitations to these rights, such as for private copying, use for educational purposes, and use by libraries and archives.

The directive mandates the protection of technological measures used to prevent or restrict unauthorized acts in respect of works or other subject matter.

3.6.3.4. Application of exceptions and limitations for libraries (the InfoSoc Directive)

The InfoSoc Directive outlines several exceptions and limitations to copyright and related rights, particularly relevant for libraries. Here are some key points:

- reproduction for non-commercial purposes: Article 5(2)(c) allows publicly accessible libraries to make reproductions of works for non-commercial

¹⁹ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0029>

purposes. This means they can create copies of works without infringing copyright, provided these copies are not used for commercial gain.

- illustration for teaching and research: Article 5(3)(a) permits the use of works for the sole purpose of illustration for teaching or scientific research.
- publicly accessible libraries to give access to its collections: Article 5(3)(n) permits, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of publicly accessible libraries of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections.
- preservation of cultural heritage: the Directive also supports the preservation of cultural heritage by allowing certain uses of works and related rights subject matter by public institutions to preserve their collections.
- “three-step test”: any exceptions or limitations applied must comply with the three-step test outlined in Article 5(5). This test ensures that exceptions are only applied in specific cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.

These provisions aim to balance the protection of copyright holders’ rights with the public interest in accessing and using works for education, research, and cultural preservation.

3.6.3.5. Orphan Works Directive

Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works²⁰, the “Orphan Works Directive”, aims to promote the digitization of and lawful intra-EU online access to OWs (i.e. works such as books, journals, films whose rights holder is unknown or cannot be located) contained in the collections of publicly accessible libraries, educational establishments, museums, as well as in the collections of archives, film and audio heritage institutions and in the archives of public service broadcasting organisations across the EU.

The Directive requires the Commission to report on whether to expand its scope and assess the need for a proposal amending the Directive. To prepare the current Staff Working Document, the Commission relied on information from various sources, in particular the independent study on the application of the OW Directive, which is published alongside in a Staff Working Document submitted to the European Parliament, the Council and the European Economic

²⁰ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0028>

and Social Committee. The report concluded that at this stage, there is no need for a review of the Directive or to propose other measures. The Commission departments will continue to monitor the application of the OW Directive together with other relevant EU instruments for the digitization and dissemination of cultural heritage.²¹

3.6.3.6. Implementation of the Marrakesh Treaty in EU law

The Directive and Regulation for the implementation of the Marrakesh Treaty in EU law were published in the Official Journal on 20 September 2017. The deadline for Member States to transpose the Directive into national law ended on 11 October 2018. The Regulation entered into application on the 12 October 2018.

The Directive

Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society²².

The Regulation

Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled.²³ The Regulation provides for a copyright exception that permits the cross-border exchange of accessible format copies of certain works and subject matter that are ordinarily protected by copyright and related rights. This is for the benefit of persons who are blind, visually impaired or otherwise print-disabled. The Regulation will permit the cross-border exchange of copies made under the exception between the EU and third countries that are parties to the Treaty.

²¹ Report on the application of the “Orphan Works Directive” <https://digital-strategy.ec.europa.eu/en/library/report-application-orphan-works-directive#:~:text=The%20%E2%80%9COrphan%20Works%20Directive%E2%80%9D%20aims%20to%20promote%20the,of%20public%20service%20broadcasting%20organisations%20across%20the%20EU.>

²² <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L1564&from=EN>

²³ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R1563&from=EN>

3.6.3.7. DSM Directive

Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC²⁴, also known as the “DSM Directive”, has several implications for libraries, particularly in the context of copyright and related rights in the Digital Single Market:

- Out-of-Commerce Works (OOCW): the DSM Directive facilitates the use of OOCW by libraries and other cultural heritage institutions. This has its relevance for digitizing and making available works that are no longer commercially available.
- TDM: libraries benefit from exceptions that allow them to perform text and data mining on works to which they have lawful access. This is crucial for research and educational purposes.
- Public Domain Works: Article 14 of the DSM Directive ensures that works of visual art in the public domain remain freely accessible. This means libraries can use faithful reproductions of these works without facing legal challenges.
- ECL: the directive supports the use of extended collective licensing schemes, which can simplify the process for libraries to obtain the necessary rights to use works, especially for mass digitization projects.
- cross-border access: the directive aims to harmonize copyright laws across the EU, making it easier for libraries to provide cross-border access to their digital collections.

The DSM Directive has also significant implications for education:

- educational exceptions: the DSM includes provisions that allow educational establishments to use copyrighted works for teaching purposes without needing to obtain permission from the rights holders. This applies to all educational institutions recognized by a Member State, including primary, secondary, vocational, and higher education.
- digital and cross-border use: the Directive facilitates the use of copyrighted materials in digital teaching activities, including online and cross-border education. This is particularly important for distance learning and international educational programs.
- non-commercial purpose: the use of copyrighted works under these exceptions must be justified by a non-commercial purpose. This means that the materials can be used freely as long as they are part of the educational activities and not for profit.
- legal certainty: the Directive aims to provide legal certainty for educational establishments when using copyrighted works. This includes

²⁴ <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0790>

creating a “legal fiction” to ensure that educational institutions can use works in digital teaching activities without facing legal uncertainties.

3.6.3.8. Collective Licensing with extended effect

Out-of-Commerce Works (Article 8-11 DSM Directive)

The out-of-commerce works (OOCW) provisions in Articles 8-11 of the DSM Directive aim to facilitate the digitization and online availability of works in Cultural Heritage Institutions (CHIs) like libraries that are no longer available through traditional commercial channels. This is an attempt to create a framework that should allow CHIs to overcome the legal challenges around the digitization and dissemination of their collections. In order to allow CHIs to make OOCWs in their collection available online the DSM Directive introduces a two-tiered approach, that relies on licensing as a primary mechanism and a mandatory exception as a secondary (“fall-back”) mechanism. The licensing mechanism, based on ECL or a presumption of representation, is a solution that is already in place in some European Member States.

Article 8 mandates that EU member states provide a legal framework allowing CHIs like libraries, museums, and archives to digitize and make OOCWs available online. The two possible solutions are a licensing mechanism or, when there is no representative CMO that can issue such licences for certain uses and types of work, an exception to copyright. OOCWs are works that have never been in commerce or when the work as a whole is no longer available through “customary channels of commerce”. There is no limitation with regards to the type of work or other subject-matter. The provisions also apply to works that have never been in commerce and unpublished works. Member States are allowed to provide specific requirements to determine whether a work is OOC, such as a date before which everything is considered OOC (a cut-off date). Rights holders whose works are digitised and made available under these provisions will be able to opt out, meaning to request the “removal” of their works from what has been made available through the licence or the exception.

Article 9 addresses cross-border uses, ensuring that once a work is made available online in one member state, it can be accessed across the entire EU. This promotes wider dissemination, and access to cultural content.

The Article 10 requires member states to implement publicity measures to inform the public and rights holders about the use of OOCWs. This transparency helps in identifying and addressing any potential rights issues. A prerequisite is a workable database managed by the European Union Intellectual Property Office (EUIPO). Article 10 requires that information on OOCWS must be published “on a public single online portal” that is to be “established and managed by the EUIPO”

six months before the works themselves can be made available online by the cultural heritage institutions. This six-month pre-publication period is intended to ensure that rights holders who object to making available of their works have the ability to opt-out in line with Article 8(4) before their works are made available online. The functioning of the EUIPO portal will play a crucial role for CHI and rights holders alike. The portal will need to provide CHIs and CMOs will low friction workflows to publish the required identifying information and will need to automatically update them about opt-outs and other changes in the status of works for which they have provided information. The portal will also need to provide rights holders with a reliable, effective and trusted way to make use of their ability to opt-out in line with Article 8(4).

To put it bluntly, the OOCW scheme relies heavily on the functioning of the portal. In order to contribute to the objective of the Directive, the portal will need to integrate with existing workflows of the intended users (CHIs, CMOs and other rights holders), be able to process large quantities of incoming data, and become a trusted and persistent source of information on the use of OOCW and opt outs registered by rights holders. Whether or not sufficient funding is allocated to enable the mission of the portal is yet unclear.

Article 11 points out that stakeholder dialogue ensures that the implementation of these provisions is effective and takes into account the interests of all parties involved, including rights holders and CHIs.

Overall, the OOCW scheme is a novelty and much emphasis is on IT-infrastructure as well as what constitutes an OOCW. The latter is not entirely clear and potentially a question that has to be resolved by the ECJ.

ECL (Article 12 DSM Directive)

Article 12.3 of the DSM Directive, focuses on collective licensing with an extended effect. This provision allows Member States to introduce measures that facilitate the licensing of works by CMOs even for rights holders who have not explicitly authorized the CMO to represent them, and specifies:

- ECL allows CMOs to enter into licensing agreements that can be extended to cover the rights of non-member rights holders. This is particularly useful in situations where it is impractical to obtain individual permissions from every rights holder;
- for the ECL to apply, the CMO must have a legal mandate or be presumed to represent the rights holders who have not authorized the organization. This ensures that the CMO operates within a legal framework that protects the interests of all rights holders;

-
- the directive emphasizes the need for transparency and fairness in the operation of CMOs. This includes clear communication with rights holders about their rights and the terms of the licensing agreements;
 - Member States have the discretion to implement these provisions in a way that suits their national legal systems. This flexibility allows for the adaptation of the ECL model to different cultural and legal contexts within the EU.

3.6.4. Selection of countries outside the European Union / EFTA

ECL has made inroads into copyright legislation outside of the EU. Below some remarks on the developments in respect of collective licensing and ECL in Malawi, United Kingdom and United States.

3.6.4.1. Malawi

Article 58(3) of the Copyright Act of Malawi reads inter alia:

“A collective license agreement permitting the use of works of authors represented either directly or through their associations by the Society, representing, as confirmed by the Minister, a substantial part of the authors concerned whose habitual residence is in Malawi, shall, subject to the terms and conditions of the agreement, extend to the use of works of authors whom the Society does not represent.”²⁵

The Article further specifies that the ECL applies to reproduction ‘for use in education’. It also sets out the conditions for its applicability.

The ‘Society’ referred to in the law is COSOMA (Copyright Society of Malawi), the combined copyright office and national multipurpose CMO and Reproduction Rights Organizations (RRO). The basis for COSOMA’s licensing of educational institutions, including secondary schools, vocational training centres and universities, is the exclusive rights granted to authors in the law, and mandates from authors and publishers and the ECL. Both reprography and certain digital uses are covered by the licence agreements.

3.6.4.2. United Kingdom

In the UK there are several CMO:s and they operate under mandates and also in combination of mandates (collective licensing) and exceptions and limitations. To address the outsiders CMOs have included in their licence schemes indemnity clauses. This is not unique for UK, but a common practice all over the world. But the issues related to outsiders have come much more in focus in the digital realm. The British government introduced ECL into UK copyright law in 2013 as

²⁵ https://malawilii.org/akn/mw/act/2016/26/eng@2017-12-31#part_VI_sec_58

part of the Enterprise and Regulatory Reform Act (The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014 UK Statutory Instruments 2014 No. 2588 Regulation 4)²⁶. This was in part in recognition of the fact that collecting societies had for decades been offering licences that included the work of non-members. If a collecting society is granted the right by government to operate an ECL non-members can receive individual remuneration (that is, royalty payments) as if they were a full member of a collecting society. The UK has introduced a general and flexible right for collecting societies to operate extended collective licences for many different purposes, as long as they can prove to government, they are sufficiently representative of the sector they operate in.

3.6.4.3. United States of America

Collective licensing is not a common feature in in the US copyright regime. The exclusive right is the rule and it is exercised by entering into contracts. In many cases mass usage of copyright protected works and other subject matter, are enabled by exceptions and limitations, for example compulsory licensing (terrestrial broadcasting). As outlined in the beginning of this chapter, ECL was considered as a solution for rights clearance in conjunction with the Google Case, a settlement. As a result of the case a mass digitization pilot program was considered (see further below). Some of the issues raised in the Google Case have arguably had their renaissance in the Hachette vs Internet Archive Case (see below).²⁷ ECL has also been mentioned as means to facilitate training of AI. Whether or not ECL will be part of future policymaking in this area, is still too early to say. Collective licensing exists and is managed by different CMO:s such as Artists Rights Society, Authors Guild, Copyright Clearance Center (CCC) and the American Society for Collective Rights Licensing (ASCRL). As mentioned above they all rely solely upon the exclusive right. As to exemplify how a CMO in the US operates, the operations of ASCRL is elaborated upon below.

The American Society for Collective Rights Licensing (ASCRL)

The American Society for Collective Rights Licensing ASCRL is a not-for-profit, tax-exempt, 501(c)(6) organization. ASCRL is governed by a Board of Directors and a Board of Advisors which oversee the management body. ASCRL has approximately 17,000 directly mandated members, and approximately 50,000 indirect members who belong through sister collecting societies. ASCRL is the largest visual material association in the United States.

²⁶ <https://www.legislation.gov.uk/ukxi/2014/2588/regulation/4>

²⁷ Hachette Book Group, Inc. v. Internet Archive, No. 20-cv-4160 (JGK), 2023 WL 2623787 (S.D.N.Y. 2023)

In 2024 the ASCRL board approved the initiation of two collective licences, one for the educational and business sector (internal educational use and internal business use). This licence follows the model of VISDA in Denmark and Rebrobel in Belgium. The second licence is for AI ingestion. ASCRL are in the beginning stages to implement these licences.

ASCRL administer visual material including photography, illustration, and fine art.

The US does not have a statutory, or legal framework, that requires a collective licence for visual material. Therefore, the US system relies upon common law copyright prohibitions against copying, and the licensee's desire for, and benefit gained from, the efficiency and economy of obtaining a blanket licence for a repertoire. Licensing is therefore voluntary for those seeking blanket compliance with copyright law.

The licensee's obligations to ASCRL are entirely contractual, under what is essentially a private contract for the repertoire. Member participation in the new collective licences will be on an opt-in basis.

The mandate from members is also a private contract matter and the detailed rules of participation in the licence and their distribution rights are agreed to by members who wish to participate. In addition to the direct member mandates (the opt-ins), sister collecting societies have with us bilateral agreements by which they may opt their members into the licence for USA educational institutions and for AI ingestion for machine learning on US based platforms.

ASCRL collaborate with other visual material sister collecting societies overseas for reciprocal distributions for the visual repertoire. Generally speaking, revenue for USA visual material embedded in books is collected by Copyright Clearance Center (CCC).

ASCRL has no legal power under the US legal system to provide licences to works for which the author has not provided a mandate. ASCRL cannot grant what they do not have; namely licences to works not authorized by the rights owner.

Mass Digitization Pilot Program

In 2011, the Copyright Office released Legal Issues in Mass Digitization: A Preliminary Analysis and Discussion Document to begin assessing ways to facilitate and support mass digitization projects while appropriately balancing the interests and concerns of copyright owners. The following year, the Office began an in-depth study of this issue and the related issue of OW. As part of its subsequent Orphan Works and Mass Digitization Report, published in June 2015,

the Office proposed the creation of a limited “pilot program” that would establish a legal framework known as extended collective licensing (ECL) for certain mass digitization activities. The ECL pilot program recommended by the Office would enable users to digitize and provide access to certain works for research and education purposes under conditions to be agreed upon between rightsholder and user representatives.

Because the success of any such pilot program depends on the voluntary involvement of both copyright owners and users, the Office published a Federal Register notice inviting public comment regarding the structure and operation of an ECL system. In response, the Office received over eighty written comments from a variety of interested parties. In September 2017, the Office submitted a letter to the Chairmen and Ranking Members of the House and Senate Judiciary Committees summarizing the comments received. The letter concludes that there currently is a lack of stakeholder consensus on key elements of an ECL pilot program and that any proposed legislation therefore would be premature at this time. The Office stands ready to assist stakeholders in developing a consensus-based legislative framework should Congress wish to pursue further discussion in this area.

Hachette v. Internet Archive Case

Hachette Book Group, Inc. v. Internet Archive, No. 20-cv-4160 (JGK), 2023 WL 2623787 (S.D.N.Y. 2023), is a case in which the United States District Court for the Southern District of New York determined that the Internet Archive committed copyright infringement by scanning and distributing copies of books online. Stemming from the creation of the National Emergency Library (NEL) during the onset of the COVID-19 pandemic, publishing companies Hachette Book Group, Penguin Random House, HarperCollins, and Wiley alleged that the Internet Archive's Open Library and National Emergency Library facilitated copyright infringement. The case involves the fair use of controlled digital lending (CDL) systems.

On March 25, 2023, the court ruled against the Internet Archive. In August 2023, the parties reached a negotiated judgment, including a permanent injunction preventing the Internet Archive from distributing some of the plaintiffs' books. In September 2023, the Internet Archive appealed the decision but it was upheld by the Second Circuit Court of Appeals which in a decision on September 4, 2024, affirmed the lower court rulings. The court stated "On the one hand, eBook licensing fees may impose a burden on libraries and reduce access to creative work. On the other hand, authors have a right to be compensated in connection with the copying and distribution of their original creations. Congress balanced

these 'competing claims upon the public interest' in the Copyright Act. We must uphold that balance here."²⁸

4. Approaches to copyright at libraries (CHI) & cross-border access

4.1. Copyright legislation in practice – the EOD consortium perspective

4.1.1. Collective licensing & outsiders in cross-border use

The challenge from a copyright perspective is what has been referred to as the outsiders, that is, the non-mandated right holders, as well as non-mandated right holders who cannot be identified (OWs).

For CMOs to represent a non-mandated right holder has in some countries not been perceived as possible. But there is a solution – collective licensing with a “help rule” – that is, ECL or the similar collective licensing in combination with an exception or limitation.

ECL prerequisites in law are CMOs being representative of the rights concerned, an agreement on the basis of free negotiations, both exclusivity and contractual freedom respected, and equal treatment.

The ECL agreement is by law made binding on non-mandated rights holders (the extended effect). But non-mandated right holders have a right to prohibit against the use of their works and the right to individual remuneration on the basis of the law. As a consequence, a library can give access to digitized books not running the risk facing individual claims from these outsiders or authors of OWs having to face criminal sanctions (legal certainty).

The DSM Directive address some of the concerns raised above, but not all. Further below, we will elaborate on to the extent the DSM Directive provide the solution to the copyright conundrum, referred to above, or if more policy work is still needed to meet the objectives set up by the EU Commission, but also the EOD consortium, to basically meet the requirements of scientific use.

²⁸<https://storage.courtlistener.com/recap/gov.uscourts.ca2.60988/gov.uscourts.ca2.60988.306.1.pdf>

4.2. Lessons Learned – Best Practices (“Pilots”)

Some 10 years ago, the EOD consortium began to explore how the service could be expanded to include copyright-protected books as well. To this end, a memorandum of understanding was reached through which NLS began work to see how such a vision could be realised. To this end the NSL has conclude several ECL pilots both in Sweden and in relation to cross-border use. Some of these endeavours are elaborated on below as well as initiatives by other libraries and cultural heritage institutions.

4.2.1. Cross-border accessibility of cultural heritage in digital environment

This chapter deals with opportunities to enable a wider cross-border accessibility of copyright protected cultural heritage materials. Without cross-border access, “silos” of resources are built – that is, source material is confined to one country and cannot be accessed by all potentially interested parties. Progress in this area is vital for society to fully enjoy the benefits of digitization across borders for all kinds of uses including extended collective licensing deals, use of the tools provided by the OW legislation and use of separate cross-border licensing deals.

4.2.2. Principal challenges from a copyright perspective

Parallel to the Google and Authors Guild/Association of American Publishers dispute, a discussion began in the European Union regarding the problem of OWs, which ultimately resulted in the Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of OW (the Orphan Works Directive). However, this piece of legislation failed to resolve the core issue of mass digitization of cultural heritage objects – inability to effectively clear rights, orphan or otherwise, in conjunction with mass use.

The European Commission then initiated a dialogue between the libraries and the rights holders to discuss how books and research journals, which were no longer available in commerce, could be digitised and made available to the public. The dialogue led to a Memorandum of Understanding, which was signed in Brussels on 20 September 2011.¹ One of the basic principles defined by the Memorandum is that libraries have to negotiate an ECL or ECL like licence, underpinned by legislation to provide the extended effect of the licence, if they desire to make available digitized out-of-commerce materials. The Memorandum did not lead to a significant uptake of this principle, however, it helped to soften the views of policy makers towards ECL, and now the principles of the Memorandum and ECL have been codified in the Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (The DSM Directive).

There was, however, a significant difference between the Orphan Works Directive and The Memorandum of Understanding. The Orphan Works Directive implies that any OW that is recognised as such should have its status recognized within confines of all the European Union Member States, ensuring a cross-border accessibility within the EU. The extended effect of the ECL, on the other hand, is usually confined to the territory of the country in which the ECL legislation is enacted. The MoU on out-of-commerce books and learned journals did not provide solution to the challenge of ECL and territoriality.

On 14 September 2016 the European Commission proposed for a Directive of the European Parliament and the Council on copyright in the Digital Single Market COM/2016/0593 final – 2016/0280 (COD). In Article 7-8, it proposed an ECL based out-of-commerce solution with true cross-border effect. The same year the NLS entered into an ECL pilot based on joint licensing with two CMOs, Copyswede (Sweden) and Kopiosto (Finland), to give access to television broadcasts in the collection of the NLS at Åbo Akademi in Finland.

These two avenues, that is joint licensing by CMO's in two or more countries providing an ECL, on the one hand, and true cross-border effect of the adopted DSM Directive Article 8-11, on the other, may be available for cultural heritage institutions which desire to make available their collection across the border. In addition to these two options, there is an additional solution, which is described below (Finland – Finnish National Gallery – Virtual National Gallery).

In addition to these two avenues, cross-border access based solely on the exclusive right and collective management is also an option, as is evident from pilots etc. in UK and US, see further below.

4.3. Rights clearance activities in practice at EODOPEN partner libraries

4.3.1. Two kinds of workflows

The practical reality of existing rights clearance activities at EODOPEN partner libraries today may differ widely, but all are made conditional on the resources available to do so, to serve the needs of users in the best way possible.

The first approach is more traditional and involves single object rights clearance with due diligence. It involves library professionals clearing rights for individual works in their collections using a systematic and documented method to identify and locate rights holders for each specific work as per the user request. It can involve direct negotiations directly with individual rights holders or their

representatives to obtain the necessary permission for the agreed uses, where contractual agreements may be customized according to the individual negotiations on terms, fees, and usage restrictions. This method generally is implemented upon the request of a user “on demand”, can be both complex and time-consuming since often it requires separate agreements for each work, and during a certain waiting period of processing the user generally must accept a degree of uncertainty on the outcome for gaining access. This workflow does however offer libraries more granular control over the terms and conditions for each cleared work, allowing for customized agreements based on specific needs.

The second approach involves libraries clearing rights for larger batches or entire catalogues of works in their collections by licensing. Library professionals enter into collective licensing contracts with CMOs or RROs. Works of non-mandated rights holders and OWs cannot be licenced under traditional collective licences but can be so in an ECL (which is the rationale behind the OOCW licence). These types of agreements can cover a broad range of works, including but not limited to books, and allow libraries to give access to use content within specified parameters. Fees may be determined based on a predetermined cost structure and/or based on usage statistics, types of use permitted, library size or other agreed-upon parameters. This method is implemented based on an anticipated future interest in users gaining access to the works in the collections, which means qualified users can immediately see what works are accessible and gain immediate access. This streamlined workflow keeps administration at a minimum by providing one-stop solution for access to a broad corpus of works.

In addition to rights clearance in some EU member states no CMO is capable to provide an OOCW licence and the exception for OOCW is applied, which is elaborated upon below.

4.3.2. Case examples

Below are provided some descriptions of the processes and practical solutions to right clearance and applying the exception for OOCW at a selection of EODOPEN partner libraries.

4.3.2.1. Partner in Slovenia

The National and University Library in Slovenia primarily digitised and made freely available works in the public domain or those for which the rights holders directly contacted the library and signed an agreement. Books digitised without resolving the copyrights were added to the Digital Library of Slovenia (dlib.si) but access was restricted to specific computers on the library premises.

During the EODOPEN project, which included books from the 20th and 21st centuries, the copyright clearance situation became more complex. Library professionals adopted an approach involving single object rights clearance with

due diligence. Copyrights for individual works were systematically resolved and documented.

Library professionals first sought information about all rights holders using the national catalogue (“COBISS”) and the physical books. All rights holders were documented, and the search for them commenced. This step involved determining if the publisher still existed and whether they held the rights, or if the authors themselves were the rights holders. Some publishing companies had merged with others or changed their names over the years, making it challenging to identify the correct publisher. It was also noted that the necessary copyrights were not present in the law before 2000. Publishers from that period, particularly in the first half of the 20th century, most likely did not hold all the required copyrights.

When it was determined that the authors held the copyrights, another complex step began: contacting them. In cases where the author was deceased, a diligent search was conducted. Sources that helped provide useful information included Google search, social media, full text search on the digital library, online graveyard searches, sites like MyHeritage, information from companies, institutes, researchers, and contacting courts or archives to obtain heritage documentation. Once all rights holders were contacted, the library signed agreements with each individual.

The OW exception was not covered by the library. In 2023, the library began implementing the DSM directive and preparing the first list of books to be uploaded to the EUIPO database. In March 2024, the first list was uploaded with 300 titles, and these works will be available in the digital library in September 2024.

By 8th August 2024, the library had signed almost 1300 agreements directly with copyright holders, some covering more than one book. The highest number of agreements signed for a single book were 23 and 17. The most agreements for one author covered 42 works. Only 8 units in the digital library have restricted access, while more than 1400 are in open access (around 340 of which are in the public domain). No fees were spent on copyright clearance; if fees were expected from copyright holders, the digitization was rejected. Public domain works are available to anyone, even cross-border; the exception will be for out-of-commerce works, which will be limited to Slovenian IP addresses.

4.3.2.2. Partners in Germany

Out-of-Commerce Works

Legal situation until June 7, 2021

Until June 7, 2021, a regulation for out-of-print works applied in Germany. A framework agreement between the federal and state governments on the one hand and the collecting societies VG WORT and VG Bild-Kunst on the other, set the remuneration/registration costs scaled according to year of publication. Important features:

- The regulation applied to works that had been published before January 1, 1966.
- The period for lodging objections before publication was 6 weeks.
- Periodicals were excluded from the regulation.
- The German Patent and Trade Mark Office kept the register of out-of-commerce works.
- Right holders can refuse consent at any time, even after publication. The work may no longer be made publicly available thereafter.
- The German National Library offered a very helpful licensing service for libraries
- The costs for the licensing/registration fee amounted to:
 - o 5 € for works published before 31.12.1920
 - o 10 € for works from January 1, 1921 to December 31, 1945
 - o 15 € for works from January 1, 1946 to December 31, 1965

In this way, the University Library of Regensburg was able to licence 246 works for the EODOPEN project by 07.06.2021.

Current legal situation

With the amendments to the Copyright Act (UrhG) and Collecting Societies Act (VGG) to the Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market has created a new legal situation for out-of-commerce works in Germany with the following characteristics:

- For information on out-of-commerce works, the European Union Intellectual Property Office (EUIPO) operates the Out-Of-Commerce Works portal.
- The period for rightsholders to object to a publication is 6 months.
- Right holders can refuse consent at any time, even after publication. The work may no longer be made publicly available thereafter.

A corresponding framework agreement between the federal and state governments on the one hand and the collecting societies on the other has not yet been negotiated for Germany. Therefore, German libraries are not yet able to publish out-of-commerce books under the new copyright law. This is a difficult

situation overall for cultural institutions in Germany that want to publish out-of-commerce works and severely limits the possibilities of the two German project partners in the EODOPEN project.

Orphan Works

In Germany, the legal possibility of publishing orphan works has existed since 2013. This was made possible by an adaptation of German copyright law to the EU directive 2013/28/EU. The prerequisite for this is registration of the orphan work in the Orphan Works Database, which is operated by the EUIPO. Whether a work is orphaned must be checked by the library with a diligent search. The search must be documented and this documentation must be retained. An annex to the Copyright Act contains a non-exhaustive list of sources that must be checked during a diligent search.

As the figures for the works reported in the Orphan Works Database show, this option is only used by a few memory institutions and for relatively few works.

The University Library of Regensburg has registered 86 main works and 12 embedded or incorporated works in the Orphan Works Database as part of the EODOPEN project.

Agreement with copyright holders

Since out-of-print works can no longer be licenced in Germany since June 7, 2021 and publication as an orphan work can only be used in rare cases, the German project partners focused on agreements with rights holders due to a lack of alternatives. In line with the public relations strategy of the EODOPEN project, we sought contact with regional historical, scientific associations or other organizations that have produced relevant publications. The associations take care of informing their members about the planned digitization and obtain the necessary approvals from the authors.

This approach involves a lot of effort, especially at the beginning, but also has some advantages:

- The organizations often self-publish their works so that no rights have to be cleared with a commercial publisher.
- The publications are often in demand, but are no longer available for purchase.
- The authors of these publications have a great interest in their work being more accessible and better received.
- Cooperation between libraries and regional scientific organizations is strengthened.

-
- Through word of mouth, other organizations become aware of the digitization services provided by the libraries and seek contact on their own initiative.
 - Since the rights holders' consent for publication is generally granted exclusively for the library that digitizes the material, the library can build up a unique digital collection. This means that even small and medium-sized libraries can provide an attractive digital service.

Workflow of the University Libraries of Greifswald and Regensburg

The University Libraries of Regensburg and Greifswald pursue a strategy of user-driven digitization. The libraries receive digitization requests in a variety of ways:

- Users can suggest works from the university library's collection for digitization using an online form.
- Requests for digitization also reach the library through informal channels, e.g. by email, phone, info desk, etc.
- When interlibrary loan requests are made, the library checks whether digitization is an option.
- The university's teaching staff have works digitized for their lectures.

Before digitization, the library checks whether the copyright requirements are met:

- Works published before 1875 are assumed to be in the public domain.
- For works published after 1875, the relevant persons under copyright law are determined and their data researched. In addition to the authors, other persons may be involved who, for example, contributed the image material.
- If all contributors died more than 70 years ago, the work can be published in public domain.
- If the work is still under copyright but is no longer commercially available, it can be licenced and published as “out-of-commerce”. However, this requires that negotiations with the collecting societies are successfully concluded.
- If no relevant information can be found about the contributors, a documented diligent search is carried out and the work can be registered as an orphan work and published after the deadline has passed.

4.3.2.3. Partner in Austria

Prior to the EODOPEN project, the University and State Library of Tyrol (UIBK) almost exclusively digitized and made available online²⁹ copyright free books from its holdings.

All books with a publication date prior to 1880 were digitised and made available online solely based on the fact of inspection of the publishing year. For all other books, a diligent search was conducted in order to find out whether the book was still copyright protected. Research concentrated primarily on finding creators' death dates. All findings were documented in an internal document and periodically the Integrated Authority File (GND)³⁰ was updated with the newly researched biographical data.

During the EODOPEN project the focus was shifted to books from the 20th and 21st centuries with a special attention on works which were created in the region of Tyrol. This marked a significant increase in time dedicated to researching creators' death dates as well as an increase in communication with creators and publishers as a good number of these books were still copyright protected. UIBK started to individually contact authors and illustrators for their consent to digitize and put their works online, but sometimes the team was contacted by local authors themselves who had heard of the digital library and wanted to make their books available there.

As soon as the rights holder or holders could be determined, individual agreements were signed with each interested party. If it was not possible to get hold of the current rights holder and the book qualified as "out of commerce", then UIBK registered the book in the EUIPO database for out-of-commerce works.

With the implementation of the DSM directive starting from January 1st 2022 cultural institutions in Austria were now allowed to make protected works from their holdings digitally available if the library signed an agreement with the Austrian CMO for literal works, Literar Mechana³¹, or if the work was registered as an exception. UIBK was the first Austrian library to register works in the EUIPO out of commerce database, and subsequently was also the first library to start a pilot project with Literar Mechana, signing an agreement covering 700 literary works (mostly dissertations from the own institution, but also single works and complete journals) from 1908 to 1993 for a flat-rate of 24.000 EUR. These 700 literary works played an important part in reaching UIBKs goal to make 1 000 copyright protected books available through our Digital library by the end of the

²⁹ Digital Library (ulb-digital.uibk.ac.at)

³⁰ https://gnd.network/Webs/gnd/EN/Home/home_node.html

³¹ <https://literar.at/>

EODOPEN project. The Digital Library contains a designated EODOPEN section³², where these 1 000+ books are available freely for all interested readers.

4.3.2.4. Partner in Estonia

The National Library of Estonia (NLE) collected proposals for books to be digitized and made publicly available, through in a shareable form on its website and Facebook page. Suggestions were also gathered from teachers and librarians due to their expertise in identifying books with higher demand. Additionally, information for the digitation of books was collected at the stands of the NLE pop-up library stands and during the various seminars. The NLE received 1,400 proposals, each of which was reviewed individually, and the workflow for making the Works available was as the follows:

Exclusion Criteria:

1. Works under copyright that have already been digitized and made publicly available with the permission of the authors or under copyright law exceptions;
2. Works under copyright and published or written abroad by foreign authors;
3. Works labeled with a Public Domain mark and had already been digitized and made available to the public;

All these three categories were excluded from further processing of the workflow.

Orphan Works

For works where the authors were deceased and the rights holders could not be identified or located, a diligent search was conducted to classify them as orphan or partially orphan works.

The Ministry of Justice of Estonia regulates the sources that are appropriate for conducting a diligent search. The library may make written inquiries to the Estonian Writers' Union, Estonian Publishers' Union, Authors' Remuneration Fund, and the Estonian Literary Museum.

Additionally, searches are conducted in relevant databases such as ERB, ESTER, VIAF, and ARROW. It is also permitted to perform searches in the population and inheritance registers in order to locate the rights holders.

Further searches were performed using Google, Geni, and the full-text search function of the digital library. Obituaries were sometimes useful, as they provided information on individuals to whom condolences had been expressed.

³²<https://ulb-digital.uibk.ac.at/topic/titles/4933761>

If the rights holders were not found, the results were recorded in library's documentation system.

After receiving approval from the Estonian Patent Office, the data of orphan works were uploaded to the EUIPO Orphan Works Database. The rights statement "In Copyright – EU Orphan Work" (<http://rightsstatements.org/vocab/InC-OW-EU/1.0/>) was added to the work in the joint library catalog. As a result, the orphan works were made available to the public in our digital library, DIGAR.

In the case of partially orphan works, the rights holders who were located, had to agree to make the work available to public. However, in both cases, downloading and printing were disabled.

Out-of-Commerce Works

The Out-of-Commerce Works regulation was incorporated into the copyright law in January 2022. In Estonia, there are no collective management organizations for authors of literary or visual art Works that can provide licence agreements with extended effect. Therefore, the exception allows cultural heritage institutions to digitize and make the following types of Works from their collections available to the public for non-commercial purposes, without requesting an authorization and payment of remuneration, under the specified terms:

- Books (works) created 50 years ago or earlier and no longer in commercial circulation.
- Serials/periodicals created 20 years ago or earlier and no longer in commercial circulation.
- Small print created five years ago or earlier and no longer in commercial circulation.

An explanatory letter from our Ministry of Justice specifies that if a reasonable effort has been made, works created later than these time frames, may also be considered out-of-commerce.

After the out-of-commerce works regulation came into effect, the NLE began selecting potential out-of-commerce (OOC) works from the EODOPEN proposals list.

The OOC works procedure at the NLE followed these steps:

1. Verification of the year the Work was published.
2. Confirmation that no identical edition has been republished.
3. Verification that the Work is no longer for sale.

The NLE imported the relevant data from the Estonian joint library catalog and conducted a reasonable search on Google, Estonian online bookstores, and publishers' websites. New editions, new formats, or aftermarket copies were not considered.

Once a reasonable search had been completed, the relevant data was prepared for bulk export into the EUIPO database for a six-month notification period. Rights holders could opt out of this process at any time before the copyright term expires by pressing the "OPT-OUT" button in the EUIPO database. If no OPT-OUT request was made, the materials were made available online in the digital archive, DIGAR, with downloading and printing disabled. These Works were marked with the rights statement "In Copyright"³³, and the joint library catalog indicated the date when the Work was uploaded to the EUIPO database.

Licensing

The licensing process could proceed once the rights holders of the copyrighted works were located through diligent search. Permissions were requested via email. The procedure became more complex when multiple text authors were involved in a work, or when the work included elements such as illustrations, photographs, or maps. In these cases, determine the rights, took additional time. Most authors granted permission to digitize and make their works publicly available for free.

Contacting publishers was sometimes necessary; however, in many cases, the works had been published years ago, and the publishers no longer held the copyright.

The licence fee depended on several factors, such as the importance of the work, the author's popularity, the year of publication, the number of pages, and the scope of rights being granted—whether the library could only make the work publicly accessible or also allow downloading.

The licence fees were agreed upon with the authors in advance, generally ranging from EUR 1 to 2 per page. For illustrators, the fee was based on the number of images, but this typically did not exceed 10% of the text author's fee for Works of fiction.

Once the licence agreement was concluded and documented, the work was digitized and catalogued, and after which the NLE could make the work available to public in the digital library. In most cases, the illustrators also granted

³³ <http://rightsstatements.org/vocab/InC/1.0/>

additional permission to use the images on social media as promotional material for the EODOPEN project. These works were marked with the rights statement "In Copyright"³⁴ and labeled with the name of the EODOPEN project.

In Summary

By August 10, 2024, 33 licence agreements had been signed, making 93 books available to the public. Free licence were granted for 367 books. A total of 130 orphan and partially orphan works were identified and made accessible. Additionally, 334 works were classified as out-of-commerce, and 190 designated as Public Domain. In total, 1 114 works have been made globally accessible through the EODOPEN project by NLE.

4.3.2.5. Partner in Sweden

ECL remote access pilots in Sweden

Because no concrete steps were taken under Licenses for Europe – a stakeholder dialogue convened by the European Commission in 2012 to enable cross-border access to audio-visual works – the NLS initiated in 2013 a study on applying ECL to enable mass usage of library collections on national and cross-border level.

In September 2015, the NLS entered into a memorandum of understanding regarding the principles, which would form the basis for an ECL agreement with the CMOs Copyswede (Sweden) and Kopiosto (Finland), in order to make cross-border remote access possible.

The NLS commenced a national pilot program to enable remote access to audio-visual works during 2015. The national pilot was expanded in September 2015 through cooperation with Åbo Akademi in Finland – with the aim of providing researchers and educators with digital access to the National Library's audio-visual materials and, ultimately, also to its printed materials. This cooperation was unique because the access is intended to occur across borders via remote access and will be based on extended collective licensing agreements. The MoU between the NLS and Copyswede and Kopiosto was followed by an ECL agreement.

Pilot contract for cross-border, audio-visual on demand

In the fall of 2016, the NLS entered a pilot agreement with the CMOs Copyswede and Kopiosto on behalf of themselves and on behalf of rights belonging to their member organizations and co-operation partners.

³⁴ <http://rightsstatements.org/vocab/InC/1.0/>

One of NLS's services is the Svensk Media Databas /Swedish Media Database (SMDB), a partly digitized database, consisting of audio-visual and audio media delivered to the NLS by virtue of decree. SMDB is available to researchers at NLS premises, but access to the content can also be given by inter-library loan. Here, inter-library loan means a remote ordering in SMDBs search service resulting in NLS staff copying the requested content to CD/DVD that is sent to the requesting researcher with traditional mail and that the researcher is obliged to handle in a certain way.

NLS ambition was to replace the described inter-library loan system. The intention was to create a system of making available over the Internet with a streaming method, which requires copyright permission. With the aim to create convenient conditions selected archives and libraries to be able to obtain such permission, the Finnish and Swedish Copyright Acts have respectively been amended with special provisions for ECL regarding making available of material in the collection of the archive/library.

The agreement covers the re-use of copyright protected contributions to audio-visual works included in Sveriges Radio AB's (presently Sveriges Television AB's and henceforth SVT's) in-house productions that have been broadcast for the first time in the 1960s.

The agreement covers rights of authors, performers and producers, which represents Copyswede's member organizations respectively and, by International Federation of the Phonographic Industry (IFPI) and the Film Producers Rights Association (FRF) as well as of SVT.

The agreement covers rights of authors and performers, which represents Kopiosto's member organizations. Through commission, the rights of these member organizations have been assigned to Copyswede and Kopiosto respectively. These latter have an agreement of mutual representation regarding inter alia for making audio-visual works available to the public for scientific research, which is the form of use that Kopiosto licences with this agreement. In addition, SVT, FRF and IFPI have assigned their rights to Copyswede.

In accordance with section 26 of the Copyright Act, the Ministry of Education and Culture approved Kopiosto on 20 December 2012 to act as an ECL organisation in this area on behalf of rights holders of audio-visual works, with the exception of the producers' special right (section 46 a) and the broadcasting company's right to television broadcasts (section 48).

For the period of the pilot agreement Copyswede and Kopiosto grant to the NLS the right to make available audio-visual works at the request of 40 researchers at Åbo Akademi (the recipient), through a special access service tied to the NLS Internet domain (the remote access service).

The parties agreed that the agreement, in respect of the use or part thereof that occur on their territory respectively, should be endowed with extended collective licensing effect to the widest possible extent in respect of works or other contributions of the kind which are granted by the agreement. Notwithstanding this, the rights holder has, in accordance with legislation and or agreement, a right to opt-out from the application of the agreement.

Pilot agreement, remote cross-border access books on-demand

A pilot agreement between the NLS on the one hand and organizations representing literary and visual rights, that is, the Visual Art Copyright Society in Sweden (Bildupphovsrätt), the Swedish Writers' Union (SFF), the Swedish Publishers' Association (SvF) and Copyright Society of Malawi (COSOMA) on the other was entered in the November 2018.

One of the main objectives with the pilot was to illustrate how ECL legislation has also been implemented in a country with a different legal tradition – Common Law – and eventually combined with Swedish ECL legislation and ECL agreements through joint licensing to show on conceptual level that cross-border access can be achieved between a country in the EU and a country outside of the EU, thus indicating ECL can enable cross border access on a global level.

NLS holds a large collection of books. NLS vision is to facilitate access to its collections on a global scale. The aim is to investigate the possibility to transform the existing national interlibrary loan system in exchange for digital access. The intention is to investigate what is required to provide access to digitized books over the Internet using the streaming method. Such access requires copyright authorisation pursuant to a specific procedure. In order to create practical conditions, which make it possible designated archives and libraries to obtain such authorisation; a specific provision has been introduced into the Copyright Act regarding ECL for the access described above.

By the term research is, within the framework of this agreement, meant scientific work conducted by PhD students and researchers with a PhD affiliated to an institution for higher education or a research institute at one (1) or two (2) universities in Malawi.

The pilot agreement covers reproduction and making available in Sweden of copyright-protected books published between 1940 and 1959. The source material (titles) to be included in the pilot has been published by a Swedish publisher and in the Swedish language. The pilot agreement covers licensing of rights vesting in authors of literary and visual material in the source material whose affected rights represents the organizations mentioned above.

For the period of the pilot agreement Bildupphovsrätt, SFF, SvF and COSOMA grant to the NLS the right to make the source material at the NLS available at the request of researchers, at one or two universities in Malawi (the recipients), through a special access service tied to NLS internet domain (the remote access service).

The parties agree that the agreement is accorded ECL effect in the broadest possible sense with respect to works of the type licenced through the agreement. Irrespective of the above-stated, however, affected rights holders may, in accordance with legislation and/or terms and conditions forth in the agreement, give notice of prohibitions against use.

It is noted that any time under the term of the contract members of Bildupphovsrätt, SFF and SvF can opt out and prohibit the use of parts the repertoire or in whole. One purpose of the pilot is to identify the relevant and adequate mechanism for such an-opt out to safeguard the interest of said rights holders and also minimize the transactions costs for all parties involved.

The contract is under the Swedish law (Copyright Act Section 42 A and B) and Malawi law Copyright Act 2016, and Section 58) accorded extended effect as to those rights holders not represented by Bildupphovsrätt, SFF and SvF based on mandates (the extended effect of the ECL).

National pandemic ECL schemes

Due to the COVID-19 pandemic, universities in Sweden decided that education and examinations should be conducted using online alternatives (distance education) from March 18th 2020. The same day the NLS initiated the negotiations of the National Emergency Licence Schemes³⁵ to enable, in principle, remote access to any and all documents in the library collections. As a result, five extended collective licence schemes were concluded Q2, 2020, providing online access to any and all newspapers, audio-visual works as well as musical works for research and education and exams; visual-art for research;

³⁵ News article: <https://press.bildupphovsratt.se/posts/news/klart-med-nodlicens-bilder-pa-kb-nu-tillgang/>

books for research and students writing their final thesis – however, no access to literature on the curriculum; manuscripts, diaries etc for research. Since the NLS has its focus on higher education and research the schemes did not provide access for the general public, with one exception, the ECL for newspapers.

4.4. Rights clearance activities in practice at other libraries (CHI)

4.4.1. Finland – Finnish National Gallery – Virtual National Gallery

An agreement – which may be considered a landmark case – was concluded September 30, 2014 between the Ministry of Education and Culture of Finland, Kuvasto (visual artists' copyright management organization), Kopiosto (an umbrella copyright management organization, representing photographers), and the Finnish National Gallery.

The objective of the agreement is the creation of a Virtual National Gallery, accessible worldwide, covering all works of Finnish visual artists and photographers contained in the collections of the National Gallery. In this virtual gallery, works are freely accessible to the public in the open information network and online. Within the scope of the agreement are approximately 1 000 visual artists or their heirs, and 11 000 works.

The agreement is based on the provisions on the ECL in the Copyright Act of Finland, and it thus is applied to authors who are not represented by the CMO. The non-represented authors and photographers have a right to prohibit the use of their works under the agreement. The parties of the agreement have received no prohibitions during the first years of application.

The scope of the agreement extends to all works of Finnish visual artists and photographers contained in the collections of the National Gallery, which are still protected by copyright. The agreed term covers the rights until the end of the term of protection. The National Gallery acquires the right for photographs specifically made for the virtual gallery.

The National Gallery receives through the agreement the right to make the works available to the public over the Internet, and to make the necessary reproductions of the works. The National Gallery admits to the public access to the web pages without payment of a fee. The Gallery may not transfer further any rights under the agreement.

The parties have observed in the agreement that private users are frequently using reproductions on their own web pages of works found in the web pages of

the National Gallery. The National Gallery has assumed the obligation to encourage the users to indicate on the Internet the name of the author, as well as the source of the works (for example, “from the collections of the National Gallery”).

The State (Ministry of Education and Culture) paid for the rights / licence a considerable lump-sum remuneration that covers all works within the scope of the agreement, for the remaining term of copyright protection of all the works. The National Gallery pays a lump sum for the new works yearly added to the collection. Kuvasto sees to that the remunerations are distributed to authors and photographers entitled to remuneration. Kuvasto applies equal treatment in the distribution of remuneration to all rights holders.

A similar agreement arrangement is being developed for the rest of the museums of visual art in Finland. Museums that are members of the Finnish Museums Association may join to this contractual arrangement. For the moment, 22 museums are parties to the agreement, and eventually 68 museums are eligible to join it. The rate of digitalization of works in Finnish museums is today 70%.

4.4.2. Norway - Bookshelf service (“Bokhylla”)

The Bookshelf service is a free service that gives users digital access to books published in Norway until and including the year 2005. The service is provided by the National Library of Norway (NB), and is based on an extended collective licensing agreement³⁶ with the Norwegian rights holder organization Kopinor.³⁷ As of today there are 250 000 available titles are made available on NBs web site for users with Norwegian IP addresses, however 400 000 titles in total will be made available. The regulation on cross border portability of online content services in the internal market will enable users to include and access the Bookshelf service, for example, if they are temporarily staying in another EEA country in connection with a business trip or holiday.³⁸ The service includes a wide range of works and not just literary works. For example, in several books there are musical works in the form of notes in songbooks, as well as illustrations and photographs. Furthermore, sound recording, film, etc. fall outside.

The Bookshelf service was first launched in 2009, and was considered a pilot project based on previous experiences with the so-called High North Project in

³⁶ <https://www.kopinor.no/en/licensing/national-library>

³⁷ Kopinor is Norwegian collective management organization, representing authors and publishers in a total of 22 rights-holder organizations.

³⁸ Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market.

2007. The High North Project consisted of collaboration between NB and Norwegian rights holders on digital access to literary works on the Internet. In addition to wanting to explore the opportunities offered by digitalization and the Internet in relation to dissemination of knowledge, the purpose of the project was to provide real experience with the use of digitized literary works on the Internet. Approximately 1400 literary works were made available in full text on the internet. Of these, 395 books and 248 journals were cleared of rights. In relation to rights clearance, one had to clear the use with individual rights holders to obtain consent to their work being published. Works by authors who were not represented by the rights holder organization fell outside of the High North Project.

The results from the High North Project provided the basis for a desire to discuss a continuation in an expanded form, and the first Bookshelf pilot agreement was signed in 2009 and covered approximately 50 000 books from the 1690s, 1790s, 1890s and 1990s. A new, permanent agreement in 2012 included books published up to and including the year 2000. In 2018, journals were also included through an additional agreement.

The Bookshelf service aimed at making available works by a very large number of rights holders, both for literary and other works represented in the relevant books. The experiences from the High North Project showed that digital dissemination of works on the internet leads to increased use of the works, and it was important to ensure that the rights holders received a satisfactory remuneration for the expanded accessibility. At the time, NB had legal grounds to digitize all works in its collections for preservation purposes, and to make the digitized material available via terminals in its own premises, cf. the Regulations to the Copyright Act § 1-3, third paragraph. However, to be able to make the works accessible on the Internet via the users' own computer, permission from the rights holders had to be obtained. Due to the large volume of works, individual right clearance was in practice impossible.

In addition to the challenges related to individual rights clearance of copyright protected works, another question was how to clear the rights of works from unknown authors, that is works whose rights holder cannot be identified or located (OWs).

The solution for NB was to enter into an extended collective licensing agreement with Kopinor, which made it possible for NB to make content available on the Internet from both members of Kopinor and rights holders not represented by Kopinor, irrespective of whether the author is known or if the work is on sale. Due to the fact that the effect of Norwegian statutory provisions on collective

licensing agreements is limited to Norwegian territory, the Bookshelf material could only be made available via NBs webpages for users with Norwegian IP addresses.

4.4.3. United Kingdom; Educational Recording Agency (ERA)

4.4.3.1. Educational Recording Agency (ERA)

On behalf of its members, UK's Educational Recording Agency (ERA) operates a licensing scheme for the recording and non-commercial educational use of television and radio broadcasts. Uniquely serving the UK education sector, ERA is one of a range of collecting societies which help copyright owners and performers derive an income from the licenced use of their literary, dramatic, musical and artistic works.

The ERA licence enables educational establishments to make recordings or copies of TV and Radio programmes for educational use. Licenced establishments can then create libraries or collections of broadcast recordings which can be used for teaching and learning. The ERA Licence also enables access to online or on-demand services such as All4 for educational use, in line with their terms and conditions.

If an educational establishment makes any use of recordings or copies of ERA's Members' rights for educational use, having an ERA Licence is a legal requirement. ERA grants licences to educational establishments covering rights that are recognised under two specific provisions of the Copyright, Designs and Patents Act 1988 (as amended). The two provisions are Section 35 (which deals with broadcasts and copyright works included in broadcasts) and paragraph 6 of Schedule 2 (which deals with performances that are included in broadcasts) - "s 35 provisions".

S 35 provisions allow for copying and other uses of broadcasts and copyright works and performances included in the broadcasts (whether television or radio) by educational establishments for non-commercial educational purposes; but the uses are not permitted if, or to the extent that, licences are available authorising the acts in question. Broadcasts under S 35 do not include programmes that are only available through streaming services. A programme has to have been broadcast at a specified, advertised time that is through linear broadcasting.

The ERA licence permits educational establishments to make or cause others to make copies of ERA repertoire within licenced ERA recordings and to enable the ERA recordings to be used for non-commercial educational purposes of licenced educational establishments.

Only “educational establishments” in the UK can take out an ERA Licence. Educational establishments are defined as schools (including independent schools) and other establishments specified by Orders of the Secretary of State under s 174 of the Copyright, Designs and Patents Act 1988. These Orders provide for Colleges of Further Education, Universities and Colleges of Theology and Higher Education to be classified as educational establishments for this purpose.

4.4.3.2. EU Roaming Pilot

During the pandemic ERA piloted access to the ERA Repertoire through the Box of Broadcast service (run by Learning on Screen) to students at UK universities who at that moment could not travel back to UK. The collective licence was extended to outside of UK based on the regulation on cross-border portability of online content services in the internal market ('Portability Regulation'), 14 June 2017.

The EU Portability Directive made it possible for Learning on Screen (LoS) to enable students to access to Box of Broadcasts (BoB) when travelling within the EU but this came to an end when the UK left the EU on 31st January 2020. Shortly thereafter the COVID pandemic hit and universities, like other educational institutions faced lockdown and were forced into a massive shift to online teaching. Many overseas students returned home or were unable to enter the country and thus offshore access to educational resources became a particularly critical issue for the sector. Teaching staff were concerned that parity of access for all students who were normally based in the UK would no longer be possible.

In the face of pressure from universities to allow offshore access to BoB to those students of normally based in the UK, LoS approached ERA about the possibility of extending EU access.

In light of the concerns of some ERA Members and PACT to the threat of cannibalisation of overseas revenues from offshore access, agreement was eventually reached with LoS to undertake a pilot study to allow carefully managed access to the ERA Repertoire through BoB to get a better understanding of the content teaching staff want their students to view as part of their studies. PACT agreed to the pilot and the Board provided its approval in April 2021.

Learning on Screen’s EU Roaming Pilot launched on 1st June 2021 and ran to 31st December 2021.

4.4.3.3. ERA Post Covid Pilot

After the EU Roaming Pilot came to an end in 2021, ERA launched a new pilot with LoS in the summer of 2023 under the terms of which access to BoB was extended – in limited form - to all off-shore students of British universities (distance learners and off-shore campuses), as well as UK-based students travelling overseas, although not based on Portability Regulation, but solely on the ERA collective licence (the ERA subscription). The requirement has been that the students are registered at a UK university which has an ERA subscription. This applies for both British students and foreign student alike. Their access is based on a secure network which they have access to while travelling abroad in certain countries. The secure access is the same as in UK³⁹. As with the EU Roaming Pilot, access is limited to playlists created by academics. Off-shore students cannot access the full repertoire available through BoB. The pilot will run to the end of July 2025.

4.4.3.4. Conclusions

In our view the ERA pilots have implications for UK now back in Horizon. We believe that if ERA would apply to be authorized to operate an ECL, the repertoire and usage could be expanded to other audiovisual works than broadcasts since the ECL legislation in UK does not exclude other audiovisual works. Access could be provided in the EU to UK broadcasts and other audiovisual works on the basis of joint licensing and ECL legislation, thus no agreement between EU and UK required. And on the basis of before mentioned licence scheme access could be provided in UK at universities to audiovisual material in CHI institutions in EU.

4.4.4. The United States of America

4.4.4.1. New York Public Library (NYPL)

Authors Guild provide New York Public Library (NYPL) with a collective licence to make available on the internet digitized books. The collective licence pertains to copyright of authors represented by Authors Guild. The collective licence does not include rights of publishers nor does it as an ECL encompass non-mandated rights holders nor OW. Non-mandated rights holders and OW consequently have to be excluded. Still the collective licence scheme is relevant since it could potentially enable access in the EU to the large number of books that has been digitized in the US.

³⁹ How can I use copies or clips of programmes? Clips and programmes can also be delivered off-site to students and staff in the UK by means of a secure electronic network. <https://era.org.uk/the-licence/frequently-asked-questions/>

4.4.4.2. ECL and cross-border access

As to the US, ECL does not at the moment seem as a probable path forward, but that might change in consideration of two developments. One is the *Hachette v. Internet Archive Case*⁴⁰ referred to above and the other is how training of AI is to be facilitated. Some stakeholders in the US advocate for ECL to facilitate training of AI, while other argue for traditional collective licensing. In the US there is already a significant corpus(es) of digitised books made available under a collective licence granted to NYPL by Authors Guild. The impediment of not having an ECL scheme in the U.S. though is evident, since books have to be excluded if the authors have not provided a mandate (“outsiders”) or cannot be identified (OWs).

As to embedded visual art the case could in part be even more complicated, since much of visual art are OWs. And we have not found that there is an exception in the US that could supplement a collective licence (Hybrid) nor that the fair use doctrine would be a viable approach. But even so, cross-border access between the US and EU Member State institutions should be possible under a collective licence based solely on the exclusive right.

As to the potential risks of infringing on outsiders and OWs rights, one could consider:

- the confined use: the user is a researcher or student at a university in the US, granted access to solely books by authors in the EU under an ECL: Considering the very limited use and the probably if not negligible friction with the primary market, in summery very little impact (risk) if any;
- the repertoire: in analogy with the in the ECL for the Finnish National Gallery, the risk pertaining to the making available of books by authors in the EU could be controlled by narrowing down the repertoire to, for example, Czech authors or works in the Czech language – in other words, providing the opportunity for both mandating right holders and as for the non-mandated rights holders to opt-out;
- the type of access (open/restricted): the access in the US is only by streaming and no permanent downloads, the risk would be even more reduced.

Therefore, access in the US at universities to books in the collection of the EOD consortium under an ECL ought to be possible and CMOs ought to be inclined to consider it. What also should be recognised is that this kind of access would not occur if the publishers make their catalogue available, thus the EOD consortium

⁴⁰ *Hachette Book Group, Inc. v. Internet Archive*, No. 20-cv-4160 (JGK), 2023 WL 2623787 (S.D.N.Y. 2023)

would only make a book available if it is not available in commerce. It could also be reasonable to expect that the scheme outlined above, would benefit not only the EOD consortium and universities in the US, but also right holders who can benefit for additional licence revenue.

If ECL would not be possible to facilitate access in the US to books in the collection of the EOD consortium, the consortium would have to rely as the New York Public Library (NYPL) does, on the exclusive rights and rights holders' mandates to licence collectively.

It is very likely collective licensing will have a prominent role facilitating training of AI in the US. If CMOs are to licence training of AI, they could as well provide a collective licence for libraries making available digitized books abroad, for example in Europe. Cross-border access would from a copyright perspective not be difficult, as long as the rights holders are willing to grant a licence. Also to consider as a factor, are the vast digital archives of books already digitized in the US. Thus, the transactions costs in the US are far less than in the EU.

5. Rights Clearance Documentation Tool (RCDT)

EODOPEN's WG6 was tasked with developing a Rights Clearance Documentation Tool (RCDT) with the primary objective to facilitate the documentation of copyright clearance procedures for library professionals, to give support mainly at those libraries where single object rights clearance takes place. A web-based application helps determine the copyright status of various materials. The RCDT allows librarians to build a comprehensive database of materials with established legal statuses. The early development process involved conducting surveys amongst project partners, taking into consideration national laws, and evaluating current interfaces and available platforms. The RCDT environment provides an organized and shareable space for documenting copyright clearance activities, including identifying OW and OOC works. The tool ensures that information regarding past clearance activities, such as consulted resources and officer IDs, are easily retrievable. It guides users through the stages of the rights clearance workflow. RCDT is designed to integrate with European Union Intellectual Property Office (EUIPO) database. It allows for automated data importation and supports the uploading of work descriptions to the EUIPO database using bulk load methods or API integration. One feature, the Out-Of-Commerce Data Packing Software (OOPS) enables partners to convert their data into an EUIPO-compliant format and upload it to the OOC or OW database. This software automates data conversion while allowing for manual task management.

6. Digitization of EOD libraries – policies, challenges and options

6.1. Digitization of cultural heritage – overall societal policies and objectives

Digitization has transformed our world and the cultural environment. Information is made available over the internet and we carry the world in our pockets. Digital access to knowledge by means of the Internet is possible in a wide range of forms and from numerous electronic resources, including Wikipedia, blogs, newspapers, radio, television, and more. The growth of information on the internet and unlimited access to it creates new opportunities. Generations of adults, children, and young people are now accustomed to gaining access to information and knowledge at any time with just the click of a button.

Cultural heritage institutions have been an invaluable part of human history, helping to support equal access to education and propagating culture over the centuries. However, the digital age has transformed information access in ways that few ever imagined. Massive amount of information is available for free online and easily searchable with search engines like Google, which means that the internet is replacing the cultural heritage institutions as the go-to sources for information.

As of 2019, 27 European countries have signed a declaration of cooperation on advancing the digitization of cultural heritage, vowing to work more closely together to better use state-of-the art digital technologies in addressing risks that Europe's rich cultural heritage is facing, enhancing its use and visibility, improving citizen engagement, and supporting spill-overs in other sectors.⁴¹ It notes, among other things, that emerging technologies such as big data, artificial intelligence and extended reality offer numerous possibilities to further process and use digital cultural heritage, and vows to mobilise national and regional networks to bring advanced technologies to enable innovative use of digitised cultural resources, knowledge extraction and more engaging experience of heritage content, enhance cross-sector, cross-border cooperation and capacity building in the sector of digitised cultural heritage, including supporting the capacity of heritage professionals to manage the digital shift by acquiring and developing digital skills and knowledge.

⁴¹ <https://digital-strategy.ec.europa.eu/en/news/eu-member-states-sign-cooperate-digitising-cultural-heritage>

There still is, however, a lot of untapped potential when it comes to effective collaboration among cultural heritage operators across borders. Since culture and identity can hardly be bound to the confines of national borders, cooperation is vital to jointly explore the regional history, culture and identity.

The countries and people in the EU have a lot in common, probably more than we realise in everyday run. Besides of shared geographic, political and business space we share a long rich history of a diverse cultural heritage, which to some extent is dispersed across the national borders. In the 21st century, we are all living even closer together, as in the digital world we are all immediate neighbours. There are hardly any borders in the digital space – save for legal issues regarding cross-border accessibility of materials protected by copyright. Good neighbours always care not only for their personal space but also for their immediate surroundings, for nurturing shared common resources. This principle should apply also for the digital space.

The demand for access to the cultural heritage is growing. Researchers in history, economy, culture, art, etc. need digitised material. Other public sectors (for example education) as well as private sector need digitised material. We are obliged to deliver. Therefore, providing cross-border access to books is possible and a necessity for the peoples all over the world.

As the cultural heritage sector faces increased pressure to digitise its physical collections and preserve recent heritage, including born-digital materials, to ensure long-term preservation of digital and digitised materials, and to create engaging, trustworthy and innovative digital products and services for different target groups, especially young audiences and persons with visual impediments, it is becoming increasingly clear that no institution – or country, for that matter – alone can be expected to tackle all these issues on their own.

The cultural heritage sector today goes much beyond the traditional conceptual frameworks, circles of experts or professional communities. Addressing innovations brought about by the globalisation, IT developments and mobility will be a valuable contribution to the cultural and historical integrity and joint human resources of the region.

Therefore, it is imperative to develop a sustainable network of cultural heritage institutions and professionals around the world to address these issues in cooperation, sharing their expertise and best practice, approaches and tools, and working towards new joint projects to expand their competence, share costs and

work towards developing cross-border access to books as well as other source material.

6.2. Key challenges and considerations

If EOD is to go from digitizing and providing access to public domain materials only to including in the service access to protected works in copyright, then solutions of the clearance of entire collections must be feasible. During the pandemic, there was incentive to quickly realize how best to meet the remote digital demands of the user.

Material in libraries, are essentially confined to the territory of the country, or even the premises of the library, with the exception of interlibrary loans. If libraries are “silos”, then research is fragmented and becomes asymmetrical. For education and research no territorial restriction is imperative and global access is desirable. If these objectives are not met, research will be fragmented and vital information will not be accessed. There is a risk of libraries being marginalized as researchers and student resort to commercial services such as YouTube which would have a negative effect on research and education and on society on the whole.

But libraries do not have to equal “silos” if material is digitised, remote access can be provided based upon consent from the right holder since no exception and limitation enable online access to entire collections of books etc.

Rights clearance of a library catalogue on an individual, work-by-work basis of single object rights clearance, is likely prohibitively expensive due to the staff cost involved in clearing each individual work. Many European libraries conduct this type of rights clearance, and of course, many of the partners in EODOPEN have been successful in their efforts and organisation of methodology to provide these services upon direct request of users, as current institutional strategy and copyright tradition in each country or region dictates. The European Commission has concluded in its policy making however that collective licensing is a more desirable solution since it enables cross-border access also vis-a-vis users outside of the EU and EFTA. As contracts are flexible – not ‘written in stone’ as exceptions and limitations – collective licences can adopt to changes in demand and technology. In addition, a contract enables also access to be differentiated, for example certain / some books to be excluded thus it is possible to avoid friction with the primary market if necessary – to avoid ‘the best the enemy of the good’.

The challenge is the outsiders and interoperability of different jurisdictions. The latter is as not only a challenge vis-a-vis users / libraries outside of the EU / EFTA, but also within the EU / EFTA. Any solution to the copyright conundrum must take this in consideration and basically enable access to any and all books, and other source material in a library, otherwise copyright will not support scientific research. As to usage and other uses, maximum access should be the goal and copyright should basically enable online access, although any solution should not go all for or nothing, because that would be promoting the best solution which could very well be the enemy of the good, i.e., a realistic and feasible solution. Also to be considered, is that libraries and for examples universities operate under different mandates, and the legal and administrative culture in government may differ significantly, which means the copyright regime must be flexible.

Since programmes of mass digitization lack funding any copyright regime must enable Public Private Partnerships (PPPs). In short, there is no one size fit all solution even though the copyright principles may be harmonized in the EU. This project is not tasked to look into the financing of digitization endeavours, still it requires further discussion and consideration for cross-border access at libraries to be materialized.

6.3. Overview of the options

If a cultural heritage institution wants to digitise its collection or parts thereof and make it publicly available over the internet, it must clear the rights of any copyright-protected works. While many European cultural heritage institutions conduct diligent rights clearing activities for one work at a time, it is an impractical solution when the goal is to make broad collections available. Since rights clearance of a library catalogue work by work is prohibitively expensive a collective licence is the solution. Hence, when an institution wants to digitise large quantities of material and make it publicly available on the Internet, it needs a collective licence.

The fact that a collective licence, and more specifically an ECL, basically enables access on the internet to any and all, does not imply that a library will be able to enter an ECL agreement for providing access for example, to any and all person in the EU. The reason for this is that there is a primary market for copyright protected works. In other words, a library providing the same copyright protected work online to the general public, for example a book, at the same time as the publisher does the same, will mean that the general public option will be either to pay for access – the publishers access – or not paying at all – the library access. It is fair to say that people would opt for the free of charge access,

leaving the publisher with deteriorating sales or perhaps none. Rights holders, for example publishers, will for this reason most likely not grant an ECL that would enable a library to compete with a publisher. An exception or limitation would never enable this kind of access, since it would not be possible to introduce such legislation. An ECL does though in principle enable rights holders to give access to any and all based on the access provided it does not cause market harm. For example, access to any and all books, with some few exceptions, was enabled by an ECL granted the NLS by the rights holders during the pandemic, where access was restricted to higher education and research and streaming only.

A contract, which is the basis for an ECL, is flexible – not “written in stone” as an exception and limitation, and the contract can be adopted to changes in demand and technology. The contract enables also access to be differentiated, for example certain / some books to be excluded, thus avoiding friction with the primary market.

So, the question whether access can be open or restricted is an issue that has to be addressed when a library negotiates an ECL.

7. Recommendations and ideas

7.1. From inter-library loans to digital and cross-border access

Physical inter-library loans (ILL's) services offered at European libraries make it possible to provide access to collections to users beyond their locally available library materials, including those located in neighbouring countries. Some materials such as rare, fragile or legal deposit materials in library collections may have ILL restrictions. The lending library delivers the work, and the borrowing library receives the work and delivers it to their user, additionally arranging for its return to the lender library. User eligibility is generally high for registered users at university libraries. Fees for ILL requests can however vary, with some institutions offering the service free of charge and others charging nominal fees. Considerable human resources are generally required in the overall handling of ILL's. Processing times for physical ILL's can vary widely and the physical transports be subjected to additional import or carrier fees.

No formula or definitive calculation of a cost-per-loan has been discovered by WG5 that identifies the summative internal costs incurred and resources

dedicated at a partner library, or other European research library for that matter, to process physical ILL's to users abroad, but the following areas are typically associated: staff resources for processing of requests and communications thereof measured in time and administrative resources, additionally fees for shipping and handling, insurance, customs and import/export. A study of the workflow of the resources involved at both the lending and loaning libraries, respectively, is desirable. What is the "real" total cost to libraries in time and money, to offer physical ILL's to users abroad, on a cost-per-loan basis? And for this physical ILL, what is the cost of lending the same library item a second time to the next user abroad? Comparatively, what would the alternative cost be, to instead clear the rights for the requested work for a fee, digitize the work, and offer the user abroad access remotely and digitally, as per the agreed-upon metrics? And for this remote, digital access, what is the cost of lending the same library item a second time to the next user abroad?

In the context of the WG5 regarding cross-border access, it has often been helpful to consider, how the EOD business model (on-demand digitization of works, "books in the library stacks", for a nominal fee paid by the initial user) might comparatively be considered an alternative for European libraries offering physical ILL's, to offer additionally protected works still in copyright to library users in neighbouring countries. The solution would be to define a business model which takes into account the cost for rights clearance in presumably ECL agreements with CMOs representing rights holders.

When negotiating ECL schemes it would not be required for each individual library in a partner country to negotiate such an agreement themselves, separately. The ECL agreement can be viewed as an infrastructure provided by for example a consortium, and a national library could be the one that negotiate the ECL agreement. Once the ECL agreement is negotiated, any and all libraries that qualify – all public libraries and a non-commercial entities) could use the ECL agreement to digitise and make books available to its patrons.

The licence fee would most likely be a flat rate for any and all books to be digitised under an ECL agreement. As a comparison, the NLS negotiates an ECL to give access to any and all audio-visual work in its collection – some 11 million hours – and the licence fee is a lump sum. The flat rate makes it easy to administrate the ECL. It should be noted that the fee for each and every one of the works could, if they had been priced individually – itself an impossible task – and would vary and in many cases be zero, considering the nature of the content and market value.

This consortium model is not only favoured by libraries, it is also preferred by CMOs since it reduces the transaction costs to a minimum, which in turn benefits the libraries because the licence fee can be kept low. .

7.2. Implications of the DSM directive on library best practices

The new Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (DSM Directive) has yet to be fully analysed in order to gain insight into avenues of further expanding cross-border access of digitised cultural heritage materials under copyright protection.

7.2.1. Out-of-Commerce Works

We have elaborated above on the copyright conundrum of non-represented (non-mandated) rights holders who are not or cannot be represented by a CMO, which is the rationale behind the OOCW licence and exception and limitation (Article 8-11) and ECL (Article 12).

In the DSM Directive, this issue is addressed in Recital 30 regarding to the so-called Out-of-Commerce Works :

“The particular characteristics of the collections of out-of-commerce works or other subject matter, together with the amount of works and other subject matter involved in mass digitisation projects, mean that obtaining the prior authorisation of the individual rightholders can be very difficult. This can be due, for example, to the age of the works or other subject matter, their limited commercial value or the fact that they were never intended for commercial use or that they have never been exploited commercially. It is therefore necessary to provide for measures to facilitate certain uses of out-of-commerce works or other subject matter that are permanently in the collections of cultural heritage institutions.”

According to the DSM Directive *“the cultural heritage institutions should benefit from a clear framework for the digitisation and dissemination, including across borders, of works or other subject matter that are considered to be out of commerce for the purposes of this Directive”* (Recital 30). This is reason for introducing the OOCW licence legislation in Article 8-11.

The DSM Directive states that *“All Member States should have legal mechanisms in place allowing licenses issued by relevant and sufficiently representative collective management organisations to cultural heritage institutions, for certain uses of out-of-commerce works or other subject matter, to also apply to the*

rights of rightholders that have not mandated a representative collective management organisation in that regard.” (Recital 31).

But what if it is not possible to obtain a licence? This scenario is also addressed in the DSM Directive (Recital 32):

“As the case may be the provisions on collective licensing of out-of-commerce works or other subject matter introduced by the DSM Directive might not provide a solution for all cases in which cultural heritage institutions encounter difficulties in obtaining all the necessary authorisations from rightholders for the use of out-of-commerce works. That could be the case for example, where there is no practice of collective management of rights for a certain type of work or other subject matter or where the relevant collective management organisation is not sufficiently representative for the category of the rightholders and of the rights concerned. In such particular instances, it should be possible for cultural heritage institutions to make out-of-commerce works or other subject matter that are permanently in their collection available online in all Member States under a harmonised exception or limitation to copyright and related rights. It is important that uses under such exception or limitation only take place when certain conditions, in particular as regards the availability of licensing solutions, are fulfilled. A lack of agreement on the conditions of the license should not be interpreted as a lack of availability of licensing solutions.”

One of the examples in Recital 32 of a situation when a licence cannot be obtained is where the relevant CMO is not sufficiently representative for the category of the rights holders and of the rights concerned. This example is relevant from a broader perspective, that is the requirement of a CMO to be sufficiently representative to be able to provide an ECL. The DSM Directive elaborates on this issue of principle importance (Recital 33). It says:

“Member States should, within the framework provided for in the DSM Directive, have flexibility in choosing the specific type of licensing mechanism, such as extended collective licensing or presumptions of representation, that they put in place for the use of out-of-commerce works or other subject matter by cultural heritage institutions, in accordance with their legal traditions, practices or circumstances. Member States should also have flexibility in determining what the requirements for collective management organisations to be sufficiently representative are, as long as that determination is based on a significant number of rightholders in the relevant type of works or other subject matter having given a mandate allowing the licensing of the relevant type of use.”

The DSM Directive leaves it to Member States to determine what the requirements for collective management organisations to be sufficiently representative are, as long as that determination is based on a significant number of rights holders in the relevant type of works or other subject matter having given a mandate allowing the licensing of the relevant type of use. It is likely that the result of Member States legislation and best practices will vary and as a result, it will be ultimately for the Court of Justice of the European Union to determine when a CMO is sufficiently representative.

It is important that existing best practices be taken in consideration when Member States implement the DSM Directive in this respect. Otherwise, we could end up with an interpretation, which could potentially have a very negative effect on ECL overall and result in lock-in effects since the exception for out-of-commerce works is not applicable for other than cultural heritage institutions. For example, a private partner in a PPP could potentially not be able to obtain an ECL, which would be a precondition for the PPP as such.

To support adequate best practice in the EU, CMOs ought to cooperate and learn from the more experienced CMOs. Moreover, this ought to apply for Member States in their transposition of the DSM Directive. We believe a CMO should be representative for the rights concerned regardless whether or not that is a literary work has as an author or a professional writer. The CMO should be representative if the organisation represents people who are authors regardless of their professional title or if they are not professional creators, merely amateurs. After all, the law does not distinguish between different kinds of works based on the kind of person who created it.

What kind of works and other subject matter could be made available under the OOCW licence and the exception and limitation? As we interpret the DSM Directive (Recital 37), it should be understood as all kinds of work permanently in the collection of the cultural heritage institution, including where they have never been commercially available. *"Never-in-commerce works can include posters, leaflets, trench journals or amateur audio-visual works, but also unpublished works or other subject matter, without prejudice to other applicable legal constraints, such as national rules on moral rights."* (Recital 37). Is it required that the work or other subject matter has been made available to the public with the consent of the rights holder? The DSM Directive is silent on this topic. Does that imply there is no requirement of such kind and that a CMO can licence OOCWs and other subject matter, which has been made available to the public, for example donated to the library to be made available for study and research?

The DSM Directive states that in addition to the requirement of the work and other subject matter to be OOCW, Member States may provide for specific requirements, such as a cut-off date (Article 8.5.2) *“in order to reflect the specificities of different types of works and other subject matter as regards modes of publication and distribution”* (Recital 37).

The idea that a work and other subject must be out-of-commerce for a cultural heritage institution to digitise and make them available is a novelty in the European Union law. The ECL scheme on which the OOCW licence is modelled, does not require works or other subject matter to be out-of-commerce. The background of the OOCW licence has been elaborated on above. The bureaucracy required when “operating” an OOCW licence is likely to prove to be cumbersome and costly. In the following, we quote in full the relevant recitals:

“(38) When determining whether works or other subject matter are out of commerce, a reasonable effort should be required to assess their availability to the public in the customary channels of commerce, taking into account the characteristics of the particular work or other subject matter or of the particular set of works or other subject matter. Member States should be free to determine the allocation of responsibilities for making that reasonable effort. The reasonable effort should not have to involve repeated action over time but it should nevertheless involve taking account of any easily accessible evidence of upcoming availability of works or other subject matter in the customary channels of commerce. A work-by-work assessment should only be required where that is considered reasonable in view of the availability of relevant information, the likelihood of commercial availability and the expected transaction cost. Verification of availability of a work or other subject matter should normally take place in the Member State where the cultural heritage institution is established, unless verification across borders is considered reasonable, for example in cases where there is easily available information that a literary work was first published in a given language version in another Member State. In many cases, the out-of-commerce status of a set of works or other subject matter could be determined through a proportionate mechanism, such as sampling. The limited availability of a work or other subject matter, such as its availability in second-hand shops, or the theoretical possibility that a license for a work or other subject matter could be obtained should not be considered as availability to the public in the customary channels of commerce.”

“(39) For reasons of international comity, the licensing mechanism and the exception or limitation provided for in this Directive for the digitisation

and dissemination of out-of-commerce works or other subject matter should not apply to sets of out-of-commerce works or other subject matter where there is evidence available to presume that they predominantly consist of works or other subject matter of third countries, unless the collective management organisation concerned is sufficiently representative for that third country, for example via a representation agreement. That assessment could be based on the evidence available following the making of the reasonable effort to determine whether the works or other subject matter are out of commerce, without the need to search for further evidence. A work-by-work assessment of the origin of out-of-commerce works or other subject matter should only be required insofar as it is also required for making the reasonable effort to determine whether they are commercially available.”

“(41) Information regarding the ongoing and future use of out-of-commerce works and other subject matter by cultural heritage institutions on the basis of this Directive and the arrangements in place for all rightholders to exclude the application of licenses or of the exception or limitation to their works or other subject matter should be adequately publicised both before and during the use under a license or under the exception or limitation, as appropriate. Such publicising is particularly important when uses take place across borders in the internal market. It is therefore appropriate to provide for the creation of a single publicly accessible online portal for the Union in order to make such information available to the public for a reasonable period before the use takes place. Such portal should make it easier for rightholders to exclude the application of licenses or of the exception or limitation to their works or other subject matter. Under Regulation (EU) No 386/2012 of the European Parliament and of the Council (11), the European Union Intellectual Property Office is entrusted with certain tasks and activities, financed by making use of its own budgetary means and aimed at facilitating and supporting the activities of national authorities, the private sector and Union institutions in the fight against, including the prevention of, infringement of intellectual property rights. It is therefore appropriate to rely on that Office to establish and manage the portal making such information available.

In addition to making the information available through the portal, further appropriate publicity measures might need to be taken on a case-by-case basis in order to increase the awareness in that regard of the rightholders concerned, for example through the use of additional channels of communication to reach a wider public. The necessity, the

nature and the geographic scope of the additional publicity measures should depend on the characteristics of the relevant out-of-commerce works or other subject matter, the terms of the licenses or the type of use under the exception or limitation, and the existing practices in Member States. Publicity measures should be effective without the need to inform each rightholder individually.”

As is evident from the quoted text above this is a kind of prescriptive legislation, and as such it is very different to ECL legislation, which is based primarily on a contract by which the parties determine the repertoire to be licenced.

The OOCW licence requires in addition to the contract the works and other subject matter to be out-of-commerce. Why this measure has been introduced when you have the contract and opt-out for both the represented rights holders (opt-out under the contract) and non-represented rights holder (opt-out under the law) is not evident from the DSM Directive. In this sense, the out-of-commerce licence deviates significantly from the “ordinary” ECL under Article 12. One could argue that the kind of “diligent search”, although the word is not in the DSM Directive, which is required to conclude for a work to be out-of-commerce should not be required.

The CMO that licences the works and other subject matter must be sufficiently representative for the rights concerned. Some CMOs have also as members, for example author’s organisations. In addition to mandates from such members, mandates could be acquired by entering into cooperation agreements with other organisations, for example organisations representing producers in order to achieve a higher degree of representation. These rights holders, which are represented, are usually the ones, which have an active interest in the rights concerned. If they opt in to the contract, it should be sufficient. It is unclear if the precondition of a work to be out-of-commerce has been introduced to safeguard the non-represented rights holder or not. Those rights holders have nevertheless a safeguard already – the opt-out under the law. That safeguard ought to be sufficient.

As to the cross-border uses the DSM Directive has two options depending on if a licence can be obtained or not (Article 9):

- ”1. Member States shall ensure that licenses granted in accordance with Article 8 may allow the use of out-of-commerce works or other subject matter by cultural heritage institutions in any Member State.*
- 2. The uses of works and other subject matter under the exception or limitation provided for in Article 8(2) shall be deemed to occur solely in the*

Member State where the cultural heritage institution undertaking that use is established.”

Article 9.2 on the cross-border aspect of the exception for making out-of-commerce works available is clearly based on copyright relevant action deemed only to take place in the Member State where the CHI is situated.

There is no explicit reference to a “country of origin principle” as to the licences granted in accordance with Article 8 of the DSM Directive. The DSM Directive just states the licence should cover all Member States.

What is the relationship between ECL and OOCW licencing? OOCW licensing is as ECL based on the extended effect of the law, that means that under certain conditions the collective licence is extended to non-mandated and orphaned works. Both are referred to by the European Commission as ECL (“CLEE”)⁴². The DSM Directive states (Recital 43) that the OOCW licence scheme should be without prejudice to the use of such works under other licences with an extended effect, where such licensing is not based on the out-of-commerce status of the covered works or other subject matter. Those measures should also be without prejudice to national mechanisms for the use of OOCWs or other subject matter based on licences between CMOs and users other than CHIs.

The OOCW scheme is perceived, as *Lex specialis* and that it should not in any respect have an effect of ECL.

The bureaucracy required when applying an OOCW licence will very likely prove to be cumbersome and costly. And with the ambiguity as to what constitutes an out-of-commerce work, the scheme does not support scientific use, which require access to any and all kind of works, regardless of their commercial status.

7.2.2. Extended Collective Licencing

DSM Directive Article 12 regulates national ECL schemes and it states (see Recital 46):

“Given the increasing importance of the ability to offer flexible licensing schemes in the digital age, and the increasing use of such schemes, Member States should be able to provide for licensing mechanisms which permit collective management organisations to conclude licenses, on a voluntary basis, irrespective of whether all rightholders have authorised the organisation concerned to do so. Member States should have the

⁴² Commission Staff Working Document: Report on the use of collective licensing mechanisms with an extended effect as required under Article 12(6) of Directive 2019/790/EU on copyright and related rights in the Digital Single Market

ability to maintain and introduce such mechanisms in accordance with their national traditions, practices or circumstances, subject to the safeguards provided for in this Directive and in compliance with Union law and the international obligations of the Union.”

In contrast to Article 8-11 of the DSM Directive, the ECL is not exclusively an option for cultural heritage institutions. It can also be used by other entities than cultural heritage institutions including commercial enterprises. As such, it is suitable for PPPs or pure commercial digitization endeavours. This aspect of ECL is very important since the demand for cultural services may change over time and could very well involve or even require for financial reasons a private partner, or as in France, the digitization and making available of out-of-commerce books is operated by publishers who cannot use Article 8-11 DSM Directive since they do not qualify as beneficiaries. But there are other aspects of ECL which makes it more favourable than the out-of-commerce scheme. Firstly, ECL does not discriminate between in or out-of-commerce works. Entire collections can be digitized and made available under an ECL, which would not be possible under the OOCW licence. Further to that, ECL can enable cross-border access not only within the EU, but also vis-à-vis third countries. The latter, we believe, is something which favour the relationship between the EU and UK in Horizon, since what is prescribed for cross-border use in Article 9 DSM Directive, does not apply in relationship to UK institutions.

Pursuant to Article 12.6 DSM Directive, the Commission submitted to the European Parliament and to the Council a report on the use in the Union of the ECL (in the report referred to as CLEE) (“the Report”). Pursuant to Article 12.6 the Commission should look into the among many things, their effectiveness in facilitating the dissemination of cultural content. The Report⁴³ serves a general and preliminary overview of ECL (CLEE) mechanisms, based on available information. The Report is part of the broader effort to modernize copyright laws in the EU and ensure they are fit for the digital age. It aims to strike a balance between protecting the rights of creators and making it easier for users to access and use digital content. According to the Report, ECL offers several benefits, particularly in the context of the digital single market. Some of the main advantages⁴⁴ are:

- a simplified licensing process: ECL simplifies the process of obtaining licences for the use of copyrighted works. Instead of negotiating with

⁴³ Commission Staff Working Document: Report on the use of collective licensing mechanisms with an extended effect as required under Article 12(6) of Directive 2019/790/EU on copyright and related rights in the Digital Single Market

⁴⁴ <https://digital-strategy.ec.europa.eu/en/library/reports-collective-management-and-extended-licensing>

individual rightholders, users can obtain a single licence that covers a wide range of works

- increased access to content: by making it easier to licence works, ECL facilitates greater access to cultural and creative content. This is particularly beneficial for educational institutions, libraries, and other public interest entities
- promotion of cultural diversity: by enabling the use of a broader range of works, ECL promotes cultural diversity. It helps to ensure that a wide variety of cultural content is available to the public
- support for new business models: ECL supports the development of new business models and services by providing a clear and efficient framework for licensing. This can encourage innovation and the creation of new digital services
- legal certainty: ECL provides legal certainty for both users and rights holders. Users can be confident that they are using works legally, while rights holders can be assured that their rights are being managed and compensated appropriately.

These benefits make ECL a valuable tool in the modern digital landscape, helping to balance the interests of rights holders and users while promoting access to cultural content.

As to 2. – 4. above the Report elaborate on these aspects (Page 16):

“Some Member States and stakeholders also highlighted the flexible nature of CLEE mechanisms. In particular where Member States have a provision in their legislation allowing for the use of CLEE beyond set areas, they can use CLEE to facilitate licensing for new uses, which may be linked to new technologies or user demand. For example, in the context of the COVID-19 pandemic, some Member States brought in specific CLEE schemes to enable access to content held by libraries, museums and other cultural heritage institutions⁴⁵. The Union legislature has now delimited CLEE to defined areas of use which should be implemented in national law.”

What are the implications of the DSM Directive (Article 12) on the ECL for the Finnish National Gallery, if any? The wording of the DSM Directive (see Recital 46) is “the use within their territory”. The act of making available to the public takes definitely place in Finland. Moreover, the availability extends to the whole world. Mere act of having access though is not relevant for the purposes of

⁴⁵ The European Commission provided in their report, here a foot note pointing to the COVID-19 emergency ECL schemes were implemented by the NLS.

copyright. This was the simple philosophy (country of origin) behind the ECL for the Finnish National Gallery.

Does the DSM Directive say anything, which could be an obstacle for the Norwegian initiative? In Article 12.1. it is stated that “Member States may provide, as far as the use within their national territory is concerned...”. In Recital 46, it is stated:

”Such mechanisms should only have effect in the territory of the Member State concerned, unless otherwise provided for in Union law.”

For the moment, there is only limited legal support in Union law for national ECL schemes as far as the extended effect of aid licence to have legal effect in any other country other than in the Member State in which the ECL licence was provided by a CMO (see Article 5.3, 8 and 9 of the DSM Directive). Thus, it would require an EU Directive or EU Regulation to achieve any extraterritorial effect of a national ECL in respect of the extended effect of said licence.

Notwithstanding the above, with a treaty between the Nordic countries one could have achieved the validation required but it would have presupposed that the receiving country had enacted a law by which the extended effect of an ECL provided in the other Nordic country was legalised – reciprocity to achieve the desired cross-border effect between the Nordic countries (by explicit mutual recognition in the respective countries). But the Directive does not seem to establish basis for such practices. However, in fact the whole idea to close the markets to national territories seems to be contrary to the whole idea of the DSM Directive, and a European Digital Single Market.

Other aspects should also be addressed in this context. Member States will not be inclined, nor encouraged, to initiate any cooperation in this area because the Union will be in control of the concept of ECL (Article 12) and follow up on national developments in this field of licensing. CMO will most likely be reluctant to engage in any kind ECL licensing, which is in the “grey” zone and not legally explicitly accepted by Union law, that is the DSM Directive. This is unfortunate, and should be mended, when the European Commission reports on use of the ECL in the Member States, and makes a legislative proposal, if appropriate, including as regards the cross-border effect of such national mechanisms.

Finally, what if any of the implications of Article 12 of the DSM Directive on the model for cross-border licencing referred to in the ALAI Opinion and put into practice in the Swedish cross-border pilots with Finland and Malawi, that is a traditional collective licensing based on reciprocal agreements (implying exchange of repertoires) and national ECL provisions extending the effect of the

collective licence to non-represented rights holders? Since this model does not require extraterritorial effect of the ECL in such cases, we argue it is not in conflict with Article 12 of the DSM Directive. The Report (Page 19) elaborate some on the NLS ECL cross-border pilot projects:

“A few pilot projects have been launched on a small scale to allow cross-border use of works licensed under CLEE, in particular under licenses granted to CHIs. For instance, the Swedish National Library has recently set up a system allowing researchers from a Finnish university to have remote access to audiovisual works (broadcasters’ archives). These pilot projects operate on the basis of an agreement concluded between the user (here the Swedish National Library) and the CMOs in different Member States representing multiple rightholder organisations. The CMOs agree mutual representation for the works and types of uses allowed under the license, and can use ECL provisions extending the effect of the collective license to non-represented rightholders in the respective Member States.”

Discussions with Member States in the context of the Copyright Contact Committee have not been conclusive on whether to introduce a cross-border mechanism for ECL. This question is still premature since the DSM Directive has just recently entered into force.

Article 9 of the DSM Directive brings in a cross-border effect to licences granted for the use of out-of-commerce works under Article 8. Therefore, Member States must ensure that the licences allow the use of out-of-commerce works by CHIs in any Member State. However, Article 12 limits ECL to use in the territory of a Member State. The Commission will monitor the implementation and practical application of this provision.

7.2.3. Suggested hybrid and/or risk management scheme in cross-border use

The following are possible methods for arranging cross-border access:

Hybrid Approach

Country A - ECL

Country B - Collective Licence + Exception & Limitation

Even if ECL in principle could be introduced in any and all countries in the world, it would be naive to suggest that it could be achieved in the short period of time or at all. In some countries stakeholders do not support the introduction of ECL or the CMO/RRO is for some reason not apt to operate an ECL. In some of those countries, the access may instead rely upon a combination of application of

copyright exceptions and licensing to the extent that rights holders are able to assert rights as an option provided by national laws.

Such a hybrid would in our view in principle be interoperable with ECLs, provided the exception/limitation encompass the same copyright relevant actions covered by the collective licence. The exception would encompass rightsholders not mandated under the collective licence and the same rights holders would in the other country be covered by the extended effect of the ECL. As long as the exception/limitation cover the copyright relevant actions covered by the licence and mandates are transferred and reciprocal agreements are in place, a hybrid could potentially work. But such a hybrid may be difficult to match with an ECL scheme in another country. A hybrid may be an adequate solution in the short term, maybe even in the medium term, but will not solve the problem in the long term. The impediment is that the limitation in Country B supplementing the collective licence issued by a CMO in Country B, defines the scope of the hybrid.

While this hybrid combination could potentially enable cross-border access, there are some caveats: exceptions and limitations limit the scope of the collective licence ("written in stone") and unnecessarily limit freedom of contract.

ECL and Compulsory Licence

Country A – ECL

Country B – Compulsory Licence (Exception & Limitation)

A compulsory licence in Country A may enable access in that country to copyrighted works and other subject matter in Country A made available under an ECL, but not vice versa. This because a compulsory licence is an exception and no mandate is transferred. Licensing involving one country with a compulsory licence and in the other country with an ECL could achieve access in the country in which the compulsory licence is applied, but not the other way around.

Collective Licensing / ECL and risk management

There are examples of such licensing in cross-border use, for example the ERA pilot providing access abroad to a curated content for higher education in a closed network. The archive is curated to enable access to content relevant for the course the student is taking. This though is different to scientific research, which in principle requires access to the entire collection(s).

Does risk management depend on the nature of collection? We believe the answer is yes. Therefore, when operating a collective licence or an ECL, some measures will have to be considered. The ERA pilot licence is confined secure network and curated content – not entire works – and the cross-border access

takes place in countries where the friction with the primary market is not an issue for the rights holders. These considerations would probably be true to some extent, for example, if one European national library were to give access to an academic faculty with at universities USA with particular interest in that European country's language or culture, though with one major difference – the market friction could be deemed to be non-existent.

7.3. ECL Pilots and Studies in the European Union and in collaboration with Third Countries – Establishing Best Practices

In the fields of non-commercial research and higher education of cultural heritage, digital technologies permit new types of uses, which are desired by users. Collaboration and partnerships in research and higher education are becoming increasingly important nationally and internationally, in order to share competence and experience and to develop services that many can benefit from. Legal uncertainty remains, for both right holders and users, as regards certain uses, including cross-border uses, of works and other subject matter in the digital environment. This is particularly relevant as regards cross-border uses in the fields of non-commercial research and higher education of cultural heritage, which are becoming increasingly important in the global digital environment. The EOD consortium libraries collectively hold large collections of works and other subject matter for the purpose of non-commercial research and higher education. Researchers and students at universities in Europe desire access to said source material and the EOD consortium desires to promote the accessibility of their collections for non-commercial research and higher education abroad. The right clearance of documents constituting large collections of cultural heritage, cannot take place without collective rights management. The collections include rights pertaining to right holders that can be identified but have not provided their mandate (outsiders) as well as right holders that cannot be identified (OW), a traditional collective licence is not sufficient. An ECL encompasses both mandated and non-mandated works, i.e. including OW. Since the cultural heritage of Member States is linked, the EOD consortium aim for ECL pilots enabling to support the intent of the EOD consortium to make their collections available for research and higher education on-line in respective Member States. Therefore, the EOD consortium ought to pursue cross-border pilots and seek support for studies as elaborated below.

7.3.1. Pilot Agreements & Studies

7.3.1.1. ECL and remote access – national and cross-border

In 2015/2016 the NLS enabled under a pilot ECL agreement entered with Copyswede (a Swedish CMO) access at Åbo Akademi University, which is a Swedish-speaking university in Finland, to NLS's archive of broadcasts, that is the Swedish Public Broadcaster SVT's broadcasts from 1960-1969, for research use by means of application of an ECL applied in their respective territories.

The cross-order ECL agreement was construed as a traditional collective licensing based on reciprocal agreements and on national ECL provisions extending the effect of the collective licence to non-represented right holders along the ideas elaborated on in the Opinion presented on September 14, 2016 by L'Association Littéraire et Artistique Internationale (ALAI) (in this paragraph referred to as "The Opinion").

The Opinion addresses those questions, which were limited to the cross-border effect of the use of Out-of-Commerce Works by cultural heritage institutions (compare Article 8-11 of the DSM Directive). The scope of an ECL-agreement and a pilot study would go beyond Out-of-Commerce Works since the ECL scheme does not as such discriminate between in and out of commerce works and research cannot be based solely on Out-of-Commerce Works – such an approach would not be scientific. The Opinion does in no way prejudice the potential of other cross-border uses of ECL's.

Thus, consistently with Article 5(2) of the Berne Convention ECL agreements based on national ECL provisions may under certain conditions be used in cross-border situations.

We believe the copyright issues referred to above should be addressed by entering into ECL-pilot agreement(s) on cross-border access to the collections of the EOD consortium for higher education and research in the EU to illustrate how cross-border access to the collections within the existing legal framework can be achieved. We also recognise that the collections of the EOD consortium can be of relevance outside of the EU. Member States and their cultural heritage are linked to the cultural heritage outside of the EU and we acknowledge that there is interest across the world in the collection the EOD Consortium possess.

The envisaged ECL pilots provide an opportunity for the EOD consortium to elaborate on best practises on how to apply ECL on providing online access to cultural heritage. An ECL pilot agreement would not involve the making available

of source material to the general public but only for non-commercial research and higher education.

The purpose of an ECL pilot agreement would also be to verify that no additional legal measures of the European Union, or larger international instruments, may actually be necessary to achieve cross-border uses in the fields of non-commercial research and higher education of cultural heritage, both which are becoming increasingly important in the global digital environment.

Notwithstanding that, the ECL pilots may provide conclusions to what end the respective ECL systems in two countries may be refined to improve the ECL systems in the respective countries as well as provide evidence on and to what extent additional legal measures of the European Union could improve the functionality of the ECL system. To that end we believe it would be relevant in addition to ECL pilot agreements to do an ECL pilot study.

7.3.1.2. ECL-Pilot Agreements

A MoU would set forth certain terms and conditions which could be included in future ECL-pilot agreement(s) with two countries' CMO:s regarding access to the Material in Country A and Country B ("ECL Pilot Agreement(s)") with such other representations, warranties, conditions, covenants, indemnities and other terms as the parties may agree upon.

The parties would do their best effort to enter into ECL Pilot Agreement(s), using the legal ECL devices for facilitated rights clearance available in Country A and Country B. In addition, the parties would do their best effort to conduct a Pilot Study as described above.

We see four possible approaches to overcome the conundrum in the EU and on a global level, for those situations direct licensing or traditional collective licensing is not feasible to enable on-line cross-border access for non-commercial research and higher education. These are elaborated on further, below.

Outside of the EU a contract may not be extended by law to non-represented right holders and for those countries with no such "help rule" one could possibly consider a hybrid, that is collective licensing in combination with an exception/limitation. The drawback of a hybrid is the exception/limitation is not a flexible "tool" since any change in demand (usage) which fall outside the scope of the exception/limitation require a revision of the law. Any revision of the law is a time-consuming process and the threshold is fair to say rather high – revised legislation is a blunt tool in the on-line environment with rapid transformation of usage and technology. An ECL on the other hand is flexible, especially if a country has introduced the General ECL, that is a provision in the law which enables an

ECL agreement to be entered if all the requirements have been met, that is for specific usage, and a specific ECL provision is not applicable.

ECL as a tool to tackle mass-usage in the on-line environment is not only an option for non-commercial use. The importance of this has been underlined in this report. Provided there is a mutual interest, the scope of a ECL study could be extended to go beyond non-commercial use. For example, in France, the out-of-commerce scheme depends on the publishers to make the books available, and in the case where another country's university library is very much interested in collaborating with book publishers as well as authors to establish a sustainable "ecosystem" of cross-border access, this is a possibility. Such approach to a study would be appropriate and fruitful for both parties.

7.3.1.3. An ECL Study / Study Group

An ECL study could provide added value to ECL pilot agreement(s). The study could be drafted by a secretary and chaired by an attorney with experience of copyright and related matters as well as international affairs. CMOs on behalf of the right holders is another stakeholder which ought to be represented. Members of the academia to provide their insight and reflection on the issue of ECL in cross-border use.

7.3.2. Elaborated concept, an ECL cross-border project with stakeholders in and outside EU to establish Best Practises

This kind of project concept have been discussed informally with representatives of relevant stakeholders and experts since 2017, and has been reviewed several times in the workshop format at the EODOPEN events under the heading of "how-to's" going forward. Key issues to define in future collaborations are included in an overall concept for an ECL Pilot / ECL Study & Study Group with the following areas of focus:

- INTEROPERABILITY – to achieve cross-border access interoperability must be defined:
- METADATA – libraries with sufficient metadata so the researcher in the other country know the content in the library that can be digitized and accessed by means of an ECL. Also, metadata for the purpose of reporting the use to the CMO
- ECL LEGISLATION – ECL legislation in both countries involved in cross-border access.
- CMO – well governed and functioning CMOs identified;

and include the following beneficiaries and stakeholders:

- Researchers, indirectly society on the whole
- Policymakers (Members of Bern)

-
- Universities – researchers
 - CMO:s
 - National and research libraries;

and additionally address the issues of:

- collective management of rights infrastructure
- metadata on source material e.g., books - from analogue to digital and the benefits both regarding sustainability and access including TMD
- mutual interest for stakeholders
- interface conducive for research and secure infrastructure.

The benefit of existing best practices and pilots is to demonstrate collective licensing and a help rule – ECL legislation, examine those applied both domestically and for cross-border.

Two or three phases are suggested:

Phase 1

- kick-off with a conference / seminar
- survey and stakeholder dialogue - what do stakeholders have in common and the necessity / need to collaborate / and build trust if needed

Phase 2

- elaborate on the issues to address at regional seminars / workshops

Phase 3

- pilots

A licensing model to drive sustainable development

The correlation between education, including higher education, and economic growth is well documented. Access to copyright-protected works in the form of books and other documents is of decisive importance for a well-functioning education and thus sustainable development.

Making works available online brings benefits in the form of wider, faster and cheaper access. One could argue that this kind of copyright is democratic by design. Furthermore, making it available online meets high environmental requirements in comparison to the physical transport of documents in paper format - sustainability.

What activities are required?

A full project description would need to be drawn up and presented to relevant stakeholders to define the activities, schedules and costs that the project entails. This includes contacts with some of the institutions and organizations whose participation is central. In the final project description, a description of possible

legal alternatives, suggested partners, model agreements between partners, training description, conference description, toolkits and manuals and which other reports need to be developed. A budget, time table and description of project managers are also needed.

The concrete work will be developed regionally and in the form of so-called "pilots" between the partners who are supposed to enter into agreements on the exchange of material online across national borders. The pilots aim to test the models and evaluate the path to a sustainable full-scale operation.

A project management group is set up consisting of participating institutions and expertise in the field. A reference group of stakeholders with an interest in the topic and who could provide valuable feedback, could also be considered.

Which institutions in the countries must be involved?

National and research libraries, IPOs and the alike, universities or organization of universities, national RROs/CMOs and the alike must be involved. In some countries, ministries of culture or authorities under ministries may be relevant to involve.

How to choose which countries to cooperate with?

The full-fledged project (the pilots) will work with example countries that are suitable to be paired with each other or that are already working in the form of cultural "hubs"; language areas as well as legal cultures are essential starting points but need not be limiting.

Economy and schedule in phase 1

In order to develop the complete project description, contacts need to be made with some of the countries/institutions/organizations that are intended to be included in order to ensure the interest in participating in the project and that they have the opportunity to allocate the necessary resources. This also includes contact with WIPO, IFRRO and other international organizations. It needs to be investigated and described regarding laws in the respective countries and which needs can be met as well as international instruments such as Bern. Written documentation and planning need to be produced and presented to WIPO to ensure that WIPO can allocate resources to the running of the project.

Using existing technology, and if there is access to a data base, libraries could strive to clear the rights to the entire database and enable streaming. Two different approaches could provide access across borders in relation to outsiders: collective Licensing with help rule (ECL) versus risk management.

7.4. Policy Recommendations

7.4.1. Legal interoperability

To enable wider cross-border accessibility of copyright protected cultural heritage materials, it is necessary to achieve interoperability not only as far as technology but also legal solutions. If the infrastructure in respective countries is not interoperable, no access is achieved. The same is true for legal aspects of cross-border accessibility such as copyright – the key element is interoperability.

The DSM Directive and its implementation will have a crucial effect on the cross-border access to works and subject matter of related right in the European Union. At this junction, there is all reason to emphasize that the necessary interoperability may only be achieved by a coordinated process of implementation of the Directive, embracing all Member States as well as the EEA States. The national solutions in the implementation should be similar, if not the same, and compatible with each other, in order to provide a possibility to establish a European area of access and accessibility for the cultural institutions and other market operators and at the same time not creating new barriers to third countries.

7.4.2. Out of commerce licences

Under an ECL, the repertoire to be made available by the library is determined by the parties in the contract. In addition to the contract, the out-of-commerce licence requires that works and other subject matter must be out-of-commerce, which disqualifies simultaneous licencing of works still in commerce. This is of course an impediment and makes the out-of-commerce licence less attractive. The transaction costs will most likely be higher with the out-of-commerce licence considering the cumbersome and costly administration of the licence and the “diligent search” of in-commerce-works, which have to be excluded.

As concluded above, both schemes enable cross-border access. The out-of-commerce scheme though, might incur less cost for the CMO since no reciprocal agreements would be required compared with the model applied in the NLS pilots.

The ECL schemes in ECL pilots are conducive for other audiences as well e.g., students and the public at large. Such a scheme would be possible to put in place in the Nordic countries with a long tradition of ECL licensing and with CMOs with reciprocal agreements. Nevertheless, in other Member States with not as well organised CMOs and no experience of ECL the out-of-commerce scheme might be favoured.

Notwithstanding the above, the out-of-commerce ECL could at first glance be perceived as an adequate alternative even in a country which has a long tradition of ECL, if the purpose is to provide a literature canon for its citizens when they are abroad in the European Union, be it for vacation or work temporarily or for a longer period of time. One substantial drawback though, is that the canon would have to exclude all in-commerce-works. Such a repertoire would, of course, not be as meaningful.

With an ECL the entire repertoire could potentially be made available. It would be decided in the contract between the library and the rights holders. The licence fee would compensate the rights holders for the usage. Even though a flat rate would be paid, it could be differentiated depending on the kind of literature made available to the patrons, for example in-commerce books.

In countries with no experience of ECL and with CMO's, which lack the necessary reciprocal agreements with CMOs in other countries, the out-of-commerce ECL in the DSM Directive (Article 8-11) may be to recommend. Such a scheme may induce less transaction costs on behalf of CMOs compared to the ECL/joint licensing. On the other hand, it is still not known how much work will be required to perform to conclude if a work is out-of-commerce. However, perhaps still more important for research, to exclude in-commerce works would be an impediment, and the only valid alternative would be an ECL (DSM Directive Article 12).

7.4.3. ECL agreements

There are five possible approaches to overcome the supposedly territorial conundrum of ECL.

Firstly, copyright relevant action takes place outside the country of the cultural heritage institutions, that is the extended effect of the ECL is not desired because it is not needed.

Secondly, if objections were to be raised that copyright relevant actions are taking place outside country of the cultural heritage institutions one could argue that the compulsory exception for temporary copies in Article 5.1 InfoSoc Directive applies and should be introduced on a global scale. This is, of course, subject to that the relevant use is "lawful use", which include cases where the use is permitted under a limitation or exception.

In a third instance, only one copyright relevant action takes place in the European Union (compare DSM Directive Art. 5.3, 8 and 9.2 and Art. 3 Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019

laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC

A fourth solution could be as referred to in the ALAI Opinion and put into practice in the NLS cross-border pilots with Finland and Malawi, i.e., a traditional collective licensing based on reciprocal agreements (implying exchange of repertoires) and national ECL provisions extending the effect of the collective licence to non-represented rights holders.

A fifth solution could be as referred to in the ALAI Opinion through a bilateral or multilateral arrangement between states, although not in the EU where it would be more likely that the European Commission would consider a directive or a regulation (mutual recognition in analogy with the Orphan Works Directive), or by a specific provision in an international treaty.

We elaborate below on these solutions to enable wide cross-border accessibility of copyright protected cultural heritage materials in relation to different kind of source material, user groups and the potential friction with the primary market.

No copyright relevant action takes place outside the country of the cultural heritage institution

The Finnish ECL referred to above (the Finnish National Gallery – Virtual National Gallery example) enables access in all countries of the world. The perception is that no copyright relevant action takes place except in Finland, or in other words, no extraterritorial effect is desired because it is not required.

Compared to traditional collective licence, which can be granted by the rights holders to provide global access, the only restriction would be the licence fee, that is, not a copyright issue but a question how to consider all aspects of the wide potential audience, and to fund the making available of works.

Should an ECL be perceived as no different to a traditional collective licence? That the extended effect of the ECL is required only in the country where the cultural heritage institution is situated to clear all relevant rights and the targeted audience abroad can access the virtual cultural heritage institution online and "walk into" the CHI (server), which is situated in the country of the CHI. In such cases, no copyright relevant action takes place outside of the country where the CHI is situated. Thus, the Finnish National Gallery – Virtual National Gallery – model, which is understood to have no extraterritorial effect of the ECL, is not against the condition in the DSM Article 12, first paragraph.

This kind of ECL is recommended for the kind of works described above, that is, fine art and photographs as well as manuscripts and other documents of the same kind i.e., a document with one author or very few rights holders such as the heirs of the author. But is the scheme conducive for licensing of for example, daily newspapers or broadcasts with complex layers of rights which could include non-represented rights holders from another Member State or a Third Country? Would such works rather require the extended effect in the receiving country? Would it be so that joint licensing (NLS's cross-border pilots on broadcasts) would be favourable or out-of-commerce ECL scheme (see Article 8-11 of the DSM Directive)? This will be elaborated upon below. As to Article 8-11 of the DSM Directive it should be mentioned that to the extent a licence cannot be provided by a CMO there is an exception for OOCW in the Directive that provides a fall-back solution.

A compulsory exception for temporary copies

If objections were to be raised that copyright relevant actions do take place outside the country of the cultural heritage institution, one could argue that the compulsory exception for temporary copies in Article 5.1 InfoSoc Directive applies in the EU – how else could one perform a Google search? In addition, that such an exception should be introduced on a global scale through a WIPO treaty to provide legal certainty since a global dimension is default.

No copyright relevant action takes place outside the country of origin

Broadcasters traditionally distribute 'linear' broadcast television and radio content. Users can access 'linear' content services only at the particular time they are offered and on the particular TV channel on which they are presented. The main characteristic of 'non-linear' content services (VOD or catch-up services) are the autonomy they offer to the user to decide what they want to watch, where to watch it, when, and on which device.

Television and radio broadcasting content incorporate a variety of copyright protected content (including audio-visual, musical, literary or graphic works). Because of the principle of territoriality – under which copyright is normally acquired and protected on a country-by-country basis – broadcasters transmitting online television and radio programmes need to clear the rights for the relevant territories before making their online services available across borders. This means that they must obtain authorisation to transmit and make available the protected content for all of the Member States in which they transmit their programmes, often from a multitude of rights holders and in a short time frame.

Such copyright clearance requires engaging in a complex process to obtain the online rights (given the national disparities in provisions on copyright), and generates high transaction costs, which in turn reduce the broadcasters' incentives to provide cross-border services. As a result, TV broadcasters often make their online services available in a single Member State and put measures in place that prevent cross-border access to these services, such as geo-blocking of IP addresses from other territories.

A library corpus includes many audio-visual works as well as newspapers with complex layers of copyright protected works and other subject matters. Libraries are therefore confronted with the same challenge as broadcasters although not a rights holder (broadcasters often have their own producers' rights, as well as rights acquired from the different groups of rights holders).

The experience from European Union legislation on this matter is the one of friction between stakeholders. In September 2016, the EC proposed a Regulation to facilitate the licensing of rights for certain online transmissions of broadcasters and retransmissions of television and radio programmes. As part of the political agreement reached on 13 December 2018, the EU co-legislators agreed to turn the proposed regulation into a directive, which is finalized and adopted. The legislation has been watered down from a regulation on all content to in-house news broadcasts. The reason for this is predominately the potential friction with the primary market and perceived potential threat such friction could pose to some rights holders.

The potential friction with the primary market is very important aspect since ECL should only be applied in cases when traditional collective licensing is typically onerous. The approach of the broadcasters was that a regulation would enable the access in the entire EU to broadcasters' archives. Such an access would inevitably create a friction with the primary market. It is consequentially very important for the legislator to be diligent when introducing new ECL legislation to safeguard the primary market from unwanted competition from libraries. The risk is potentially more obvious with the broadcasters' approach in the regulation than the final directive.

If a cultural institution targets certain user groups (audiences), which typically do not constitute an existing market or a potential market for commercial content, an ECL, could be very useful for making a virtual library accessible outside the country of the cultural heritage institution. The key element is the contract, which on the one hand requires the rights holders to opt-in and on the other hand the safeguard, the opt-out. The opt-out provides the safeguard for the rights holders who opted into the contract to opt-out of the same under the

terms and conditions set out in the contract and for the outsiders – that is, the rights holders not represented by the CMO – to have the right by the law to opt-out of the scheme. These mechanisms provide the adequate safeguards for the ECL to enable access without creating friction with the marketplace.

The reason why the ECL has of yet not been accepted to be applied along the lines of the new Broadcast / online Directive in other sectors of the society may be that many rights holders / stakeholders have less or even no experience of ECL and thus take the safe standpoint and say no to such a scheme to be introduced, rather than engage in a discussion how ECL could supplement traditional licencing. Launching pilots could be a way forward engaging all rights holders and building trust as well as new best practices.

It is to be noted that the DSM Directive creates an extraterritorial effect (Article 8.1, with the support of Article 9, which introduces and apply the country-of-origin principle and which both require the extraterritorial aspect to be implemented in each Member State’s legislation.

Reciprocal agreements and national ECL provisions extending the effect of the collective licence to non-represented rights holders

ECL agreements based on national ECL provisions may be used under certain conditions in cross-border situations and the cross-border effect of the ECL, or a combined ECL effect, may be achieved by joint licencing by CMO’s in two or more countries providing an ECL. Although on a greater scale this model could be perceived as complex, artificial and too much dependent on to what extent CMO’s in different countries are willing to cooperate and take a potential risk. Examples of this kind of uses of cross-border ECL are the SNL’s cross-border pilots regarding broadcasts and books.

The benefit of such a solution is that the repertoire, which can be licenced, is not hampered as with out-of-commerce ECL or the alike licencing by excluding in-commerce works. The NLS pilot schemes are especially useful for research be it studying source material or applying technology such as TDM for granting lawful access (see DSM Article 3 and 4). Any exclusion of works such as with out-of-commerce ECL is detrimental for scientific research. In the field of scientific research, the default should be all works and for such usage, the ECL schemes in the NLS ECL pilots are recommended.

Bilateral or multilateral arrangement between states or by a specific provision in an international treaty

It should be stressed that the DSM Directive will have no relevance for making available culture heritage outside of the EU. This may very well be of the greatest

relevance for research and higher education but it could also be of importance to other categories of user groups.

Research is to a great extent performed on an international level. Higher education in countries outside of the EU may desire to access to source material in the EU. One example is foreign language and culture studies programmes offered at different universities outside of the European Union, which have an interest to access to material from particular European countries.

Thus, even with the DSM Directive enacted it will still be relevant to apply ECL unless a global treaty is entered under the auspices of WIPO or treaties between nations are entered with the effect that the extended effect of national ECLs will have legal effect in the receiving country.

7.4.4. A new EU regulation on mutual recognition

An additional solution, albeit somewhat premature, considering that the DSM Directive has recently been implemented, would be a new EU regulation, which would have a direct effect in each Member State, proclaiming extraterritorial effect of national ECL agreements in the Union. Such a regulation could be construed as follows:

“An ECL agreement which is intended to be applicable in the entire Union or in specific Member States is applicable only if the following requirements are met or a reference is made to Article 12 of the DSM Directive.”

The advantage of this approach would be that it would work within the European Union as well in relation to third countries. However, the DSM Directive Article 12.1 is very specific that it will require European Union legislation to achieve such an effect. Thus, an EU Directive could stipulate that each Member State could or should, impose legislation that stipulates that another Member State agreement on digital accessibility (with ECL-effect) will also have effect in the country concerned. Or even better, in a European Union regulation stipulate the same, that is, a Member State agreement on digital accessibility (with ECL-effect) would also have effect in any and all Member States all depending on what the contracts stipulate – in some cases it may for financial reasons not be desired to give access in all Member States because it would incur too high of a licence fee.

7.4.5. Business models for making cultural heritage available on the Internet

The kind of “business model” for making the cultural institution’s materials available on the Internet across borders cannot be decided irrespective of copyright or other aspects such as data protection and information technology.

A licence for making the cultural materials available in for example all EU member states for all would be more expensive than a licence that differentiate between categories of users and material. Furthermore, applying a market-oriented approach, that is, to let the user decide what content is relevant for the user, is focused on user benefit. This approach is useful as far as access to source material but not in respect to services such as TDM simply because when applying such technology as TDM a user is better off to have access to as many works as possible.

One business model for scientific research may very well require that all content in an institution is made available for said purposes. Another business model is possibly more conducive for education as students are supposed to use the same literature for their studies. Yet another business model would most likely be useful for the general public. Unless an institution has the funding to digitise the entire collection and pay licence fees to enable Internet access, a different approach is more likely, that is, the one used by Public Broadcasters when providing access to their archives. In the latter case, the institution would decide what to be digitised if it has not yet been digitised and if it is reasonable to pay the licence fee.

Besides copyright, another legal constraint, which has to be considered, is data protection. IT- infrastructure, required metadata and economical constraint have to be addressed also. How much would different schemes incur as far as costs for staffing and technology?

When considering cross-border access and considering all of these considerations, it will have to be dealt in dialogue with representatives of each participating stakeholder, including rights holders and CMOs. Depending on which model of for cross-border licencing you opt for the CMO must be interoperable, that is, have reciprocal agreements and the ECL legislation must be of the kind that the extended effect of a licence has the same desired effect, otherwise the repertoire in question cannot be licenced.

Furthermore, very important factor is how to finance these endeavours, that is who will finally pay for the licence. If no CMO would be available, the fall-back exception would be applied. However, the exception would require the necessary staffing at the institution. How much costs the exception would incur is uncertain at this point. We do not know of any analyses have been made or assessments of costs. However, one could assume the exception will not be without costs and thus it may be a hurdle to overcome if the funding is lacking. Even if an on-demand business model may be the solution the issue of funding is still a relevant aspect to take in consideration.

By developing an on-demand model where digitization takes place gradually based on demand, the costs become moderate and fall within the parameters of the existing copyright situation. If the EOD consortium joined forces to share the costs of a cross-border solution, which can manage the copyright problems and the financial burdens, the opportunity arises to make the knowledge in the EOD cultural institutions publicly available.

In its initial phase, this could be launched as a project between some EOD libraries, such as national libraries, to test how the schemes described in this report works across borders in the European Union and then outside the European Union. The long-term goal should be a global digital library, not a library confined to a certain region. The institutions will be able to take on the copyright and data protection challenges in cooperation with each other and their foreign counterparts, but this is unquestionably contingent on working based on a nationally and globally interoperable model.

7.4.6. AI and TDM

We argue that AI is essential for a society in the Digital Realm. In our view, what CHI institutions create through research on language models (AI) is a “Digital Twin” of languages, or differently expressed a “Digital Tongue”. You could ask yourself if without such a Digital Tongue, a society is “Digitally Mute”, or for that matter “Digitally Blind” and “Digitally Deaf”? If what we suggest is true, it could be argued that AI is an existential issue and that a national AI model is a national infrastructure which no nation can be without. Accordingly, access to an AI model is a fundamental right and a matter of democracy for any and all to have access to their digital language. This has profound implications on future policymaking on copyright and libraries.

Research in CHI is exempted from The AI Regulation. This is all good, but unfortunately Article 3 of the DSM Directive is very narrow as to what kind of collaboration between a CHI and a non-CHI is allowed. Article 3 is vague on cross-border research. Research would benefit from more legal certainty and a better “toolbox”, that is different options all depending on the conditions under which research is to be performed. An exception that clearly facilitated access to source material within the EU both as to train AI models, as well as to do research on source material would be an advantage to scientific research. The importance of Public Private Partnerships cannot be overstated and Article 3 is not sufficient in this respect. A compulsory licence would perhaps be more adequate than an exception for some scientific research and especially research in collaboration with the private sector. Article 4 of the DSM Directive is irrelevant since rights holders may opt-out. To base a scientific research project on Article 4 would be

irresponsible considering the obvious risk of rights holders opting-out and thus put an end to a carefully planned research project. ECL could also be considered since an exception requires legislation, that is less flexible than a contract which is the foundation an ECL is based upon. A contract could be tweaked to accommodate to different needs and requirements for example in a consortium of stakeholders of different kind.

The task of policymakers to strike a balance between the exclusive right on the one hand and exceptions and limitations on the other is a challenge in a rapidly changing world. Comprehensive exceptions may impede right holders' ability to exercise their rights. Narrow exceptions on the other hand may be less useful because they do not encompass the entire scope of research to be performed. In addition, exceptions take time to legislate and they rarely stand the test of time.

From the user perspective exceptions may be less attractive since they demand the researcher to adapt the research to fit the exception. Should copyright legislation define research or should academic freedom be the rule? Since scientific research is essential for progress and it is not in the interest of the society on the whole to limit research to certain confined uses defined by narrow exceptions, it is crucial for the legislator to consider an extensive and future proof "toolbox". Multiple tools of different kind of exceptions with and without remuneration ought to be considered as means by which research is facilitated within existing international norms. ECL could also be used to facilitate research to enable maximum flexibility. As to research regardless if it takes place within the Internal Market or beyond borders and outside the Internal Market, it should be stressed that legislation should not regulate technology. As it is now the legislation focus on generative AI, even though it is obvious such a distinction will be irrelevant in the near future. To regulate technology is in itself limiting research. To legislate copyright on the basis of technology would be counterproductive for several reasons. One is that legislation is quickly outdated. Another one is that it has a negative effect on research and funding thereof. Better to have research being funded based on the merits of the research, rather than to what extent the legislator has been farsighted and legislated according to the rapid technological change.

It has become more evident than ever that the legislature cannot keep up with the rapid technological developments and its impact on copyright. Current systems of public policy and decision-making evolved alongside the Second Industrial Revolution, when decision-makers had time to study a specific issue and develop the necessary response or appropriate regulatory framework. The whole process was designed to be linear and mechanistic, following a strict "top

down” approach. But such an approach is no longer feasible⁴⁶ and Recital (3) of the DSM Directive confirms this:

“Rapid technological developments continue to transform the way works and other subject matter are created, produced, distributed and exploited. New business models and new actors continue to emerge. Relevant legislation needs to be future-proof so as not to restrict technological development.”

How can the EU Commission or any other policymaker preserve the interest of the public at large while continuing to support creativity, innovation and technological development? What is the recipe for innovation? Some steps have been taken to provide a mechanism which facilitates an equilibrium from a social welfare perspective as well as flexibility – Article 12 of the DSM Directive. The recently published *Study on emerging issues on collective licensing management in the digital environment*⁴⁷ suggests that could be the case:

“In general terms, particularly from a social welfare perspective, CLEE (ECL) reinforces the impact of collective management of copyright and related rights. CLEE strengthens the market power of CMOs, as a consequence of more complete market coverage.... CLEE amplifies the cost-saving rationale of collective management of copyright, resulting from a reduction in the number of transactions, standardisation of terms, economies of scale in the enforcement of rights and reduced search costs. Where non-membership is rarely a rightholder’s active choice, but rather results from transaction costs of registration or a lack of awareness, CLEE with a right to opt-out appears to be more efficient from a social welfare perspective than collective licensing relying only on explicit authorisations from rightholders.”

Digitization and mass utilization of text and other copyright protected materials require a solution which balances the aforementioned interests. In addition to carefully crafted exceptions (“toolbox”), mentioned above, extended collective licensing (ECL) provide the flexibility, which the exceptions lack, whilst ensuring right holders the ability to exercise their rights and receiving fair remuneration. Could Article 12 on ECL be the advent of a new era in EU policy making on copyright? From a non-EU centric perspective, ECL can facilitate cross-border

⁴⁶ <https://www.weforum.org/agenda/2016/01/the-fourth-industrial-revolution-what-it-means-and-how-to-respond/>

⁴⁷ <https://digital-strategy.ec.europa.eu/en/library/reports-collective-management-and-extended-licensing>

access without introducing legal fictions. Fair use as a vehicle to establish an equilibrium determined by a Court of Law which act as a policy maker is advocated by many. But Fair Use does not enable cross-border access to source material as well as enable the use of AI, ML and TDM across borders to the extent a copyright relevant action occurs.

Article 12 of the DSM Directive is a framework and licensing practices may evolve gradually and organically without requiring additional legislation unless it is concluded EC has to intervene with additional legislation. EC could also consider in analogy with Article 5 of the DSM Directive (Use of works and other subject matter in digital and cross-border teaching activities), to introduce one or several exceptions which apply unless an ECL is easily available. Such kind of legislation could incentivize licensing without creating lock-in effects.

8. Conclusions and Summary

As for conclusions these have been elaborated on in section 7 and we therefore refer the reader to this part of the report. Below we have extracted some of the aforementioned conclusions.

8.1. Extended Collective Licencing

DSM Directive Article 12 regulates national ECLs and it states (see Recital 46):

“Given the increasing importance of the ability to offer flexible licensing schemes in the digital age, and the increasing use of such schemes, Member States should be able to provide for licensing mechanisms which permit collective management organisations to conclude licences, on a voluntary basis, irrespective of whether all rightsholders have authorised the organisation concerned to do so. Member States should have the ability to maintain and introduce such mechanisms in accordance with their national traditions, practices or circumstances, subject to the safeguards provided for in this Directive and in compliance with Union law and the international obligations of the Union.”

In contrast to Article 8-11 of the DSM Directive, the ECL is not exclusively an option for cultural heritage institutions. It can also be used by other entities than cultural heritage institutions, including but not limited to commercial enterprises. As such, it is suitable for PPPs. This aspect of ECL is very important since the demand for cultural services may change over time and could very well involve or even require for financial reasons a private partner. In some Member

States, such as France, the Publishers are “tasked” to digitise and make available out-of-commerce books. The EU copyright acquis does not regulate how Member States organise their public sector, including public libraries. The EU is very diversified as to means of funding digitization and how culture heritage is made available. Therefore, ECL makes sense since it can be modulated through the contract to adopt to specific needs as well as to tackle frictions with the primary market, to the end that “the best not become the enemy of the good”.

Does the DSM Directive say anything, which could be an obstacle for the Norwegian initiative? In Article 12.1. it is stated that “Member States may provide, as far as the use within their national territory is concerned...” In Recital 46 it is stated “Such mechanisms should only have effect in the territory of the Member State concerned, unless otherwise provided for in Union law.”.

For the moment, there is only limited legal support in Union law for national ECL schemes as far as the extended effect of aid licence to have legal effect in any other country other than in the Member State in which the ECL licence was provided by a CMO (see Article 5.3, 8 and 9 of the DSM Directive). Thus, it would require an EU Directive or EU Regulation to achieve any extraterritorial effect of a national ECL in respect of the extended effect of said licence.

Notwithstanding the above, a treaty between the Nordic countries – an idea floated some 12 years ago - one could have achieved the validation required but it would have presupposed that the receiving country had enacted a law by which the extended effect of an ECL provided in the other Nordic country was legalised – reciprocity to achieve the desired cross-border effect between the Nordic countries (by explicit mutual recognition in the respective countries). But the DSM Directive does not seem to establish basis for such practices. However, in fact the whole idea to close the markets to national territories seems to be contrary to the whole idea of the DSM Directive, and a European Digital Single Market.

Other aspects should also be addressed in this context. Member States will not be inclined, nor encouraged, to initiate any cooperation in this area because the Union will be in control of the concept of ECL (Article 12) and follow up on national developments in this field of licensing. CMOs will most likely be reluctant to engage in any kind ECL licensing which is in the “grey” zone and not legally explicitly accepted by Union law, that is, the DSM Directive. This is unfortunate, and should be mended, when the EC potentially makes a legislative proposal, if appropriate, including as regards the cross-border effect of such national mechanisms.

Finally, what if any of the implications of Article 12 of the DSM Directive on the model for cross-border licencing referred to in the ALAI Opinion, that is, a traditional collective licensing based on reciprocal agreements (implying exchange of repertoires) and national ECL provisions extending the effect of the collective licence to non-represented rights holders? Since this model does not require extraterritorial effect of the ECL in such cases, it is not in conflict with Article 12 of the DSM Directive.

8.2. AI and TDM in cross-border use

Article 3 is vague on cross-border research. Research would benefit from more legal certainty and a better “toolbox”, that is different options all depending on the conditions under which research is to be performed. An exception that clearly facilitated access to source material within the EU both as to train AI models, as well as to do research on source material would be an advantage to scientific research. The importance of Public Private Partnerships cannot be overstated and Article 3 is not sufficient in this respect. A compulsory license would perhaps be more adequate than an exception for some scientific research and especially research in collaboration with the private sector. Article 4 of the DSM Directive is irrelevant since rights holders may opt-out. To base a scientific research project on Article 4 would be irresponsible considering the obvious risk of rights holders opting-out and thus put an end to a carefully planned research project. ECL could also be considered since an exception requires legislation, that is less flexible than a contract which is the foundation an ECL is based upon. A contract could be tweaked to accommodate to different needs and requirements for example in a consortium of stakeholders of different kind.

From the user perspective exceptions may be less attractive since they demand the researcher to adapt the research to fit the exception. Should copyright legislation define research or should academic freedom be the rule? Since scientific research is essential for progress and it is not in the interest of the society on the whole to limit research to certain confined uses defined by narrow exceptions, it is crucial for the legislator to consider an extensive and future proof “toolbox”. Multiple tools of different kind of exceptions with and without remuneration ought to be considered as means by which research is facilitated within existing international norms. ECL could also be used to facilitate research to enable maximum flexibility. As to research regardless if it takes place within the Internal Market or beyond borders and outside the Internal Market, it should be stressed that legislation should not regulate technology. As it is now the legislation focus on generative AI, even though it is obvious such a distinction will be irrelevant in the near future. To regulate technology is in itself limiting

research. To legislate copyright on the basis of technology would be counterproductive for several reasons. One is that legislation is quickly outdated. Another one is that it has a negative effect on research and funding thereof. Better to have research being funded based on the merits of the research, rather than to what extent the legislator has been farsighted and legislated according to the rapid technological change.

8.3. Are there any Remaining Obstacles?

How far could ECLs be stretched and under what terms?

As concluded above, global access can be achieved based on parallel licensing and bilateral agreements between CMOs/RROs. If the required national legislation is in place, it should in principle be possible to achieve global access based on ECL as outlined above in the Swedish/Finish pilot.

This of course not possible to the extent that the right holder has opted out of the agreement or if there are otherwise specific reasons to assume that the author would object to the exploitation (Cf. Art 42 d Sw. Copyright Act). Would licensing of a “mix” of materials (works), including works from other countries be possible? ECL permits such a “mix” within the jurisdiction of respective country. In our view it depends to what extent it is not possible to licence by other means such as traditional direct licensing or collective licensing. We believe the answer to all these questions is that you cannot resort to ECL without the due diligence of the CMO/RRO.

But even if ECL in principle could be introduced in any and all countries in the world, it would be naive to suggest that it could be achieved in the short period of time, or at all. In some countries stakeholders do not support the introduction of ECL or the CMO/RRO is for some reason not apt to operate an ECL. In some of those countries, the access may instead rely upon a combination of application of copyright exceptions and licensing to the extent that rights holders are able to assert rights as an option provided by national laws.

Such a hybrid would in our view basically be interoperable with ECLs, provided the exception/limitation encompass the same copyright relevant actions covered by the collective licence. The exception would encompass the rightsholders not mandated under the collective licence and the same rights holders would in the other country be covered by the extended effect of the ECL. As long as the exception/limitation cover the copyright relevant actions covered by the licence and mandates are transferred and reciprocal agreements are in place, a hybrid

could potentially work. But such a hybrid may be difficult to match with an ECL scheme in another country. A hybrid may be an adequate solution in the short term, maybe even in the medium term, but will not solve the problem in the long term.

A compulsory licence on the other hand may enable access in one country but not in the country in which ECLs is applied. This because a compulsory licence is an exception and no mandate is transferred. Licensing involving one country with a compulsory licence and in the other country with an ECL could achieve access in the country in which the compulsory licence is applied, but not the other way around.

An additional approach is for libraries and users, for example universities, to rely on traditional collective licensing for cross-borders access. The collective licence would rely solely on the exclusive right and mandates. If the collective licence is based solely on mandates and does not entail any risk management – all rights mandated – the transaction costs would likely be higher compared to an ECL or a hybrid. This risk could though be managed as has been done for many decades in some countries as to collective licensing for reproduction of copyright protected works (photocopying) by an indemnity clause in the collective licence. The difference though between the long existing practice of collective licensing for photocopying, is that the collective licence did not permit copying of entire works, only parts thereof.

8.4. Going Forward

We see a possible way, or combination of ways, forward for the EOD consortium to digitise their collections and to make even copyright-protected material available to the public.

If the EOD Consortium join forces to share the costs of a pan-European and a global solution, which can manage the copyright problems and the financial burdens, the opportunity arises to make the world's knowledge publicly available. This opportunity belongs to the libraries. We can Google as much as we want, but access to the different types of artefacts contained in the libraries requires initiative on the part of the libraries.

The next phase following earlier pilots ought to test cross-border access in the EU and then outside the EU with for example UK and the U.S. The long-term goal is a global library.

The EOD consortium will be able to solve the copyright problems in cooperation with its foreign counterparts, but this is unquestionably contingent on working on the basis of a nationally and globally interoperable model. Interoperability is a keyword.

Coordinating the political wills of different countries is not possible, but the power of setting a good example cannot be underestimated. Since the technology is available and it is possible to achieve results at a relatively low cost, we are convinced that politicians will concur. Moreover, when ECLs have been implemented not only in the EU but also, outside the EU, a critical mass will arise which, in all likelihood, will lead to the rest of the world choosing the same solution – this will give the other libraries and their users a de facto opportunity to gain access to relevant collections. The incentive is obvious, to be part of an ever-expanding group of libraries and universities collaborating and enhancing access to copyrighted books and potentially other source material.

9. Cited Works and Legislation

9.1. Sited Works

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

http://ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm

Report on the application of the “Orphan Works Directive” <https://digital-strategy.ec.europa.eu/en/library/report-application-orphan-works-directive#:~:text=The%20%E2%80%9COrphan%20Works%20Directive%E2%80%9D%20aims%20to%20promote%20the,of%20public%20service%20broadcasting%20organisations%20across%20the%20EU.>

Commission Staff Working Document: Report on the use of collective licensing mechanisms with an extended effect as required under Article 12(6) of Directive 2019/790/EU on copyright and related rights in the Digital Single Market

SMART 2018/0069: Study on emerging issues on collective licensing practices in the digital environment

ALAI Opinion on cross-border licencing using ECL presented on September 14 2016 by ALAI <https://www.alai.org/en/assets/files/resolutions/160914-opinion-cross-border-ECL.pdf>

9.2. Sited Legislation

Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979) (Authentic text)

<https://www.wipo.int/wipolex/en/text/283698>

Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) <https://www.wipo.int/wipolex/en/treaties/details/231>

World Intellectual Property Organization (WIPO) TRT/WCT/001 WIPO Copyright Treaty (WCT) (Authentic text) <https://www.wipo.int/wipolex/en/text/295157>

Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled

<https://www.wipo.int/wipolex/en/text/301019>

Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017L1564&from=EN>

Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017R1563&from=EN>

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, also known as the InfoSoc Directive <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32001L0029>

Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, the “Orphan Works Directive” <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32012L0028>

Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, also known as the “DSM Directive”, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32019L0790>

Berne Convention – Convention for the Protection of Literary and Artistic Works: <https://www.wipo.int/treaties/en/ip/berne>

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11. Glossary

Orphan work = works for which none of the rights holders are identified

Outsiders = works for which the rights holder(s) has not given mandate

12. List of abbreviations

ARIPO – African Regional Intellectual Property Organization

ASCRL – American Society for Collective Rights Licensing

CCC – Copyright Clearance Center

CHI – Cultural Heritage Institutions

CLEE – Collective Licence with an Extended Effect (same as ECL, see below)

CMO – Collective Management Organization

DG CNECT – European Commission’s Directorate-General for Communications Networks, Content and Technology

DSM – Directive on copyright and related rights in the Digital Single Market

EC – European Commission

ECJ – European Court of Justice,

ECL – Extended Collective Licence

ERA – Educational Recording Agency

EUIPO – European Union Intellectual Property Office

IFRRO – International Federation of Reproduction Rights Organizations

ILL – Inter-Library Loans

InfoSoc – Directive on the harmonisation of certain aspects of copyright and related rights in the information society

IPR – Intellectual Property Rights

MoU – Memorandum of Understanding

NLS – National Library of Sweden

NYPL – New York Public Library

OOO – Out-of-Commerce

OOOW – Out-of-Commerce Work

OW – Orphan Work

PPP – Public Private Partnerships

RCDT – Rights Clearance Documentation Tool

RRO – Reproduction Rights Organization

SCCR – Standing Committee on Copyright Related Rights

SI – the Swedish Institute (“Svenska institutet”)

TDM – Text and Data Mining

TFEU – Treaty of the Functioning of the European Union

TRIPS – World Trade Organization’s TRIPS Agreement

USPTO – US Patent and Trade Mark Office

WCT – WIPO Copyright Treaty

WIPO – World Intellectual Property Organization

WTO – World Trade Organization