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Extended Collective Licensing: A Significant Contribution to International Copyright Law and Policy

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Jan Rosén's contributions in the field of intellectual property, and copyright in particular, are many. They include important scholarship on the complex but very interesting topic of extended collective licensing (ECL) – or what I prefer to call extended repertoire[1]. ECLs were a significant innovation made by the Nordic countries to the field of international copyright. In this brief chapter, I consider the nature of ECLs and their possible importance in online markets. This brief chapter begins by explaining the issue of copyright fragmentation and the role of licensing in making copyright markets function. The chapter then turns to ECLs proper and ends with a few thoughts on how their role might evolve.

The Fragmentation of Rights

One of the issues that can make recourse to ECLs particularly advantageous is the fragmentation of rights. Such fragmentation results from two main causes. First, copyright is generally expressed

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1 In this chapter, I will use the Nordic terminology ('ECL').

in international instruments and national laws as a 'bundle' of rights focused on the technical nature of the use of the copyright work: reproduction (copies), performance in public, communication to a public by broadcasting, etc. Second, each right in the bundle can be shared by co-authors or their successors in title, and it can be divided contractually by territory, language, type of media, etc. This means that, for a single use of a single copyright work, a user may need several authorizations.

Let us take a concrete example. A radio station (broadcaster) wishing to copy music on its computers and then use that copy to broadcast the music over the airwaves and/or online will need to clear two rights: the right to copy (reproduction) and the right to communicate the work to the public. The radio station will need both rights in respect to three different objects: (1) the musical work, (2) the sound recording and (3) the musical performance of the musical work incorporated in the sound recording. Our hypothetical broadcaster will likely want to use works, sound recordings or performances, owned in whole or in part by foreign nationals.[2] In fact, the broadcaster may use hundreds of songs from around the world each week. Making matters worse, a typical broadcaster does not know in advance which songs it will play enough to seek individual licenses. The broadcaster may of course have a change of mind. For example, after the death of Michael Jackson was announced, several radio stations decided to play his music much more than usual. If some of the rights have been transferred to or split among various right holders, the broadcaster may need up to twenty licenses and the clearance process will be required for each song, performance and recording used by the station.

What are the broadcaster's options? Could the broadcaster not go online and find out who owns every piece of the work, performance and recordings the broadcaster wants to use and obtain rights that way? The answer is no, for at least three reasons. First, because under Article 5(2) of the Berne Convention – incorporated by reference into the Agreement on Trade-Related Aspects of Intellectual Prop-

[2] The broadcaster may not know whether the work, performance or recording is in fact from this or that country, and it may be from several. The music composer might be American, the lyricist Canadian, the performer Nigerian and the producer Swedish.

erty Rights (TRIPS Agreement) – mandatory, copyright-specific formalities such as registration with a governmental entity cannot be imposed as a condition for the normal exercise or enjoyment of copyright. Put differently, a country party to the Berne Convention and/or member of the World Trade Organization (WTO) cannot impose a mandatory registration system for copyright, at least not if the sanction is a reduction in copyright rights below the minimum thresholds established under the Berne Convention (and the TRIPS Agreement).[3] Second, where optional registration systems do exist (e.g., in the United States), not only are right holders, especially foreign ones, not required to use them, but once a work is registered, total or partial transfers of rights are often not registered, at least not in a timely fashion.[4] This means that a radio station, even if it wanted to do so, could essentially use the register only to identify works, not to find all of the right holders. Third, it is also rather obvious that the transaction costs would be astronomical.

A better option for the broadcaster is to obtain a license, probably from a collective management organization (CMO), to use of all the right fragments (reproduction, communication, etc.) both for the copyright work(s) (music and lyrics) and the objects of related rights (performance and sound recording).[5] The ideal license from the user's perspective would cover all works, performances and sound recordings (worldwide) that the radio station might want to use.

Against this backdrop, it is easy to see that CMOs can but indeed should facilitate the establishment of more uniform methods for col-

[3] This was confirmed by a WTO panel report issued in January 2009 examining a complaint filed by the United States against China, in which copyright was denied for works that failed censorship review. See D. Gervais, 'World Trade Organization Panel Report on China's Enforcement of Intellectual Property Rights', *American Journal of International Law* 103, no. 3 (2009): 549–554.

[4] See Daniel Gervais and Dashiell Renaud, 'The Future of United States Copyright Formalities: Why We Should Prioritize Recordation, and How To Do It', (2013) 28:3 *Berkeley Technology Law J.* 1460–1496.

[5] The chapter does not analyze the economics of collective management. For a more complete look at the economics of collective management, the reader might want to refer to Daniel Gervais, 'The Economics of Collective Management Organizations', in P. Menell and B. Depoorter, eds, *Research Handbook on the Economics of Intellectual Property* (Cheltenham, Edward Elgar, 2016).

lecting and dispersing royalties and negotiate licensing arrangements for works.[6]

The Fragmentation of Rights, Online

One of the main differences between online copyright works and off-line (or 'brick-and-mortar') uses is that the division of labour among traditional rights 'fragments' (reproduction, performance, communication, etc.), which is often reflected in the structure of collective management (e.g., the rights of communication to the public and reproduction will be licensed by different CMOs), is much less relevant in mapping the latter. For example, to make music available on an Internet server, at least four right fragments could be involved, namely:

– Reproduction on the emission server[7];
– Authorization of communication to the public in territory of emission;
– Communication to the public in territory of reception;
– 'Making available'[8]
– Reproduction in territory of reception (unless only streaming without the possibility of copying).[9]

In reality, the rights matrix involved in this fact pattern is much more complex because there are three levels of rights involved in music: composers, songwriters and lyricists; performing artists; and makers (producers) of the sound recordings. Naturally, there are ways in which the situation may be simplified, notably by agreements among CMOs that allow one participating CMO to grant a worldwide license on behalf of all other participating entities. Still,

6 See Daniel Gervais, 'Individual and Collective Management of Rights Online', in J. Axhamn (ed.), *Copyright In A Borderless Online Environment*, Stockholm: Norstedts Juridik, 2012, pp. 89–100.

7 Unless, at the time the copy is made, it is a 'private copy'. Even then theories based on the right of destination might apply.

8 Assuming this is considered under national law a separate right implementing art. 8 of the *WIPO Copyright Treaty*, and arts. 10 and 14 of the W*IPO Performances and Phonograms Treaty.*

9 Which is potentially a 'private copy'.

one must proceed with an analysis of each of right fragment to avoid a potential finding of infringement. Clearing each of these rights can be a labyrinthine process even if each individual process is in itself reasonably efficient.

Rights analyses concerning audio-visual works add layers of complexity to the licensing picture. A film might include rights to a screenplay, a book on which the screenplay was based, musical works incorporated in the film, any art or photographs used in the setting, as well as the end product of the film itself. Each of the works[10] in turn involve several different rights fragments and, consequently, multiple right holders and systems of rights clearance and possibly also guilds or unions. Some right holders may have moved or died. And of course any one of the right holders who has an exclusive right may prevent the use and stop or force a rearrangement of the entire project.

Recent developments including those under negotiation in bilateral and regional trade agreements have not been primarily focused on making licensing work better but rather on so-called 'graduated responses', namely schemes under which users believed to be infringing copyright rights are sent gradually harsher notices possible leading to disconnection of their Internet service.[11] Yet, exchanges of music files have apparently continued to grow. Events since introducing graduated responses beg the question whether the music industry underestimated the strength of the demand for, and the societal role of, file-sharing and 'free music'. Distributed file-sharing technologies such as torrents are extremely hard to pin down, and music users in jurisdictions where graduated response is in place are turning to anonymizing software and secure USENET access to continue to 'share' music undetected.[12] Even if the authors of the software and/or some operators of sites promoting the technology can be fined or even jailed, as in the PirateBay case, trying to stop file-sharing and other forms of unauthorized dissemination raises privacy concerns. More importantly for the purposes of this chapter, it

[10] Or object of a related right.

[11] See Annemarie Bridy, 'Graduated Response and the Turn to Private Ordering in Online Copyright Enforcement' (2010) 89 *Oregon Law Review* 81; and P H Lim and L Longdin, 'P2P online file sharing: transnational convergence and divergence in balancing stakeholder interests', E.I.P.R. 2011, 33(11), 690–698.

[12] See Annemarie Bridy, 'Is Online Copyright Enforcement Scalable?' (2011) 13 *Vanderbilt Journal of Entertainment & Technology Law* 695, 705.

seems hard to demonstrate conclusively that authors, performers or the industry will make more revenue because Internet accounts of music users have been shut down. Historically, copyright industries have done well, one could argue, when their primary focus was not to minimize unauthorized uses but to maximize authorized use. The Internet-based picture is thus far more complex than the 'piracy' label implies.[13]

If this analysis is correct, even in part, online mass uses are a market that still is not well organized, in spite of major contributions by services like Spotify. Part of that market organization should take the form of a broad license to use the music and allow open competition in that space – and perhaps not just for music (Netflix comes to mind). That should include competing, as in the Fair Trade movement for coffee, on whether the services treat authors fairly.[14]

Situating the exact role that CMOs will play in managing transactional uses and/or general online use licenses (which one could then compare to a compensation regime) is an unstable target to be sure. That role depends in large part to the degree to which CMOs can facilitate new business models. If the Internet is conceived of as a space of allowing uses but creating viable financial flows to professional authors, then allowing use against payment (when no exception or limitation applies) without restricting use is destined to grow. Professor Jane Ginsburg has recently referred to this situation as 'permitted but paid'.[15]

It may be the case that the advancement of new technologies will minimize the role of CMOs so that other players will perform the licensing function. Conversely, it could also lead to a significant expansion of their role. Whatever view is taken, the rationalization of the collective management of copyright remains an important

[13] For a discussion of the use of the term 'piracy', see William Patry, *Moral Panics and the Copyright Wars* (Oxford: Oxford University Press, 2009). Whereas the term is now used for its apparent rhetorical appeal, it has been in use for centuries as a fairly technical term of the art to refer, *inter alia,* to an unauthorized printing of a book etc.

[14] See Eddie Schwartz, 'Fair Trade Music: Letting the light shine in', in D. Gervais and Susy Frankel, *The Evolution and Equilibrium of Copyright in the Digital Age*, Cambridge, Cambridge University Press, 2014, p. 312.

[15] Jane C. Ginsburg, 'Fair Use for Free, or Permitted-but-Paid?', *Berkeley Technology Law Journal* 29 (2014): 1383–1446. See also Daniel Gervais, 'Authors, Online', *Columbia Journal of Law & the Arts* 38:3 (2015) 385–396.

task. In fact, if CMOs are to play the role of intermediary fully and efficiently, these organizations must acquire the rights they need to license digital uses of protected material and build (or improve current) information systems to deal with ever more complex rights management and licensing tasks.

It should also be noted that there are powerful forces, aligned with new technology intermediaries, that do not operate as copyright holders and whose business is to get users to watch advertisements in exchange for free access to 'content'. They argue that copyright must be reduced to its smallest possible expression, if not entirely eliminated. One of their arguments is that licensing structures are inefficient and in some cases non-existent. These intermediaries are not evil. They only seek to limit costs, including paying authors or other right holders. If their approach succeeds, it would further reduce licensing options for any 'content' that courts or legislators deem free to use. Hopefully, at least for those who believe that viable financial flows to professional authors (whose works are successful in the online marketplace) must be created or maintained, a proper balance will be found. This balance must be anchored in reasonable part on licensing.

How can this happen? The ability of CMOs to meet the needs of authors, other right holders, and users is contingent on the evolution of both their internal practices, and the framework in which CMOs work to alleviate the many concerns of fragmentation within the current system. Countries and CMOs throughout the world must adapt their laws and infrastructure to meet the challenges of digital technology irrespective of the philosophical underpinnings of each nation's copyright system.

The Evolution of ECLs

ECLs find their origin at the beginning of the 1960s when primary broadcasting was at stake. In the 1970s and 1980s, they were use also for reprography and re-transmission of broadcasts.[16] ECLs are

[16] See Tarja Koskinen-Olsson, 'Collective Management in the Nordic Countries' in D. Gervais (ed.), *Collective Management of Copyright and Related Rights,* 3rd ed. (Kluwer Law, 2016).

under consideration or being implemented in other parts of the world, including Central and Eastern Europe, Africa and possibly also Canada[17]. They were featured in a 2015 report by the United States Copyright Office on the issue of orphan works.[18]

ECLs are a two-step process: first, a voluntary assignment or transfer of rights from right holders to a CMO, followed by a legal extension of the CMO's repertoire to encompass non-member right holders. ECLs greatly simplify the acquisition of rights (or of the authority to license). In Nordic countries the legal extension applies after a determination that a 'substantial' number of right holders in a given category have agreed to join a CMO.[19] Then the repertoire of the CMO is extended (for the licensing scheme concerned) to domestic right holders in the same category and often to all foreign right holders as well. The license also extends to deceased right holders, particularly in cases in which estates have yet to be properly organized. Thus, ECLs are potentially a powerful solution to some of the problems concerning the use of orphan works.[20]

ECLs are an interesting model for countries where, on the one hand, right holders are reasonably well organized and informed, and, on the other hand, a great part of the material that is the object of licenses comes from foreign countries. It is often more difficult and time consuming to obtain an authorization for the use of foreign material. ECLs provide a legal solution to this situation, because the agreements struck between users and right holders will include all non-excluded domestic and foreign right holders. Finally,

[17] See Daniel Gervais, 'Application of an Extended Collective Licensing Regime in Canada: Principles and Issues Related to Implementation (2003)', study prepared for and published by the Government of Canada, online: *aix1.uottawa.ca/~dgervais/publications/extended_licensing.pdf*.

[18] United States Copyright Office, *Orphan Works and Mass Digitization*, June 2015, at pp. 18 and 82–83. The report is available at copyright.gov/orphan/reports/orphan-works2015.pdf.

[19] Substantiality is contextual. A new collective – that is, one trying to organize right holders in a given area for the first time – should have a lower substantiality threshold to pass but perhaps a higher degree of proof concerning the professionalism, efficiency and transparency than a well-established collective trying to obtain an extension of repertoire for a new licensing scheme.

[20] See Daniel Gervais and David R. Hansen, 'Analyse quantitative et qualitative du problème des œuvres orphelines: un point de vue états-unien' (2012) 24:2 *Cahiers de Propriété Intellectuelle* 347–366.

by accelerating the acquisition of rights, ECLs increase the efficiency and promptness of royalties' collection. The monies available to distribute to right holders are thereby increased.

An argument raised against ECLs is their alleged incompatibility with Article 5(2) of the Berne Convention, which, as noted above, prohibits formalities concerning the existence and exercise of the rights granted by virtue of the Convention. This argument must fail, for reasons I have explained in detail elsewhere.[21] Basically, the formalities that are prohibited under Article 5(2) are essentially registration with a governmental authority, deposit of a copy of the work or similar formalities when they are linked to the existence of copyright or its exercise, especially in enforcement proceedings.

ECLs are powerful instruments. They provide CMOs with the ability to license all or almost all works that users need to license. ECLs can ensure that uses that go beyond exceptions are paid for without affecting the scope of exceptions. The objective of providing a fair reward is fulfilled. At the same time, easier licensing removes the (theoretical) obstacle and frustrating attempts by certain right holders to stop Internet uses. This then fulfils the other side of the equation, namely the promotion of the public interest in the encouragement and dissemination of works of the arts and intellect. Naturally, CMOs must use ECLs adequately, fairly, and transparently – especially for represented right holders that are not in a contractual relationship with the CMO). This in turn requires proper regulation and oversight.

Conclusion

Collective management as a process is easier to explain and, when necessary, defend when the quality of services CMOs offer is perceived as efficient by both authors and users. Initially, CMOs developed out of necessity; it was not feasible for authors and publishers to maintain a direct relationship with users. With the advent of new technologies, authors and publishers are increasingly able to initiate and maintain direct relationships with users. Although this will not

[21] See Daniel Gervais, 'The Google Book Settlement and the TRIPS Agreement', 2011 *Stanford Technology Law Review* 1–11.

necessarily diminish the role of CMOs, it highlights the need to reform the existing CMO structure both to justify their continued existence and to alleviate the problems stemming from the fragmentation of copyright rights proper and rights clearance processes.

There may be a greater role for CMOs in the area of mass online uses. If copyright's excludability does not easily reach individual end-users, neither does it reach without difficulty users who have no direct (one-on-one) transactional contact with the right holders concerned. To maximize efficiency, it seems that copyright's power to exclude online uses should be limited to cases in which an exclusive distributorship (or other form of dissemination) is negotiated by the first owner of copyright or someone else who acquired rights from that first owner and in cases of commercial piracy. It was never an obvious step for copyright to try to reach individual Internet users who do not consider themselves pirates or act with intent of commercial gain. The way forward lies in opening business models and monetization, not in imposing unproductive roadblocks.

What does it mean for the future of copyright? Historically, copyright has been used to organize markets. It should continue to do so, taking account of the different nature of online uses. Additionally, copyright works best, as an exclusion tool, when its rules are internalized by users. This is why, when copyright was used by and/or against professional users, it tended to work reasonably well. It is not so with mass uses. This is not a normative claim; it is a mere empirical observation.

If one thus abandons attempts to stop Internet users, copyright remains as a market organization tool, and morphs into an entitlement to remuneration for mass uses when such uses reach the level of interference with normal commercial exploitation under the Berne Convention and the TRIPS Agreement's three-step test.[22] The solution – at this point, the only solution I can see – is thus to license mass Internet uses in a way that respects all of those involved in the creation, performance, publication, production and use of copyright 'content'. Naturally, this includes respect for existing

[22] See Ch Geiger, D. Gervais and M Senftleben, 'The Three-Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law', 29:3 *American University International Law Review* 581–626.

exceptions.[23] Perhaps the best way to achieve this, barring a major technological paradigm shift, is collective management using ECLs when convenient to ensure that licenses cover all or almost all the protected material that a user, especially in a commercial exploitation context, may want to use.

[23] Soft enforcement measures may be used to help convince users to accept the scheme, but it cannot be overly emphasized that the best way to ensure adoption is to offer users practicable terms they will perceive as fair.