Extended collective licences – the compatibility of the Nordic solution with the international conventions and EC law.

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1 Introduction

1.1 Definition of the problem and limitation of scope

The extended collective licence model is a Nordic invention aimed at resolving a certain type of problem within copyright law. Despite being the very backbone of copyright protection, the exclusive nature of copyright entails certain undesirable consequences, as seen both from the perspective of the author and that of society: The need for the user to obtain authorisation from the author does at times entail transaction costs of such a scale that the user refrains from seeking the required consent, or from using the work at all. In general terms it can be asserted that the non-conclusion of any contract that in lack of administrative costs would have been concluded is undesirable. The extended collective licence seeks to counter the effect of this situation.

While the nations traditionally have been free to regulate copyright protection vis-à-vis their citizens, international instruments such as the Berne Convention[1] have bound the signatories to grant citizens of the other member states certain minimum rights. In the later years, these obligations have been amended with new sorts of minimum rights in new international instruments, some of which even require the minimum rights to apply to the citizens of the signatory state. The rising interest for copyright protection within the European Community (EC) has also prompted the adoption of community legislation harmonising certain parts of copyright protection in the member states.

The said international obligations are usually formulated as a requirement to confer upon the authors an exclusive right to authorise the use of their works. By implication it is illegal to use a work without such authorisation. In turn, most of these instruments permit the member states to make certain exceptions and limitations to this right. Many of these

[1] For an introduction to the convention, see 3.3.1.1.

'exclusionary provisions' dictate rather clearly *how* the right is to be limited, and the *extent* to which it may be limited. Others, however, are vaguer. Notably the so-called 'three-step test', which over the years has been implemented in several of the said instruments, is a rather vague formula for determining the permissibility of a limitation.

The question to be discussed in this thesis is whether- and to which extent the extended collective licence model is in harmony with the obligations under the mentioned international instruments. Except in a few EC directives, the model has not been directly addressed on an international level.

A first question is whether the model at all is at variance with the exclusive right. Provided the question can be answered in the affirmative, the objective is to examine the extent to which the exclusionary provisions permit that the exclusive right be modified by an extended collective licence.

The answer to these questions may vary according to the instrument in question. The formulation of the different rights and exceptions is not always consistent, nor is the material content of the rights. Furthermore, the extended collective licence model is a concept rather than a reference to one single type of legal provision, meaning that the answer needs not be the same irrespective of how the extended collective licence is constructed.

In the choice of which conventions and exclusionary provisions to treat, an objective has been to provide discussions of the broadest possible relevance. In this respect, the choice has been made to discuss the compatibility of the extended collective licence model with the above-mentioned 'three-step test'. Incorporated inter alia in article 9(2) of the Berne Convention, article 10 of the WIPO Copyright Treaty and article 13 of the WTO TRIPS-agreement, the three-step test has become a widespread method of crafting exclusionary provisions in international copyright, governing limitations on a multitude of exclusive rights. As there is reason to interpret the different three-step tests much in the same way,

and considering their widespread use, examining the compatibility of the extended collective licence with the three-step test will yield conclusions of general relevance. In addition to the three-step test in article 9(2), the Berne Convention contains other exclusionary provisions of relevance to the extended collective licence model, notably articles 10(2) and 11bis(2). While these are of central interest to certain particular extended collective licences (sections 13b and 30 of the Norwegian Copyright Act in particular, see 2.3.1 below), their general relevance in the discussion of the extended collective licence *model* is on the other hand smaller, hence they will not be discussed here.

Pertaining to the choice of legal instruments, apart from their common employment of a three-step test, the choice of the TRIPS-agreement and the Berne Convention owes to their very practical significance: Through the Dispute Settlement Body of the WTO the member states may unilaterally seek binding dispute settlement.[2]

The second main theme in this thesis is the compatibility of the extended collective licence model with EC law. This choice owes to its very practical relevance to national, Nordic legislation: Through the European Court of Justice (ECJ) and the EFTA Court respectively, disputes over incorrect implementation of EC law may be settled in a binding manner, without prior consent from the member states.

EC legislation contains several instruments that can be relevant to the ECL-model. I have chosen to discuss the relation to Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, for two reasons: Firstly, it has a kinship with the above-mentioned conventions, both with respect to the overlap of protected subject-matter as well as with respect to the employment of a three-step test to limit the imposition of limitations. With regard to the application of the test, the argumentation in relation to the above-mentioned conventions is, as will be seen, valid also for the directive. Secondly, the directive explicitly accepts the extended collective licence

[2] See 3.3.1.3

model as non-conflicting with the directive. As such, it is the most explicit recognition of the model within international copyright. The significance of this recognition is however rendered dubious by an apparent methodological problem: The extended collective licence is only mentioned in the preamble – not in the operational clauses of the directive. While this is not problematic insofar as the preamble is an important source to the interpretation of Community directives, problem arises in that the wording of the rights granted may hardly be interpreted as consistent with the compulsory element of the model. In such cases of clear conflict, settled practice from the European Court of Justice (ECJ) shows that the preamble may not derogate from a clear wording. This conflict is treated in chapter 7.

2 The extended collective licence model

2.1 Introduction

In short, 'extended collective licence' (ECL) refers to the situation where a licence agreement *freely negotiated* between a collective management organisation (CMO) and a user – typically an institution – by legal provision is *extended* onto the works of rights holders who are not members of the CMO.

Under normal circumstances, CMOs only have the power to license the use of the works that they represent according to voluntary agreement with the rights holder. This is also the outset for the ECL. However, if the CMO is deemed representative for the category of authors whose works are to be licensed, and provided there exists a legal provision imposing an ECL for the particular field, the extension may take place. In effect, the user is legally able to use the works of all authors within the concerned category on terms of use equal to those of the licence agreement, although the non-represented authors have not authorised this use.

The ECLs in many respects resemble the mandatory collective licence-schemes[3] by relying on a collective to conclude licence agreements that cover a whole category of works. The main difference, however, is that the ECL does not entail any automatic transfer of rights to the collective. Rather the contrary: The CMO must operate on a voluntary basis, and as long as no licence agreement is concluded, the non-member authors retain their exclusive right to authorise (or prohibit) the use of their works. Additionally, the Norwegian ECLs

[3] As implemented e.g. in France in the field of reprography, cf. article L. 122-10 of the French Intellectual Property Code.

are crafted such as to respect any individual agreement already concluded between the user and the author.[4] The same applies to agreements concluded after the ECL has taken effect.

The very purpose of the ECL is to counter *market failure*, by providing a means of facilitated, smooth rights clearance. Whilst the model in practice implies that the author is forced to share his right to authorise the use of his work with the collective, the purpose of the ECL is normally *not* to intentionally disrespect the will of the author.[5] The cases where this happens are regarded as unfortunate side effects. Pursuant to the ECL, the author should as far as possible be afforded a say in the use of his work, and his economic rights be saved as far as possible.

The ability of the ECL to counter market failure will hopefully become clearer during the course of this thesis. At this stage, I will only provide an outline of the concept of rectifying the consequences of market failure. The concept 'market failure' is not very precise. It seems that the term has been subject to many polarized debates.[6] Both words 'market' and 'failure' are inherently vague, and may be interpreted differently depending on the perspective of the interpreter. To some, a market failure in the field of copyright implies only that the rights holder is incapable of maintaining *control* over the use of his work. When digital rights management systems (DRM) become effective enough to allow absolute control of the use of the work, the proponents regard the market to be functional again. Others use 'market failure' as an umbrella for a certain kind of normative arguments that should justify the imposition of copyright limitations, whilst yet others use the term in a purely factual and value-neutral way. *In the following*, 'market failure' will be used as a value-neutral reference to the *factual* situation of licence agreements not being concluded although there is a certain potential for such contracting if the transaction costs were lower.

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[4] This relies on an *interpretation* of the Norwegian ECL-provisions, which will be accounted for in more detail in 2.3.1 below.

[5] Although this could be the case with *certain* individual ECLs, cf. below.

[6] Cf. the account in Robert Burrell and Allison Coleman, *Copyright Exceptions: The Digital Impact*, Cambridge 2005, p. 167 ff.

Said differently, there is a market failure if both the users and the rights holders want to conclude licence agreements, but are prevented from doing so because of [prohibitively] high transaction costs. In this case, there are two different outcomes, namely that the market failure incites the users to make use of the works *illegally*, or that the users abstain from using the works at all. In the first case above, the initial prohibition against using works without authorisation is *in*effective, while in other cases it is *effective* due to a higher risk of detection. Furthermore, the first case implies that the author is unable to control and thus derive profit from the [illegal] use of his work. In the latter situation, the author is deprived of a remuneration he otherwise could have obtained, and society is deprived of a desirable dissemination of works.

Evidently, certain interests – both on the side of the users and authors – suffer from market failure.[7] By providing a means of facilitated rights clearance, it is presumed that the ECL manages to serve these interests, most notably the authorial interest in receiving remuneration, and the user-specific (public) interest in maximum dissemination of works as well as the interest in avoiding illegality. Although much the same could have been achieved with a compulsory licence, the ECL has certain features that render it even more efficient in countering the effects of market failure, as well as features that render it less prejudicial on the interests of the rights holders.

2.2 Historical overview and terminology

The *model* of extended collective licences is not homogenous, but is an abstraction of a number of different provisions that share a common core.

The first ECL was introduced in the Nordic copyright acts in the early 1960s.[8] It concerned the act of broadcasting, and was devised as a solution to the problem of inefficient rights

[7] Where these are called on to justify the imposition of a limitation, e.g. in relation to the three-step test, they will be mentioned explicitly, in order to keep the term 'market failure' as neutral as possible.

[8] In Norway, in the Norwegian Copyright Act of May 12 1961 nr. 2.

clearance for broadcasts of the time. The broadcasters depended on using copyright material, but it proved far too complicated to clear the rights in advance of the transmission. They had concluded contracts with major collecting societies that provided them with blanket licences for the use of their catalogue, but obviously the collectives did not represent all rights holders.[9] In consequence the broadcasters made use of the material they needed without regard to the need for licence, and remunerated only the authors who demanded payment.[10] Clearly, this situation of illegal use was unacceptable. The authors opposed the imposition of a compulsory licence, and the ECL was introduced as a compromise.[11] Since its inception, the number of ECLs has multiplied in pace with the evolving need for facilitated rights clearance. The resulting provisions are presented briefly below.

In the following, the model of extended collective licences is referred to as the "ECL-*model*", the individual legal provisions which impose the extended effect as "ECL-*provisions*", and the individual licence agreements concluded between the CMOs and the users which form the basis for the subsequent extension as "ECL-*agreements*". Where there is no risk for confusion, "ECL" is sometimes used alone, in which case the meaning is evident from the context.

2.3 Presentation of the individual ECLs

2.3.1 The Norwegian ECLs

2.3.1.1 Introduction

The Norwegian Copyright Act[12] (NCA) contains 7 different ECL-provisions, which will be presented briefly below. The other Nordic countries have a similar number of ECLs which

[9] Ot.prp. nr. 26 (1959-1960) p. 51-59

[10] Ole-Andreas Rognstad, "Avtalelisenser", *Nordiskt Immateriellt Rättsskydd*, nr. 2/2004, p. 151-159 (p. 152)

[11] Ibid.

[12] Act of May 12 1961 nr. 2.

cover approximately the same areas. In 2008, however, a unique new ELC-provision was added to the Danish Copyright Act[13] (DCA). Since the scope of this new ECL is of central interest to the following discussion, it will be presented separately in subchapter 2.3.2.

2.3.1.2 Section 13b NCA – Reproduction for internal use in educational establishments

Section 13b NCA introduces an ECL for the act of reproduction for use in own educational activities. The ECL was the result of a Nordic legal cooperation in the seventies, resulting in four nearly identical provisions in Denmark, Finland, Sweden and Norway.[14] From its introduction in 1979 until 2005, it covered only analogue reproduction (paper copies), but in 2005 it was extended to cover also digital reproduction (from and to digital media, including digital uses of the digital copy, e.g. for virtual classrooms on the school intranet.)[15]

Section 13b allows *reproduction* for *use* within own *educational activity* of *published* works. This implies a restriction in five dimensions: Firstly, the original may only be *reproduced*. Secondly, the resulting copy may be used in whatever way necessary for the purpose of education, restricted however to use *within* own educational activity.[16] Thirdly, both the reproduction and the subsequent use must be for *educational purposes*. Fourthly, the work to be used pursuant to section 13b must be *published* in the sense of section 8(2) NCA.[17] Fifthly, as mentioned only in the preparatory works of the ECL, the ECL is

[13] Act of June 20 2008 nr. 587 (latest amendment)

[14] Cf. NU 1973: 21

[15] Cf. Act of June 17 2005 nr. 97

[16] 'Educational activity' is a translation of the Norwegian word 'undervisningsvirksomhet', which may refer both to the activity of imparting knowledge, and to the institutions providing such services. According to Ot.prp. nr. 46 (2004-2005) p. 65, 'educational activity' refers to "the impartment of knowledge in organised forms", consequently excepting inter alia ad hoc seminars from the scope of the provision.

[17] For all practical purposes, the concept of publication in section 8(2) NCA corresponds to the concept of publication in article 3(3) of the Berne Convention.

delimited against use that verges on activities normally undertaken by a publisher (e.g. multiple copying of entire works).[18]

Apart from the mentioned restrictions, the closer delimitation of the use is left to the CMO (section 36(1) which will be presented in 2.3.1.9 below). In other words, as long as an authorised CMO has concluded a licence agreement with a user, the terms of the agreement are extended onto the non-represented works as well, provided that the terms of use do not exceed the above-mentioned restrictions. In such cases, the exceeding terms apply only with respect to the works of the member authors.

Lastly, section 13b also allows for fixation of broadcasts, on the same terms as the above, except where the broadcast consists of cinematographic works that must be perceived as intended also for uses other than presentation through television.

2.3.1.3 Section 14 NCA – Reproduction for internal use in businesses

Section 14 NCA imposes an ECL pursuant to which public and private institutions, organisations and commercial enterprises may, for use within own activities, reproduce published works, provided they are covered by a relevant ECL-agreement. Introduced in 1995, the ECL covered only analogue reproduction until 2005, when it was extended to cover digital reproduction as well.[19]

The ECL is limited in five dimensions: Firstly, it has a personal limitation which, admittedly, is very wide: Both public and private institutions, organisations and commercial enterprises may benefit from the ECL. Secondly, the ECL is functionally limited to the act of reproduction (from the original). Thirdly, there is no explicit limit to

[18] Ot.prp.nr.46 (2004-2005) e.g. p. 144. Incidentally, this is to prevent the ECL from encroaching upon markets of regular exploitation of the work. As contended in the above chapters, the ECL is meant to combat the effects of market failure.

[19] Act of June 17 2005 nr. 97

the forms of use that the resulting copy may be subjected to – 'use within own activities' gives substantial freedom – *but* it must be limited to use *within* the institution.[20] Fourthly, the work to be reproduced must have been published, and fifthly, the ECL may not cover reproduction of such a scale that it borders on activities normally undertaken by a publisher.[21]

Apart from the mentioned restrictions on the scope of the ECL-provision in section 14, the closer delimitation is left to the CMO through its fixation of the terms of use pursuant to the ECL-agreement. In practice, as will be seen below, the extent of the licence agreements pursuant to this and the ECL of section 13b are much narrower than the scope of the provisions.

Similar to section 13b, section 14 allows for the fixation of broadcasts on the same terms as above, with certain minor exceptions.

2.3.1.4 Section 16a NCA – Reproduction in the archive-, library- and museum-sector (ALM-sector)

Introduced in 2005, section 16a NCA is one of the newest ECLs. Implemented as an addition to an already existing free-use provision for the ALM-sector (section 16), the main cause for its imposition appears to have been the wish to open up new markets through facilitated rights clearance, where before the need to acquire individual permission had proven prohibitive (untapped potential).[22] Pursuant to section 16a, archives, libraries and

[20] The ECL consequently does not cover the activities of e.g. press clip agencies, since the press clips are not for use *within own activities*, but for sale to other institutions. This of course with the reservation that press clip agencies naturally may have an ECL for *internal* copying.

[21] Ot.prp.nr.46 (2004-2005) e.g. p. 145

[22] Cf. implicitly Ot.prp.nr.46 (2004-2005) 3.4.7.

museums (the 'ALM-sector') may reproduce published works contained in their collections and make such works available to the public[23], if covered by a relevant ECL-agreement.

In terms of permitted acts, section 16a is of a much wider scope than e.g. section 13b. While the latter only allows for the *reproduction* of the original, and certain forms of subsequent use of the resulting copy, section 16a in principle allows for nearly all copyright relevant acts. As seen, the ECL is personally restricted to the ALM-sector, which comprises fairly large entities.[24] Furthermore, whilst sections 13b and 14 have fairly constricted fields of operation due to the restriction on permitted purposes for which the reproduction may take place, section 16a seems to lack such a delimitation. When regarded in connection with the relatively intense use rendered possible by digital means of exploitation, it becomes apparent that this particular ECL places very few restrictions on the possible contents of the subsequent ECL-agreements. As with the two preceding ECLs, however, only published works may be used pursuant to this ECL, and additionally, the works to be used must be contained in the collections of the particular institution covered by the ECL-agreement.

As with all ECLs, the further delimitation of scope is left to the parties to determine, through the fixation of licence terms in the ECL-agreement. In April 2009, the first ECL-agreement within this field was concluded, allowing the National Library to make available on the Internet 50 000 books published in Norway in the 1790-ies, 1890-ies and 1990-ies, of which most are protected by copyright.[25] The permitted use is delimited in several

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[23] Direct translation of the Norwegian term "gjøre…tilgjengelig for allmennheten", which is not only restricted to the act of making available a work through 'on demand' services, but which also covers the act of communicating the work to the public through wireless as well as wire-bound means and the act of distributing copies.

[24] Which entities within the ALM-sector that may be allowed to benefit from the ECL is subject to delimitation by section 16 NCA, pursuant to which the King (in practice the Ministry of Cultural Affairs) is given decisive power.

[25] The agreement can be found on http://www.kopinor.no/avtaler/avtaleomraader/nasjonalbiblioteket (Norwegian only).

respects, one important limitation being that the books may only be made available in a read-only format (§ 4 of the agreement). Although section 16a is vast in scope, there is reason to believe – further strengthened by the formulation of the said agreement – that the future ECL-agreements will not necessarily use the freedom afforded under the ECL-provision to its full extent. The ECL leaves the parties extensive freedom to enable them to conclude the most preferable licence agreement, their individual requirements taken into consideration. In practice, this could imply using the maximal limits in one respect, whilst imposing narrow restrictions in another.

2.3.1.5 Section 17b NCA – Fixation for the benefit of the disabled

Section 17b NCA was introduced in the 1995 revision of the NCA. It allows the fixation of a published film or picture, with or without sound, and of a transmitted broadcasting programme not essentially consisting of musical works, for the purpose of free use by the disabled, if covered by a relevant ECL-agreement. The ECL is subject to regulation by the King[26], including the stipulation of which entities that may make use of the ECL. At present[27] no such regulation has been enacted.

2.3.1.6 Section 30 NCA – Broadcast of works

The ECL for broadcasting of works was, as mentioned above, the first ECL, enacted as early as in 1961. Pursuant to this, the Norwegian Broadcasting Corporation (NRK) (and other broadcasters, as decided by the King)[28] may broadcast a *published* work, if covered by a relevant ECL-agreement. The same applies to *issued*[29] works of art and *issued* photographic works.

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[26] In practice the Ministry of Cultural Affairs

[27] August 2009

[28] At present (August 2009) no such regulation is enacted

[29] 'Issued' implies something less than for a work to be published. Pursuant to section 8(1) NCA, a work is issued when it has been 'made available to the public', cf. the definition of this term in footnote 23.

Section 30 is delimited in several respects. Firstly, there is the evident personal limitation: For the time being, only NRK is benefited by the provision. Secondly, the ECL is restricted to the act of broadcasting of the work, with the further exception of wire-originated transmissions[30] and satellite broadcasting unless it is part of a simultaneous wireless transmission by the same broadcaster. Thirdly, stage works and cinematographic works are excluded from its scope,[31] as are fourthly any works opted out by the rights holder. Fifthly, apart from works of art and photographic works which only need to be *issued*[32], the ECL only encompasses *published* works. Finally, the ECL is restricted to individual payments, meaning that no collective schemes pursuant to the prospective ECL-agreements may be given extended effect.

The further delimitation of scope is left to the CMO through its fixation of the terms of licence. A notable difference between this ECL and the other ECLs, is the requirement of *individual remuneration* and the right to *opt out* of the scheme. Whilst the remainder leave this to the CMOs to decide, thus giving extended effect to [almost] whatever regulation the ECL-agreements should have in this respect, section 30 is of a narrower scope.

2.3.1.7 Section 32 NCA – Re-use of self-produced material contained in the collections of the broadcasting company.

Section 32 imposes an ECL on the re-use of the so-called 'dead archives' of the broadcasters. Introduced in 2005, it enables the conclusion of ECL-agreements allowing the broadcasters to broadcast anew the productions or to make the productions available in 'on demand' services.

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[30] Owing to article 11bis of the Berne Convention regulating only wireless transmissions and wire-bound, simultaneous transmissions and *re*transmissions: Thus, with respect to the wire-originated transmissions, article 11bis makes no exception from article 11 and 11ter.

[31] Mainly due to article 14 and 14bis of the Berne Convention.

[32] Cf. footnote 29.

Pursuant to section 32, the productions must be part of the broadcasters *own* productions, it must have been issued (normally it has if it has been broadcasted before), and it must have been made before January 1 1997. As with section 30, the rights holder is granted a right to opt out.

Curiously, the ECL *does* comprise cinematographic works, which is surprising, taken into consideration articles 14 and 14bis of the Berne Convention, cf. the discussion of the legal character of the ECL in subchapter 2.4 below.[33]

2.3.1.8 Section 34 NCA – Cable retransmission

Pursuant to section 34, works that are lawfully included in a broadcast may, by simultaneous and unaltered retransmission, be communicated to the public, if covered by a relevant ECL-agreement. In case an ECL agreement is denied or otherwise not concluded within six months after the negotiations are initiated, each of the parties may demand that permission and terms for retransmission be determined in a binding manner by a special commission, cf. section 36(2).

Apart from the possibility for *each* of the parties to refer the case to a special commission with the power to *bindingly* settle the case,[34] section 34 differs from the other ECLs in that it prescribes ECL as the *only* possible way to exercise the particular right of retransmission. This implies that the author cannot exercise his exclusive right individually in this respect, but is forced to exercise it through the CMO. Finally, section 34 excepts wire-originated broadcasts from its scope.

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[33] Ot.prp. nr. 46 (2004-2005) p. 105. See also Rognstad (2004) p. 156, who describes the relation between ECL and said provisions as "a still unsolved question" (my translation).

[34] With respect to the other ECLs, section 38 enables each of the parties to demand mediation, but *both* parties must agree if the dispute is to be settled in a binding manner.

2.3.1.9 Sections 36 – 38a NCA

Sections 36, 37, 38 and 38a regulate certain aspects common for all ECLs.

While the individual ECL-provisions regulate the *fields* in which ECL-agreements may be concluded, plus certain aspects specific to the individual ECLs, section 36(1) regulates and delimits the extension-effect of the ECL.

Pursuant to section 36, an ECL-agreement (between an authorised CMO and a user) has the effect that the user covered by the agreement may use the works of non-represented authors *in the same field*, *in the same way* and *with respect to the same types of works* as covered by the ECL-agreement. 'In the same field' refers to the field of the ECL-provision, meaning e.g. reproduction in the educational sector in the case of section 13b etc. 'With respect to the same types of works' implies that the extension effect applies [only] to works of the same kind as those covered by the ECL-agreement. A 'type of work' is however a very imprecise term: e.g. both literary works and non-fiction literary works may be seen as 'types of works', the first being much broader than the second. However, this delimitation of the extension effect must be seen in connection with the requirement of representativity pursuant to section 38a (described below): In order for a CMO to be authorised to conclude ECL-agreements, it must be representative for the category/type of works onto which the extension effect is to be applied. In other words, the CMO may not conclude ECL-agreements with respect to categories of works for which it is not representative. If, for example, the CMO is representative only for non-fiction literature, and not for literary works in general, the ECL will only be extended onto non-fiction literary works. Lastly, 'in the same way' implies that the terms of the ECL-agreement are extended: As long as it does not exceed the limits of the individual ECLs, that which is determined concerning the use of the works in the ECL-agreement is decisive also for the use of the non-represented works. E.g. if the ECL-agreement pursuant to section 14 only allows *photocopying* for *purposes of information* in the institution, this is decisive also for the use of the non-represented works. Moreover, pursuant to section 36(1) second sentence it is clearly established that the ECL-agreement in its entirety is decisive for the use of the non-

represented works, meaning that all terms governing the use, duty of reporting the use, remuneration for use, etc. must be observed.

Concerning the remuneration for use, section 37(1) determines that the decisions of the CMO with respect to the *collection and distribution* of the remuneration are binding for the rights holders to the non-represented works. Pursuant to the second sentence of the paragraph, non-member rights holders are all the same to be secured the same access to the remuneration as the members, i.e. the distribution formula must be non-discriminatory. Section 37(2) modifies this outset to a certain degree by granting the non-member authors a right to individual remuneration to the extent that they substantiate the use of their works pursuant to the ECL. This will be treated in more detail in subchapter 6.2.7. Furthermore it may be kept in mind that section 30 derogates from section 37 by allowing *only* the payment of individual remuneration.

Lastly, all ECLs rely on an authorised CMO[35] to conclude licence agreements with users. In order to obtain authorisation, the CMO must be representative, which pursuant to section 38a is the case where the CMO, in "the field", represents a "*substantial*" part of the authors of *works used in Norway*.

'In the field' may refer both to the category of works as well as to the field of the individual ECL-provision.[36] The normal situation is where the CMO represents authors of one or a few categories of works, e.g. the Writers Guild of Norway (Dramatikerforbundet) which represents some 285 writers for film, television, radio and theatre.[37] In this , the CMO may

[35] Authorisation is not a requirement in Sweden.

[36] The term is used somewhat differently in Ot.prp. nr. 15 (1994-1995) pp. 150-151 and Ot.prp. nr. 46 (2004-2005) pp. 54-56, but a dual sense is in any case meaningful.

[37] Source: WGN's web pages, available at: http://www.dramatiker.no/index.php?name=english

be deemed representative for this particular category.[38] In other cases, as e.g. the case of NORWACO which licenses the retransmission right according to section 34 NCA, it is more natural to question if the CMO is representative for the authors of works which normally are retransmitted this way. Thus, even though a work of a type which would be hard to fit into one of the categories represented by NORWACO should find its way into a retransmission, the CMO would still be considered representative.[39]

'Substantial part of authors of works used in Norway' implies three things. Firstly, representativity can only be achieved by representing the original rights holders – the *authors*. Derivative rights holders, such as heirs and publishers do not count with respect to the requirement of substantiality.[40] Secondly, 'substantial part' implies less than a majority:[41] It suffices to represent a fairly large number of authors of the relevant category the closer delineation being subject to an individual assessment where factors such as the degree of organisation within the category of works are relevant. Incidentally, it is impossible to operate with fixed thresholds, as it is impossible to determine the exact number of authors within a given category. The question therefore is whether the CMO represents a sufficient number of authors to be *representative* for the interests of the *group*.[42] Lastly, the limitation to 'works used in Norway' implies that it is neither sufficient to represent only national authors, nor necessary to represent a substantial number of all authors in the world – the key is given by the pattern of use in the relevant market. In all probability, pursuant to many ECLs, the predominant part of works used will be of national authors. Additionally, the many reciprocity agreements concluded between the different CMOs of the world considerably extend representativity beyond the national borders.

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[38] What constitutes a 'category' is not very clear, and will have to be determined partly with regard to the CMO which applies for authorisation. Based on the type of authors it represents, this particular configuration may be deemed one 'category', for which it in turn must be examined whether it is representative or not.

[39] Cf. Ingrid Mauritzen, "Avtalelisenser etter åndsverkloven § 36 – med særlig vekt på de krav som stilles til organisasjonen, jf. § 38a", *CompLex*, nr. 8/1997, p. 50 ff.

[40] Cf. Ot.prp. nr. 46 (2004-2005) p. 55

[41] Ibid.

[42] Cf. NU 1973: 21 p. 84

2.3.2 The Danish 'omnibus'-ECL: Section 50(2) DCA

In 2008 a new section 50(2) was amended to the DCA, introducing the broadest ECL in the Nordic countries to date.[43] Pursuant to this section, the licence agreements of a CMO deemed representative for a certain category of works and within a certain specified field may be given extended effect onto all the works of this category within this field. In other words, section 50(2) imposes a general ECL – a sort of 'omnibus' ECL that is not restricted to certain specified fields, purposes, copyright relevant acts or groups of beneficiaries, as are the abovementioned ECLs (which have their equivalents in Denmark as well).

Although undeniably broad, even section 50(2) has certain boundaries. Firstly, section 50(4) requires that the CMO be authorised by the Ministry of Cultural Affairs to conclude such ECL-agreements. The authorisation is to define more closely the fields in which such ECL-agreements may be concluded (e.g. the field of digital lending of books, etc. Note that 'field' in this respect is a vague word, giving the Ministry much latitude). Through this authorisation, the Ministry is also to control that the CMO fulfils the requirement of representativity, namely that it represents a *substantial* number of works within the particular category. Moreover, the Ministry is to see to that authorisation is given only in fields where 'normal' voluntary rights clearance is impractical,[44] thus securing that the ECL is only used to counter market failure. Secondly, section 50(2) grants the non-member authors an unconditional right to opt out of the ECL.

The closer delimitation is left to the relevant CMO. Undeniably, this gives the CMO wide margins for determining the terms of licence pursuant to the ECL-agreement. However, taken into consideration the need for authorisation, and the relatively wide margins given the Ministry when delimiting the scope of the authorisation, in practice the freedom of the CMO, and consequently the extent of the ECL, might end up as quite constricted.

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[43] Act of June 20 2008 nr. 587.

[44] Cf. Proposition L 58 of 30.01.2008, comment to section 50(2) and (4).

2.4 The legal character of the ECL – is it a limitation?

In recent years, there has been a shift in the legal perception of the ECL: From initially being regarded as a limitation of copyright, possessing common traits with the ordinary compulsory licences, the later years have seen an increasing exposure of the rights management-aspect of the model. Amongst the indicators of this trend, a shift of perspective can be seen in the Scandinavian copyright acts, where the chapters containing the ECL-provisions now bear names that accentuate the rights management-perspective.[45] This development raises the question of the appropriate legal characterisation of the ECL. Is it an outright limitation or is it merely an arrangement concerning rights management?[46]

The fact that ECLs are referred to as 'rights management' rather than statutory limitations is not in itself problematic. For all practical purposes, the ECLs are in fact a means of managing collectively the rights of a whole class of authors. And, contrary to outright mandatory licences, the ECLs involve an *active* management, i.e. the terms of use are not regulated by rigid, *passive* legislation, but by agreements negotiated in the free market.

The question, however, becomes relevant when the present trend of regarding such rights management as non-conflicting with the exclusive rights structure is taken into consideration – in other words that material implications are drawn from the terminological divide. For instance, paragraph 18 to the preamble of the Infosoc-directive[47] states that the directive is not to prejudice national arrangements "concerning the management of rights such as extended collective licences". Inasmuch as article 5 of the directive, which is to

[45] Chapter 2 of the DCA and the NCA reads "Limitation of copyright and management of rights by extended collective licence". Chapter 2 to the SCA, which contains the outright limitations, reads "Limitation of copyright", whilst the ECL-provisions are contained in chapter 3 reading "Transfer of rights".

[46] See Rognstad (2004) p. 154-155 for a similar discussion that has inspired the present one.

[47] Directive 2001/29/EC

provide for an exhaustive enumeration of permissible limitations,[48] does not mention any ECLs, this might imply that the system of ECL is seen as a special category, different from a limitation. Another example is found in French doctrine, which according to Geiger is unanimous in treating the mandatory collective management imposed on the reproduction right (article L. 122-10 of the French Intellectual Property Code) as separate from the compulsory licences.[49] Geiger furthers this perspective by asserting that the mandatory scheme in fact "does not limit existing exclusive rights".[50] This should apply a fortiori to the ECLs, considering that the ECLs imply something *less* than fully mandatory collective licensing.

In asserting that such schemes of managing copyright conform to the exclusive rights-construction of copyright and that they as such do not infringe upon the exclusive right,[51] it seems to have been forgotten that the conventions grant *the author* (or rights holder) an *exclusive* right to authorise the use of his work. While it might perhaps be argued that the exclusive rights-construction in the 'acquis communautaire' does not include the freedom for the author to determine how his rights are to be managed,[52] it cannot thereby be concluded that the same holds true for the rights granted e.g. in the Berne Convention.

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[48] Recital 32 of the preamble.

[49] Christophe Geiger, "The role of the three step test in the adaptation of copyright law to the information society", *UNESCO Copyright Bulletin*, January – March 2007, p. 1-21 (p.11) Online: http://portal.unesco.org/culture/en/files/34481/11883823381test_trois_etapes_en.pdf/test_trois_etapes_en.pdf (last accessed: 13.04.09.)

[50] Ibid, p. 12.

[51] Cf. for instance the white paper to the 1995 amendment to the NCA, Ot.prp.nr.15 (1994-1995) p. 69-70. In connection with the proposed ECLs for broadcasting (section 30) and retransmission of broadcasts (section 34) it is commented that recent development in international law has recognised these ECLs as conforming with the exclusive rights-structure, and thus not in need of any proviso allowing for compulsory licences. The comment is nevertheless only a side remark inasmuch as the necessary conventional basis is found in the BC article 11bis. The same tendency can be inferred implicitly from Ot.prp. nr. 46 (2004-2005) which foregoes the 2005 amendment to the NCA, on pp. 66-67.

[52] Cf. recital 18 of the preamble; see chapter 7.

Although the ECL in formal terms might be said to uphold the exclusive rights-construction, in that the users still need authorisation (licence) to be able to use the work legally, and in that the CMO is free to choose whether or not to conclude an ECL-agreement, the *author* himself is bereft of his *exclusive* right of authorisation. While the authors member to the CMO voluntarily have acceded to the management scheme, and as such are *exercising* their individual right, the outsider authors are forced by legal provision to share their right of authorisation. Considering that e.g. the reproduction right in article 9(1) BC is a personal right – not one granted the body of authors as such – the fact that the ECL *also* can be seen under the angle of rights management cannot change its property of limiting copyright, which in turn necessitates compliance with the three-step test of article 9(2) BC.

It could of course be argued that by providing the possibility to opt out, the ECL only *presumes* that authorisation would have been given, which in case should keep it clear of conflict with the exclusive right: In case the presumption should be erroneous, the author could just proceed to forbid the use. However, while it could cogently be argued that an ECL with this option would sufficiently ensure the interests of the rights holder, it would be an untenable claim that this would not be contrary to the exclusive right.[53] Effectively, such a system turns upside down the outset of copyright, namely that it is forbidden to use a work unless authorisation is granted by *its* rights holder. Using contractual presumptions (or for that matter considerations based on procedural law[54]) cannot alter this fact if the presumption of acceptance verges on a simulation.

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[53] For a more detailed discussion, see subchapter 6.2.8.

[54] Which seems to be the case in the Google book settlement which operates on an opt-out basis. Unless opting out within September 2009, authors within the Berne Union are bound by the terms of the settlement, which include the right for Google to digitally reproduce, make available on demand, and more, of the works comprised. Although the settlement (including the opt-out system) builds upon the US system of class action, this does not mean that no conflict with the exclusive right may arise. On the contrary: The conventions do not require that limitations have a certain form – they ask only if copyright has been limited.

> Given its mention above, the French system of mandatory collective licence deserves a short comment. Regarding Geiger's abovementioned statement, it might be argued that it is passable with respect to article 9 of the Berne Convention. Contrary to the system of ECL, article L. 122-10 of the French IPC provides that an author, by publishing his work, automatically assigns his reproduction rights to a collective. It might thus be contended that the author, by voluntarily publishing his work when presumptively aware of the automatic transfer of rights thereby entailed, voluntarily exercises his exclusive right to this effect. While this might be true in a strictly formal sense, the solution nonetheless is functionally equal to a compulsory licence that encompasses published works: For many types of works, publishing them is the very consequence of- or a precondition for exploiting them. Considering that the exclusive right is granted as a means for the author to exploit his work, and that it for this reason is granted *the author exclusively*, the claim that said rule is conforming to the exclusive right amounts to fiction, when in fact the author is only exploiting his work as envisaged.

Accordingly, while both the ECL and the French system might more appropriately be referred to as rights management systems, rather than systems of compulsory licensing, this terminological and functional difference must not induce one to assuming that no conflict with the exclusive right arises. On the contrary, both solutions imply an element of coercion, to which the three-step test applies: The inescapable reality is that a work may be used pursuant to a will external to that of the author. In response to the question posed initially, the answer must be that the ECL is a limitation, although its rights management properties might render it less radical than outright compulsory licences (and thus possible to impose in fields where compulsory licences surely would be inadmissible).

3 Compatibility with the three-step test - introduction

3.1 Structure

In the following chapters, the ECL-model is examined in light of the three-step test as embodied in the Berne Convention, the WIPO Copyright Treaty and the TRIPS-agreement. The model is systematically reviewed in relation to each limb of the test, successively. Considering the particular method of interpretation applying to international conventions, a short account for the principles used in the following is given in this chapter. Next, the conventions incorporating the test are introduced, followed by a general presentation and discussion of certain common questions relating to the test.

3.2 Methodology – principles of interpretation

The Vienna Convention on the Law of Treaties of 1969 regulates, in its Part III Section 3, the principles of treaty interpretation. Although the treaty is non-retroactive (article 4), entered into force in 1980, and thus strictly speaking does not apply to the Berne Convention, its principles on treaty interpretation are considered to be a codification of customary international law.[55] It is thus justifiable to base the subsequent interpretations on Section 3 of the convention, keeping in mind that it is not *formally* binding. With respect to the WIPO treaties and the TRIPS (see below), these entered into force after the Vienna Convention. However, considering that there is no complete overlap between the states

[55] See e.g. Sam Ricketson and Jane Ginsburg, *International Copyright and Neighbouring Rights*, Oxford 2006, p.189 and Martin Senftleben, *Copyright limitations and the three-step test*, The Hague 2004, p. 99, with further references.

party to the Vienna Convention and the other treaties, the Vienna Convention is not *formally* binding to the interpretation of these either.[56]

As to the principles codified in the Vienna Convention, article 31(1) establishes the outset: The *text of the treaty* interpreted according to the "ordinary" meaning of the words *and* the context in which they appear, is primary. To the extent that an "object or purpose" can be inferred from the treaty, the text will have to be interpreted in light of this as well. Pursuant to article 32, if the provisions so interpreted appear ambiguous, obscure or "manifestly absurd or unreasonable", recourse may be had to 'supplementary means' of interpretation, such as preparatory works.

As the act of interpreting is continuous and comprehensive, and normally not something that might be split up, the fact that articles 31 and 32 create a hierarchy between primary and supplementary means of interpretation needs not imply that the different means must be kept apart and be applied in an orderly manner.[57] On the contrary, read in connection, the different means of interpretation might shed light on the meaning of one another: The hierarchy is really only relevant when it comes to harmonising the different conclusions that can be drawn from the different sources, should they be contrary to one another. If for example a side remark in the preparatory works is contrary to the ordinary meaning of the text and does not find resonance in the object and purpose of the treaty, it cannot prevail.

Considering the relation between different supplementary means of interpretation, article 32 does not establish any hierarchy, nor does it provide any explicit limits to what may be regarded as such. The explicit mention of preparatory works can nonetheless be taken to confirm that these have a central position:[58] The intimacy between the preparatory works and the ensuing instrument can often be substantial, in which case they may be well-suited for shedding light on the meaning of the latter. However, the relative weight of the

[56] Ricketson/Ginsburg (2006) p. 189.

[57] In this sense, see Ian Brownlie, *Principles of Public International Law*, 7th edition, Oxford 2008, p. 632.

[58] Similarly, Senftleben (2004) p. 111.

supplementary means of interpretation must ultimately be determined concretely, with regard to the individual accompanying circumstances, see 3.3.1.1 below.

3.3 The three-step test – a general outline

3.3.1 The conventions in which a three-step test is applied

3.3.1.1 Berne Convention

In the field of copyright, the Berne Convention (BC) constitutes the very cornerstone of international harmonisation of legal protection. Signed in 1886, it represented the first multilateral copyright agreement affording a comprehensive and systematic protection of copyright.[59] Subsequently, the convention has been amended seven times, where both the categories of works protected as well as the level of protection, i.e. the acts of use covered, have been extended. The latest amendment *to the scope of protection* was done in the Stockholm Act of 1967, where the act of reproduction was given status as exclusive right, see below.

The Berne Convention establishes a union (article 1) in which the member states are required to treat the works of nationals of other member states in an equal manner to the works of its own nationals (article 5). Moreover, pursuant to the same provision, the member states are obliged to grant the foreign authors a minimum of protection corresponding to the minimum rights stipulated in the convention, even though the level of protection granted its own nationals might be lower. These principles of national treatment and minimum rights form the backbone of the Berne Convention. The relation to national authors, on the other hand, is not subject to regulation.

In the following, only the reproduction right and the limitation to it are to be presented, since this is the only instance where the three-step test applies in the BC.

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[59] Ricketson/Ginsburg (2006) p. 42.

Article 9(1) BC grants the authors of artistic and literary works "the exclusive right of authorizing the reproduction of these works, in any manner or form". This rule is however subject to a proviso in subsection (2) giving signatory states the ability to make exceptions to this right. Subsection (2) also limits the scope of the exceptions that can be made with the wording:

> "It shall be a matter for the legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author".

The most prominent construction of this limit of scope is known as the three-step-test, and is a linguistic deconstruction of the aforementioned wording into the three following criteria:

1. Any exception must be limited to "certain special cases".
2. An exception must not allow reproduction that "conflict[s] with a normal exploitation of the work".
3. An exception must not "unreasonably prejudice the legitimate interests of the author".

The three-step test appeared for the first time in the Stockholm text of the Berne Convention, and was carried on to the Paris text of 1971. It was introduced along with the protection of the reproduction right, acknowledging the impossibility of an unlimited right of reproduction.[60] Since its first appearance, the test has later on been adopted in the WTO TRIPS agreement, in the WIPO Conventions of 1996 and in EC law, with only slight alterations of wording.

Considering the apparent vagueness of the three-step test, it can be anticipated here that the preparatory works to the Stockholm Act de facto have a proportionately greater importance

[60] World Intellectual Property Organisation, *Records of the intellectual property conference of Stockholm (1967)*, Geneva 1971, p. 111

to the interpretation, although being a supplementary means of interpretation. Moreover, the general significance of preparatory works already having been discussed, it may here be noted that the Records are detailed, seemingly precise and readily available, which could justify putting strong emphasis on the arguments thus derived. The preparatory history leading to the adoption of the three-step test is accounted for in detail, the records providing all the relevant documents and transcripts, spanning from the preparatory documents to the Conference (S/1) to the debates of the Main Committee I, which was entrusted with considering the proposal for revising the substantive provisions of the BC. These arguably shed light on the object and purpose of the regulation, as does the report of the Main Committee I, in which the work of the committee is accounted for in detail, including the interpretations on which it based its deliberations.

3.3.1.2 WIPO treaties

1996 saw the adoption of two new treaties concerning copyright and neighbouring rights, namely the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). These were the products of the WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions, convened for the need of new international instruments on copyright capable of handling the challenges brought by the "economic, social, cultural and technological developments"[61] since the last amendment to the Berne Convention in 1971.[62]

Especially the technical evolution necessitated a new regulation. Whilst the BC protected both the reproduction right (article 9), and certain acts of communication to the public (wireless broadcasting in article 11bis, wire-bound communication to the public of cinematographic works and works thus adapted in articles 14 and 14bis, any communication to the public of performances and recitations of works in articles 11 ad 11ter respectively), and whilst these rights still are of importance in the technical reality of

[61] Preamble to the WCT and WPPT

[62] Cf. Senftleben (2004), p. 91.

today, the patterns of use brought about by the 'digital age' were not effectively addressed by the provisions of the BC. For instance, the act of making a protected work available to the public through digital on-demand service, which is inherent to the Internet, is of such a distinctive nature that it calls for a separate regulation. There was also substantial uncertainty as to the status of 'digital copying' under the Berne Convention: Although certain forms of digital copying probably would fall within the term 'reproduction' as regulated in article 9 BC, the status of for instance transient copying and storage (e.g. in the RAM of the computer) was not evident.[63] Furthermore, the adoption of new instruments would provide the opportunity of homogenizing certain rights that were rather heterogeneously treated in the BC, i.e. the right of communication to the public[64].

As with the Berne Convention, the WIPO treaties acknowledge the need for limitations to the outset of exclusivity. Similar to the system of the BC, articles 10(1) and 16(2) in the WTC and WPPT respectively, subject the protected rights to a proviso granting the signatory states the power to impose exceptions and limitations. The scope of this authority is in turn limited by a three-step test identical to that of the BC, with only negligible differences in wording. (Concerning the possibly different interpretations of the individual three-step tests, se subsection 3.3.2 below). In addition, article 10(2) WCT introduces a separate, identical three-step test on limitations to the minimum rights of the Berne Convention.

Although the WCT is a treaty of its own, it defines itself a "special agreement within the meaning of Article 20 of the Berne Convention" and proceeds to incorporate articles 1 to 21 and the appendix of the Paris Act of the BC into the scope of obligations (article 1(1), (3) and (4)). Consequently, the signatory states are obliged to comply with the substantive provisions of the BC, although not bound by the latter. By the imposition of the three-step

[63] See the account in Ricketson/Ginsburg (2006) p. 682 ff.

[64] Which in the WCT is given general application, both with respect to the works covered as well as with respect to the different modes of such communication: wireless, by wire and on demand transmission.

test pursuant to article 10(2), the signatory states are consequently required to subject all limitations to the BC to the scrutiny of the test.

The effect of this extended applicability of the three-step test is nonetheless rendered uncertain by a unanimously agreed [65] statement on the interpretation of article 10 by the Conference when adopting the treaty. In the second paragraph of the statement, article 10(2) is affirmed to neither reduce nor extend the "scope of applicability" of the limitations and exceptions permitted by the BC. According to the principles of the Vienna Treaty, such agreements made between all the parties are to be part of the context in which the terms of the treaty are interpreted (article 31(2)(a)). It thus appears that the provision is less of an imperative than a recommendation: Limitations to the Berne Convention are not *required* to conform with the three-step test of the WCT if they otherwise are permissible according to the provisions of the BC.[66]

The said agreed statement is nevertheless not exhausted by the above. According to the first paragraph of the statement, the three-step test of article 10(1) is understood to permit the continuation and extension into the digital environment of national exceptions and limitations that conform to the Berne Convention. Furthermore, it is understood to permit the introduction of new limitations that are appropriate in the digital network environment. Considering the interpretation of the three-step test, the WCT (and the WPPT which is accompanied by an agreed statement incorporating the abovementioned statement mutatis mutandis) is thus equipped with an interpretation tool not available to the test of the BC. As to its significance, see subsection 3.3.2 below.

[65] Ricketson/Ginsburg (2006) p. 870

[66] In the same direction, see Ricketson/Ginsburg (2006) p. 871

3.3.1.3 TRIPS-agreement

In the Marrakesh Agreement of 1994 establishing the World Trade Organisation, there was annexed a number of agreements, among which the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

The copyright-specific regulation of the TRIPS-agreement is contained in articles 9-14. Apart from incorporating the substantive provisions of the Berne Convention (article 9), the agreement affords computer programs protection as literary works under the BC (article 10), introduces a lending right for computer programs and cinematographic works (article 11) and extends the term of protection in cases where the calculation is done on other basis than the life of a natural person (article 12).

Pursuant to article 13 the signatory states are obliged to bring all limitations to the exclusive rights protected by the TRIPS in conformity with the requirements of a three-step test similar to the above-mentioned tests. Article 13 is different, however, in that it demands an assessment of the prejudice caused to the *rights holder*, as opposed to the above three-step tests where the *author* is in focus. "Right holder" is in this sense a broader term, since it also includes derivative rights holders, e.g. heirs. Furthermore, article 6bis BC which grants the *authors* moral rights is explicitly excepted from the incorporation of the substantive provisions of BC into TRIPS (article9). Thus, it would appear that the 'legitimate interests' of the rights holders pursuant to article 13 do not include moral rights. This, however, seems to be the case with the two above-mentioned tests.[67]

An important question is how the three-step test of the TRIPS relates to the exclusionary provisions of the BC. Article 13 TRIPS declares that member states shall confine limitations to "exclusive rights" to cases in conformity with the three-step test. The indefinite reference to "exclusive rights" might at first sight appear to require that the member states bring *all* limitations in conformity with the three-step test. This can however

[67] Senftleben (2004) p. 224-225.

not be the case, as it would be utter meaningless to require of the member states that they restrict their limitations on rights that the convention does not even require to be protected. A common interpretation, on the other hand, which accords well with the indefinite reference to "exclusive rights" in general, is that in addition to serving as authority for imposing limitations with respect to the rights afforded 'first' protection in the TRIPS, it also applies as a limitation of scope to the exclusionary provisions of the BC which is included in the obligations of the TRIPS by reference.[68] As to the closer question of how it relates to the *individual* provisions of the BC, I will limit myself to referring to the extensive literature on the topic.[69] For the purposes of the present thesis, it suffices to point out that articles 10(2) and 11bis(2) BC which, as mentioned introductorily, are of relevance to the ECL, might thus be subject to the three-step test of the TRIPS. Certain authors all the same suggest that the extensive nature of the limitation in 11bis(2) entails that the three-step test is not to be applied.[70] Concerning article 9 BC as incorporated in the TRIPS, the differences accounted for above between the three-step tests of the BC and the TRIPS respectively, implies that when limitations must comply with both, the additional test of the TRIPS might imply a further restriction, see also the discussion of the relation between the three three-step tests in subchapter 3.3.2 below.

An important feature of the TRIPS-agreement, absent in the two above-mentioned treaties, is the possibility of unilaterally requiring binding dispute settlement (article 64(1) TRIPS) This implies that the conformity of national limitations to the requirements of the three-step test may in fact be subjected to binding decision by the Dispute Settlement Body (DSB) of the WTO.

Pertaining to the status of such panel reports as sources of interpretation, they may hardly be invoked as more than a supplementary means of interpretation.[71] Nonetheless, and as

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[68] E.g. Ricketson/Ginsburg (2006) p. 855-856; Senftleben (2004) p. 90.

[69] E.g. Ricketson/Ginsburg (2006) p. 855 ff; Senftleben (2004) p. 87 ff.

[70] Ricketson/Ginsburg (2006) p. 859-860.

[71] Ricketson/Ginsburg (2006) p. 200; Senflteben (2004) p. 110.

pointed out by many commentators, panel reports adopted by the DSB must be given a certain weight.[72] The reports are often thorough, and as pointed out by Senftleben, they are a result of the participation – if indirect – of the member states of the WTO.[73] Compared to other supplementary means of interpretation, such as national court decisions, the panel reports arguably are of superior weight. Pertaining specifically to article 13 TRIPS, the near vacuum of sources on the interpretation of the three-step test might also contribute to an increased weight de facto being put on the panel report.

3.3.1.4 Directive 2001/29/EC

Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society will be treated separately in chapter 4. It is however in this context noteworthy that pursuant to article 5(5), the member states are obliged to ensure that any implementation of the limitations provided for in articles 5(1)-(4) of the directive into national legislation must conform to the requirements of the three-step test.

Per recital 44 of the preamble of the directive, the directive is intended to bring the community into compliance with certain international obligations relating to the subject matter of the directive; of particular relevance here is the three-step test as implemented in the WCT. The implementation of the directive into the domestic legislation of a member state must accordingly include an incarnation of the three-step test which is no more permissive than the implementation of the same test in the WCT, in order to allow the EC as a whole to comply with the WCT.

Whether the directive itself imposes a stricter test than the WCT and whether the member-states are free to implement a less permissive test will not be considered and I will for the present purposes proceed on the assumption that the tests are identical.

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[72] E.g. Senflteben (2004) p. 110; Ricketson/Ginsburg (2006) p. 201.

[73] Senftleben (2004) p. 110.

3.3.2 Is it possible to operate with a common interpretation of the three-step test?

The different three-step tests appear in different contexts. While they share the common purpose of limiting the scope of exceptions to the exclusive rights, the treaties in which they are embodied are separate legal instruments requiring a separate interpretation.

For instance, the TRIPS-agreement explicitly excludes the moral rights pursuant to article 6bis BC from its scope of protection. This implies that the provision does not form part of the context in which the three-step test of the TRIPS is to be interpreted. In turn, this would indicate that the "legitimate interests of the rights holder" referred to in the third step do not include these moral rights. A limitation encroaching upon e.g. the right to be named[74] does consequently not need to justify this particular prejudice to the interest of the author. The three-step test of the BC, however, where article 6bis undoubtedly forms part of the context, could very well lead to a different result.

Furthermore, being a trade agreement, the TRIPS may promote objectives other than those of the Berne Convention and the WCT, which might give rise to differences in interpretation.[75]

A third example is the agreed statement to article 10 WCT. As mentioned, such statements form part of the interpretative context of the treaty. As the agreed statement is specific to the WCT only, it cannot be used in the same way when interpreting the BC and the TRIPS, which incidentally are older instruments than the WCT.

The exemplification shows that there are relevant differences that, apart from the fact that they formally are independent instruments, indicate that the application of the three-step test may become different in practice.

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[74] Article 6bis(1) BC, "the right to claim authorship", of which the right to be named is a derivative, cf. Ricketson/Ginsburg (2006), p. 600-601.

[75] Cf. Ricketson/Ginsbug (2006), p. 852-853

On the other hand, as pointed out by Senftleben, the incorporation by reference of the substantive provisions of the BC which is made both in the WCT and the TRIPS-agreement, ensures a high degree of common context for the interpretation of the three different tests.[76]

With respect to the interpretational value of the agreed statement to article 10 WCT, the fact that it was adopted by a substantial number of the states signatory to the TRIPS-agreement,[77] implies that it may be taken into consideration when interpreting the TRIPS:[78] While a complete overlap would be necessary if the statement were to be a primary source of interpretation pursuant to article 31(3)(a) of the Vienna Convention, it nonetheless would appear qualified as a supplementary means of interpretation pursuant to article 32.[79] (Incidentally, the same could be said for the very three-step test of the WCT).

Evidently, there is a difference between serving as primary means of interpretation to one convention whilst only as a supplementary one to the other. For example with respect to the agreed statement to article 10(2) WCT, which arguably is at odds with the scope of application of the three-step test as inferred from the wording of both the TRIPS and the WCT, such difference is indeed of relevance.

However, when having regard to the all-but-identical wording of the three-step tests, the high degree of coincident context and their ability to serve as interpretative backgrounds for each other respectively, it seems reasonable to use a shared interpretation of all treaties and only where warranted from the context deviate from this approach.

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[76] Senftleben (2004) p. 106. This only applies to the younger instruments, however, since they incorporate the BC, not the other way around.

[77] World Trade Organisation, *United States – Section 110(5) of the US Copyright Act*, Report of the Panel, WT/DS160/R, 15.06.2000, paragraph 6.70: 127 countries participated in the WIPO Conference. Incidentally, there are at present 70 signatory states to the WCT, cf. www.wipo.int. WTO at present has 153 member states, cf. www.wto.org.

[78] Mihály Ficsor, *The law of copyright and the Internet*, Oxford 2002, p. 61; Senftleben (2004) p. 106-107.

[79] Ibid. Cf. also WTO (2000) paragraph 6.70

3.3.3 A review of the system of three steps

Traditionally, the three steps of the test have been perceived as separate, cumulative hurdles that must be applied in the order in which they appear. Thus, a limitation on the exclusive right must pass each limb successfully; a failure to meet the conditions of any of the steps would render the limitation inadmissible.[80] The interpretation seems to rest on a linguistic analysis, more precisely on a structural analysis of the wording of the respective provisions: A limitation may be imposed "in certain special cases, *provided that* [criterion 2]…*and* [criterion 3]"[81], "in certain special cases *that* [criterion 2]…*and* [criterion 3]"[82] and finally "in certain special cases *which* [criterion 2]…*and* [criterion 3]"[83] (emphasis added).

The preparatory history of the Stockholm Act might lend support to this interpretation: In the initial proposition, the third step appeared before the second, but this was reversed by the Main Committee I as it would "afford a more logical order for the interpretation of the rule".[84] Subsequently, the committee gives the following explanation to the logic of the reversal:

> "If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory licence, or to provide for use without payment."[85]

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[80] Cf. Silke von Lewinski, *International copyright law and policy*, Oxford 2008, p. 160; Ricketson/Ginsburg (2006) p. 763, who nonetheless only mention their cumulative nature; Senftleben (2004) p. 125 with further references.

[81] Article 9(2) BC

[82] Article 10(1) WCT

[83] Article 13 TRIPS

[84] Records (1967) p. 1145.

[85] Ibid.

Lately there has been some debate as to the relation between these three steps. In 2008, the Declaration on a Balanced Interpretation of the Three-Step Test in Copyright Law was issued, in which – as the title reveals – a balanced interpretation of the three-step test was proposed.[86] The Declaration, signed by a large number of legal experts, affirms that the three-step test is not to be interpreted in the traditional, restricted manner. Instead, it is seen to call for a "comprehensive overall assessment rather than the step-by-step application that its usual…description implies. No single step is to be prioritised".[87]

First of all, the formulation of the test does not *prescribe* the traditional interpretation. The wording – "*provided* that" – indicates a cumulative application of the steps. That it should require *separate* assessment of each step, on the other hand, i.e. that they be independent, absolute hurdles, is but one *possible* interpretation.

To be sure, the very existence of the second step might be taken in support of this interpretation: If a provision deprives the author of the ability to exercise a normal exploitation of his work, it normally prejudices his interests. Thus, the third step would have been sufficient if the aim were to ensure that such economic regards could be taken into consideration. When the second step in spite of this has been included in the test, an obvious conclusion would be that the step is an independent hurdle that the limitation *must* pass, and that it consequently is not subject to the balancing of interests inherent to the third step. The exemplification of the Main Committee I tends to bear out this interpretation as well.

All the same, a different perspective on the explicit inclusion of the second step is that it can be seen as a directive for which considerations that *must* be included in the assessment

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[86] Christophe Geiger, Jonathan Griffiths and Reto M. Hilty, *Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law*, International Review of Intellectual Property and Competition Law, IIC Heft 6 p. 707-713 (available at: http://beck-online.beck.de)

[87] Ibid. p. 709

of the limitation, but without imposing any obligation to let disharmony in this respect, be decisive. Although this harmonises poorly with the example of the Main Committee I, it seems on the other hand to be in line with the purposes of the instruments incorporating the three-step test.

As demonstrated in the Declaration, a balancing of interests between the authors and the public is inherent to the conventions on copyright protection.[88] For instance, the preamble to the WCT stresses "the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information", whilst article 8 TRIPS allows member states to "adopt measures necessary…to promote the public interest in sectors of vital importance to their socio-economic and technological development". Considering that this forms the context in which the three-step tests are to be interpreted, a balanced interpretation where the steps are considered "together and as a whole in a comprehensive assessment"[89] appears better founded than the strict, orderly application.[90] If each step were to be given such decisive influence on the outcome, the said balance of interests could suffer, as will be pointed out more clearly in the subsequent interpretation of the individual steps. As a curiosity it can be noted that there seems to be a tendency amongst legal scholars who propose the 'traditional' interpretation to focus on the *normative* elements of the first two steps (see below). If interpreted in the traditional way this is understandable, since 'safety valves' taking into consideration the *necessity* of imposing a limitation would be necessary in order to prevent that 'purely' quantitative thresholds become *absolutely* decisive. On the other hand, such 'veiled' balancing of interests in each step would seem rather counterproductive, as well as add uncertainty to which normative regards (which interests) to include where.

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[88] Ibid.

[89] Ibid. p. 711

[90] The BC is however not this explicit in recognising the competing interests, making the 'modern' interpretation somewhat more doubtful with respect to this instrument. The consequences to the following discussion are nonetheless few, see the last paragraph of this discussion.

Arguments that the three-step test would become ineffective in ensuring that limitations on the level of protection do not become too extensive, if this relative interpretation were adopted, of course carry some weight. Nonetheless, adopting the 'modern' interpretation does not deprive the test of its regulatory capacity: Interpreting it as not providing three independent, absolute hurdles, does not entail it being a *carte blanche* to impose any conceivable limitation. The three steps still indicate quite clearly which regards are relevant in the assessment to be done, but the modern interpretation allows for a more flexible approach, that is better suited to adapt to the ever-changing patterns within copyright utilisation and societal needs.

In any case, how the system of three steps is to be interpreted is not cardinal to the discussion in the following. Systematically, the discussion is divided into three parts where each step is treated separately. Thus, the requirements of the individual steps – whether they be absolute or not – are given due consideration, and the traits of the ECL relevant to the individual steps are highlighted. The relevant differences arise where the compliance with the first two steps is dubious. As will be seen, the ECL is not unquestionable in this respect. In this case, the question is whether limitations that emerge as 'reasonable' from the comprehensive test of the third step, which has taken into due consideration the requirements of the first two steps, pass the three-step test as such. Although I tend to see this interpretation as having reasonable support, reaching a different conclusion does not deprive the following of meaning or interest, as the different parts, although connected, speak for themselves.

3.4 Is it possible to assess the ECL-model as such?

The ECL-model is heterogeneous. This naturally complicates the assessment of the model, since its different modes might give rise to differences in judgement. Moreover, the reasons for imposing an ECL – the normative justification for wishing to rectify market failure in a particular market – are various, as are the uses that it might be set to regulate. All ECLs share a common core, however. In the following, only a material consideration of certain particular ECL-provisions will be presented, in view of later abstraction of the results.

Where differences in judgement might arise, the different modes of the ECL-model will be discussed explicitly. This method should allow an impression of the compatibility of the model with the three-step test.

4 Step one: Certain special cases

4.1 General interpretation

4.1.1 Introduction

Although a superficial reading of the phrase indicates a constriction of scope, it is not possible to conclusively determine what the words "certain special cases" mean from the wording alone.

"Certain"[91] somehow indicates that the limitation must be particularised. Some legal scholars claim it requires a high degree of precision in that the scope of the limitations must be clearly defined.[92] One could also ask whether it only implies that limitations in accordance with the test are a particularised mass of provisions. Likewise, "special"[93] connotes a number of significations: It can for instance refer to the exceptional character of a case, its distinctiveness from other cases, or its limited character.

Accordingly, various legal scholars have constructed the first step in a number of ways, including both as a quantitative test and a qualitative test.[94] Others have understood it to

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[91] "Determined, fixed, settled", "[used] to define things which the mind definitely individualizes or particularizes from the general mass, but which may be left without further identification in description". Source: Oxford English Dictionary Online, online: http://www.oed.com

[92] E.g. Lewinski (2008) p. 161; Ricketson/Ginsburg (2006) p. 764, who claim that the limitation must be 'clearly defined'.

[93] "exceptional in character, quality or degree"; "[marked] off from others of the kind by some distinguishing qualities or features; having a distinct or individual character; also, in weakened senses particular, certain"; "[having] an individual, particular, or limited application, object, or intention". Source: Oxford English Dictionary, online: http://www.oed.com

[94] The terminology of quantitative and qualitative interpretations in relation to the first step is lent from Senftleben, see Senftleben (2004) p. 137 ff.

require a high degree of precision. Some have used the records of the Stockholm Conference as a basis for their interpretations, whereas yet others have relied on structural and teleological considerations. In the following, I will present these different approaches before continuing to evaluate the ECL-model in light of the first step.

4.1.2 The quantitative approach

Construed as a quantitative test, the notion of "certain special cases", more precisely its connotation of "limited application"[95], is taken to imply that the limitation ("cases") must be of a limited character in that it must be "narrow in its scope and reach".[96] In *what sense* the limitation must be narrow as well as *what aspects* would need to be of such a scope, is less evident.

The notion of narrowness inevitably hints at some sort of numerical assessment. In other words that there is a numerical limit to what the signatory states may exclude from the author's sphere of control by means of one, single limitation. There are however many ways of quantifying such a limit.

For instance, such a limit could be constructed as a ratio. This seems to have been the approach of the WTO Panel in its report on Section 110(5) of the US Copyright Act. Pursuant to the said section, certain establishments up to a certain size in square feet could communicate radio or television broadcasts of musical works to the public on their premises free of charge. When determining whether this was a "certain special case" in a quantitative sense, the panel inquired into the ratio between businesses falling within the size limit and businesses too large to be included.[97]

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[95] Cf. footnote 93.

[96] Ricketson/Ginsburg (2006) p. 764. In the same direction, Lewinski (2008) p. 161.

[97] WTO (2000) paragraphs 6.118-6.126

The limit could also be constructed as a non-relative maximal number. This interpretation is however to be rejected at once, as nothing in the wording nor in the preparatory history suggests that there is in fact such an absolute limit, not to mention the lack of any guidance on how to fix this limit.

Furthermore, one must ask *what aspects* of copyright are to be quantified. Is it the number of users who would benefit from the exception? Or the number of protected acts permitted under the limitation, e.g. the number of individual reproductions? Or the number of different rights being limited, e.g. the right of reproduction *and* the right of broadcasting being excluded pursuant to the same provision? Or perhaps the number of purposes of use that are covered by one and the same limitation, e.g. if reproduction for judicial, private and educational purposes were permitted by virtue of the same provision?

It may be argued that a purely quantitative threshold is unsuitable. As will have appeared, it is not clear which factors are to be quantified (and which consequently would need to be narrow in scope). If not careful, however, a purely quantitative assessment could prove devastating to otherwise sensible limitations underpinned by important policy considerations (this is of course the case only in the traditional interpretation of the system of three steps, see 3.3.3). For instance, it would be difficult to claim that the transient or incidental reproduction that happens in computers every day during the course of their normal operation is narrow in quantity. Nonetheless, a prohibition against a limitation allowing such use would be devastating to the modern, digital society. A solution could of course be to assess the quantitative extent in relation to uses that are of economic importance to the rights holder: Controlling, and thus profiting on such transient copying would probably be very difficult. However, this would anticipate the test of the second step. In general, it is not evident how this quantitative limit – the "narrow scope" – is to be assessed.

All in all, it can be questioned whether operating with a quantitative *limit* is a correct interpretation of the first step. The solution seems to give rise to more questions than it

solves. Furthermore, a purely quantitative assessment which determines the admissibility of a limitation without having taken into account the importance of the underlying policy considerations could, as seen in the case of transient reproduction, be devastating. Moreover, as persuasively argued by Gervais, there is no logical necessity in the connotation of "limited…application"[98] being translated into narrowness in scope.[99] On the contrary, there is a "huge logical jump"[100] between the two. Whilst it in the traditional understanding of the test would be paramount to determine appropriately a possible threshold, this nonetheless is less important in the modern approach to the test. Since the individual steps do not form independent hurdles, but are subject to a conclusive, overall assessment, the very notion of a limit is alien. On the other hand, the process of determining in rough terms the extensiveness of an exception still would be of interest, as it can be posited that the broader the limitation, the worthier must [usually] the policy objectives which underlie the limitation be in order to see the limitation through the final balancing of interests. The first step forms an appropriate framework around this assessment.

4.1.3 The qualitative approach

Constructed as a qualitative test, the term "certain special cases" is understood to call for a scrutiny of the purposes underlying the limitation rather than an assessment of its numerical extent. It is especially the word "special" connoting "[of] exceptional…distinguishing qualities"[101] that has fuelled this interpretation.

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[98] Cf. footnote 93

[99] Daniel Gervais, *Towards a New Core International Copyright Norm: The Reverse Three-Step Test*, Marquette Intellectual Property Law Review, 9/2005 p. 1-37 (p.17)

[100] Ibid.

[101] Cf. footnote 93

According to the view of Ricketson, which in large has been built upon by other commentators,[102] there must be "something 'special' about the purpose of the limitation, 'special' here meaning that it is justified by some clear reason of public policy or some other *exceptional circumstance*" (emphasis added).[103] Further elaborated by Senftleben, a "sufficiently strong justification must be given for a limitation".[104] The latter hints at a relative assessment, where the justification must be stronger, i.e. the policy objectives must be more 'worthy', the more extensive the limitation.

Whether it serves as an additional hurdle to the above quantitative test, or whether as the only test of the first step, a qualitative test in the first step seems superfluous when considering the test of the third step. This last step calls for a balancing of interests between the author's interests in protection and society's interest in imposing a limitation, see chapter 6 below. Thus, some form of policy consideration would have to justify the limitation in order not to unreasonably prejudice the interests of the author. And, as will be seen below, this balancing of interests clearly calls for a *relative* assessment: The more the interests of the author are prejudiced, the more worthy must the policy objectives be. To repeat such a proportionality test in the first step does not seem advisable.[105]

It could of course be argued that the first step would represent something new to the test already embodied in the third step, if it were to assess the qualitative aspects in a *non-relative* manner. However, the term 'certain special cases' gives no clue as to what this qualitative threshold would consist of, and, as submitted by Ricketson/Ginsburg (the

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[102] Ficsor (2002) p. 284; Senftleben (2004) pp. 137 (in footnote) and 152.

[103] Sam Ricketson, *The Berne Convention for the protection of literary and artistic works: 1886-1986*, London 1987, p. 482. It must however be pointed out that this no longer is Ricketson's opinion, cf. Ricketson/Ginsburg (2006) p. 764-767.

[104] Senftleben (2004) p. 137.

[105] It must in this connection be noted that according to the traditional understanding of the test, where the first step represented an absolute hurdle of its own, a normative dimension was paramount in order to ensure that the limitation not be dismissed on a purely quantitative basis. This is not necessary according to the 'modern' interpretation of the test.

former of which now has abandoned the view expressed in the former edition of his book) nothing in the preparatory history of the test in the BC suggests such a lower qualitative threshold – rather the contrary.[106]

In the modern view of the test, the question of qualitative justification does not need to be incorporated in the test of the first step. The third step (as well as certain parts of the second step, see below) forms a sufficient framework around the review of the qualitative aspects of a limitation. This aspect is thus not further explored in this subsection, the qualitative assessment being deferred to the third step instead.

4.1.4 The notion of "certainty" as a requirement of legal precision

Adding to the requirement of limitedness in scope, the first step has been constructed so as to require that the limitation is formulated in precise terms – that it be "clearly defined"[107] as it is put by the WTO Panel in the "Homestyle"-case. While some legal scholars have adopted this view,[108] others oppose the need for such clear definitions arguing instead that different national limitations only need to be discernable from each other.[109] Yet others argue that the first step only requires the limitation to be of a "reasonably foreseeable" scope.[110]

Against the need for clearly defined limitations, Senftleben argues that such an interpretation would be an unfounded preference of the positivistic civil law approach to formulating legal norms.[111] The more open-ended approach of the common law system, where necessary adjustments to a higher degree are left the courts to perform, would suffer

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[106] Ricketson/Ginsburg (2006) pp. 766-767.

[107] WTO (2000) paragraph 6.108.

[108] E.g. Ricketson/Ginsburg (2006) p. 764; Lewinski (2008) p. 161.

[109] Senftleben (2004) p. 135.

[110] Geiger, Griffiths, Hilty (2008) p. 711.

[111] Senftleben (2004) p. 135

under such an interpretation.[112] Indeed, there seems to be little support in the wording, the context or the preparatory works for such an interpretation.

Nonetheless, the requirement of certainty undeniably connotes foreseeability to some degree, and it would be easy to agree that utterly shapeless provisions that are indeterminable in scope and justification might fail to be a certain case. As was contemplated in the first draft text of article 9(2) BC prepared by the Study Group[113] "exceptions should only be made for clearly specified purposes…exceptions for no specified purpose, on the other hand, are not permitted".[114] Although the draft text to which the comment was made did not make its way into the final text of the article, it nonetheless has persuasive qualities. Requiring that the 'borderlines' of the limitation are at least reasonably clear would both increase the foreseeability for the users and authors as well as ensure that the legislator has thought through the implications of the proposed limitation, "including such matters as the right(s) and works covered, the persons who may take advantage of it, and the purpose of the exception".[115] Considering the tests of the ensuing steps, a reasonable degree of clarity with respect to the scope of the limitation would furthermore be of key importance.

It is thus submitted that the first step indeed does require a reasonable degree of clarity and foreseeability. This does not mean that open-ended limitations necessarily are disqualified: According to the overall approach, a comprehensive evaluation of the limitation must be conducted. Nonetheless, the lesser degree of clarity, the less probable that the limitation survives the scrutiny of the test, seen as a whole.

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[112] E.g. the 'fair use' defence pursuant to section 107 of the US Copyright Act.

[113] Cf. Records (1967) p. 75 for a description of its composition.

[114] Ibid. p. 112.

[115] Ricketson/Ginsburg (2006) p. 764

4.2 The system of ECL

4.2.1 Introduction

Considering the nature of the requirements of the first step, an inquiry into the compliance with the criteria of each individual ECL-provision is of course preferable. That way the extensiveness of the different provisions that come under the common abstraction of the ECL-model can be determined in empiric terms. In the following, the quantitative aspect of a few, representative ECLs will be assessed, before a more general assessment of the ECL-model is conducted conclusively.

4.2.2 A review of certain specific provisions

As concluded above, the first step measures the width of scope as well as the precision of the limitation. A very broad scope could indicate a conflict with the first step, but as already seen, this is not necessarily so, e.g. in the case of transient copying. In the following, I will run the ECLs through the test of the first step, exemplifying with the two 'reproduction'-ECLs, namely sections 13b and 14 NCA, and the 'omnibus'-ECL of section 50(2) DCA.

Sections 13b and 14 NCA

In order to measure the scope of the said provisions, the aspects that are to be quantified must be determined. This question was touched upon above, although in a slightly different connection, namely the question of whether the first step operates with a fixed limit – a threshold – or not. One way of forming a framework for the subsequent review of sections 13b and 14 is to ask: *Who* can make *what use* of *which types* of works to *which extent* and for *what purposes*. In other words, which users may benefit from the exception, which categories of works may they use, which acts of use are permitted, how intensely can they use the works, and what purpose must the use have.

The group of *users* benefiting from the exception in section 14 is large: Public and private institutions, organisations and commercial enterprises form a very large group of copyright

'consumers', while "educational activities" (section 13b) arguably is much narrower. Furthermore, except for a small exception for the fixation of certain broadcast works, there is no limitation as to the *categories of works* that may be used pursuant to either section. The only requirement is that the work must be published. As for the *uses covered*, the ECLs allows for reproduction for "use within own activities" (section 14) and "use within own educational activities" (section 13b). The subsequent use of the reproduction thus made is only limited by the purpose of "use within own [educational] activities", meaning that other copyright relevant uses are permitted as well, e.g. remote education pursuant to section 13b and distribution in the intranet pursuant to section 14, which arguably falls within the act of communication to the public.[116] Both analogue and digital reproduction is permitted. Furthermore, the provisions set few limits to the *extent* of the reproduction (the intensity of use): The outer limit is that of copying activities similar to those normally undertaken by a publisher.[117] ECL-agreements allowing such copying may, for this part, not be given extended effect. Apart from this, the closer determination of the copying volume is left to the individual agreements. Finally, the most significant constriction of scope is found in the *required purpose of use*. The reproduction may only be done for the said "use within own [educational] activities". This excludes external distribution, communication to- and making available to externals of the reproductions, e.g. copying for use in sales prospects.[118] With respect to section 13b, the restriction to *educational* activities implies that only the copying with the purpose of serving for education is covered by section 13b. Copying for other uses, such as administrative use would have to be done pursuant to section 14.

The account shows that both ECLs are extensive. While rather foreseeable in scope – the terms of the provisions are not very vague – this nonetheless clearly not implying narrowness. Interestingly, when these ECLs initially were proposed by the Holmøy

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[116] As protected e.g. by article 8 WCT. For a discussion of the term "the public", see e.g. Ricketson/Ginsburg pp. 704-705.

[117] See 2.3.1.3.

[118] Cf. Ot.prp.nr.15 (1994-1995) p. 114.

Committee in the late 1980s, the committee considered the compliance with the first step to be dubious, due to their very extensive nature.[119] To exemplify in terms of numbers, the statistics of the period 2004-2005 which are used to calculate the payments under the said ECLs shows an average of 824 pages of protected material copied per person in the university/college-sector. This corresponds to a yearly volume of 195M copies of copyright protected pages out of a total of 467M pages.[120] In 2007, this yielded revenues of MNOK 68,1.[121] Considering that these figures only represent a share of the copying conducted pursuant to the said ECLs, this should give a rough idea of their scope.

Section 50(2) DCA

Lastly, section 50(2) DCA can be called on for comparison: At first sight section 50(2) appears nearly limitless, in that none of the abovementioned criteria for establishing the scope of a limitation are defined. It does not define a circle of beneficiaries nor does it limit its field of operation to any particular categories of works. It is open with respect to forms of use, and it does not set a maximum to the intensity of use. Finally, there is no restriction to any particular purpose of use. The only apparent limitation is the need for an ECL-agreement onto which it may be applied, which in turn requires the contracting CMO to be representative and authorised. This is however of key importance: As will be seen in the subsequent chapter, the ECLs possess certain common properties that are of central relevance when assessing their scope qua limitations.

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[119] NOU 1988: 22 p. 24. However, this assessment related only to the first step, and did not hinder the committee from concluding that the ECLs were in accordance with article 9(2) BC in general terms. It is noteworthy that the discussion related to the question of whether Norway should accede to the Paris amendment of the BC or not.

[120] Source: http://www.kopinor.no/avtaler/statistikk/oversikt_over_statistiske_undersoekelser. This average covers copying pursuant to both ECLs, i.e. sections 13b and 14.

[121]Source: Kopinor's annual report for 2007. Available at: http://www.kopinor.no/om_kopinor/aarsmelding.

4.2.3 A review of the ECL-model

The ECLs can be extensive. Apart from section 50(2) DCA which undeniably is the broadest of them all, sections 13b, 14, 16a NCA and their equivalents in the other Nordic countries are probably the most extensive of the ECLs qua legal provisions. Based only on the above, the provisions would indeed appear problematic with respect to the first step. However, the ECLs possess important properties with respect to the assessment of scope. Firstly, the contractual basis of the ECLs seen in connection with the requirement of representativity entails a constriction of scope. Secondly, the contractual basis implies that in practice the ECL-*provisions* only form an outer borderline: The *actual* scope of the limitation is determined by the individual ECL-*agreements*, since the ECL-provision only extends the terms of the ECL-agreement onto the unrepresented authors. Thirdly, as regards section 50(2) DCA, the requirement of ministerial authorisation probably will serve as a limitation of scope as well, cf. below.

The contractual basis and the requirement of representativity.

The contractual basis of the ECL-model combined with the requirement that the CMO be representative form together an important limitation of scope: Namely that only the unrepresented authors are affected by a *limitation* of their copyrights. The represented authors are simply *exercising* their rights – not having them limited. Notwithstanding the scope that an ECL might have according to the abovementioned criteria, this limitation of scope comes in addition. In the following, the significance of this trait is to be explored in more detail.

The requirement of representativity implies that a CMO must represent a substantial number of original rights holders (the actual authors) to the works of a certain category in order to be enabled to conclude ECL-agreements that are given extended effect for these types of works. The representativity requirement is limited to "works used in Norway"[122],

[122] NCA Section 38a(1)

which implies that while it is insufficient to represent only national authors, it is on the other hand not necessary to represent a substantial number of all authors in the world.

It might be argued that the requirement of substantiality only forms a very small limitation of scope, since its reference point is "works used in Norway". E.g. if the world population of authors of a particular category of works – say translations[123] – is 100 000, it could be sufficient for authorisation to represent 300 translators. On the other hand, although this obviously would be insubstantial compared to the total population of authors, it could nevertheless be substantial when compared to the number of authors of works used *in Norway*. Although the works of 100 000 *potentially* could be used pursuant to the ECL, the number would *in practice* be far less. Consequently, when a work is used pursuant to an ECL, the probability of it being represented by the CMO is substantial, and it is submitted that it is *this* perspective that must be used when assessing the scope of the ECL: It would serve few purposes to require the consideration of the most remote of probabilities when assessing the scope of a limitation in the sense of the first step.

The ECL-provisions as an outer borderline

When assessing the scope of a limitation, it seems natural to look at the use that is made of it in practice. While it might be argued that it is the potential use, and not the actual use at any given time that is of relevance,[124] it is evident that one cannot operate with the most remote of probabilities: Stable patterns of use are a reality that the legislator must be able to take into consideration when formulating a provision. The fact remains that although containing few explicit limits, the ECL-provisions are in need of an ECL-agreement, and the ECL-agreement is concluded by a CMO which represents rights holders to the category of works that is about to be subjected to a limitation. Especially with respect to the

[123] Admittedly, the example of translations is a bit odd, since it can be assumed that most of the translations used are those into Norwegian. Thus, the risk of extensive use of foreign translations is low, which in turn indicates that it could be enough to represent a substantial number of national translators in order to be representative.

[124] Cf. the WTO Panel's interpretation of the first step in the 'Homestyle'-case, WTO (2000) paragraph 6.127.

assessment of section 50(2) DCA this is of importance: Even if there were no requirement of ministerial authorisation – the requirement of representativity being the only remaining condition – practice from the other ECLs shows there are limits to how far the CMOs go – and thus to the scope of the imposed limitation. The quantification of the restrictive properties of the ECL-agreements, however, would necessitate empiric studies of the different agreements that exceed the frames of this thesis.

Significance of prior authorisation

As to the significance of prior authorisation, this is a notable limitation of the scope of section 50(2) DCA. While the provision is formulated in broad terms, no extended effect will be given to any agreement unless the contracting CMO has obtained an authorisation (section 50(4)). And while the primary function of this authorisation is to secure that the CMO is sufficiently representative,[125] the explanatory remarks to the proposition of the new section 50(2) explicitly mention that the ministry should ensure that no authorisation is given in fields where it still is practical to clear the rights in accordance with the normal system of voluntary licensing.[126] Thus, the scope of the ECL is at least functionally limited to situations where the normal system of copyright clearance has proven inefficient. Furthermore, the authorisation is to concern certain "closely defined fields" (section 50(4)). The meaning of this phrase is not evident, nor is there given any evident guidance as to its interpretation in the preparatory works. Nonetheless, it would seem consistent with the regulatory role of the ministry to interpret it in such a way that the ministry is enabled to define very narrowly the field of application in its authorisation, e.g. what forms of use, purposes of use etc. that may be given extended effect. Accordingly, the maximal scope of the extension effect pursuant to the provision in section 50(2) would be limited by the stipulations in the ministerial authorisation. It can consequently be argued that the requirement of authorisation in fact is an important limitation of scope, the significance of which will become clear when a practice of authorising CMOs for ECLs pursuant to

[125] Cf. Martin Kyst, "Aftalelicens – Quo Vadis?", *Nordiskt Immateriellt Rättsskydd*, nr. 1/2009, p. 44-55 (p. 48)

[126] Forslag L 58 fremsatt 30.01.2008, comment to section 50(4)

section 50(2) has emerged. Moreover, it makes the limitation more *foreseeable*, since no authorisation means that no limitation is imposed.

In conclusion it can be established that the 'omnibus'-ECL is not unlimited in scope. Rather, it is constricted by the requirement of authorisation in two respects: Firstly, it ensures a functional limitation in that the ECL may only be applied in situations of inefficient rights clearance, and secondly it seems probable that the ministry is empowered to regulate in quite some detail the scope of the ECL in its authorisation. The importance of the latter will nevertheless have to be ascertained by empiric studies of the emerging practice of authorisation.

4.2.4 Conclusion

As will have appeared from the above, all the mentioned ECLs are of a very broad nature. Although broad, sections 13b and 14 of the NCA are foreseeable in scope: Little is left to any uncertain wording or the like, although there of course are no guarantees as to the scope of the individual ECL-agreements that are concluded within the frames of the provision. The latter nonetheless seems of lesser import, as arguably, it is the maximal scope of any limitation that is of interest in this respect.

With respect to the Danish 'omnibus'-ECL pursuant to section 50(2) of the DCA, the case is not so clear. While its broad scope is constricted to some degree by the requirement of authorisation and the constriction to situations where copyright has proven inefficient, these do not imply any precise definition of the scope of the ECL. Quite the contrary: The emerging practice is uncertain, and the notion of inefficiency is vague: Whether one considers the normal, voluntary exercise of copyright to be practicable or not depends on the perspective from which the question is answered.

As demonstrated above, the scope of any ECL is substantially limited by the contractual basis of the ECL combined with the criterion of representativity. On the other hand, the initial scope of the examined ECLs is of such an extent that the remaining scope, even after

the subtraction of the substantial number of authors has been done, can be considered quite large. Although the first step according to the modern interpretation does not erect any absolute threshold, it still has a qualificatory function in that it gives very broad limitations a ‘handicap’ in the subsequent overall assessment. As mentioned above, the first step is not only a measurement of scope to be used in the subsequent steps. On the contrary, it is an imperative of its own implying that a limitation should be as narrow, and as precisely defined as possible.

5 Step two: Not conflict with a normal exploitation of the work

5.1 General interpretation

5.1.1 Introduction

The second step forbids the limitation to "conflict with a normal exploitation of the work". The word "exploitation"[127] seems to imply the derivation of economic[128] value – the "profitable management" of the work. The word "normal"[129], on the other hand, is less clear. As pointed out by various legal scholars, the term may have both an empiric and a normative connotation:[130] Firstly, it denotes a state of regularity in a strictly empiric sense. Secondly, it has a connotation of conformity to a normative standard or convention – that which *should* be, irrespective of any empiric data. The combination "normal exploitation" consequently alludes to either (or both) a usual way of deriving profit from ones work, or to a more normative conception of how a work *should* be exploited – in this sense: what forms of exploitation that *should* be reserved the author irrespective of how he and his fellow-authors currently and usually derive profit from their works.

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[127] "The action of exploiting or turning to account; productive working or profitable management (of mines, cattle, etc.). Also, an instance of this." Source: Oxford English Dictionary Online, online: http://www.oed.com

[128] Taken in a broader sense: not necessarily *money*.

[129] "Constituting or conforming to a type or standard; regular, usual, typical; ordinary, conventional. (The usual sense.)" Source: Oxford English Dictionary Online, online: http://www.oed.com

[130] Ficsor (2002) p. 284; Lewinski (2008) p. 162; Ricketson/Ginsburg (2006) p. 768 ff; Senftleben (2004) p. 168.

Lastly, the word "conflict"[131] connotes the state of being contrary to something – in this regard, the state of being incompatible with the way in which rights holders normally exploit their work.

5.1.2 The empirical connotation

The empirical sense of the adjective 'normal' causes few problems. A normal exploitation would be those forms of use which the authors regularly employed to derive profit from their works. For instance, the licensing to a publisher of the right to print and distribute copies would be a normal exploitation of a novel. The reproduction of a poem by embroidering it onto garments would, arguably, be rather abnormal in this sense.

The problem of the purely empirical approach however, as pointed out by many commentators, is that inquiring only into the current modes of exploitation would imply that the very existence of a limitation affected its compatibility with the second step.[132] It would only be natural that no profit was derived from uses that were exempted by virtue of a limitation. In case an empiric inquiry should be decisive, this would imply that the limitation would shelter itself from conflict with a normal exploitation of the work, since it precluded any normal exploitation from ever taking place within its field of operation. This can obviously not have been the intention of the second step.

5.1.3 The normative connotation

With regard to the normative connotation, there is less guidance in the wording itself as to the contents of this norm. The preparatory works of the Berne Convention may be of help.

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[131] "To come into collision, to clash; to be at variance, be incompatible. (Now the chief sense.)" Source: Oxford English Dictionary Online, online: http://www.oed.com

[132] Ricketson/Ginsburg (2006) p. 769 who refer to a comment made by prof. Goldstein in his book "International Copyright".

As was contemplated by the Study Group which prepared the first draft for article 9 BC, the authors should be spared the situation where a limitation came into economic competition with the exploitation of their work.[133] Further, all forms of use which "have, or are likely to acquire, considerable economic or practical importance, must be reserved to the authors".[134]

With this understanding of the concept of normality, the loophole of the purely empirical approach would be sealed. Instead of asking only what currently constitutes a regular way of deriving profit, an assessment of the likeliness of the author putting the work to profitable use if the limitation was thought absent would have to be conducted as well.[135]

The normative content of the word 'normal' is however not exhausted by this. As noted by Senftleben, there should be a lower threshold to the economic importance of the use in order to be characterised as 'normal'.[136] The notion of regularity of use should thus not be entirely decisive. The rationale behind this qualification of 'normality' is linked to the potential offered by the digital technology in exploiting works to a negligible transaction cost. As contended by Senftleben, if there were no such threshold, "nearly all ways of using and enjoying the works of the intellect" would end up as 'normal' and as such beyond reach for any limitation.[137] Whilst such a development would not be out of the question if the purpose of the three-step test were to reduce limitations to a minimum, the objective of ensuring a proper balance between the authors and the users would suffer. As mentioned in 3.3.3 both WCT and TRIPS more or less explicitly state this objective. BC, on the other hand might at first seem to prioritise only the interests of the authors in that its preamble

[133] Records (1967) p. 112.

[134] Ibid.

[135] This appears to be a common standpoint amongst the legal scholars in the field, see e.g. Ficsor (2002) pp. 284-285 and Ricketson/Ginsburg (2006) p. 769.

[136] Senftleben (2004) p. 180 ff.

[137] Senftleben (2004) p. 181. Remember, nonetheless that this only would be the case according to the 'traditional' interpretation of the test.

reads "the countries of the Union, being equally animated by the desire to protect, *in as effective…a manner as possible*, the rights of authors in their literary and artistic works" (emphasis added). The reservation "as possible" might indicate that this effective protection is not to be pursued at any cost. As observed by the Study Group of the Stockholm Conference: While the uses that could amount to considerable economic or practical importance would need to be reserved the authors, "it should not be forgotten that domestic laws already contained a series of exceptions *in favour of various public and cultural interests* and that it would be in vain to suppose that countries would be ready…to abolish these exceptions" (emphasis added).[138] Furthermore, the very existence and content of the specific exceptions in the Berne Convention acknowledges that public policy objectives are given preference over the interests of the authors.[139] As to the lower threshold, guidance can again be found in the above-quoted preparatory work for the Stockholm Conference: That forms of use which "have, or are likely to acquire *considerable economic…importance*"[140] (emphasis added) should be reserved the author. Incidentally, the inclusion of the qualifier 'considerable' is shared by many authors, many not as explicit as Senftleben.[141]

Finally, the normative connotation of the adjective 'normal' could imply that non-economic normative considerations are to be included as well. Whilst this to a certain degree has been done in the above establishment of a lower threshold for the economic importance of a use, the word still leaves room for more overall considerations of *what markets* the author *should* be able to control.[142] Especially under the traditional view of the interplay between the three steps, such an interpretation would be important, as it would serve as a safety-valve where the economy-centred perspective of the second step proved detrimental to key objectives of public interest. According to the modern interpretation of

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[138] Records (1967) p. 111-112.

[139] Cf. Ricketson/Ginsburg (2006) pp. 771-772.

[140] Records (1967) p. 112.

[141] Ficsor (2002) p. 285; Lewinski (2008) p. 162; Ricketson/Ginsburg (2006) pp. 769-770.

[142] Ricketson/Ginsburg (2006) pp. 771-773.

the three-step test, this part of the normative consideration can however safely be deferred to the third step, which already embodies such considerations of colliding interests.

In sum, the notion of a "normal exploitation" implies regular derivation of 'considerable' profit. A conflict with the threshold of the second step would provide the limitation with a severe handicap in the consequent balancing of interests to be done in the third step. Although the three-step test calls for a comprehensive, overall assessment, the prioritisation of economic interests which obviously is inherent in the imperative of the second step may not be ignored.

5.1.4 The dynamics of the third step: When does a limitation amount to a 'conflict'?

Having established that a certain use constitutes a normal exploitation, e.g. the licensing of letterpress reproductions of novels for subsequent distribution, clearly the exemption of such a use altogether would conflict with this normal exploitation: The author would be divested of this normal source of income. Limitations of a smaller scope could nonetheless be admissible.

Arguably, the linguistic structure of the second step implies that when a use demonstrably is normal, no exemption or limitation on this use may be introduced at all, since a limitation is, arguably, incompatible with exclusivity. This interpretation must nevertheless fail. The second step does not imply that when a certain use has been shown to generate considerable profit it may not be touched at all. If it were so it would suffice to proclaim that no limitation on (e.g.) the reproduction right was permissible, since clearly, the use of a work by means of reproduction is a considerable source of revenue for the author.[143] The relevant question is whether the exempted use – the scope of the limitation – has or potentially could acquire a considerable economic importance if otherwise in the hands of the author. Likewise, if the exempted use entered into 'considerable' economic competition

[143] Inspired by Senftleben (2004) p. 181, although he uses the train of thought in a slightly different context.

with ways in which the author normally exploited his work, this would amount to a conflict irrespective of whether the author himself could have derived profit from it.[144] The author should be safeguarded from such economic competition which is only rendered possible by a limitation of his initial sphere of exclusivity. An exemplification to this effect can be found in the comments of the Main Committee I of the Stockholm Conference:

> "A practical example might be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertaking, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid."[145]

It seems odd to interpret the example as claiming that the reproduction of a very large number of copies on a photocopier in itself was a way in which authors normally derived considerable profit from their works. While it may be so, the example would be just as meaningful if it were taken to imply that the copying of a very large number of copies (in many cases) would unduly compete with the way in which authors derive profit from their works, e.g. partly the possibility of establishing licensing schemes for such photocopying, partly the sale of their works by other means. The reproduction of fewer copies would not rise to a 'considerable' level of conflict even though one single copy could prevent a regular sale: The total effect of the limitation would not amount to depriving the author of a source of considerable economic importance.

5.2 The system of ECL

5.2.1 Introduction

As with the first step, only the exemplification and review of a few ECL-provisions, with the subsequent review of certain common properties of the ECLs (the ECL-model), will be

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[144] In this direction, WTO (2000) paragraph 6.183 and implicitly Ricketson/Ginsburg (2006) p. 770.

[145] Records (1967) pp. 1145-1146.

provided. Although such an examination is not exhaustive, it is sufficient to give an impression of the compliance of the ECL-model with the second step.

5.2.2 A review of certain provisions

An important regard when reviewing the ECL-model is, as shown in the test of the first step, that the ECL-*provisions* create an extensive framework within which it is up to the CMOs through the ECL-*agreements* to decide the final scope of the limitation: The limitations on the non-represented authors' rights will never exceed the boundaries of the ECL-agreement. This interdependence is important as it implies, as will be shown, that a conflict with the second step cannot be assessed only on the basis of the scope of the ECL-*provision*, but must take account of the special qualities of the contractual basis of the ECL-model as crystallised in the need for an ECL-agreement.

The two ECLs chosen for exemplification are sections 13b and 16a since they illustrate the different aspects of the market failure rationale inherent to the ECL-model which, as will be seen, is relevant to the test of the second step.

Section 13b NCA

Section 13b permits the reproduction of any work, and the subsequent use of the copy, as long as it is confined to purposes of education within the user-institution, and as long as it does not involve copying on a scale similar to that normally undertaken by a publisher. This framework nevertheless leaves room for quite intense use.

Based only on the scope of the provision, it is easy to envision uses that would both conflict and not conflict with a normal exploitation of many classes of works.

The copying of newspaper articles, for instance, is a case where the required purpose of use (educational use) probably would keep the ECL clear of conflict with normal exploitation.

Their primary market – subscriptions and sale to non-subscribers[146] – would probably not suffer any considerable loss from such copying. Neither does there seem to be any regular market for licensing such photocopying directly.

The opposite is easily imaginable with respect to extensive copying of learning-materials in schools. It is evident that widespread photocopying of even a few pages often could reduce the need to acquire a copy from the publisher, and thus compete with the market for the latter. With respect to the sales-market for booklets intended for one-time use by pupils, allowing even a very limited number of copies could severely impair the respective market.

Section 16a NCA

Apart from the personal limitation to the ALM-sector and the requirements that the work be published and contained in the collections of the institution, there are only other minor limitations, and the uses allowed are extensive: reproduction and communication to the public[147].

Based solely on the scope of the ECL-*provision*, section 16a also has the potential of coming into conflict with normal use of many categories of works. For instance, in the case of new novels, the primary market is often regular sale of books. If the libraries, pursuant to section 16a, were enabled to scan and subsequently e-mail books to their clients, this could obviously unduly compete with the sales-market. While the current library lending-practice has limited impact on the sales market as it is restricted to physical copies, the potential of digital distribution clearly alters this.

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[146] Cf. Paul Torremans, *Archiving exceptions – where are we and where do we need to go?*, p. 11. Online: www.nottingham.ac.uk/law2/news-and-events/Archiving_exceptions-final.doc (last accessed: May 2009)

[147] Cf. 2.3.1.4.

5.2.3 A review of the ECL-model – the 'defences' of the ECL

The above findings may seem grave, but they are only part of a greater picture: As mentioned, the ECL-provisions only create the *outer* frames, whilst it is the ECL-agreements that in each case decide the extent of the limitation within these frames. This is central to the assessment of the second step, and will be examined below. Furthermore: While at first blush the scope of the provisions might appear broad enough to cover a potential conflict with a normal exploitation of the works covered, the very market failure rationale inherent to the ECL might lead to another result as will be explained below.

5.2.3.1 The market-failure rationale

As acknowledged by the Holmøy Committee when assessing the compatibility of [the current] sections 13b and 14 with the Paris Act of the Berne Convention, much of the use pursuant to the ECL would encroach upon the normal exploitation of the works covered.[148] Nonetheless the committee contended that such conflict was the result of a market failure – already existing illegal use due to unenforceability of copyright – and that the ECL itself did not rise to such conflict.[149] This is the one half of the market failure rationale.

The other half concentrates on the situation where inefficiency in clearing rights causes prohibitively high transaction costs. Instead of leading to illegal use, the situation leads to a lack of use – a situation of 'untapped potential': The users want to use the work, the author wants to licence the use, but the costs connected with clearing the rights (not the price of the work) are too high. It is obvious that in these circumstances, a limitation releasing this untapped potential would at least not directly encroach upon a regular way of exploiting a work.

The latter half of the market failure-rationale can for instance be found in the ECL pursuant to section 16a. It is not explicitly stated, but it can be inferred from the preparatory works

[148] NOU 1988: 22 p. 24.

[149] Ibid.

that a motivation for its imposition is the release of untapped potential.[150] The same applies to the Danish 'omnibus'-ECL of section 50(2) DCA. The preparatory works explicitly state that authorisation pursuant to section 50(4) should not be given where normal rights clearance is practical.[151]

Significance of the market failure argument

In the *illegal use*-situations, the Holmøy Committee was – in my opinion – correct in asserting that no conflict would arise as far as the limitation covered use which would have been made illegally anyway. In this situation it is not the limitation, but rather the failure of making the users comply with the outset of prohibition that causes the conflict with the normal exploitation of the work.

The outset of prohibition could of course be reinforced by increasing the criminal liability, or by similar measures which would reduce the scope of the illegal activity. This is however not an obligation under the present conventions, and it could thus not be used to create a frame of reference when assessing the conflict with a normal exploitation of such limitations.

Another objection is that the limitation encroaches upon the right to sue for damages. While this might prove prejudicial to the legitimate interests of the rights holders in the sense of the third step, it is relatively clear that the practice of suing for damages is not a normal way of exploiting works in Norway: Norwegian law does not recognise punitive damages, and the economic prejudice caused by single instances of use is often prohibitively small in this relation. Whatever prejudice caused to this right by the system of ECL would thus not rise to a conflict with a normal exploitation of the work.

Finally, although legalising the illegal use by virtue of ECLs might not directly encroach upon normal exploitation of the work, a question arises as to indirect conflict, which as

[150] Cf. Ot.prp. nr. 46 (2004-2005) chapter 3.4.7.

[151] Forslag L 58 fremsatt 30.01.2008, comment to section 50(4)

seen above also is contrary to the second step. If the use according to the ECL were to assume considerable market shares from a use that *is* normal, this could rise to a conflict. In the case of illegal use, what was earlier done for free is to be encompassed by a licensing scheme with the ECL. Provided that the ECL-agreement imposes a duty to remunerate the use, the user institution would now need to pay where before it did not pay. In turn, this could lead to the reduced purchasing of e.g. new books to the library due to a lack of funding. It would seem odd to deem such circumstances to be in conflict with a normal exploitation of works: The link between such reduced purchasing power and the effect on the normal exploitation of works would be both weak and difficult to establish to any appreciable degree. The argument must thus fail.

Successfully arguing that the *untapped potential* brings conformity with the second step hinges upon the logic that when the work is not used, no profit is derived (currently or potentially). A limitation releasing this potential would accordingly have no normal exploitation to conflict with.

Although it may be presumed that much of the use pursuant to sections 13b and 14 would have been done illegally in their absence, and although section 16a is directed at releasing untapped potential, the ECL-*provisions* do not *limit* the ECL-agreements to the cases of market failure. For instance, if the 'untapped' need for a digital library service[152] were solved by implementing a broad right for libraries to lend digital copies (e.g. by e-mailing, on-line downloading or otherwise) this could come to conflict with the normal sales-market, and especially with the emerging digital one. Concerning section 13b, it would for instance be conceivable that the authors of booklets for one-time use in schools had agreements with the schools which both earned them considerable revenues and averted illegal use. In that case, a limitation allowing copying would conflict with a normal exploitation.

[152] A potential testified to by the recently concluded ECL-agreement for the making available on-line of read-only copies of Norwegian books from the 1790-ies, 1890-ies and 1990-ies on the website of the national library, see http://www.kopinor.no/avtaler/avtaleomraader/nasjonalbiblioteket (Norwegian only).

In sum, as far as the ECLs only allow use that otherwise would have been subject to market failure, they will avoid conflict with a normal exploitation of the works thus used. As seen, the ECL-*provisions* fail to *ensure* that only use subject to market failure is covered: Even though the fields in which they are imposed are marked by such, their scope is very extensive. This calls for the announced examination of the significance of the contractual basis of the ECL.

5.2.3.2 The contractual basis and the requirement of representativity

The scope of the ECL-*provisions* is intentionally broad, in order to give the CMOs the necessary flexibility to conclude ECL-*agreements* that best fit the needs of the parties. While it would be possible to narrow the scope by annexing a list of specifications to the provisions, the ECL-model relies on the assumption that the authors know best how their works are exploited, and that this flexibility will not be used to maximise the limitations in all directions, but to tailor them.

The ECLs' combination of the contract-mechanism with the requirement of representativity ensures that any limitation imposed on third-party rights holders has been approved on a voluntary basis by a "substantial"[153] number of authors of works of the same category. In other words, the limitation imposed on the unrepresented authors by virtue of extending the ECL-agreement is in fact only a compulsion for the author to exploit his work in a manner that this substantial number of authors have found to be a 'normal exploitation' of their own works. The authors are, arguably, best positioned to know how to exploit their works; accordingly, one can ask if the contractual basis of the ECL in fact averts conflict with a normal exploitation of the works on this basis alone.

An obvious problem is the significance of the singular form of "the work" in the second step. If this implies that a separate assessment of normality must be conducted with respect

[153] Section 38a NCA.

to each and every work, an assertion of representativity would be meaningless in this regard, since representativity is only relevant if one can operate with *categories* of works. There are, however, significant objections to this interpretation of the second step: Firstly, requiring that the limitations be relative to the individual work in question would imply an unfounded preference of 'fair use'-type limitations:[154] The preparatory works give no indication of such a preference, and when the three-step (BC) was introduced, there already existed limitations that did not necessitate a per-work evaluation,[155] which is relevant since the test was conceived as capable of 'grandfathering' existing limitations.[156] Secondly, the concept of regularity which is inherent to the concept of "normal exploitation" points at assessing a category of works – not every work separately: It is difficult to see how the exploitation of a work could be 'regular' if it has no frame of reference (e.g. a category).

A question nonetheless arises as to the delineation of appropriate categories under the second step. With respect to the system of ECLs, the question is whether the requirement of representativity conforms to this way of categorising works. For instance: If the NFF (Norwegian Non-Fiction Writers and Translators' Association), an authorised ECL-institution, engages in an ECL-agreement concerning all non-fiction works – would this be an appropriate category of works?

There does not seem to be any obvious way of drawing these lines. This needs not be of any great concern: According to the 'modern' interpretation of the relation between the three steps, the outcome of the second step is not cardinal to the status of the limitation. In fact, it is the third step that ultimately will decide its fate. Thus, for the purposes of the following, it is deemed serviceable to postulate that representativity in the sense of the ECL-model conforms to the categorisation of works allowed by the second step. This

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[154] US Copyright Act (UCA) Section 107 according to which fair use must be assessed for every instance of use.

[155] E.g. the private use-exemption which was obviously taken into consideration at the time, cf. Records (1967) p. 111 ff.

[156] Ricketson/Ginsburg (2006) p. 776

means that when a CMO is authorised to conclude ECL-agreements with respect to a certain category of works, this very category is a relevant unit with respect to the assessment of conflict with a normal exploitation.

By all standards, use according to an ECL-agreement would have to be regarded as 'normal exploitation' of the works covered. The ECL-agreement is concluded by a substantial number of authors of the category of works concerned, which ensures that the necessary regularity required in order to be deemed 'normal' is attained. Additionally, it can be affirmed that the ECLs generate considerable revenues. When extending the ECL-agreement onto third party authors, the user-parties to the agreement are consequently enabled to make a 'normal' use of the unrepresented works. But, is the author thereby deprived of a regular, considerable source of revenue? Rather the contrary: That which is normal, is the ECL-agreement as it stands at any given time. When this subsequently is extended, the author is not deprived of this normal exploitation of his work – he is forced to exploit it this way.

Hence, the requirement of representativity ensures that the ECL-agreement at least is *a* normal exploitation of the type of work covered. On the other hand, as the requirement of representativity only entails the need for "substantial" representation, it is theoretically possible that the category of works covered by the ECL is subject to other, parallel, *normal* exploitations that either directly or indirectly are adversely affected by the ECL. However, as will be discussed in more detail in the examination of the third step below, while the substantiality-requirement might fail to *ensure* that the CMO is *truly* representative for the interests of the group, it entails a strong presumption. Concerning the second step it may thus be presumed that the normal use pursuant to the ECL does not unduly displace another normal exploitation.

5.2.4 Conclusion

The above investigation shows that while the ECL-*provisions* are broad enough to possibly come into conflict with a normal exploitation of the works thus limited, the provisions

cannot be assessed in isolation: The dependence upon ECL-*agreements* to be concluded by *representative* CMOs entails a constriction of scope which, in practice, will make the ECL conformant with the second step.

Where in practice it can be demonstrated that the permitted use pursuant to the ECL competes with [other] normal forms of exploitation, the market failure rationale entails that if the use in the absence of the ECL would have been done illegally, it is not the ECL as such that conflicts with the normal exploitation; it would certainly be in the *interest* of the CMO to permit such use, in order to at least obtain profit from it, *and* presumably stand a better chance of regulating it. Since the ECL brings legality so close to hand, the user might feel incited to operate legally.

The ECL nonetheless fails to establish *certainty* in that the CMO will not conclude ECL-agreements that exceed the limits of the second step. It only establishes a strong presumption. In case a conflict should be demonstrated, at least it is that of one normal use displacing another. In the end, the non-represented authors are ensured *a* normal exploitation of their works, which might add to the ECL being ‘reasonable’ in terms of the third step.

6 Step three: Not unreasonably prejudice the interests of the rights holder

6.1 General interpretation

6.1.1 Introduction

As distinct from the two preceding steps, the wording of the third step appears relatively clear: "prejudice"[157] connotes harm, the "legitimate"[158] "interests"[159] connotes interests of a certain, qualified kind, whilst the word "unreasonably"[160] indicates something that exceeds the bounds of reason; something which is unjustified.

In sum, based on a reading of the terms according to their ordinary meaning, the third step calls for a comprehensive evaluation of the prejudice caused the authors by the limitation: A balancing of interests must be done, where, depending on the interests at stake on both sides, the harm caused the rights holder might rise to an unreasonable level. In such a case, the limitation would be inadmissible.

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[157] "To affect adversely or unfavourably as a consequence of some action." Source: Oxford English Dictionary Online, online: http://www.oed.com

[158] "Conformable to law or rule; sanctioned or authorized by law or right; lawful; proper." Source: Oxford English Dictionary Online, online: http://www.oed.com

[159] "The relation of being objectively concerned in something, by having a right or title to, a claim upon, or a share in." "The fact or relation of being legally concerned; legal concern *in* a thing; esp. right or title to property, or to some of the uses or benefits pertaining to property." Source: Oxford English Dictionary Online, online: http://www.oed.com

[160] "1. In a manner at variance with reason; without due observance of reason or good judgement. 2. To an unreasonable extent; excessively, immoderately." Source: Oxford English Dictionary Online, online: http://www.oed.com

Although the above, superficial, reading of the wording gives a rather clear impression of the purpose and function of the third step, a closer look at its different components is necessary in order to determine its application more precisely.

6.1.2 "legitimate interests"

The term 'interests' (of the author) leaves little doubt that the measurement of prejudice is in relation to the authors' interests in upholding the exclusive rights as they are. The addition of the word 'legitimate' has caused some debate; 'legitimate' may connote both something that is sanctioned by law and something which is qualified by some other normative standard. In other words, the interests of the author can be understood in a positivistic sense, i.e. the interests protected by law, or as a more general sensation of concern for something which in turn must be of a certain quality in order to be reckoned with.[161]

The difference in interpretation materialises in the question of whether the concept of legitimate interests directs a further qualification of the authors' interests beyond ascertaining that they are 'lawful' in a positivistic sense: Although the interest which is harmed by the limitation could be said to be 'lawful', no "prejudice" would arise if it were not qualified in some other sense as well (e.g. promoting certain public policy objectives). This interpretation would have appeared correct if the test of the third step had only included an assessment conflict with the interests of the author. Ficsor persuasively argues that the addition of the adverb "unreasonably" makes such an additional normative consideration both superfluous and wrong.[162] In the initial formulation of the third step, the qualification of unreasonableness was not included. It would hence appear evident that the notion of legitimacy included an additional normative test, otherwise no limitation would pass the third step -evidently, some moral or pecuniary harm will be caused the author when imposing a limitation. However, as contended by Ficsor, when the adverb was added

[161] Cf. Ricketson/Ginsburg (2006) p. 774

[162] Ficsor (2002) pp. 286-288.

without the concept of legitimacy being removed, the sense of the latter shifted from directing a normative assessment to only requiring that the interests be sanctioned by law.[163] In turn, this means that the 'legitimate interests' of the author in the case of the BC and the WCT include both the pecuniary and non-pecuniary (moral) interests, whilst the sphere of interests in the TRIPS agreement must be narrowed to only cover the pecuniary interests, as article 9(1) explicitly exempts article 6bis BC (moral rights) from its scope of protection.

Conclusively, it can thus be ascertained that the concept of 'legitimate interests' does not require any further, normative qualification of the interests in question. This naturally leaves the sphere of interests quite open. This does however not pose a problem, as a limitation is more likely to be unreasonable if the interest is strongly justified in the normative perspective.

6.1.3 "unreasonably prejudice"

Having determined the proper sphere of interests to be evaluated, the next question is whether these interests are being prejudiced, and secondly whether this prejudice is unreasonable.

Arguably, any limitation of the exclusive rights does to a certain extent prejudice the interests of authors. If not of the authors in general, e.g. if a limitation permits uses which they would not be able to control anyway, then at least to some particular authors who do in fact manage to exploit or otherwise control their works. This cannot be decisive, and the adverb "unreasonably" has been introduced to ensure that such prejudice will not topple the limitation: Only that which reaches an unreasonable level.[164]

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[163] Ibid. p. 287.

[164] Cf. the comments of the chairman in Records (1967) p. 883. (Source found in Ficsor (2002) p. 288)

Consequently, the third step consists of first determining the degree of prejudice caused the interests of the author, and secondly determining whether this level of prejudice is unreasonable. In the preparatory works to the BC, the Main Committee I gave the following example:

> "A practical example might be photocopying for various purposes…If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use."[165]

The example is instructive in two ways: Firstly, it indicates that the degree of prejudice to the interests of the author depends upon the configuration of the limitation in question. For instance an obligation to pay for the use could bring a limitation within the boundaries of reason, where a free use provision otherwise would be unreasonable. Secondly, it demonstrates that the outcome of the test of unreasonableness depends on the user-specific interests at stake. This implies that the test of unreasonableness requires a balancing of interests, where the user-specific interests (public policy objectives etc.) must justify the prejudice caused the interests of the author. Although some caution should be exercised when extracting arguments from the example, due to its character of supplementary means of interpretation, this seems to lie well within an ordinary construction of the third step. There has been some opposition to the understanding that the third step allows for compulsory licences. According to Desbois et al. the choice of the third step is either that of free use exception or no exception, in the sense that the obligation to pay remuneration does not affect the outcome of the test.[166] This view is shared by few, and there seems to be something close to unanimity between the leading legal scholars in the field.[167]

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[165] Records (1967) pp. 1145-1146

[166] Henri Desbois, André Françon, André Kéréver, *Les Conventions internationales du droit d'auteur et des droits voisins*, Paris 1976, p. 207. Source found in Ricketson/Ginsburg (2006) pp. 775 and 777.

[167] See e.g. Ficsor (2002) p. 188; Lewinski (2008) pp. 163-164; Senftleben (2004) p. 237; Ricketson/Ginsburg (2006) pp. 775-777.

As to the closer determination of the norm guiding said balancing of interest, the wording of the third step is of little guidance. It would appear logical that the more the limitation prejudices the interests of the author, the more cogent or 'worthy' must the public policy objectives underlying the limitation be for the prejudice to appear 'reasonable'. This does however not determine where the threshold of unreasonableness lies. An indication, which incidentally only is relevant to the modern approach to the system of three steps, is that limitations which are difficult to reconcile with the first two steps are 'unreasonably prejudicial', and that somehow the limitation would need to reduce the prejudice on the author or otherwise be underpinned by very cogent public interests if to pass the third step. However, the question of which interests that are 'very cogent' and which that are not is not thereby solved, and it must be admitted that the threshold of the third step is still vague, apart from the circumstance that the prejudice must be of a *qualified* graveness before it reaches the level of unreasonableness. However, considering the nature of the subsequent inquiry into the compliance of the ECL-model with the three-step test, it is contended that a more precise determination of this threshold is not *strictly* necessary.

6.1.4 Conclusion

The third step calls for a comprehensive evaluation, where the interests of the users must be balanced against the frustrated interests of the authors. In this sense, the compilation of the limitation is of central interest. The broader the scope, the more probable the limitation is to prejudice the interests of the authors. Thus, measures such as the obligation to pay for use must be assessed as well, since the economic interests of the author are prejudiced less if he is being remunerated. Likewise, it can be assumed that the authors are interested in having a say in how the limitation is crafted. Limitations including the opportunity for the authors of influencing its scope or functioning thus must be presumed to be less prejudicial. Hence, it can be assumed that compulsory licences are less prejudicial to the interests of the author than statutory licences, which in turn are less prejudicial than free use provisions.

6.2 The system of ECL

6.2.1 Introduction

As with all limitations, the ECLs prejudice the interests of some authors. Correspondingly, the ECLs are imposed in order to attain certain policy objectives. The ECL is first and foremost imposed as a means of providing a practical and efficient method of clearing rights, where individual conclusion of licence agreements is deemed too great a hindrance. The interests which in turn may benefit from such facilitated rights clearance are many, and vary with the individual ECL. This thesis is not an analysis of how the *individual* ECLs and the particular policy objectives they promote relate to the third step, but an examination and discussion of how the *model* of ECL satisfies the requirements of the third step. Such an examination cannot be performed in a vacuum – a frame of reference is needed. In this respect both a comparison to other forms of limitation and to internal variations of configuration between ECLs may serve as a reference point. In short, the objective is to examine whether the ECL-model, as crafted to forge compromises between the need for easy rights clearance and the authorial interest in retaining individual control over works, is more likely to be 'reasonable' in the terminology of the third step.

6.2.2 Presentation of the different traits to be discussed

All limitations or restrictions on copyright seek to achieve some objective by somehow modifying the outset of protection and exclusive rights conferred on the rights holders. Different methods are used, and can be categorised (inter alia) according to the way they limit copyright. The ECL, as a category of limitations, has especially one key trait that is different from other types of limitations, namely its contractual, collective basis. As will be shown below, three circumstances of interest to the test in the third step are occasioned by this contractual basis.

While the contractual, collective basis entails certain advantages with respect to satisfying the third step, the collective foundation also raises some questions pertaining to the system

of remuneration pursuant to the ECL: The current ECLs leave it to the CMO to determine the distribution of collected funds. The significance hereof will be discussed in 6.2.7.

Moreover, although not a *necessary* trait of ECLs, many ECLs nonetheless provide an opt-out right for authors. Such a right is of central relevance to the third step, and in light of the present trend to increase both the number and extent of ECLs while in return providing an opt-out right, this point will be elaborated in 6.2.8.

Finally, all ECLs have been imposed in situations marked by market failure, where individual contracting is the exception rather than the rule. This is of relevance to the test of the third step, as will be seen below. In this regard, the digital 'revolution' is by many thought to reduce the need for limitations on copyright due to the opportunities entailed for the author to regain control over works through DRM-systems. The significance of the modern, digital situation for the ECLs will be given consideration in 6.2.9.

6.2.3 The contractual basis: An introduction

The ECL *extends* the terms of a contract onto unrepresented authors in substitute for explicit stipulation directly in the law; three interesting effects arise from this: Firstly, the fact that the author-parties to the ECL-agreement are *not affected by the limitation*. Secondly, the collective, contractual basis combined with the extension effect implies that the CMO achieves a de facto monopoly vis-à-vis the users, thus substantially increasing its *bargaining power*. Lastly, and as touched upon in connection with the second step, the collective, contractual basis ensures that the limitation which eventually is imposed on the non-member authors has been *subjected to delineation and approval by a substantial number of authors of works of the same category as the affected author*.

6.2.4 Fewer authors affected

In terms of prejudicing authors' interests, it is clear that a reduction in the number of authors affected by a limitation must necessarily reduce the overall prejudicial effect of the limitation: The unaffected authors do not experience any prejudice.

It follows that the larger the CMO, the less global prejudice is inflicted by the ECL, since the member authors are *exercising* their copyright, not having it limited. Nonetheless, the *formal* requirement is only that a "substantial" number be represented. As seen in the discussion of the first step, the requirement might be satisfied with relatively low proportional representation.[168] This is not problematic, as the aim of section 38a is to ensure representativity of the CMO for the category of affected authors.[169] A high proportion is not required as long as the number is sufficient to ensure that individual members' interests are not favoured at the expense of common interests in the group. It does however imply that the significance of the substantiality-criterion pursuant to section 38a NCA in lowering the prejudice on the rights holders is reduced – at least theoretically.

In practice, the number of authors needed to be considered representative will depend on how well-organised the market is. If, in a certain market, the authors are highly organised, it would be natural to require that the CMO represent a quite large portion of these to be considered representative. In case the authors are organised in smaller collectives, section 38a (1) provides the ministry with the power to require that the authorised organisation be an umbrella organisation for these smaller collectives.[170] In such a situation, the reduction of authors affected could become quite significant. Considering also the reciprocity-agreements usually concluded between the larger CMOs worldwide, the overall number of rights holders left unaffected by the limitative function of the ECL could indeed become significant.

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[168] Although it must be kept in mind that operating with percentages in any case is problematic, see 2.3.1.9.

[169] Cf. Ot.prp. nr. 15 (1994-1995) p. 27.

[170] Cf. Ot.prp. nr. 54 (1978-1979) p. 10, where such a solution is indicated.

In less organised markets, the situation is different. The number of represented authors is lower, and the number of authors affected by the limitation higher. Although there might be a sufficient number of organised authors to ensure representativity, this would certainly reduce the potency of this particular argument towards seeing the ECL as a better alternative than the outright compulsory licences.

6.2.5 Increased bargaining power

By concluding the ECL-agreement, the CMO does not only manage the rights of its members, but also those of all authors within the same field as the ECL-agreement. A grant of licence allows the user to use all works within the category as long as- and to the extent that it is allowed in the terms of use in the ECL-agreement. On the other hand, a denial of concluding an ECL-agreement means that the user is unable to use legally any work within the category, unless by individual agreement with the authors or if the use is covered by another limitation, e.g. the private use exemption.

Considering that for most users of ECLs it is imperative that they are allowed to use copyrighted material, and considering furthermore that the situations in which ECLs are imposed are characterised by the impossibility of concluding individual agreements, the situation may amount to a de facto monopoly for the CMO.

As compared to ordinary compulsory licences, where the author negotiates only on behalf of himself, and where his contractual foothold is further weakened since the power to deny the use of the work is bereft him, replaced instead by statutory conditions of use, the unique position of the CMO substantially increases the bargaining power of the authors.[171]

[171] Although it cannot be ruled out that certain few authors would have been able to negotiate a higher price pursuant to a compulsory licence than the uniform fee pursuant to the ECL-agreement.

To exemplify, both in 1984 and in 2006 Kopinor[172] and its contracting party (the Ministry of Culture and The Norwegian Association of Local and Regional Authorities (KS) respectively) failed to agree on the licensing terms and fees for copying in schools. In 2006, the collapse led to a 96-day prohibition of copying copyright material in schools. According to the initial surveys conducted, the ban was only poorly respected (as opposed to 1984). When Kopinor consequently inserted advertisements in the newspapers, visited schools and alerted the pupils of the illegality of the copying, later surveys indicated that the prohibition eventually was respected. In turn, this caused severe problems in education,[173] the preparations for the end-of-term exams and purportedly also for the grading of pupils. Eventually, KS and Kopinor agreed to solve the dispute by arbitration.[174]

Evidently, the described case is special since in the educational sector, a common agreement for all public learning institutions (except higher education) is negotiated between Kopinor and KS. The collapse of negotiations thus affected the whole educational sector. In the cases where Kopinor concludes *individual* agreements, e.g. with businesses pursuant to section 14b NCA, there is less reason to believe that a ban will be as effective. Nonetheless, compared to the situation pursuant to an ordinary compulsory licence, there still is reason to believe that the ECL-institution has a better foothold in the contractual negotiations.

While this situation of de facto monopoly might render the ECL less usable as a tool in cases where the policy objectives require a more secure – or even cheaper – access to works, this does not alter the fact that the ECL in the hands of the authors is a powerful tool vis-à-vis the users.[175]

Although the increased bargaining power may benefit the average authorial interest by increasing the average collected remuneration, the prejudice-reducing effect depends on the

[172] The Norwegian 'umbrella'- CMO in the field of reproduction.

[173] Which was bound to depend on photocopying through the curriculum fixed by the ministry.

[174] Source: Kopinornytt nr. 1/2006, available at: http://www.kopinor.no/om_kopinor/kopinornytt. (Norwegian only)

[175] See Rognstad (2004) pp. 157-158 for a discussion of whether the ECL-model is *useful* as a limitation in all relations.

subsequent distribution scheme.[176] Bargaining power vis-à-vis the users is only half the equation. As will be shown in 6.2.7, in the relation between the CMO and the affected third party authors, it is not immediately clear that the ECL is less prejudicial to the interests of the authors than is e.g. an ordinary compulsory licence.

6.2.6 Delineation and approval of limitation by substantial number of authors of works of the same category as the affected author.

Pursuant to the contractual foundation of the ECL, no limitation is in fact imposed until an ECL-agreement is concluded. The moment this contract is concluded, the ECL springs to life by extending the terms of the ECL-agreement onto the non-member rights holders as well. In turn, this implies that within the freedom given the CMO by the [quite sizeable] ECL-provisions, it is up to the collective to delineate and concretise the further terms of use which to the non-members will materialise as a limitation on their exclusive right once the extension effect is applied.

A key to understanding the rationale of the ECL is that the delineation is done by a *collective* which represents a "substantial" number of authors of works of the same category as the non-member authors who are affected by the resulting limitation.[177] The perspective is that this approach contributes to lessen the prejudice inflicted on the interests of the authors by the limitation, since the limitation's terms of use are *delineated and approved* by authors of similar works. As opposed to compulsory licences where the terms of use are stipulated by rigid legislation, the ECL provides a more flexible solution in which the authors may tailor the solution which best fits them.

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[176] And of course also on the costs incurred by administering the ECL-scheme. Nonetheless, it is assumed that in general, the transaction costs of the ECL scheme is lower than the average cost would be pursuant to individual licensing.

[177] See 2.3.1.9.

The conception is founded upon the assumption that authors of works of the same category share common interests with respect to the use of their works. Copyright is individual for a reason: The authors know best how to put their works to use in order to create maximum utility and incentive for themselves.[178] This notwithstanding, it seems safe to assert that most authors [of similar works] share at least a minimum of interests in common – an assumption the correctness of which is testified to by the very existence of CMOs and other rights representation organisations. Naturally, on a strictly individual plane, the authors probably would have too high a degree of varying personal interest for any one author to be representative for the group. By requiring 'substantial' representation, however, it is believed that overall representativity for the group of authors is achieved.[179] Subsequently, because the ECL-agreement reflects the condensed interests of this [presumably] representative group, it can be assumed that the ECL in fact is 'reasonable' within the meaning of the third step, since the authors would not engage in an agreement contrary to their own interests.

The certainty of this conclusion is however not entirely evident. Firstly, statistical representativity fails to make room for interests that are shared by few. While this is important in securing that CMOs only prioritise common interests of the group, it is evident that the third step also safeguards other interests that a rights holder might have in addition to the common ones. By the compromise forged in the CMO, some rights holders will always to an extent feel prejudiced; the members do so voluntarily, while the non-members have their exclusive rights *limited*.[180] Besides, as will be discussed in 6.2.7, being a

[178] This is at least one central reason, although other parallel rationale exists: For a short presentation of the main rationale underlying copyright protection, see Lucie Guibault, *Copyright limitations and contracts*, The Hague 2002, pp. 7-16; Senftleben (2004) pp. 5-21.

[179] Cf. for instance NU 1973: 21 pp. 83-84, implicitly.

[180] On the other hand, in a *normative* perspective, this type of prejudice might very well be *reasonable*, in light of the harm otherwise caused the authors by the market failure situation in which the ECL is imposed, cf. 2.1.

member might sometimes create a stronger bond than being authors to similar works, thus challenging the presumption of representativity.

Secondly, a requirement of 'substantial' representation might imply that a 'substantial' number of authors are *not* members of the CMO. While a certain statistical representativity may be presumed, certain authors might deliberately keep without of the collective solution. Considering furthermore that the requirement of substantiality pursuant to section 38a NCA only comprises original rights holders, i.e. the actual authors, derivative rights holders are not necessarily represented.[181] Article 13 TRIPS protects the "legitimate interests of *the right holder*" (emphasis added), thus it is clear that the interests of the latter group also are relevant. Moreover, there is reason to believe that the interests of the authors and derivative rights holders are not always concurrent.

> To exemplify, it is easy to envision that authors, publishers and other institutional copyright holders e.g. to highly specialised legal (non-fiction) literature wish to administer their rights individually due to the special character of their works. For instance, when it comes to routinely updated standard works, where law firms may be presumed to always need the newest edition in order to avoid liability, the rights holders would have an easier job in policing illegal use and in negotiating individual contracts than rights holders to works the use of which is impossible to estimate in advance. Considering furthermore that such works may be very expensive, the rights holders have even greater interest in operating an individual scheme.
>
> The example also shows how the market failure rationale is not uniformly valid: Mass use-situations do not necessarily entail market failure with respect to all works or groups of rights holders. As will be seen in 6.2.8 below, an opt-out right might nonetheless reduce significantly any prejudice caused by situations as the one just described.

Thirdly, for the argument of representativity to be relevant, the third step must necessarily allow for collective regards: Evidently, market failure will seldom be so total, and

[181] *Publishers* are de facto represented in the relevant Norwegian CMOs, and enjoy a certain protection from their works being used without consent pursuant to the Norwegian Marketing Practices Act of January 9 2009 section 25.

representativity never so comprehensive that no one author will feel more prejudiced than the rest. The fact that the third step refers to the interests of "the author" *in singular* ("the right holder" in the case of TRIPS) might nonetheless challenge this. Isolated from the context, the singular form arguably connotes individuality, in the sense that it is the effect of the limitation upon each and every author *without* regard to the overall effect upon the *group* of affected authors that is to be assessed. Undeniably, if a collective assessment were intended, this could have been expressed more clearly by referring to 'authors' in *plural*. Notwithstanding this, it must be remembered that the third step inquires whether the prejudice is '*unreasonable*' – the connotation of which is not restricted to such individuality. Rather, the question is whether the limitation is underpinned by sufficiently strong policy considerations. Concerning this proportionality test it must be remembered that prior to the three-step test of the BC, many national copyright limitations existed which did not necessitate any *individual* assessment of the prejudice upon each affected author including the 'fair use'-principle of the UCA. To the contrary, e.g. the private use exemption of [the former] section 11 NCA struck uniformly without regard to the fact that evidently some authors would be prejudiced more than others by the same limitation. Remembering that the BC was conceived as capable of 'grandfathering' existing limitations,[182] it is thus contended that using the group of affected authors as a frame of reference is relevant.

Lastly, while theoretical exercises may be useful to trace the logical limits of the advanced arguments, empirical facts must also be considered: The ECLs are mainly imposed in situations where individual licensing is deemed scarce and difficult; the agreements which have been imposed in practice do seem to concern usages that otherwise would have been difficult to exercise on an individual basis.

> For example, Kopinor's current ECL-agreements on *reproduction* in schools and universities precisely delineate the use that may be made of the works covered. In general terms, no more than 15 % of a work may be copied, and copying may not be done to substitute works that normally should be kept in

[182] Ricketson/Ginsburg (2006) p. 776.

> stock. Furthermore, schools are prohibited from copying particularly vulnerable works such as one-time-use booklets, forms and tables made especially for educational use: Otherwise, the very market for such works would be heavily prejudiced. Moreover, the agreements have special rules for works that are out of print, etc.[183]

One can of course not just advance the 'market failure'-argument, and thus proceed to claim that the authors would have been badly off anyway. Market failure is an imprecise term, because it denotes characteristics of a factual situation without revealing the extent of market failure. For instance, in a market where 60 % of the use is contracted individually, 20 % collectively and 20 % carried out illegally, there is evidently a *part* of the market that is subject to failure. Whether the market as a whole is to be deemed failing is a matter of opinion: The term 'market failure' is not conclusive. In such a market the presumption that the collective (20 %) is representative for the interests of the 80 % other rights holders would in any case at best seem strained. The reality in which the ECLs are imposed is quite another, however. And, with respect to the Danish 'omnibus'-ECL pursuant to section 50(2) cf. (4), the preparatory works expressly state that the Ministry of Culture is to ensure that authorisations are given only in situations where individual clearance is improbable.[184]

6.2.7 The remuneration scheme

While the CMO possesses a strong foothold when negotiating the ECL-agreement with the users, the question of subsequent distribution of the collected remuneration is central when it comes to assessing the level of prejudice inflicted upon the authors. The pecuniary interests of the authors are not served well by a high fee on the users if the collected money subsequently is put to use in a way that does not benefit them.

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[183] Source: On-line access to the agreements on Kopinor's website. Available in Norwegian at: http://www.kopinor.no/avtaler/avtaleomraader. For the sake of interest, the previous agreement between Kopinor and the university/college sector (in force until 2002) is available in English at http://www.kopinor.org/avtaler/avtaleomraader/universiteter_og_hoeyskoler/avtaletekst_moensteravtale.

[184] Forslag L 58 proposed 30.01.2008, comment to section 50(4)

Concerning the distribution of the collected money, the outset is stipulated in section 37 paragraph one NCA: The CMO decides how the collected remuneration is to be distributed. Consequently, it is up to the CMO to decide whether the authors are to be remunerated individually or collectively, including detailed determination of the distribution criteria.

Central to the ECL is that the collective may be presumed to be representative also for the interests of the non-member authors. Thus, it could be argued that the stipulation of the remuneration scheme would be acceptable for the non-member rights holders as well. However, in certain respects, there is reason to believe that the member authors are not representative at all for the interests of the non-member rights holders. The distribution of collected payment seems to be one of these instances: In this case, being a member presumably creates a stronger bond than the one shared by holding rights to the same type of work. Left unattended this could easily have caused a quite unreasonable prejudice to the interests of the unrepresented authors. Hence, it is stipulated in section 37(1) NCA that the distribution criteria must be formulated in such a way that members and non-members are treated alike.

By the latter requirement, the non-member rights holders are to have the same claim on the collected funds as the member authors. In case the funds are used for purely collective purposes, such as e.g. political lobbying, it must be ensured that the purpose is common for all the rights holders in the field.[185] In case a more individual distribution is aimed at, e.g. scholarships, the CMO must ensure that the criteria for application are neutral with respect to organisational affiliation.[186]

There is however still reason to question if- and how much the solution contributes to benefit the non-member authors affected by the limitative effect of the ECL. Whilst the distribution criteria might be neutral of appearance, there are several circumstances that might cause reality to be quite another.

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[185] Ot.prp. nr. 15 (1994-1995) p. 148.

[186] Ibid.

Firstly, there is the evident problem caused by section 38a paragraph one requiring only that the CMO represent a substantial number of "*authors*". To the group of derivative rights holders there is probably little comfort in being safeguarded the same access to the collected remuneration as the represented authors, if the criteria for obtaining remuneration according to the collective scheme more easily are fulfilled by authors. And as can be remembered, the three-step test of the TRIPS is concerned with the interests of all *rights holders*.

> For example pursuant to the distribution formula for The Non-fiction Fund (Det faglitterære fond) managed by NFF (Norwegian Non-fiction Writers and Translators' Association), four categories of scholarships are awarded: A) Scholarships for concrete literary projects within the field of non-fiction, B) Travel scholarships, C) Pensioner's scholarships for authors above the age of 67 and D) Extended pensioner's scholarships. The applicant must document authorship (as author or translator) to at least one non-fiction work of at least 200 000 characters (including spaces), which must have been disclosed to the public. For scholarship C, a larger literary production is required. [187]
>
> As will have appeared, these guidelines prioritise non-fiction *authors* that are *still active* as authors, as well as *retired* authors. On the other hand, all derivative rights holders as well as non-retired authors who do not currently produce non-fiction works are excluded from being awarded such scholarships. While this obviously discriminates the latter category of rights holders, it is nonetheless in accordance with the requirement that represented and non-represented authors be treated alike pursuant to section 37(1) NCA: The distribution formula does not differentiate between members and non-members. Thus, the result is that a rather large group of rights holders to non-fiction works are denied the possibility of receiving individual remuneration.
>
> As a matter of form, it must be added that Kopinor, the CMO to which NFF is a member, also has publishers amongst its members. This ensures that at least some portion of the collected remuneration is channelled to certain derivative rights holders, namely the publishers. On the other hand, heirs and institutional owners except publishers are not so favoured.

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[187] Cf. the guidelines for awarding scholarships from The Non-fiction Fund as decided on the annual meeting of The Norwegian Non-fiction Writers and translators' Association, March 2009. Available at: http://www.nffo.no. (Norwegian only)

Secondly, regardless of how neutral the distribution criteria might be in practice, there is the inescapable discriminatory reality that if the CMO should decide on a collective distribution scheme, member authors are more likely to be aware of the scheme than most non-member authors. This is even more the case of foreign authors. Thus, the non-member authors affected by the limitation benefit the least from the collective scheme.

Those who benefit from the increased bargaining power pursuant to the ECL might very well be someone else than the authors whose works are used the most. This is a problem with all collective schemes, as they do not differentiate between authors whose works are more expensive or whose works are used more intensely. With regard to the imperatives of the third step, this is important, as a collective scheme might easily come to benefit authors whose works have not been used at all pursuant to the limitation. These authors have thus not experienced any prejudice from the limitation – only benefits. When in turn assessing the level of prejudice inflicted on the group as such, it would appear wrong to include these in the assessment, since their works in fact have not been used at all. Whilst the prejudice on the pecuniary interests of the authors affected would increase since the amount of available remuneration is reduced, the benefit experienced by the authors whose works are not used cannot be included as a counterweight. In sum, while the collective scheme might contribute to redistribute money from the successful authors to the less successful ones (this might have some normative value in itself), this does not contribute to lessening the prejudice inflicted on the authors by the limitation.

In this sense, as pointed out by Rognstad, there is reason to question whether the ECL really is that much more advantageous for the affected author than a regular compulsory licence that at least secures him individual remuneration.[188] Although a regular compulsory licence might weaken his bargaining power, it secures the author a remuneration that reflects the intensity of the performed use.

[188] Rognstad (2004) p. 155. Except of course section 30 NCA which requires individual remuneration.

Section 37(2) NCA confers on the non-represented authors a right to individual remuneration to the extent that they manage to substantiate that their works have been used. Pursuant to the preparatory works, it suffices to render probable the use e.g. by means of statistical analyses, in which case the remuneration would have to be determined in an approximate manner.[189]

In real terms, however, the advantage of the right to the affected authors is debatable. The difficulty of demonstrating or substantiating that ones work has been used can be considerable, especially when the users do not contribute by registering the works used.[190] In the mass use situations covered by the ECLs pursuant to sections 13b, 14 and to a certain extent 16a (e.g. scanning and subsequent e-mailing of a book to a [library] loaner) the use takes place within the perimeters of the user-institution which substantially impairs the rights holder's chance of learning of- and much less proving or substantiating use of his particular work. In other cases, e.g. where a library pursuant to the ECL in section 16a makes scanned books available online, the use could be relatively easy to *prove*, but difficulties of learning of the use could still be considerable.

In sum, for the CMO to choose a collective remuneration scheme over individual remuneration may very well amount to a de facto discrimination of the non-member rights holders – incidentally the group whose exclusive rights are being limited. In terms of justifying the prejudice as 'not unreasonable', this clearly reduces the potency of the ECL-model: Both because it impedes the affected rights holders from benefiting from the strong bargaining power of the CMO, and thus does not lessen the prejudice to any mentionable degree, and in a more normative perspective, because such discrimination easily could become 'unreasonable' if it were possible to avoid by simple means. As contended by Senftleben, a limitation could easily come into conflict with the third step if it is not

[189] Ot.prp. nr. 15 (1994-1995) p. 148.

[190] Which incidentally is one of the main causes of the market failure situation of illegal use: The users have reduced incentive to obtain licences since the risk of detection is low.

necessary, meaning that "a limitation must be the least harmful of more than one available means to obtain a particular objective".[191] Naturally, this does not mean that any small difference between two alternatives is cardinal: The term "unreasonable" connotes, as mentioned earlier, that the prejudice must be of some qualified graveness before the limitation is rendered impermissible.

An important argument is that collective schemes render ECLs more effective:[192] The users need not register the works they use except once in a while for statistical purposes,[193] and the CMO needs not use resources on finding the rights holders. Depending on how important effective rights clearance is deemed in the individual case, the policy objectives underlying the ECL might very well support the use of collective remuneration schemes through the scrutiny of the third step: It can of course not in general be claimed that such schemes are impermissible.[194] On the other hand, it would seem rash to admit failure in reaching a solution that forges a better compromise between the aim of efficiency and the authorial interest in a remuneration that reflects the actual use of a work. Keeping in mind the above-mentioned uncertainty as to whether the CMO is representative for the interests of the non-members with respect to remuneration schemes, the fact that such individual schemes to a low degree have been implemented in Norway should not give rise to any strong assumptions of inefficiency.

> For instance in Denmark, the CMO Copydan Tekst & Node has implemented an individual remuneration scheme, where a selection of user institutions make one extra copy of all works copied, onto which the number of copies made and certain details about the work copied are written. Additionally, spot checks are conducted at certain intervals. Subsequently, these extra copies are sent to Copydan, which registers the rights holders and the number of copies produced. In turn these

[191] Senftleben (2004) p. 236

[192] Cf. implicitly the argumentation of the Norwegian delegation in NU 1973: 21 p. 92 (Norwegian only).

[193] In order to determine the correct distribution formula from the CMO to foreign CMOs and in relation to the CMOs member-organisations.

[194] For instance section 13b is seemingly such a case, where incidentally the cogency of the public interest in education explicitly is recognised in the limitation in article 10(2) BC.

'individual' numbers are adjusted according to general, nationwide statistical data, and the individual authors are remunerated accordingly. In case the sum payable to the author would be very low, the sum is retained at the CMO. Correspondingly with the portion of collected fees which correspond to works of indeterminable origin. Lastly, if the individual rights holders prove too difficult to find, the remuneration is retained at the CMO as well. After three years, if no rights holder has presented himself with a claim on the collected money, the money is put to collective use.[195]

Purportedly, in 2008 Copydan Tekst & Node received 70 000 registered copies which in turn were converted to individual remuneration of approximately 30 000 rights holders.[196] The administration costs of Copydan Tekst & Node amounted in 2003 to 15 % of the collected remuneration, whilst in 2004 it amounted to 12%.[197] In comparison, Kopinor, the Norwegian equivalent to Copydan Tekst & Node, incurred administration costs of roughly 11% of the collected remuneration both years.[198]

It must of course be mentioned that the above numbers of Copydan and Kopinor, respectively, cannot automatically be compared to one another: There might be relevant differences between the organisations other than those caused by the chosen system of remuneration, which could affect said figures. Furthermore, the above numbers do not give expression to the transaction costs the individual remuneration scheme inflicts on the users. Thus, it is not possible to conclude on any reliable basis how the individual remuneration scheme affects the efficiency of the ECL model. Considering that there is little reason to believe that the Danish ECL regime should be motivated by significantly different policy objectives than the Norwegian one, there is in my opinion still grounds to draw a *qualified assumption* that individual remuneration is possible to achieve at a higher level without significantly prejudicing the efficiency of the solution.

Any obligation to register works imposed on the user represents a transaction cost which could render the ECL less effective.[199] There is a very significant distinction, however, between having to locate and negotiate with the rights holder in advance, and merely

[195] Source: Copydan's web pages, available at:
http://www.copydan.dk/DK/Copydan/Om-Copydan/Fordeling_af_vederlag/Fordelingsmanual.aspx

[196] Source: Copydan Tekst & Node's annual report for 2009. Available at:
http://www.copydan.dk/DK/Tekstognode/~/media/Files/Tekstognode/Brochurer/TN_aarsbrev.ashx

[197] Source: Copydan Tekst & Node's web pages. Available at:
http://www.copydan.dk/UK/Writing/Economy.aspx (Available in English)

[198] Source: Kopinor's annual report for 2004. Available at: http://www.kopinor.no/om_kopinor/aarsmelding.

[199] For instance by inciting the user to use the work illegally instead.

registering the work after use. In the latter case, the ECL has already taken care of the negotiation of a fee, and all the user has to do is to register the work used. (Correspondingly, there is a relevant difference between locating rights holders in connection with the individual instance of use, and doing so in a centralised, professional unit.)

Naturally, in the pre-digital age, keeping track of the works used in mass use-situations and locating rights holders could appear prohibitively troublesome and costly. In the contemporary 'digital' age, there might on the other hand be reason to review this outset. Considering today's wide array of electronic aids, simple and cost-effective means of registering the works used seem at hand (adding to the apparent Danish success of manually sending in extra copies of used works from representative user institutions).

> For instance in the case of photocopying from books, a barcode scanner attached to the photocopier could be serviceable. Or for instance affixing RFID-chips onto the originals, which in turn could be registered by the photocopier. In the case of libraries, the very way in which libraries function by classifying and categorising works implies that creating a central database in which the use that was made of the works could be registered, would cause little trouble. For instance when the library scans its books, it would need to register the book. This information could in turn be forwarded to the relevant CMO. If the library should [pursuant to the prospective ECL-agreement] mail one of its loaners the digital copy of the book, it would seem rather simple to register this – at least not more problematic than the registration done during ordinary lending of books.

Evidently, digital means are not going to solve all problems of registering works. There are still cases in which registering a work for individual payment will prove prohibitively burdensome. Nonetheless, adopting schemes of individual remuneration is not a question of yes or no: Total accuracy is of course not necessary in order to reduce the prejudice on the interests of the affected authors. It may be presumed that the [pecuniary] interests of the affected authors will be satisfied proportionally with the increase of individual remuneration.

In sum, to the extent that the ECL model provides for individual remuneration, the combined effect of this and the increased bargaining power undoubtedly will substantially lessen prejudice of the affected authors' interests.[200] While an exclusively collective remuneration scheme could be acceptable if the policy objectives underpinning the particular ECL *required* as smooth a rights clearance process as possible, the relatively small loss of efficiency entailed in supplementing the ECL with at least a certain degree of individual remuneration weighs heavily for supplementing the ECL-provisions with a certain directive to the CMOs in case – as seen in Norway, contra in Denmark – they should cling to the collective systems.[201]

6.2.8 The opt-out right

6.2.8.1 Introduction

Although the ECL is crafted to minimise the prejudice on the interests of the affected rights holders, it still is a *compromise* between this and the aim of providing a smooth rights clearance procedure.

It would be easy to voice arguments which question the availability of alternatives, when faced with the impediments of individual rights clearance in a failing market. Viewed from the perspective that illegal use and untapped potential is detrimental to society and should be rectified, the alternative to introducing limitations is not evident.[202] The question of

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[200] Cf. footnote 171.

[201] It must also be kept in mind that in addition to the above discussed reasons for not adopting an individual remuneration scheme, the non-recurring cost of implementing such a system could prove prohibitive if not instructed by law to do so.

[202] It must be mentioned that I do not intend to assess the validity of normative arguments that call for limiting copyright in order to prioritise a certain part of its rationale (namely the dissemination of works, and the remuneration of authors). The background for copyright protection is complex. When, as in the case of ECL, copyright is limited with the effect that certain parts of its rationale are given lesser priority to promote other parts of its rationale, it is evident that copyright itself cannot provide the answer to whether the

alternatives is however not exhausted at that: There is still the question of whether the limitation is *necessary* as it appears.[203] The question of an opt-out right thus springs to mind: If the rights holders were allowed to opt out of the solution, this would – as will be seen below – have an unparalleled effect in lowering the prejudice of the ECL on their interests. On the other hand, any deviations from the collective scheme reduce its efficiency.

6.2.8.2 What is opt-out?

An opt-out right is an opportunity for the rights holder to escape the compulsory effect of the ECL. Whilst the ECL in practice entails a transfer of the authorisation right to the collective (or perhaps more precisely indirect management of the right by the collective), an opt-out clause [in its purest form] grants the author the opportunity to reverse this transfer, thus bringing the work back into his exclusive sphere of control. To the user of an ECL, the opt-out would imply that he is not allowed to use the work as far as the opt-out reaches.

The opt-out right might come in many different shades, where the opportunity to opt out is delimited by e.g. rigorous procedures of announcing the opt-out, or outright delimitation of the extent to which opt-out is given effect. For instance, the opportunity to conclude individual licence-agreements with the users of an ECL-agreement which have priority over the latter may be seen as one modality of the opt-out right. Correspondingly, it is easy to envision different variations, where the author is allowed to opt out of certain parts of the ECL-agreement but not others.

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limitation is reasonable or not: The very copyright that the three step test is to safeguard is composed of all these individual rationales, and does not advise on any hierarchy between them.

[203] Cf. 6.2.7.

6.2.8.3 What is the effect of an opt-out right on the assessment of prejudice?

In chapter 2.4, it was established that ECLs are *limitations* in the sense that they need to pass the scrutiny of the three-step test. As can be remembered, this fact was not altered by the provision of an opt-out right. While it is clear that such a right would contribute to reduce the scope of the limitation, and thus its limitative effect on the respective rights, it is equally clear that it turns the outset of copyright upside down– namely that the *author*, and he alone, has a right to authorise the use of his work.

Nonetheless, although an opt-out clause does not make the ECL avoid entirely the brand of limitation, it clearly entails a reduction in prejudice caused to the rights holders. As to the degree of reduction, this is evidently dependent upon the formulation of the right: The more 'constricted' modalities, such as a right to conclude parallel licence agreements, are obviously less effective than a right to opt out entirely. Although the limited opt-out rights might formally give the author influence over the use of his work, the practical reality of such a right must also be taken into consideration. The right to conclude individual agreements for example, is probably of little use to the author if he has little more to offer the user than that which is provided by the ECL-agreement.

The 'full' opt-out right, on the other hand, serves the interests of the rights holders more effectively: By allowing the author to regain *exclusive* control over his work, the ECL is but a very small deviation from the outset of exclusive rights. With respect to the inconvenience of having to take positive action towards the CMO in order to opt out, the prejudice inflicted may be considered marginal (unless the opt-out procedure is very burdensome). It must be acknowledged, however, that while the author formally would regain his exclusive right when opting out, the practical reality could be quite different. The advantage of the ECL with respect to facilitating rights clearance lies in its blanket licence-function – a function which might incite the user to refrain from controlling if the work has been opted out of the licence. On the other hand, this is a situation that stems from the very same market failure that the ECL in case has been introduced to counter: The same could easily be the case if a fairly broadly representative CMO without the support of an ECL-

provision concluded a blanket licence with a user in a market that otherwise is characterised by illegal use. Thus, as long as the opt-out is announced in a fairly effective manner by the CMO, there seems to be little reason to classify the non-observation of the opt-out as a "prejudice" caused by the limitation. Hence, if implemented in a relatively effective manner, the opt-out right provides a strong reduction of prejudice within the meaning of the third step. Whilst it certainly would not be sufficient to see *any* limitation through the scrutiny of the third step, in combination with the ECL-model there is on the other hand reason to believe that reasonableness is within reach without the need for any strong normative justification.

6.2.8.4 The opt-out in combination with the ECL.

For the time being, only sections 30 and 32 NCA grant opt-out rights. For the remaining ECLs the question of opt-out is left to the collectives to decide, except section 34 in which the retransmission right due to EC-regulation is made subject to mandatory collective licensing.[204] Furthermore, there might be reason to interpret the ECLs as allowing for individual agreements, due to certain remarks to this effect in the preparatory works.[205]

When, as seen, the opt-out right has the effect of dramatically reducing the prejudice of a limitation on the interests of the rights holder, a question is why not all ECLs provide such a right. Indeed, the above discussed traits of the ECL-model entail a strong presumption that the prejudicial effect of the limitation upon the *group* of affected authors does not reach an unreasonable level. Nonetheless, the model fails to make room for the interests of the [few] authors who do not share the interests of the group. As the concept of

[204] Directive 93/83/EEC (satellite broadcasting and cable retransmission) article 9.

[205] Ot.prp. nr. 46 (2004-2005) p. 51-52. Nevertheless, as pointed out by Rognstad, it is not *evident* that the preparatory works should be decisive in this case, as the wording of said sections indeed does imply that the ECL should be given priority, Rognstad (2004) p. 159.

unreasonableness includes an assessment of the limitation's *necessity*,[206] there is reason to examine why such a right is not always included.

The main reason for leaving the question to the CMOs rather than including an opt-out right directly in the provisions seems to be the fear that such a right would render the ECL less effective in facilitating rights clearance.[207] One of the main advantages of the ECL is after all that it is relatively uncomplicated for the user. Checking for works opted out of the ECL would evidently be an additional, complicating burden on the user.

Additionally, the lack of opt-out clauses seems to have been founded in an unwillingness to provide a system that is vulnerable to exploitation by rights holders seeking to obtain unwarranted economic benefits.[208] Evidently, 'freeloaders' who used the opt-out right as a coercive tactic to obtain better terms than they otherwise would have managed (with or without the ECL) would harm the efficiency of the ECL-solution, in that it would be almost impossible to filtrate such attempts from 'normal' use of the opt-out right.

The argument should however , in my opinion, not be exaggerated: For the opt-out right to be useful as a coercive instrument, the number of authors using it this way would need to be low, lest there be no funds left to 'freeload' on. In that case, however, the low number of opt-outs would probably be quite easy to respect: The problems pile up when the number of opt-outs increases. Additionally, the experiences from the Swedish ECLs pursuant to which the author is granted an opt-out right (except section 42f) seem to counter the fear of 'freeloading': There are for instance no works currently opted out of the ECL for internal copying in businesses (section 42b).[209]

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[206] Cf. 6.2.7.

[207] NOU 1988: 22 p. 40; NU 1973: 21 p. 89. Concerning the latter, it was feared as well that an opt-out right could be used by the authors to deny access to works of central cultural importance.

[208] Ibid.

[209] Source: Bonus Presskoipa's web pages. The list where opt-outs would be published is available at http://www.bonuspresskopia.se/texter/read.php?mid=2016.

Regarding the concerns over loss of efficiency, the argument is more potent. Where an obligation to remunerate the rights holders individually probably could be implemented without too much loss of efficiency, there is a relevant difference between just registering a work that has been used, and having to check *in advance* if the work is covered by the scheme. Should the process become too cumbersome, the ECL risks losing efficiency when the user omits checking the status of the work, and thus proceeds to copy illegally. The aim of the ECL of making *legal* access to works so easy that it becomes a natural alternative for the user to copy legally would thus be frustrated. Where the ECL is imposed to release untapped potential,[210] the inconveniency would imply that less potential is released. In both cases the ECL would be rendered less effective.

Considering the effect upon the efficiency of the ECL, the omittance of an opt-out right is as a general contention defendable: The ECL does not thus become *unnecessarily* prejudicial to the interests of the authors. It must be remembered that the three-step test forbids the 'unreasonable' prejudice: A certain *qualified* graveness is necessary to render the limitation inadmissible. The *individual* situations must however be assessed separately: Section 16a for example would probably be well suited for an effective opt-out right causing negligible loss of efficiency to the ECL, since it must be presumed that much of the use pursuant to the ECL is going to be scanning with subsequent making available of the work. In such purely digital uses, and especially in libraries which already use precise cataloguing systems, an opt-out right would seem easy to implement.

> Incidentally, the 'orphan work'-problem which is a main impediment to realising the vision of a 'digital library' (which in turn was an important incitement to the imposition of section 16a) would to a large extent be solved even with the grant of an opt-out right: Anyone not expressly opted out would be covered by the ECL-agreement.

[210] E.g. section 16a NCA (which serves both purposes – both countering illegal use and untapped potential)

Newer technology will probably further facilitate the process of controlling the status of the work even in the 'analogue environment' if, as envisioned with the remuneration right, technical appliances such as barcode scanners, RFID-chips or even manual keypads to type in e.g. the name of the author were employed to register the works used. In this case, it would be fairly easy to connect to on-line databases that could warn before exempted works are copied.[211] This notwithstanding, even technical appliances cannot solve all problems. For instance printing from the Internet would probably be difficult to subject to an opt-out right unless the rights holders announced the opt-out on the web page itself. For retransmissions of broadcasts, irrespective of the ease of learning of an opt-out, such a right could prove positively devastating, since the company retransmitting the broadcast has no opportunity to change the contents of the broadcast.[212] Nonetheless, there seems to be reason to review the outset that opt-outs generally cannot satisfactorily be implemented. In any case there is reason to ask whether leaving the question of opt-outs to the CMOs, as is the case in Norway, is the correct solution. Whilst this might ensure a dynamic approach where separate cases were given separate consideration, the very membership to the collective indicates that the rights holder prefers collective administration over individual management, in which case opting out would appear a contradiction (unless for 'moral' reasons)

In sum, the requirement that a limitation be *necessary* in order to remain 'reasonable' does not generally *require* the ECL to include an opt-out right. While such a right would imply a *significant* reduction of prejudice, and as such would all but ensure that the ECLs passed the third step, an opt-out right would challenge the efficiency of the model. Depending on the importance of efficiency to the interests underlying the imposition of the ECLs, as well as the cogency of the latter, it might be reasonable to avoid an opt-out right. In other cases, as with the one outline above, an opt-out right would at least seem feasible to include. And, while it may not be strictly necessary, the inclusion of the opt-out right would at least serve

[211] Compare e.g. to the systems used in libraries to record and access information about the books.

[212] Cf. Directive 93/83/EEC (satellite broadcasting and cable retransmission) which expressly requires collective management.

as an important safeguard against 'unreasonableness', keeping in mind the insecurity inherent to the ECL-model in that it relies on CMOs – entities out of the legislator's sphere of control – to manage the closer delimitation of the limitations (cf. 2.3.1).

6.2.9 The digital impact on the ECL-model.

The significance of the 'digital' evolution is closely linked with the market failure rationale that so often is invoked in connection with justifying limitations.

It has been claimed that modern, digital, technology might lead to a reduced need for limitations on copyright. It is easy to envision the establishment of central databases which contain rights management information on copyrighted works which are easily available to the users. In this case, the users would not be much more troubled by having to consult these registries than by registering the work used in accordance with individual remuneration schemes pursuant to ECL-regulation. The result would probably be that blanket licences are still granted by the collectives, while those who wish to stay out of the collectives successfully operate their own schemes (meaning that their works now would not be used without the user at least being aware of their opt-out). If the users wish to contract with the respective rights holder on the offered terms, this could be done.

As to claiming that the digital evolution would render limitations *unnecessary*, this is in my opinion dubious.[213] Firstly, the very long duration of protection entails that works made before the 'digital revolution' will still be protected for many years to come. Secondly, the problem of concluding individual contracts does not go away once the rights holders are identified. Without collective schemes individual contracting could easily become a very cumbersome process. The same applies if the authors were to gain strict control with the use of their works by employing effective DRM-systems. This would still not solve the problem as there in my opinion is reason to believe that the illegal use then would be transformed to untapped potential instead.

Hence, there would in my opinion still be a need for ECLs and other types of limitations for the years to come. And, incidentally, as the digital evolution makes direct right management easier, an ECL

[213] Cf. Thomas Dreier in the 'Rights Management Report' of Panel 1 of the EU-conference "European Copyright Revisited" in Santiago de Compostela, 2002, who mentions the view with respect to collective licensing.

furnished with the possibility of opting out could prove to be even *less* prejudicial to the interests of the rights holders than is the case today, as the digital appliances further lessen the burden of opting out and for the user to learn of the opt-out.

6.2.10 Summary and conclusive remarks.

The 'edge' of the ECL-model [as a limitation] is in essence that the model contributes to lessen the prejudice upon the legitimate interests of the authors brought about by the simultaneously imposed limitation, thus [presumably] allowing for more extensive regulation of copyright than would be possible pursuant to e.g. compulsory licences.[214] The contractual basis, the aim of representativity, the strong bargaining power and the fact that the system generates income where the authors otherwise would be victims to market failure (many authors would even be better off with the ECL than without)[215] are central to this conclusion. Market failure also prejudices public interests, since it leads to illegal use of copyrighted works, which contributes to lessening the respect for the laws,[216] as well as the entrapment of potential of use, which harms the aim of dissemination of knowledge and culture (as well as the authorial interest in remuneration). The positive effect on public interests by imposing ECLs is thus indisputable – the degree varying with the interest in question.

The potency of claiming that the authors are better off by the limitation since there otherwise would have been market failure is on the other hand disputable. While all ECLs have been imposed in markets thought to be marked by such failure, it can be questioned if the market failure is of such a total character that no authors would have been able to

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[214] Note however that this 'author-friendliness' implies that the ECL is not always *suitable* as a means of attaining certain policy objectives, cf. footnote 175.

[215] As pointed out and discussed in Silke von Lewinski, "Mandatory collective administration of exclusive rights – a case study on its compatibility with international and EC copyright law", *UNESCO Copyright Bulletin*, January – March 2004, p. 1-14 (especially pp.6-7) Online: http://portal.unesco.org/culture/en/files/19552/11515904771svl_e.pdf/svl_e.pdf

[216] Cf. NOU 1988: 22 p. 16.

manage their works in a profitable manner despite the failure of the majority to do so. In case the answer is no, another question arises as to the potency of claiming that the ECL in any case ensures that authors are remunerated. In essence, the question is whether prejudicing a few authors can be justified by the fact that it improves the situation for the bulk of authors. It would seem that the rationale underlying copyright protection cannot be called on in this regard, since this rationale, as seen above, is the result of a balancing of different considerations that in sum supports the introduction of a copy*right*,- not limitations to it.

However, in such cases where the rationale of copyright is unable to suggest a solution, it would seem natural that the three step test offered latitude to the states who wanted to regulate the conflict by using a limitation to alter the copyright balance. The above conclusion that both the second and the third steps allow for collective regards to be had, rather than requiring that the situation of each author be assessed individually adds to this. That the regulation in case coincides with a wish to promote certain public interests does not alter this. To the contrary: As seen, the concept of unreasonableness within the meaning of the third step *directs* a consideration of the public interests at stake.

To answer the question initially posed, it can be determined that although in part being a limitation, the ECL-model does have qualities that significantly reduce the prejudice caused by the limitation. Although it cannot be *ensured* that ECLs only are *imposed* on uses that otherwise would be subject to [total] market failure, and notwithstanding the fact that many ECL-provisions are very broad, the contractual basis of the ECL in combination with the trait of representativity entail a *presumption* that the ECLs are delimited by the CMO in such a way so as not to unreasonably prejudice the legitimate interests of the authors. The reason why only a presumption may be erected is that the ECL-model makes use of mechanisms *external* to the legislator to conduct the final delimitation of scope – mechanisms the legislator *trusts* to act in a certain way, but which it does not control. The ECL-model is thus not a *carte blanche* to impose limitations of all kinds irrespective of the 'modality' of the ECL: For instance, while it is probable that the CMO will delimit the

permitted uses vis-à-vis the user in a manner consistent with the interests of the whole group of affected authors, there is reason to believe otherwise with respect to the distribution of collected remuneration. The mitigating effect of the strong bargaining power of the CMO combined with the fact that the ECLs generate revenues in otherwise barren markets is lost on the unrepresented authors if the remuneration scheme is compiled such as to better serve the member authors. And while the prohibition on discrimination might level out the differences within the group of *authors*, the fact that representativity is not required vis-à-vis *derivative* rights holders definitely is a problem with respect to TRIPS. Whilst considerations of efficiency could perhaps justify the lack of a right to individual remuneration in certain cases, it is in any case clear that providing such a right would help redress the problem and thus help fortify the presumption that the ECL is delimited in a manner consistent with the three-step test.

Lastly, the compromises that necessarily must be struck in the formulation of the ECL-agreements entail that the ECL-model fails to allow for the various interests the authors might have but which are shared by few. Although the expression of these interests might not amount to the regularity needed to be labelled 'normal', it is nonetheless to be remembered that copyright *is individual* at its outset, and that said deviations thus entail some 'prejudice' in terms of the third step. Granting a right to opt out would in this case effectively redress the problem, and incidentally imply that only the most unfounded ECLs failed to pass the three-step test. Considering the inherent decrease in efficiency, the provision of such a right would nevertheless seldom be *necessary*, if the public interests served by the ECL were sufficiently cogent.

7 Compatibility with EC law

7.1 The compatibility of ECLs with Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

7.1.1 Introduction

Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (ID), adopted in 2001, was introduced as a result of a growing concern within the Community over the effects of a disharmonious copyright system on the functioning of the internal market – especially in recognition of the importance of a strong production of copyright material to the European industry.[217] The development of digital systems which allowed a radically new use of works, both qualitatively and quantitatively, was both a cause and a driving force behind the work of launching a community-wide harmonisation of copyright protection.[218] As opposed to earlier forms of use, which were broadly confined to the national territories, the transnational nature of digital networks sparked greater concern for the functioning of the internal market. At the same time, it was felt that the directive would need to provide a high level of protection in order to ensure that the authors were sufficiently incited to create.

Pursuant to articles 2-4 (the 'constitutive' provisions), the authors and certain other categories of original rights holders are to be provided with "the *exclusive* right to authorise or prohibit" (emphasis added) certain specified uses of their works, namely: reproduction (article 2); communication to the public and making the work available to the public (article 3); and the distribution to the public of [physical copies of] their works (article 4).

[217] Recital 4

[218] Recitals 5 and 6.

This relatively absolute outset is subsequently modified by a proviso in article 5 allowing (and in one case requiring) the member states to impose certain enumerated limitations on the rights granted. Pursuant to recital 32 of the preamble, the enumeration is intended to be exhaustive.

The ECL-model is not mentioned in the list of article 5. However, recital 18 of the preamble states that the directive "is without prejudice to arrangements in the Member States concerning the management of rights *such as extended collective licences*" (emphasis added). A common conclusion – at least in Scandinavian legal literature – is that the [Nordic] ECL-model may be upheld on this basis: It is argued that within the meaning of the directive, ECLs do not constitute a limitation, but an arrangement concerning management of rights.[219]

The ECL-model is arguably *in part* a rights management arrangement: With respect to its members, the case is clear: The CMO *manages* their by exercising the right of authorisation on their behalf. It does not itself use the works, nor is it entitled to reap the benefits of the use that it in turn authorises. With respect to non-members, the CMO is not being *assigned* any of their rights. Rather, the agreements concluded on behalf of its members are extended to cover the works of the non-represented authors. While the CMO thus never formally acquires their right of authorisation, it nonetheless exercises it on their behalf, if in an indirect manner.

However, the conclusion that the ECL-model is permissible by virtue of being a rights management arrangement and *not* a limitation, is in my view not as evident as the cited opinions give the impression of. Recital 18 refers to "extended collective licences" as a form of rights management. Notwithstanding this, the *extended* application of a collective

[219] See e.g. Gunnar Karnell, "The Swedish Implementation of the European Infosoc-Directive", *Revue Internationale du Droit d'Auteur*, nr. 206/2005 p. 161-233 (p.209-211); Peter Schønning, *Ophavsretsloven med kommentarer*, 4th edition, København 2008, p. 452; Ds 2003: 35 p. 280.

licence entails that a user may use the works of the non-member authors *without* any authorisation having been given by them. Certainly the user is legally authorised to use the work, but the authorisation does not stem from the author or anyone he has entrusted with authorising the use of his work. Whilst the ECL might not be the typical limitation – or as some claim, not a limitation at all within the meaning of the directive – this feature of the ECL-model is nonetheless difficult to reconcile with the wording of articles 2-4, according to which it is the *authors* who are granted an "*exclusive* right to authorise or prohibit" (emphasis added) the use of their works. Besides, nowhere in said articles is the term 'limitation' used.

Against this background one must ask whether and to what extent there is room for ECLs within the framework of the directive. Whilst the preamble is traditionally given much emphasis, the European Court of Justice (ECJ) has confirmed on a number of occasions that the preamble alone "cannot be validly relied on...as a ground for...interpreting [the actual] provisions in a manner clearly contrary to their wording".[220] Nonetheless, it is not the wording alone that decides the meaning of a provision – according to settled case-law it is, in interpreting a provision of Community law, "necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part".[221] Although it may seem as if the ECL – if not a 'limitation' – at least entails a slight *alteration* of the outset indicated by the wording of articles 2-4, it is not necessarily so that the provisions correctly interpreted must exclude the application of ECLs.

In any case, it is evident that recital 18 is a central guide to understanding the place that the ECL-model has in the framework of the directive. In this relation, it is, as pointed out by Rognstad, far from certain what the preamble means by its referral to "extended collective

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[220] Case C-134/08 *Hauptzollamt Bremen v J. E. Tyson Parketthandel GmbH hanse j.* Judgment of 02.04.2009, para. 16.

[221] Case C-306/05 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA* [2006] E.C.R. I-11519, para. 34.

licences":[222] The concept is not further defined, and as shown in the above chapters, the ECL-model is but an abstraction of several different ECLs appearing in the Nordic legal landscape. Whilst the concept of 'extendedness' indicates a central feature common to all ECLs, the ECL-model is not restricted to this trait. To the contrary, while ECLs share a common core, they also differ on important points: ECLs may have different modalities. Moreover, it must be kept in mind that although the term "extended collective licences" sets certain minimum requirements as to which traits all provisions that are to be categorised as "ECL" need have in common, it is not thereby evident that this common core, e.g. the requirement of representativity, which is all but identical to the Nordic ECLs, needs be identically formulated within Community legislation.[223]

Lastly, it may in this regard be mentioned that irrespective of the conclusions that may be drawn from the above, the ECL-model is uncontroversial in the cases where the exhaustive list in article 5 warrants the imposition of a limitation. Arguably the ECL is less of an interference with the protected rights than compulsory licences and free use provisions. In this respect recital 18 may indeed serve as testimony. It could of course be claimed that the aim of harmony, which was one of the main contributors to the list in article 5 being made exhaustive, contradicts such *a fortiori*-reasoning.[224] This would, however, be hard to reconcile with the fact that the limitations are facultative. Moreover, recital 36 states that fair remuneration may be provided to the rights holders at the discretion of the member states even where the listed limitations do not require the payment of such. It is difficult to imagine how the imposition of ECLs would further distort the internal market not already occasioned by allowing a heterogeneous practice of imposing the limitations listed. Thus, to the extent that the ECLs cover use that it in any case would be permissible to limit according to article 5, they are permissible. For instance, section 13b NCA and its Nordic equivalents arguably fall within the scope of article 5(3)(a). At the time of the adoption of the directive, section 14 NCA covered only analogue use, and thus fell within the scope of

[222] Rognstad (2004) p. 157.

[223] Ibid., if in a slightly different context.

[224] Recitals 31 and 32.

article 5(2)(a) (although it is questionable whether this ECL provides authors with "fair compensation"). Since it was amended to cover digital use as well, it has lacked support in the list of article 5. Lastly, section 30 NCA is an example of an ECL which completely lacks a basis in article 5.

7.1.2 Analysis

In the following discussion of the admissibility of the ECL-model, recital 18 of the preamble appears to be a reasonable outset. While the admissibility of the ECL is ultimately determined by an interpretation of the operational provisions of the directive, the preamble is the only part of the directive which bears mention of the "extended collective licences". More importantly, it also explicitly recognises it as an acceptable rights management arrangement which is not to be prejudiced by the directive.

It should be mentioned that recital 18 was included after Nordic initiative during the negotiations of the directive.[225] In the first proposal by the Commission the directive did not include any mention of the ECL-model,[226] and the Nordic countries were anxious to safeguard the continued application of their ECLs through formal recognition in the directive.[227] During the negotiations, there was purportedly consensus about the ECL being a form of rights *management*, and *not* a limitation.[228] From this point of view the continued application of the ECL-model would not necessitate any specific provision in the closed list of permissible exceptions in article 5, a statement in the preamble that the directive would not prejudice rights management arrangements being sufficient. In consequence, a recital to

[225] Ds 2003: 35 p. 280.

[226] COM(97) 628 final.

[227] Ds 2003: 35 p. 280; Harald von Hielmcrone, "Orphan works. The Danish solution: Extended collective licensing", *EBLIDA news*, nr. 6/2008 (p. 1-2), p. 1.

[228] Ds 2003: 35 p. 280.

this effect was added in 2000,[229]where, to be on the safe side, an explicit mention of the ECL was included.[230]

While recital 18 was naturally formulated with the Nordic ECLs in mind, the fact remains that the directive is a legal instrument of its own, independent from any definitions of the ECL-model that should appear in national, Nordic legislation. Nowhere does the preamble equate the term "extended collective licences" to the *Nordic* ECL-model, and in such cases consistent case-law from the ECJ confirms that Community law "must normally be given an autonomous...interpretation".[231]

In this autonomous interpretation, the formulation "extended collective licences" is admittedly not very clear. Notwithstanding this, it seems quite possible to infer form the wording at least a few central characteristics that a legal provision must have to fit within the concept of "extended collective licences". Firstly, a collective licence must form the basis of the management scheme. This licence agreement must be voluntary (otherwise the addition of the word 'extended' would be meaningless), and it must be of some magnitude with respect to the number of rights holders represented, cf. the adjective 'collective' (otherwise it could simply have read 'extended licences'). Lastly, the arrangement must contain a compulsive element, in that the [voluntary] collective licence may be "extended", which must be taken to imply that the licence agreement is extended by legal interference beyond its initial field of application.

Judging by these traits, the construction has the same core as the Nordic ECL-model. However, while the closer determination of these features in the Nordic model is based on a comparison and an abstraction from the different Nordic ECLs, this procedure is not available to the directive, where the wording must form the basis for the interpretation. It can be noted that the word "collective" does not give any certain indication of *how*

[229] Common Position (EC) No 48/2000 of 28 September 2000, (OJ C /2000/344/ 1)

[230] Ds 2003: 35 p. 280.

[231] Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening*. Judgment of 16.07.2009, para. 27

representative the CMO must be. Moreover, whilst the method of abstraction gives grounds for asserting that certain traits, such as the opt-out right, are optional in the *Nordic* ECL-model, the wording "extended collective licences" hardly necessitates this to be optional. The wording is simply neutral to whether this is required.

Due to the principle of autonomy, seeking guidance in national legal systems is more of a last resort. The same does not apply in regard to other Community instruments. Unless otherwise is explicitly provided, directives are separate instruments which must be interpreted in their own right. Nonetheless, the "need for uniform application of Community law and the principle of equality"[232] which underlie the principle of autonomy do not have the same importance in relation to other instruments of Community law. To the contrary there is good reason to take these into consideration as they form part of the same legal system, and as such constitute each other's *context*.

In this regard, the Satellite and Cable Directive (SCD) which, inter alia, constitutes an exclusive right for the author to authorise communication to the public by satellite, is of relevance.[233] Pursuant to article 3(1), it is to be ensured that said right can only be acquired by agreement. This is to preclude the member states from imposing compulsory licences that subsequently have effect in the whole community due to the 'country-of-origin'-principle established in the directive (see below).[234] Pursuant to the second paragraph, however, the member states are explicitly allowed to provide for the extension of a "collective agreement between a collecting society and a broadcasting organisation concerning a given category of works" onto non-represented rights holders of the same category, i.e. the imposition of an ECL. Although the directive mentions the "extension of a collective agreement"[235], and not "collective licence", as in the preamble of the ID, there can nonetheless be little doubt that they refer to the same arrangement.

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[232] Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening*. Judgment of 16.07.2009, para. 27.

[233] Council Directive 93/83/EEC.

[234] Cf. COM(91) 276 final, p. 37, and in more general terms, recital 21.

[235] Article 3(4).

The central observation is that although the directive intends to preclude statutory licences, it permits the imposition of ECL. Whilst this is done in the operational clauses of the directive, and as such does not pose the same methodological problem as encountered in the ID, it nonetheless serves to strengthen the perception that within Community legislation ECLs are seen as something different from the ordinary limitations.

The implicit recognition of the ECL-model should however not be exaggerated: Firstly, the directive permits the imposition of ECLs *on the condition* that they provide the author with a right to opt out, cf. article 3(2) second subparagraph. As discussed at length in 6.2.8, the inclusion of an opt-out right has a considerably mitigating effect on the ECL. Secondly, when seen in connection with the condition pursuant to the third subparagraph, namely that the ECL be imposed only where the satellite broadcast simulcasts a terrestrial broadcast by the same broadcaster, it becomes clear that even with the provision of an opt-out right, the ECL was not uncontroversial. This is confirmed by the revised proposal of the Commission, which states that the second condition was included to ensure that the ECL "more or less only be applied in the context of national broadcasting" which in turn would ensure that "negative cross-frontier effects are excluded".[236] Initially, the Commission had proposed that the ECLs be prohibited, albeit with a certain transition period expiring in June 1997 for countries which by a certain date already provided ECLs in their national legislation.[237] The European Parliament, however, opted for a "limited recognition"[238] of the ECL-model, including the aforementioned conditions.

Arguably, the SCD is a special case due to the 'country-of-origin'-principle established in article 1(2)(a), whereby the act of communicating the work to the public by satellite is determined to occur solely when "the program-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards earth",

[236] COM(92) 526 final, p. 9.

[237] COM(91) 276 final, p. 56.

[238] COM(92) 526 final p. 2

irrespective of whether the signals are *received* in other member states. The principle consequently allows the member states' domestic legislation to gain community-wide impact, which obviously necessitates harmonisation of the permissible arrangements concerning copyright. Nonetheless, the fact that it was deemed necessary to introduce such conditions on the ECL is an indication that despite being given a certain recognition, the ECL is not necessarily a suitable solution irrespective of its composition.

In this regard it is worth noting that of the ECLs which existed in the Nordic countries at the time of the adoption of the ID, only one, namely section 30 NCA and its Nordic counterparts, lacked all basis in the list of exceptions in article five. Considering that this particular ECL provides the author with a right to opt out, it arguably is of the least invasive kind. While the wording of recital 18, "extended collective licences", gives little clue in determining whether the permissible ECLs should provide the author with a right to opt out, the demonstrated trend might nonetheless give reason to interpret it that way. Incidentally, granting the author a right to opt out, whereby he is allowed to escape the compulsory effect of the ECL, does indeed make the ECL less of a deviation from the wording of the constitutive provisions: The author is clearly reserved his right to "prohibit" the use of the work, and although the users might legally use his works without his authorisation until such 'prohibition' has been given (if covered by an ECL-agreement, that is), opting out would restore the need for authorisation *from the author*. Thus, the ECL would appear as less of a limitation, further strengthening its character of rights management. Considering that recital 18 describes the "extended collective licences" as "arrangements...concerning the management of rights", this might thus suggest that ECLs within the meaning of recital 18 include a right to opt out.

Pursuant to article 9, the SCD does impose an arrangement which arguably fits the description of ECL as can be inferred from the wording of recital 18 of the ID, but does not include any right to opt out. With respect to cable retransmissions, collective management is made *mandatory* (article 9(2)) – those who have not voluntarily transferred the management of their rights to the relevant CMO are all the same deemed (irrefutably) to

have mandated the CMO to exercise their rights. Moreover, instead of providing the author with an opt-out right, the directive does the exact opposite by forbidding the rights to be exercised individually. Although formally the term "extended collective licences" encompasses such provisions, it is nonetheless just as clear that the obligatory collective management is a more thorough deviation from the outset of an "exclusive right to authorise or prohibit", than the 'ordinary' ECLs which do not deprive the author of the right to exercise his right individually. Also, it is noteworthy that technically speaking, article 9 makes use of a *presumption*, and not an 'extension'. While the reality in such a distinction is debatable, it serves as an argument for interpreting the "extended collective licences" pursuant to recital 18 of the ID as a separate arrangement. Furthermore, the arrangement pursuant to article 9 of the SCD is warranted in the operational clauses of the directive, and thus is not problematic. Finally, the very particular situation of cable retransmission, which does not allow for any individual clearance, much less clearance prior to the retransmission, unless the market should become completely impaired, clearly indicates that this particular provision is more of an exception than the rule.

What *is* noteworthy about article 9, however, is the fact that when the Community was faced with the situation of a potentially complete market failure if the exclusive right were to be normally upheld, it chose collective licensing as the remedy, rather than imposing compulsory licences. Whilst article 9 might not serve as a pattern for ECL-arrangements that are to be in conformity with the ID, it serves as a further recognition of the ECL-model in addressing market failure. Instead of reducing the economic potential of the exclusive right by removing the need for authorisation prior to certain uses, the potential vis-à-vis the users is upheld, with the slight alteration that the author must accept that the right is exercised by a collective. Against this background it is not surprising that the ECL-model is referred to as 'rights management' rather than a limitation: The level of protection remains the same, as does the need for prior authorisation.

Incidentally, the effectiveness of the ECL in addressing market failure, while simultaneously safeguarding the interests of the affected authors though active

management, is the main argument for why ECLs should not be seen as contrary to the rights granted by articles 2-4 of the directive. Despite the apparent conflict with the wording of the constitutive provisions, the exclusive right proves no hindrance to the ECLs insofar as they contribute to lessening the effects of market failure. As accounted for above, the ECJ has on a number of occasions underscored the importance of the context and objective of the community instruments to the interpretation thereof. Thus the objective of the ID is indeed missed in the cases of market failure.

While the formulation of the constitutive articles clearly fulfils the aim of achieving a high level of protection,[239] it is equally clear that this aim has no intrinsic value. On the contrary, a high level of protection was perceived as necessary in order to "foster substantial investment in creativity and innovation", which in turn would boost European industry.[240] In line with the common reasoning that exclusive rights can be used to generate economic reward, a high level of protection would "guarantee the availability of such reward", and thus serve as incentive to intellectual creation and the investment in such, since the rights holders could expect to get satisfactory returns on their investment.[241]

In the situations of market failure however – whether it be the situation of illegal use or the entrapment of potential use – the high level of protection loses its function as incentive. In these cases, the exclusive right is in fact counterproductive: The prohibitive trouble (and cost) of having to contact the rights holder, and of having to do so in advance, leads the user either to use the work illegally or refrain from using the work (in practice: use fewer works than he would have, had the transaction costs been lower). In both cases the rights holder receives no remuneration, and the exclusive right therefore fails to guarantee the requisite reward. Additionally, it can be noted that illegal use entails a disrespect for the law, which by any standard is unfavourable. The entrapment of potential, on the other hand, entails that the exclusive right is respected, but the author is deprived of

[239] Recitals 4 and 9.

[240] Recital 4.

[241] Recital 10.

remuneration that the user otherwise would have been willing to pay, and society is deprived of the desirable dissemination of works.

A certain scepticism has been voiced in respect of answering rights clearance problems by reducing the scope of protection,[242] and recital 22 explicitly states that the objective of disseminating culture must not be sought attained by reducing the scope of protection. Additionally, the wording of the constitutive provisions hardly suggest the procedure. However, recital 18 is clear: Extended collective licences are not to be prejudiced. Moreover, the ECL is as asserted not a limitation of the scope of protection, in that it keeps intact the potential of copyright vis-à-vis the users – it is only with respect to *managing* the right that it entails a minor limitation. While the preamble alone may not derogate from a clear wording, the fact remains that rather than conflict with the provisions, the system pursuant to recital 18 is in *harmony* with the objective of the directive. It generates remuneration and allows the authors to stipulate terms of use where the factual situation in lack of the ECL would be that the works were used illegally (or not at all). At the same time, this correspondence of objectives indicates the extent to which the ECLs may be applied under the directive (see below).

It can of course be asked whether the aim of community-wide harmony, which is also central to the directive, contradicts such a finding. The exhaustive list in article 5 is meant to safeguard harmony (as well as a high level of protection). Nonetheless, this argument may be rejected on the grounds that the effects on the internal market are hardly worsened by imposing an ECL, than what already is the case due to the market failure. There is hardly any difference between providing (cross-border) products and services in a market that is actually failing, and doing so in a market which would have been failing if it were not for the ECL imposed. (And in the latter case, the authors do at least receive some form of remuneration which is in line with the purpose of creating incentives.) Moreover, if the ECLs are found to be permissible, the ID does not require that other member states

[242] E.g. COM(95) 382 final, p. 72.

recognise ECL-agreements concluded with foreign CMOs. Thus, to the extent that there are geographic differences with respect to the degree of market failure within the internal market, the ECL needs not become an interference with the functional markets.

On-line transmissions in digital networks, such as the Internet, may alter this outset a little: Cross-border services are easily provided and subscribed to in the digital network environment. While the EC has not acted to regulate the [hitherto unsolved] question of where the copyright relevant acts are to occur in such cases, the fact remains that the threshold of providing cross-border services might be lowered considerably if the digital service is lawful in the country of origin. The risk might nonetheless quite easily be reduced if the ECLs are explicitly confined to the national territory – a solution which is strongly advocated by mentioned article 3(2) of the SCD, and implicitly also recognised as acceptable. This also seems to be the current practice: E.g. the aforementioned ECL-agreement pursuant to section 16a NCA, which enables the National Library to make available a number of works on the Internet, explicitly confines the ECL to users with Norwegian IP-addresses.[243]

Pertaining to the benefit of legal harmony, implying that the content providers have the same legal framework to deal with within the internal market, the aim of harmony is undermined by the multitude of optional limitations provided for in the directive. As concluded in the report of Hugenholtz et al. on the implementation of the ID, any harmony that might have been sought attained in this perspective has in practice been hampered by the varying practice of implementing the permitted limitations.[244] On this factual basis, the aim of legal harmony hardly contradicts the ECL.

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[243] See 2.3.1.4. For a similar discussion, see Kyst (2009) p. 52.

[244] Bernt Hugenholtz et al., *Study on the implementation and effect in Member States' laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society*, Amsterdam 2007, pp. 63 and 174.

Against this background, there are reasonable grounds for asserting that the ECL-model is compatible with the ID. Meanwhile, the latest findings also give reason to review which modalities of the ECL-model that may be accepted under the ID. A part of this has already been discussed in the above review of the opt-out right pursuant to the SCD. Furthermore, there is reason to question whether other requirements may apply although they cannot clearly be inferred from the wording of recital 18. The abovementioned restriction to the national territory is central in this respect.

The correspondence of objectives between the ECL-model and the ID, which is central to the ECL being compatible with the directive, also indicates the extent of applicability of the ECL. While the term "extended collective licences" in recital 18 is silent in this regard, a sliding scale may be appropriate: The more a market is failing, the more invasive the ECL can be. If the market failure is moderate, there might in addition to an opt-out right, be reason to require the authors to be individually remunerated. Whilst this obviously harms the efficiency of the ECL in facilitating rights clearance at a low cost, such a right has a mitigating effect on the ECL which brings it more in conformity with the fact that the constitutive provisions grant *the author* individually the exclusive right (see 6.2.7).

Regarding the right to opt out of the ECL, the effects of such a right on the efficiency of the model has been discussed in 6.2.8. Providing the right to opt-out will prejudice the efficiency of the ECL, also with respect to the ability of generating income for the authors. While not providing for such a right could be conforming to the aim of maximising the profit (and thus the incentive) for the authors, which is inherent in the ID, the opt-out right on the other hand substantially mitigates the invasive character of the ECL. Earlier legislation has on this point required that the authors be enabled to opt out, and considering the emphasis on the ECL being a rights management arrangement, there is in my opinion little reason to believe that this view has changed. To the contrary, said emphasis tends to bear out the interpretation that the least limitative modality be chosen. It might be noted that if recital 18 was intended to safeguard the continued application of the Nordic ECLs,

the only ECL which at that time lacked basis in the list of article 5 did include the right to opt out.

Questions might also be asked in relation to the ECLs which employ obligatory conflict resolution[245] where ECL-agreements fail to be concluded. In the cases where it is the user who requires arbitration, the ECL loses much of the voluntary basis that prompted the perception of it as a 'rights management' arrangement rather than a limitation. Although both parties will be bound by the outcome of the arbitration – not only the authors – this hardly alleviates its limitative function: The fact remains that the users are given an option to use the works of the authors on terms fixed without any voluntary participation. Thus, the inclusion of such obligatory regimes is in my opinion at best dubious.

Lastly, there is reason to question whether the current section 50(2) DCA will be accepted as a correct implementation of the directive. In effect it introduces an ECL where ECL-agreements may be given effect in *any* market without the need for further legislative action. To be sure, authorisation is needed, and is to be given by the Ministry of Culture. However, it might be asked whether the delegation, to the ministry, of the individual assessment of whether a market is sufficiently ridden with failure entails a sufficiently clear and predictable delimitation of the 'omnibus'-ECL – especially in lack of any practice on the grant of such authorisations. Because the ECL technically implies a limitation of copyright, the definition of the ECL is of importance to the 'rights and obligations' of persons within the community. In such cases, case-law from the ECJ shows that a reasonable degree of clarity and certainty is required.[246]

Lastly, the three-step test in article 5(5) requires a short mention. Pursuant to said section the limitations to the rights provided for in article 5(1)-(4) shall only be applied in "certain special cases which do not conflict with a normal exploitation of the work or other subject-

[245] E.g. section 16b DCA, which provides an ECL similar to section 16a NCA.

[246] See Karsten Engsig Sørensen and Poul Runge Nielsen, *EU-Retten*, Copenhagen 2008, p. 122-123, with cited case-law.

matter and do not unreasonably prejudice the legitimate interests of the rightholder". While it only applies to the listed exceptions, there is in my opinion reason to require that also the ECLs pass this three-step test. Although the permissibility of the ECLs has not been addressed in article 5, there is as shown no reason to interpret this as implying that the ECL is not a limitation. To the contrary, the ECL does entail a certain limitation of the exclusive right, if little invasive in the modalities permitted pursuant to the ID. In this regard, recital 44 clearly states a main principle underlying the inclusion of the three-step test in the ID, which should be guiding in the determination of its field of application: Limitations applied in accordance with the directive should not be contrary to international obligations, where the protection required by the ID overlaps with that of the said instruments. Where the ECLs thus limit copyright as granted both in the ID and the conventions, there is reason to require that they pass the scrutiny of the three-step test. Regarding the outcome of such assessment, the reader is referred to the discussion in chapters 3-6 above.

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10 List of preparatory works

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