

**Extended Collective Licensing in the UK – One Year On:
A Review of the Law and a Look Ahead to the Future**

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Abstract

This paper presented in two parts, outlines the development of the extended collective licensing regulations in the UK in Part One. In doing so, the paper draws a line through the failed attempt of the Gowers Review 2006 to the success of the Hargreaves Review 2011 and ultimately to the successful implementation of an extended collective licensing scheme in 2014. Part Two reviews the scheme, which has now been in place for more than one year and explores the progress of the licensing organisations in implementing the scheme. Furthermore, from the perspective of one of the oldest extended collective licensing schemes in the world - i.e., Denmark – the paper questions whether the UK can learn any lessons from the Danish system in moving forward.

Keywords: Copyright; Extended Collective Licensing; Hargreaves Reform; United Kingdom; Denmark

Introduction

In 2014, a number of copyright reforms were introduced in the UK including exceptions for research, education, libraries, museums and archives;¹ exceptions for disabled people;² exception for public administration;³ exceptions for quotation and parody;⁴ and orphan works.⁵ Amongst these various exceptions, the regulation of

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All links correct as at 22 January 2016.

¹ SI 2014/1372, The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014.

² SI 2014/1384, The Copyright and Rights in Performances (Disability) Regulations 2014.

³ SI 2014/1385, The Copyright (Public Administration) Regulations 2014.

⁴ SI 2014/2356, The Copyright and Rights in Performances (Quotation and Parody) Regulations 2014.

⁵ SI 2014/2861, The Copyright and Rights in Performances (Certain Permitted Uses of Orphan Works) Regulations 2014; SI 2014/2863, The Copyright and Rights in Performances (Licensing of Orphan Works) Regulations 2014.

licensing bodies⁶ and extended collective licensing⁷ were also introduced on 6th April and 1 October 2014 respectively.

The main rationale given by the UK Government for introducing an extended collective licensing (ECL) scheme was that it would reduce transaction costs and streamline the licensing process⁸ as seen in the ECL regulations in Nordic countries which are now “generally regarded as a practical and uncontroversial way of solving the problems of access in mass-user situations.”⁹

Since the Gowers Review of 2006, there have been attempts in the UK to introduce an ECL scheme, although it did not materialise until 2014.¹⁰ As such, it may be seen as a provision, which has been delayed in its implementation. However, it is interesting to note that the UK’s journey towards implementing this provision has developed parallel to the European legislation on collective rights management, which incorporates provisions on ECL. For example, a year prior to the Gowers Review, a discussion of regulating the collecting societies at European level began with the Commission’s non-binding Recommendation in 2005.¹¹ This initiative was followed by a public hearing in 2010¹², which in turn was followed by a Consultation period.¹³ In 2012, the Collective Rights Management Directive was finalised and the Collective Rights Management Directive passed into law in 2014.¹⁴

⁶ SI 2014/8988, The Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014.

⁷ SI 2014/2588, The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014.

⁸ BIS1054 Impact Assessment, *Extended Collective Licensing (ECL)* (2012) available at http://www.legislation.gov.uk/ukia/2014/189/pdfs/ukia_20140189_en.pdf at p. 1.

⁹ Riis T., & Schovsbo J., *Extended Collective Licenses in Action* [2012] 43(8) *International Review of Intellectual Property and Competition Law*, pp. 930-950 at p. 930.

¹⁰ See, *infra* pp. 3-5.

¹¹ Recommendation 2005/737/EC of 18 October 2005.

¹² The Governance of Collective Rights Management in the EU, Brussels, April 23, 2010. The aim of the hearing was to explore how the relationships between copyright owners, collecting societies and commercial users of copyright have evolved over time.

¹³ The “call for comments” launched on 17 January 2007 yielded 89 replies from a wide variety of stakeholders that have a direct or indirect interest in how music is licensed for online services that are accessible across the Community.

¹⁴ Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014L0026>

A final version of this paper will appear in the European Intellectual Property Review (EIPR) in April 2016. Issue 4, Volume 38; pp. 208-220.

The EU developments in February 2014 signalled the reform of existing ECL schemes in Nordic countries, notably in Denmark,¹⁵ whilst in UK, a few months later new regulations on ECL was introduced.

This article presented in two parts, draws a line through the development and coming in to being of the UK ECL scheme in Part I. From the failed Gowers 2006 attempt to the success of Hargreaves 2011, the article highlights and discusses the journey of the ECL regulation, through the consultation and technical processes, to it becoming law in the UK in 2014.

Part II explores the ECL scheme in Denmark, considered as the oldest system in the world and particularly outlines the reforms to the Danish ECL provisions in 2008 and 2014. In doing so, this part of the article explores UK's developments in taking forward the ECL scheme – one year on – and questions whether the UK can learn any lessons from Denmark's system as well as its recent reforms.

In looking ahead to the implementation of an ECL scheme in the UK, the article concludes with some thoughts for the future.

Part One:

From Gowers to Hargreaves (2006 – 2011): A Timeline

Until the Gowers Review of Intellectual Property (2006),¹⁶ there was no direct discussion of extended collective licensing in the UK, although there was some discussion of the transparency of collecting societies and the complexity of licensing within the UK. The Gowers Review aimed to establish whether the Intellectual Property (IP) system in the UK was “fit for purpose in an era of globalisation, digitisation and increasing economic specialisation.”¹⁷ The Review recommended that the Office of Fair Trading conduct a survey to gather evidence of stakeholder

¹⁵ See *infra*, ‘Learning Lessons from Another Jurisdiction: An Overview of the Danish ECL Scheme’.

¹⁶ Gowers A., *Gowers Review of Intellectual Property* (2006) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/228849/0118404830.pdf

¹⁷ *Ibid.*, p. 1.

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satisfaction with the collecting societies.¹⁸ However, after ‘careful consideration,’ this was not carried out.¹⁹

After Gowers, licensing featured more prominently in the Digital Britain Review 2009, where Extended Collective Licensing (ECL), and the use of Codes of Practice to regulate the collecting societies were considered as potential solutions for orphan works.²⁰ During this time period (2008-9), the UK Intellectual Property Office (IPO) also began consulting on a Copyright Strategy. Echoing the Digital Britain Review, the strategy stated that the Government intended “...to implement a system of extended collective licensing,” “...legislate in order to enable schemes for dealing with orphan works,” and “...to manage organisations licensed to set up extended collective licensing and orphan works schemes”.²¹ Despite this, powers to address licensing schemes and orphan works (Clause 43) were removed from the *Digital Economy Act 2010*, after strong criticism from rights holder groups including Stop 43.²²

Later, in 2011, the Hargreaves Review again recommended that ECL be introduced and that collecting societies be regulated through the use of Codes of Practice. A public consultation followed (*Modernising Copyright*, or the *Consultation on Copyright*), and the IPO published a set of minimum standards for Codes of Practice in 2012. UK Collective Management Organisations (CMOs) voluntarily worked to

¹⁸ *Ibid.*, p. 8.

¹⁹ Hargreaves I., ‘Supporting Document A: Audit of Recommendations from Previous Reviews of Intellectual Property Rights,’ in *Digital Opportunity: A Review of Intellectual Property and Growth* (2011) available at <http://webarchive.nationalarchives.gov.uk/20131212191114/http://www.ipo.gov.uk/ipreview-doc-a.pdf> at p. 9.

²⁰ The Digital Britain Review was part of ‘Building Britain’s Future,’ a draft legislative programme developed by the then UK Labour Government to build a stronger economy and reform public services. The Digital Britain Review outlined key objectives that would transform the UK digital economy. See the final report for more details at <http://webarchive.nationalarchives.gov.uk/+http://www.culture.gov.uk/images/publications/digitalbritain-finalreport-jun09.pdf>

²¹ UK IPO, *The Way Ahead: A Strategy for Copyright in the Digital Age* (2009) available at: <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/c-strategy-digitalage.pdf> at pp. 49-50.

²² The *Digital Economy Act 2010* includes multiple provisions relating to online infringement of copyright. The Digital Economy Bill was rushed through Parliament in the ‘wash-up’ before the 2010 general election, with many opponents of the bill claiming it had not been subject to proper scrutiny. Five years later, many of the provisions have not been implemented, and there are continued calls for the act to be repealed.

establish Codes of Practice, with many adopting the Code developed by the British Copyright Council (BCC).²³

The Hargreaves Review 2011²⁴ expressed broad support for ECL in the UK, stating “the simplified regime can be good for users by providing legal certainty, good for creators because it delivers remuneration, and good for consumers because it extends access to works. It should not be imposed on a sector as a compulsory measure where there is no call for it, and individual creators should always retain the ability to opt out of ECL arrangements”.²⁵

The Review reported that support²⁶ for ECL as a potential solution to the problem of high transaction costs when negotiating individual permissions on a large scale was expressed by various sectors including ‘music, TV, visual arts and archives,’ (where archives²⁷ potentially hold collections covering literature, film, music/sound and visual

²³ British Copyright Council, *Principles for Collective Management Organisations’ Codes of Conduct*, (2012) available at http://www.britishcopyright.org/files/3014/1312/9765/BCCPGP_Policy_Framework_250512.pdf

²⁴ The Hargreaves Review, in the Call for Evidence in December 2010, asked a general question about whether the necessity, complexity and cost of licensing constrained economic growth, whilst also referring to licensing arrangements, transparency and the collecting societies. The Call for Evidence received 256 responses, from a variety of sectors. To this question, the responses varied. Some author/performer representatives felt the question pointed towards ECL and criticised the possibility of implementation, and photographers and authors in particular strongly advocated the security of negotiating licenses on an individual basis. The Nordic ECL example was used frequently, sometimes in a favourable light (BBC response, BFI response), and at other times to argue against the use of ECL (Action on Author’s Rights response). For more details, see the archived Call for Evidence responses at <http://webarchive.nationalarchives.gov.uk/20131212191114/http://www.ipo.gov.uk/ipreview/ipreview-c4e.htm>

²⁵ Hargreaves I., *Digital Opportunity: A Review of Intellectual Property and Growth* (2011) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32563/ipreview-finalreport.pdf p. 38.

²⁶ *Ibid.*, pp. 37-38. The review reported that broadcasters like the BBC, and film archives including the BFI, wanted to make their collections available online, as did other institutions like libraries and archives. Interest was shown from both consumers, who wanted to access the material, and SMEs and telecommunication companies, who needed large amounts of content in order to develop new products and services. High transaction costs were reported as the main barrier to access, as negotiating individual permissions on such a large scale was expensive and time-consuming, with the added potential for large numbers of orphan works.

²⁷ It is interesting to note that very rarely do respondents point to the fact that the ECL schemes in Norway have mainly been used to facilitate the digitisation of published works: i.e. library projects where large numbers of books (i.e., in-copyright, out of commerce, potentially orphaned works) are made available. There are very few examples where unpublished, ‘non-commercial’ collections have been digitised using the schemes (for example, personal papers) which are typical of archive holdings and often contain large amounts of 3rd party

arts, etc.).²⁸ ECL was also mentioned as a having a potential role to play in solving the problem of orphan works.²⁹

Consultation on Copyright (December 2011 – March 2012)

Key Features and Outcomes of the Consultation

The Consultation on Copyright, which addressed the recommendations of the Hargreaves Review, ran for 14 weeks between December 2011 and March 2012 and generated 471 responses.³⁰ The Consultation also asked more specific questions³¹ about ECL and the collecting societies. These included, for example, the likelihood of uptake of ECL among licensing bodies, in addition to practical considerations, such as opt-out arrangements, publicising the schemes and fair distribution of fees.

Support for ECL came from institutional users, end users, consumer representatives, broadcasters and service providers with some cautious support from some CMOs. The main opposition came from “commercial archives, and from representatives of photographers and authors,” i.e., sectors where direct licensing models are more prevalent.³² The ECL Impact Assessment highlighted the fact that negotiating licences on a case-by-case basis is resource-intensive, and that a blanket licence

copyright material. Many ECL schemes are limited to published works only (education is the only exception in KOPINOR) for obvious reasons: it would be difficult to claim representation of the rights holders in unpublished works. One example of a project involving the digitisation of archive photographs is arkiv.dk in Denmark. Cultural Heritage Institutions (CHIs) pay a nominal fee per image to Copydan, and the images can be displayed on arkiv.dk without engaging in rights clearance. While this will enable digitisation and dissemination of the photographic collections, public domain and orphan images may also end up being licensed through Copydan on arkiv.dk, and images may be subject to usage restrictions.

²⁸ *Ibid.*

²⁹ *Ibid.*, p. 39.

³⁰ *Consultation on Copyright (2011)* available at: <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/consult-2011-copyright.pdf> The archived responses to the consultation are available at <http://webarchive.nationalarchives.gov.uk/20121011121930/http://www.ipo.gov.uk/pro-policy/consult/consult-closed/consult-closed-2011/consult-2011-copyright/consult-copyright-response.htm>

³¹ *Ibid.* Questions covered the efficacy of the current collective licensing framework (q.22, p.31); potential cost-savings and increases through the use of ECL (q.23-25, p.34); and the extent of repertoire and the likelihood of uptake among CMOs (q.26-29, p.35); criteria for representative-ness, securing consent, differential treatment of members, checks and balances on additional powers (q.30-35, p.36); publicising the scheme and opt-out arrangements (q.36-40, p.37); locating missing or opted-out rights holders for remuneration (q.41, p.38); and retention periods/distribution of unclaimed licensing fees (q.42-43, p.39).

³² *HMG Consultation on Copyright: Summary of Responses June 2012 (2012)* available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/320223/copyright-consultation-summary-of-responses.pdf p. 9.

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would ‘reduce barriers to entry,’ ‘improve access to works’ and ‘save on search costs.’³³ This was questioned by CMOs, who pointed to the administrative costs “involved in managing rights for non-members” which could include engaging in diligent searches for orphan works, and which would inevitably result in higher licensing fees for users.³⁴

Opt-out arrangements were the subject of detailed discussion³⁵, with most respondents advocating that rights holders should have every opportunity to opt-out, and that advertising and publicising the schemes should be of high importance. Special consideration would also have to be paid to foreign rights holders and the relatives of deceased rights holders, as these were felt to be the two groups who would most likely be unaware of the proposed ECL scheme, and miss the opportunity to opt-out.³⁶ Information sharing was considered to be an important part of opt-out arrangements, with respondents stating that CMOs should be required to publish lists of opted-out rights holders.³⁷

There was difficulty reaching a consensus on the best way for a CMO to prove representativeness prior to authorisation. Some respondents suggested an appropriate threshold level of membership and repertoire as a solution, while others pointed to the problem of determining overall sector size in such calculations.³⁸

Codes of Practice³⁹

The Consultation on Copyright also asked a series of detailed questions⁴⁰ pertaining to the development of Codes of Practice for CMOs, based on proposals included in

³³ BIS1054 Impact Assessment, *Extended Collective Licensing (ECL)* (2012) available at http://www.legislation.gov.uk/ukia/2014/189/pdfs/ukia_20140189_en.pdf at p. 1.

³⁴ HMG *Consultation on Copyright: Summary of Responses June 2012* (2012) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/320223/copyright-consultation-summary-of-responses.pdf p. 9.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ *Ibid.*, pp. 9-10.

³⁹ Some of the consultation documents refer to ‘Codes of Conduct,’ but the final version of the legislation refers to ‘Codes of Practice.’ In the interests of consistency, we have referred to ‘Codes of Practice’ throughout.

⁴⁰ HMG *Consultation on Copyright* (2011), available at <http://webarchive.nationalarchives.gov.uk/20121011121930/http://www.ipo.gov.uk/consult-2011-copyright.pdf> Questions addressed areas of good performance and areas for

the Modernising Copyright documentation. The proposed minimum standard to be included in a Code of Practice covered 'obligations to right holders, members and licensees; the requirements imposed on licensees; conduct of employees, agents and representatives; information and transparency – monitoring and reporting requirements; resolution of complaints and disputes; and the ombudsman scheme.'⁴¹

There was strong support for regulating the collecting societies, especially from licensees, end users and consumer representatives:⁴² there was a 'consensus' that adopting and adhering to a Code of Practice should be considered a pre-requisite of authorisation to operate ECL. CMOs supported the use of the British Copyright Council's principles⁴³ to inform development of individual codes. Institutional users like the National Library of Scotland favoured a single code for simplicity, but other end users argued for the flexibility of adaptable frameworks.⁴⁴

improvement (q.44-45, p.42); the costs and benefits of codes and their potential side-effects (q.46-47, p.44); the time period for development and implementation, and potential benefits and rewards of using codes (q.48-49, p.45); whether one common code or individual codes were appropriate (q.50, p.46); the areas to be included in a minimum standard (q.51, p.47); fair and transparent treatment of members and licensees, including additional expectations (q.52-54, p.47-48); conduct of employees and representatives (q.55, p.49); measures to improve transparency (q.55, p.50); reporting requirements, including member numbers, distribution and revenues (q.57, p.50); fair and reasonable complaints procedures (q.58, p.51); the appointment of a single or joint ombudsman (q.59, p.52); independent review of the codes (q.60-61, p.52); initiatives to recognise high performance (q.62, p.53); how to measure compliance, penalise non-compliance and how often to review (q.63-65, p.54); and the use and monitoring of voluntary codes (q.66, p.54).

⁴¹ *Ibid.*, p. 46.

⁴² In the interests of consistency across multiple Government consultations, a comprehensive categorisation of respondents is preferable to a general list of respondent types: the authors have decided to use the categorisation provided by the EU-wide Consultation on Copyright. Responses were received from End Users and Consumers (includes individuals, researchers, consumer organisations or their representatives); Institutional Users (includes libraries, museums, archives, research centres, teachers and librarians (or their representatives); Authors, Performers or their representatives; Publishers, Producers, Broadcasters (across the creative industries) and their representatives; Intermediaries, Distributors and Service Providers (including ISPs, platforms, film distributors and telecom companies) and their representatives; Collective Management Organisations, and Public Authorities.

European Commission, *Report on the Responses to the Public Consultation on the Review of the EU Copyright Rules*, (2014) available at http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf at pp.3-4.

⁴³ HMG *Consultation on Copyright: Summary of Responses June 2012* (2012) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/320223/copyright-consultation-summary-of-responses.pdf at p.11.

⁴⁴ *Ibid.*

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Institutional and end users favoured a single ombudsman service. Perhaps unsurprisingly, CMOs were not in favour of financial penalties or statutory intervention as they felt this might affect their 'commercial viability', and they also argued that there should be provision to recover costs from 'frivolous or vexatious' complainants.⁴⁵ However, even where institutional and end users recognised that the cost of licensing might rise as a result of such measures, they were generally in favour of fines, sanctions and a 'statutory back-stop power.'⁴⁶

In addition to the Code of Practice work in the UK, the World Intellectual Property Organisation has facilitated a new international scheme called the TAG of Excellence.⁴⁷ The objective of the TAG project is to develop a global 'voluntary quality assurance standard,' which will allow CMOs to demonstrate their transparency, accountability and good governance.

Technical Consultation on Draft ECL Legislation (November 2013 – January 2014)

The technical consultation on draft ECL legislation ran from November 2013 to January 2014. 37 consultation responses were received, with most responding on behalf of CMOs. A number of broadcasters and institutional users including cultural heritage institutions also responded, in addition to some service providers and authors/performers.⁴⁸ Respondents were chiefly concerned with the requirement for CMOs to demonstrate representativeness within a sector, how to obtain informed consent from rights holders, how non-members should be treated, and how long ECL schemes should be authorised to operate before renewal.

The Government has provided flexibility in the legislation, in order to allow CMOs to apply for ECL where they do not hold a pre-existing collective licence, but the requirements in terms of demonstrating representativeness within a particular sector are higher as a safeguard. The Government response on the representativeness test

⁴⁵ *Ibid.*, p.12.

⁴⁶ *Ibid.*

⁴⁷ TAG stands for Transparency, Accountability and Good Governance. The project includes a compendium that is designed to facilitate the process of drafting governance documents, to improve transparency and accountability within CMOs. More details are available at http://www.uil-sipo.si/uploads/media/WIPO_TAG_Pamphlet.pdf

⁴⁸ The archived consultation responses can be found at <https://www.gov.uk/government/consultations/extending-the-benefits-of-collective-licensing>

also mentions ‘flexibility’ and ‘transparent methodology,’⁴⁹ which points to the fact that authorisation is at the discretion of the Secretary of State, and applications will have to be judged on a case-by-case basis. Setting a specific threshold for representativeness was deemed ‘unworkable,’ despite strong support for a 75% minimum from rights holders. The terminology chosen is a ‘substantial proportion of voting members,’ and a higher proportion again where the CMO does not hold a pre-existing collective licence.⁵⁰

Informed consent was considered an essential safeguard within the application process, and there was broad support for the mandatory inclusion of documentation used to inform member rights holders about any proposed ECL in the application for authorisation of a scheme.⁵¹ There was consensus from all respondents on the issue of treating members and non-members alike, although the Government accepted the views of CMOs, where ‘the contractual benefits of membership need not be extended to non-members,’⁵² as the protections for non-members in the legislation were deemed to be sufficient.⁵³

The majority of respondents agreed that ‘proportionality’ was the key principle in deciding the scope of an advertising campaign for an ECL scheme, although some rights holders didn’t think this was enough.⁵⁴ Opinions diverged on whether a five-year authorisation period was an appropriate length for an ECL scheme: most CMOs and rights holders agreed with five years, or thought it should be shorter, whereas most institutional users and end users felt this was not long enough, as it would be difficult to get funding for digitisation projects with such a short authorisation period. Ultimately, the Government opted to retain the five-year period.⁵⁵

⁴⁹ UK Intellectual Property Office, *Government Response to the Technical Consultation on Draft Secondary Legislation for Extended Collective Licensing (ECL) Schemes* (2014) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/309894/government-response-ecl.pdf at p. 5.

⁵⁰ *Ibid.*, p. 6.

⁵¹ *Ibid.*, p. 7.

⁵² *Ibid.*, p. 11.

⁵³ *Ibid.*, p. 13.

⁵⁴ *Ibid.*, p. 17.

⁵⁵ *Ibid.*, p. 21.

ECL Legislation in the UK: 1 October 2014

Authorisation: Section 4(1) – (3)

The *Enterprise and Regulatory Reform Act 2013* granted powers to create secondary legislation to enforce self-regulation and penalise non-compliance of licensing bodies.⁵⁶ New secondary legislation also allows ECL within the UK for the first time.⁵⁷ The *Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014* came into force on 1st of October 2014.⁵⁸ Licensing bodies can seek authorisation to operate ECL schemes, subject to a successful application and the approval of the Secretary of State.⁵⁹ An authorisation to operate ECL must include the types of works within the scheme and the permitted uses.⁶⁰ As such, licensing bodies may licence all rights within the scope of the ECL scheme if they abide by the terms and conditions of the authorisation⁶¹; follow a Code of Practice; and comply with the regulations.⁶²

Demonstrating Representation: Section 4(4) – (6)

⁵⁶ *The Copyright (Regulation of Relevant Licensing Bodies) Regulations 2014* came into force on 6th April 2014 (SI2014/898). The legislation allows the Secretary of State to direct licensing bodies to ‘adopt and publish a code of practice that complies with the specified criteria’ (s.3(1)). The specified criteria (Schedules) outline the content of a code of practice, which should include: ‘obligations to right holders, members, licensees; requirements imposed on licensees; conduct of employees, agents and representatives; information and transparency – monitoring and reporting requirements; resolution of complaints and disputes; and the ombudsman scheme’.

⁵⁷ Given that ECL is a very recent introduction to the UK, there is little empirical analysis of the impact of the legislation so far. Interested readers may find the following academic articles useful in understanding the implementation of ECL in the UK, and the use and impact of ECL in other jurisdictions: Rivers T., *A fuss about something*, [2015] 37(1) *European Intellectual Property Review* pp.4-14; Ross A., *The New Regulatory Regime for Collective Rights Management – The Government Consults on how to Implement* [2015] 26(4) *Entertainment Law Review* pp.130-33; Riis T., & Schovsbo J., *Extended Collective Licenses and the Nordic Model: It’s a Hybrid, but is it a VOLVO or a Lemon?* [2010] 33(4) *Columbia Journal of Law and the Arts* pp. 471-498; Favale M., Homberg F., Kretschmer M., Mendis D., & Secchi D., *Copyright, and the Regulation of Orphan Works: A Comparative Review of Seven Jurisdictions and a Rights Clearance Simulation* (London: Intellectual Property Office; 2013) at

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312779/ipresearch-orphan-201307.pdf

⁵⁸ SI 2014/2588.

⁵⁹ SI 2014/2588, section 4(1).

⁶⁰ SI 2014/2588, section 4(2)(a)–(b).

⁶¹ SI 2014/2588, section 4(3)(a).

⁶² SI 2014/2588, section 4(3)(b)–(c).

The Secretary of State may only grant ECL authorisation where a licensing body already collectively licenses the type of works specified in the application and where the licensing body can demonstrate significant representation in those types of works.⁶³ The Code of Practice adopted by the licensing body must meet the specified criteria, covering protection for non-member right holders, adequate opt-out arrangements,⁶⁴ publicising the scheme, distributing fees to non-members and safeguarding undistributed fees. The licensing body must demonstrate it has the consent of its members in relation to the ECL scheme. Authorisations are non-transferrable and last for a maximum of five years, unless cancelled or revoked.⁶⁵

The Application Process: Section 5(1) – 8(6)

Applications are made to the Secretary of State, and contain: a summary, contact details, the type of works to which the ECL will apply, and evidence proving that the applicant is an appropriate licensing body for the types of works specified. A description of the rights that the licensing body seeks to license, and a clear description of the steps necessary to opt-out of the scheme are required. The number of right holders who have either already opted-out, or have contracts with the licensing body that exclude them from the scope of ECL must be included, along with the number of works in which they hold the rights. Applications must also provide evidence of the representation of a licensing body and evidence of consent, including the documentation sent to members when asking for consent. A copy of the collective licence under which the body operates, their Code of Practice, any Code reviews, and a declaration confirming that the licensing body complies with its Code, are also required. The proposed terms and conditions of the ECL scheme, the distribution policy and the plans for publicising the scheme to non-member right holders, including how the licensing body plans to contact and distribute fees to them, must also be included.⁶⁶ A fee is charged to process the application.⁶⁷

⁶³ SI 2014/2588, section 4(4)(a)–(b). UK IPO guidance on demonstrating representativeness available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/360120/extend-ed-collecting-licensing-application-guidance.pdf

⁶⁴ SI 2014/2588, section 4(4)(c)–(d).

⁶⁵ SI 2014/2588, section 4(4)(a-f); section 4(5); and section 4(6).

⁶⁶ SI 2014/2588, section 5(1)(a)–(s).

⁶⁷ SI 2014/2588, section 5(2).

If an application meeting these criteria is submitted, the Secretary of State must inform the licensing body that the application has been received, ask for any additional information required, and inform the licensing body of the date by which the application will be decided. A decision is given within 14 days.⁶⁸ If the application does not meet the requirements, the Secretary of State has a maximum of 14 days to inform the licensing body and provide reasons for rejecting the application.⁶⁹ A proposed ECL scheme must be publicised for at least 28 days, allowing time for comments, before it can be authorised.⁷⁰ Once the period for comments has elapsed, the Secretary of State has 90 days in which to notify the licensing body of the decision. If granted, authorisation, again, must be publicised in an appropriate manner.⁷¹

Renewing an Authorisation: Section 9(2) – (4); Section 10(1) – (3)

Licensing bodies can apply to have their authorisations renewed⁷² for a fixed period, or until it is cancelled or revoked.⁷³ An application for renewal can be made after three years from the date of the previous authorisation and up to three months before the previous authorisation expires. The application for renewal either confirms that the information provided in the previous application remains the same, or details the changes that have taken place.⁷⁴ Evidence of the operation of the opt-out arrangements; the number of right holders who intend to opt-out, compared to the number who opted-out previously; and the number of works that have been opted-out, compared to the number of works opted-out previously, is required.⁷⁵ The application for renewal must also include the following: evidence of representation at the time of the renewal application and the consent of members; copies of documentation sent to members when obtaining consent; any Code Review reports produced during the previous authorisation period; and a signed declaration confirming that the licensing body has complied with its Code.⁷⁶

⁶⁸ SI 2014/2588, section 6(1).

⁶⁹ SI 2014/2588, section 6(2).

⁷⁰ SI 2014/2588, section 7(1)-(2).

⁷¹ SI 2014/2588, section 8(5) – 8(6).

⁷² SI 2014/2588, section 4(3)-(5); s. 9(3).

⁷³ SI 2014/2588, section 9(2)-(4).

⁷⁴ SI 2014/2588, section 10(1)-(2)(a)-(b).

⁷⁵ SI 2014/2588, section 10(2)(c)(i)-(iii).

⁷⁶ SI 2014/2588, section 10(2)(d)-(h).

Details of any complaints from non-member right holders whose works have been licensed by the ECL scheme, and how they were resolved, are also necessary, alongside details of distribution to non-members and any undistributed fees and evidence of the effectiveness of the scheme.⁷⁷ A renewal fee is charged to process the application.⁷⁸

Reviewing ECL schemes: Section 11(1) – (5)

Licensing bodies operating ECL schemes must provide information to the Secretary of State every three years for review.⁷⁹ The information required is identical to that provided in the application for authorisation and renewal. The review can be published to elicit comments from those affected, and the licensing body may be required to pay a fee to cover the administrative costs of the review.⁸⁰ The Secretary of State must notify the licensing body of the conclusion of the review within three months, and publicise the outcome.⁸¹

Modifying and revoking authorisations: Section 12(1); Section 14(1) –(10); Section 15(1) – (4)

Authorisations may be modified by the Secretary of State, either as the result of an application from a licensing body, or as the result of a review.⁸² Where a licensing body fails in the operation of an ECL scheme, the Secretary of State must revoke authorisation. Revocation may happen where the licensing body has failed to comply with the specified criteria, the regulations, or any conditions set in the authorisation. The licensing body may also be required to pay an administrative fee.⁸³

Before revocation, the Secretary of State must publicise their intention to revoke the authorisation, including the reasons for doing so and allowing 21 days for those affected by the revocation to make comments.⁸⁴ A decision must be provided within

⁷⁷ SI 2014/2588, section 10(2)(j)-(k).

⁷⁸ SI 2014/2588, section 10(3).

⁷⁹ SI 2014/2588, section 11(1).

⁸⁰ SI 2014/2588, section 11(3)-(4).

⁸¹ SI 2014/2588, section 11(1)-(5).

⁸² SI 2014/2588, section 12(1).

⁸³ SI 2014/2588, section 14(1)-(3).

⁸⁴ SI 2014/2588, section 14(5)(a)-(c).

42 days including the reasons for revocation and the effective date.⁸⁵ Licences granted by a licensing body operating an ECL scheme lapse from the effective date of the revocation. Revocation must be publicised.⁸⁶ Licensing bodies may cancel their authorisation if they inform the Secretary of State, who may impose conditions before a cancellation date is set, and charge a fee to cancel the authorisation.⁸⁷

Opt-out arrangements: Section 16(1) – (5)

By adhering to the opt-out arrangements, a right holder may withhold the relevant licenses in their works from the scope of the ECL scheme. Right holders who want to opt-out must inform the licensing body of their name, and may choose to inform the licensing body of the specific works that are to opt-out.⁸⁸

Opt-out arrangements shall allow right holders to notify the licensing body that some or all of their works should be excluded from the ECL scheme; that works should be excluded before the ECL scheme is in operation; and that, where an agreement between a right holder and a licensing body already exists, the right holder can notify the licensing body of the wish to opt-out of either the ECL scheme, the collective licensing, or both.⁸⁹ After receiving notification of an opt-out, the licensing body has 14 days in which to acknowledge the notification, let the right holder and any licensees know the effective date of the opt-out and the termination date of the licences, and update their list of opt-outs for review purposes.⁹⁰

Licences should be terminated within six months of receipt of a notification to opt-out or nine months where the licensee is an education establishment and the licensing body has sought the permission of the Secretary of State. Licensing bodies shall maintain and make available a list of the right holders who have opted-out of an ECL scheme, any works which have been specified as opted-out, and right holders whose works are not included in the ECL scheme because of other contractual agreements with the licensing body.⁹¹

⁸⁵ SI 2014/2588, section 14(7)-(8).

⁸⁶ SI 2014/2588, section 14(9)-(10).

⁸⁷ SI 2014/2588, section 15(1)-(4).

⁸⁸ SI 2014/2588, section 16(1)-(2).

⁸⁹ SI 2014/2588, section 16(3)(a)-(c).

⁹⁰ SI 2014/2588, section 16(4)(a)-(d).

⁹¹ SI 2014/2588, section 16(5)(a)-(c).

Treatment of non-members: Section 17(1) – (5)

Licensing bodies can only grant non-exclusive licences to the works of non-member right holders, but they have effect as if granted by the right holder of the work, and are valid for the duration of the authorisation.⁹² If a non-member rights holder opts out or excludes one of their works from the scope of an ECL, the licence terminates in accordance with section 16(4) and section 16(5)(d), as described in the previous section. By complying with the regulations, neither the licensing body or the licensee is liable for infringement when granting licences or carrying out the acts permitted by the licence.⁹³

If a licence is terminated, the licensing body must follow its distribution policy and pay the non-member right holder any remaining fees, including a statement of the payments they have made to the right holder. Payments should be made as soon as practicable and records of distribution must be maintained.⁹⁴

Determining fees: Section 18(1) – (5)

Licensing bodies may include an administrative fee in their licensing fees when administering an ECL scheme. In such cases, the benefit should go to both non-member and member right holders.⁹⁵ Licence fees should be distributed as soon as possible, or within nine months of the end of the financial year in which licence fees have been collected. An appropriate amount should be distributed to non-member right holders, and the unclaimed amount should be kept in a designated account.⁹⁶ In situations where a licensing body has received a fee for the use of a non-member right holder work, the non-member right holder has three years in which to provide the licensing body with evidence of a reasonable fee or the amount of use of the work during the licensing period, in order to request the adjustment of the licensing

⁹² SI 2014/2588, section 17(1)(a)-(c).

⁹³ SI 2014/2588, section 17(2).

⁹⁴ SI 2014/2588, section 17(3)-(5).

⁹⁵ SI 2014/2588, section 18(1)-(2).

⁹⁶ SI 2014/2588, section 18(3).

fee. The licensing body shall publish details of works that have been licensed where right holders cannot be identified or located.⁹⁷

Arrangements for unclaimed licence fees: Section 19(1) – (3); Section 20

Unclaimed licence fees where the rights holders cannot be identified or located must be held in a dedicated account until three years have elapsed since authorisation, or the licensing body is directed by the Secretary of State to transfer the funds at the end of a specified period.⁹⁸ The maximum retention period from initial authorisation is eight years. At the end of this period, unclaimed fees may be used for activities that benefit non-member right holders.⁹⁹ The Secretary of State also has the power to request any information relating to an ECL scheme from a licensing body, which must be met within 14 days.¹⁰⁰

The above discussion outlined how the ECL provision was proposed, consulted and brought into force in the UK. More than one year on from the provision coming into force, this paper will now consider the impact it may have, particularly when viewed from the perspective of other countries which also have ECL provisions in force.

Part II of this article will therefore consider the ECL system in Denmark, which has had the system in place for a number of decades – and will question what lessons the UK can learn from this jurisdiction.

Part Two:

Learning Lessons from Another Jurisdiction: An Overview of the Danish ECL Scheme

Denmark's ECL scheme dates back to 1961¹⁰¹ and is considered to be the first in the world¹⁰². As such, ECL is widely regarded as a Nordic legislative concept. In

⁹⁷ SI 2014/2588, section 18(4)(a)-(b); section 18(5).

⁹⁸ SI 2014/2588, section 19(1)(a); section 19(2).

⁹⁹ SI 2014/2588, section 19(3).

¹⁰⁰ SI 2014/2588, section 20.

¹⁰¹ The ECL scheme was introduced into the Danish Copyright Act in 1961. Carrying the title "The extended collective license scheme in the Danish Copyright Act" the first ECL scheme was reflected in section 30 of the Danish Copyright Act and dates back to 1961.

¹⁰² Foged T., Licensing Schemes in an On-Demand World [2010] 32(1) *European Intellectual Property Review*, pp. 20-28 at p. 20.

Denmark, the ECL scheme has “shown to be a well-suited instrument to secure the rights holders’ rights in connection with mass exploitation of their works, for instance in the fields of photocopying for educational use and retransmission of works broadcast on radio and television, while at the same time meeting the users’ demands for the easiest way to exploit protected works. In short, the advantage for the users is that they need only enter into one single agreement, which reduces the transaction costs”.¹⁰³ A further advantage of the ECL scheme is that it removes the possibility of illegal reproduction without remuneration and “increase[s] the digital exploitation of creative content to the benefit of all parties”¹⁰⁴ and this is particularly true in the case of interactive services, as discussed below.

The Danish ECL system was amended in 2008 and 2014. The 2008 reform was consolidated into the Copyright Act of 2010¹⁰⁵ with the 2014¹⁰⁶ forming part of the consolidated Copyright Act 2014. On both instances the scope of the ECL scheme was broadened as outlined in the discussion below.¹⁰⁷

The Danish ECL system involves negotiation between users – generally a category of users – and collecting societies. As such, collecting societies play a pivotal role in administering the ECL system. In particular, *KODA*, which represents composers, song writers and music publishers (including performers)¹⁰⁸; *NCB*, which manages the mechanographic rights; and *CopyDan BilledKunst*, the umbrella collecting society that represents authors, performers and producers of writings and pictorial works¹⁰⁹ play a significant role in ensuring the success of the ECL scheme.

¹⁰³ Foged T., Licensing Schemes in an On-Demand World [2010] 32(1) *European Intellectual Property Review*, pp. 20-28 at p. 21.

¹⁰⁴ *Ibid.*

¹⁰⁵ Consolidated Act No. 202 of 27th February 2010 at http://kum.dk/uploads/tx_templavoila/Lovbekendtgorelse%20af%20ophavsretsloven%202010%20engelsk.pdf

¹⁰⁶ Consolidated Act on Copyright 2014 (Consolidated Act No. 1144 of 23rd October, 2014) at http://kum.dk/fileadmin/KUM/Documents/English%20website/Copyright/Act_on_Copyright_2014_Lovbekendtgorelse_nr._1144_ophavsretsloven_2014_engelsk.pdf

¹⁰⁷ See *infra* ‘Reform of the Law in 2008’ and ‘Reform of the Law in 2014’.

¹⁰⁸ “Koda's two main tasks are to ensure that the music creators get paid when their music is played in public - and to ensure that the music users are able to clear the rights to the music they wish to use”. See KODA at <http://www.koda.dk/eng/home/> “CopyDan BilledKunst is a rightholder organisation for visual arts in Denmark”. See CopyDan BilledKunst at http://www.billedkunst.dk/om_os/english.aspx

¹⁰⁹ “CopyDan BilledKunst is a rightholder organisation for visual arts in Denmark”. See CopyDan BilledKunst at http://www.billedkunst.dk/om_os/english.aspx

Accordingly, a user who has entered into an agreement with a particular collecting society comprising rights holders with similar types of works, obtains the right to use the works of the same type owned by non-members of the collecting society and on the terms that follow from the agreement with the organisation.¹¹⁰ The system also includes foreign rights holders.¹¹¹ This is achieved through a collective remuneration of the relevant foreign collecting society (not of the individual rights holder). However, a pre-existing agreement must have been concluded between the foreign collecting society and the Danish collecting society for revenues to be distributed. These agreements are known as “A-Agreements” and so far have been concluded by *CopyDan BilledKunst* with the following organisations: Access Copyright (Canada), Bonus Presskopia (Sweden), CAL (Australia), CCC (USA), Cedro (Spain), CLA (United Kingdom), ICLA (Ireland), SIAE (Italy), and VG Musikedition (Germany).¹¹²

As such the current system¹¹³ reflects that foreign rights holders are not individually remunerated under the current ECL scheme and organisations are only remunerated if the relevant collecting society in the foreign rights holder’s country has an “A-Agreement” with *CopyDan BilledKunst* for example. Furthermore, the revenues collectively distributed are likely to be used by the foreign collecting society for internal purposes and general activities included in their mission (such as support for cultural projects, copyright issues awareness etc.).¹¹⁴

¹¹⁰ *Danish Copyright Act 2010* Section 50(3).

¹¹¹ Koskinen-Olsson T., ‘Collective Management in the Nordic Countries’, in Gervais D., (ed.) *Collective Management of Copyright and Related Rights* (Netherlands: Kluwer Law International; 2006) pp. 257-258.

¹¹² Favale M., Homberg F., Kretschmer M., Mendis D., & Secchi D., *Copyright, and the Regulation of Orphan Works: A Comparative Review of Seven Jurisdictions and a Rights Clearance Simulation* (London: Intellectual Property Office; 2013) at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312779/ipresearch-orphan-201307.pdf pp. 1-104 at p. 23.

¹¹³ *Ibid.* See also, Riis T., & Shovsbo J., Extended Collective Licenses and the Nordic Experience – It’s a Hybrid but is it a VOLVO or a Lemon? [2010] Vol. 33, Issue IV, *Columbia Journal of Law and the Arts*, pp. 471-498.

¹¹⁴ Riis T., & Shovsbo J., Extended Collective Licenses in Action [2012] 43(8) *International Review of Intellectual Property and Competition Law*, pp. 930-950. Riis and Shovsbo state that the “balance of remuneration vis-à-vis foreign countries is not favourable to Danish right holders. In 2011, *Copydan* sent 10.6% of total remuneration to foreign rights holders, whereas only 0.5% of total remuneration was received from foreign collecting societies that manage rights for the same type of usage. To a certain extent, the imbalance in the flow of remuneration to and from foreign countries probably reflects the fact that the share of foreign works used in Denmark is larger than the share of Danish works used in foreign countries” (at pp. 946-947).

The rights holders not represented by the organisation have a claim for remuneration only against the organisation, not against the user. In other words, if a collecting society collects royalties for a non-member under an ECL scheme, the non-member has the right to claim the remuneration provided they are able to show their work has been used.

“The philosophy is that the commercial terms must be *prima facie* acceptable for unrepresented rights holders if they are negotiated and accepted by a representative rights holders’ organisations regarding the same type of works. Thus, the rights are obtained regardless of whether the rights holders of these works, e.g. foreign rights holders are ‘orphan works’ rights holders, are represented by the organisation”.¹¹⁵

As mentioned above, the Danish ECL scheme adopts a system within *specific* fields of use. These include:

- (1) Retransmission of radio and TV broadcasting;¹¹⁶
- (2) Retransmission of broadcasters’ archives¹¹⁷ (repeat broadcast and on-demand provision of own productions recorded before January 1, 2007);
- (3) Reproduction for educational use;¹¹⁸
- (4) Reproduction of descriptive articles in newspapers, magazines, etc., by business enterprises etc., for internal use for the purpose of their activities;¹¹⁹
- (5) Online transfer of texts via libraries;¹²⁰
- (6) Retransmission of radio and TV broadcasting for visually and hearing impaired persons;¹²¹
- (7) Reproduction of works of art in generally informative presentations;¹²²

¹¹⁵ Foged T., Licensing Schemes in an On-Demand World [2010] 32(1) *European Intellectual Property Review*, pp. 20-28 at p. 22.

¹¹⁶ Section 30 of the Danish Copyright Act was consolidated in 2010. It is understood that this includes a *retransmission* of radio and television broadcasts and not first time broadcasts. Broadcasters are not included in the ECL scheme, because they are not represented by the collecting societies. They conclude licensing agreement individually.

¹¹⁷ Section 30a.

¹¹⁸ Section 13.

¹¹⁹ Section 14.

¹²⁰ Section 16b.

¹²¹ Section 17(4).

¹²² Section 24a.

(8) Retransmission of works broadcast on radio and television.¹²³

Reform of the Law in 2008

The reform of the law in 2008 introduced a new ECL norm under section 50(2)¹²⁴, which included a *general* extended collective licence provision, subject to its approval by the Government, specifically, the Ministry of Culture.¹²⁵ The approval of the Ministry is typically granted on a specific agreement between a user and a specific collecting society. The agreement defines, among other matters, the specific use of the work.¹²⁶ This is an important limitation on how Section 50(2) has been used in practice – while it is a general provision it only produces very specific licences. In practice, therefore, collecting societies apply for approval prior to entering any agreement.¹²⁷

Section 50(2) permits rights holders to issue a prohibition against the use of their works towards any of the parties of the licensing agreement (Opt-out).¹²⁸ The prohibition to use the work must be issued personally and individually towards the user or the collecting society with specific indication of the work, which is the subject of the prohibition.¹²⁹ Therefore, no general prohibitions can be issued on the works of

¹²³ Section 35.

¹²⁴ Section 50(2) has been in force since 1 July 2008.

¹²⁵ Section 50(4).

¹²⁶ **Section 50(2)**–: “Extended collective license may also be invoked by users who, within a specified field, have made an agreement on the exploitation of works with an organisation comprising a substantial number of authors of a certain type of works which are used in Denmark within the specified field. However, this does not apply, if the author has issued a prohibition against use of his work in relation to any of the contracting parties”. See English Translation of the section at http://kum.dk/uploads/tx_templavoila/Lovbekendtgorelse%20af%20ophavsretsloven%202010%20engelsk.pdf at p. 18.

¹²⁷ Foged T., Licensing Schemes in an On-Demand World [2010] 32(1) *European Intellectual Property Review*, pp. 20-28 at p. 23-24.

¹²⁸ The opt-out option is included in many -but not all- copyright norms implementing the ECL. In addition to section 50(2) also sections 24a, 30, and 30a include an opt-out option. However, in most situations the opt-out option would be too costly for the system, and therefore rights holders do not have this option. Opting out is obviously possible only for known or reappearing right owners; in this case a work would not be -or no longer be- orphan. The collective agreement in fact includes both orphan and non-orphan works.

¹²⁹ The fact that the prohibition must be issued personally and individually means that a prohibition cannot be issued with binding effect by organisations etc., unless the rights holder has authorised these organisations to do so. The decision as to whether this is the case will depend on the general legislative rules of power of attorney. See, Foged T., Licensing Schemes in an On-Demand World [2010] 32(1) *European Intellectual Property Review*, pp.

A final version of this paper will appear in the European Intellectual Property Review (EIPR) in April 2016. Issue 4, Volume 38; pp. 208-220.

a particular author, for example, and no prohibition can be issued by an organisation.¹³⁰

This option is however seldom exercised in practice.¹³¹

Reform of the Law in 2014

The modernisation of the Danish Copyright Act was carried out in order to take into account the use of online TV, its use by third parties whilst encompassing new ways in which content is offered by broadcasters and exploited by TV (programme) distributors. The Consolidated Act was passed by the Danish Parliament on 17 May 2014 and entered into force on 29 October 2014.¹³²

In practice, TV distributors' on-demand /catch-up services have been licensed in Denmark since 2009 following the implementation of section 50(2), which provides for the 'general' ECL system.¹³³ The 2014 amendment improves on the previous scheme and moves 'forward with the times'¹³⁴, by expanding the ECL scheme and encompassing, amongst other things, "store TV services and various other on-demand exploitation of broadcasters' linear and on-demand offers by third parties using radio and TV programmes, including content from foreign broadcasters and exploitation online".¹³⁵

20-28 at p. 25; Riis T., & Schovsbo J., Extended Collective Licenses in Action [2012] 43(8) *International Review of Intellectual Property and Competition Law*, pp. 930-950 at p. 941.

¹³⁰ Foged T., Licensing Schemes in an On-Demand World [2010] 32(1) *European Intellectual Property Review*, pp. 20-28 at p. 25. Foged explains that the consequence of a prohibition being issued is that the said author's works cannot be exploited under the agreement resulting in the extended collective licence.

¹³¹ *Ibid.*

¹³² Act No. 1144 of 23 October 2014. English Translation of the Consolidated Act on Copyright 2014 (by Ministry of Culture) at <http://www.wipo.int/edocs/lexdocs/laws/en/dk/dk091en.pdf> The 2014 Act supersedes Consolidated Act No. 202 of February 27, 2010; Consolidated Act No. 763 of June 30, 2006; and Act No. 395 of June 14, 1995.

¹³³ See *supra* n. 126.

¹³⁴ Foged T., Danish Licences for Europe [2015] 37(1) *European Intellectual Property Review*, pp. 15-24.

¹³⁵ See English Translation of the Danish 2014 Act at <http://www.wipo.int/edocs/lexdocs/laws/en/dk/dk091en.pdf> See also, Foged T., Danish Licences for Europe [2015] 37(1) *European Intellectual Property Review*, pp. 15-24 at p. 17. Foged states: "On the whole the players in the TV distribution sector wished for an update of the existing licensing possibilities so that the new ways in which TV content is being distributed and consumed today are taken into account".

As such, the reform, which is reflected in section 35(4)-(7) of the Danish Copyright Act, aims to achieve the following:

“The proposed amendment of section 35 aims at ensuring that the extended collective licence in section 35 regarding simultaneous and unchanged retransmission of radio and television programmes in cable networks and other networks with wireless distribution of radio and television programmes is modified to take into account the technological development and the new on-demand exploitation possibilities available to third parties. The Ministry of Culture believes that there is a growing need for the set-up of a flexible way in which third parties may clear the rights to such types of services”.¹³⁶

Section 35(1) – simultaneous retransmission – and section 35(3) are not amended, however, section 35(4) clarifies that retransmission over the Internet which may not be encompassed by sub-section (1) is covered by the ECL¹³⁷ and includes on-demand use, store TV services and public performance as well as other types of exploitation that is relevant to copyright and needing clearance. Section 35(5) concerns only on-demand content offered online by a broadcaster which means that programmes which have not been broadcast (i.e., linear TV) and fall into the category of “on-demand-only programmes” may be encompassed by the new ECL.¹³⁸

As such, and as with the previous system, the new ECL scheme in sections 35(4) and (5) are also specific, even though they cover many types of third-party exploitation of radio and TV programmes and require approval from the Ministry of

¹³⁶ Bill No. 123, put forward on 29 January 2014 by the Ministry of Culture, p. 6, column 1.

¹³⁷ **Section 35(4)**– “Works broadcast by radio or television may in ways other than as provided in subsection (1) be reproduced by others provided that the requirements regarding an extended collective licence under section 50 below are met. Acts of reproduction and of making works available in such a way that the public acquires access to them at an individually chosen place and time; cf. section 2(4)(i), shall take place in connection with the broadcasting in terms of time”.

¹³⁸ **Section 35(5)** – “Works made available by a broadcasting organisation in such a way that the public acquires access to them at an individually chosen place and time, cf. section 2(4)(i), may be made available by others in such a way that the public acquires access to them at an individually chosen place and time, cf. section 2(4)(i), when they are made available in the same way and within the same period as they are made available by the broadcasting organisation and provided that the requirements regarding an extended collective licence under section 50 below are met. Acts of reproduction necessary to make them available may be carried out”.

Culture. Section 35(6) provides for the 'opt-out' provision¹³⁹ for the ECL set out in sections 35(4) and 35(5) and is available to an individual rightsholder who can issue a prohibition against exploitation of their work to any of the parties to the agreement (i.e., collecting society or the TV distributor).¹⁴⁰

The existence of a Copyright Licence Tribunal ensures a fair system in Denmark. The Copyright License Tribunal exists to make decisions regarding conditions of the ECL and the size of remuneration where it is found not to be reasonable. Section 35(7) ensures the continuity of this provision in relation to the ECL in 35(4) and 35(5).¹⁴¹

Ultimately, the Danish legislators have ensured that the new ECL "will remain relevant in times like the present where the technological and market situations are evolving very fast."¹⁴²

One Year On: Reflecting on UK's ECL Scheme and Learning Lessons from Denmark

As the UK moves ahead with implementing the ECL scheme, are there any lessons that can be learned from Denmark? One of the significant aspects of the Danish system is the flexible approach, which has been adopted in moving ahead with technological developments or in ensuring a fair ECL system, as discussed below.

For example, one of the noteworthy aspects of Denmark's ECL scheme is that the broadcasters' rights, in the TV field, are not encompassed in to one single ECL licence, which clears all the necessary copyright and related rights with a TV

¹³⁹ **Section 35(6)** – "The provisions of subsections (4) and (5) shall not apply if the author has obtained an injunction prohibiting the exploitation of the work by any of the parties to the licence agreement. The provisions shall not apply to rights held by broadcasting organisations".

¹⁴⁰ See, Foged T., Danish Licences for Europe [2015] 37(1) *European Intellectual Property Review*, pp. 15-24.

¹⁴¹ **Section 35(7)** – "If questions arise as to whether an organisation approved under section 50(4) hereof to conclude licence agreements covered by subsections (4) and (5) is imposing unfair conditions in connection with a licence, either of the parties may submit the question to the Danish Copyright Licence Tribunal (Ophavsretslicensnævnet), cf. section 47. The Tribunal may determine the conditions, including the amount of the remuneration".

¹⁴² Foged T., Danish Licences for Europe [2015] 37(1) *European Intellectual Property Review*, pp. 15-24 at p. 22.

distributor.¹⁴³ The reasons include (a) the complexity of encompassing broadcasters; and (b) the possibility for TV distributors to clear the rights with broadcasters on an individual basis.¹⁴⁴ Furthermore, since broadcasters are very much dependent on a well functioning licensing scheme for third party distribution of their content, the relevant licensing organisation¹⁴⁵ has been supportive of the recent reforms in Denmark.

Such a provision does not exist in the UK legislation and the UK does not specify *how* an ECL scheme should be used; as long as a CMO meets the authorisation criteria, they can set up an ECL scheme. Therefore, at the moment, it is not clear how broadcasters will clear their rights in practice when the ECL scheme is implemented. However, in terms of broadcasters' rights, the Danish system has much practical significance considering the complexity of licensing and the UK may wish to follow in similar footsteps in moving ahead with the ECL scheme.

A second interesting aspect of the Danish system is the approach to 'representativeness'. Whilst UK shied away from a specific threshold for representativeness and opted out of a '75% minimum', there continues to be a requirement for a 'substantial proportion of voting members' to exist before an ECL scheme can be considered by a CMO. As to what this means remains unclear and could pose problems for smaller licensing organisations as the threshold is indeed higher for CMOs, which do not hold a pre-existing collective licence. During the technical consultation¹⁴⁶ the Government accepted the views of the CMOs that the 'contractual benefits of membership need not be extended to non-members as the protection of non-members' in the legislation were deemed to be sufficient.¹⁴⁷

¹⁴³ **Section 35(1)**–: “Works which are broadcast wireless on radio or television may be retransmitted simultaneously and without alteration via cable systems and may in the same manner be retransmitted to the public by means of radio systems, provided the requirements regarding extended collective license according to section 50 have been met. *The provision of the first sentence shall not apply to rights held by broadcasters*” (2010 Act). Section 35(6) 2014 Act.

¹⁴⁴ Foged T., Danish Licences for Europe [2015] 37(1) *European Intellectual Property Review*, pp. 15-24 at p. 20.

¹⁴⁵ Union of Broadcasting Organisations (UBOD) Denmark. The equivalent in the UK was the Broadcasting Standards Commission which was replaced by the Office of Communications in 2003. See <http://stakeholders.ofcom.org.uk/broadcasting/>

¹⁴⁶ Technical Consultation on Draft ECL Legislation, November 2013-January 2014.

¹⁴⁷ See Part I of this paper.

The preparatory work of the Danish Copyright Act, states that adopting a system on the premise of a “substantial amount” of rights holders is misleading as it is not equivalent to an organisation representing a “majority” of rights holders. Furthermore, Denmark’s view is that such a system would be “impractical” for the simple reason that it would be difficult to establish whether such a condition would be satisfied because not all rights holders are members of collecting societies. Finally, if there are two or more organisations representing the same type of rights holder, it is obvious that neither collective will represent a majority of the rights holders if the organisations are of the same size.¹⁴⁸ The Cable Dispute Tribunal (*Norwegian Kabeltvistnemda*)¹⁴⁹ demonstrated the risks associated with the construction of a specific representation within collecting societies.

The difficulty of demonstrating representativeness has already been illustrated in a mass digitisation project undertaken by the Wellcome Library in the UK. During *Codebreakers*, the Wellcome Library digitised 1773 books relating to the history of modern genetics. They worked with ALCS and Publishers Licensing Society (PLS) to clear rights in the books selected for digitisation. Of the total selected, permission was denied for 12% of the works; rights holders did not respond in relation to 21% of the works, and 12% of the works were identified as orphan works. Out of the total works selected, 45% could not be made available through the collecting societies.¹⁵⁰ Under the conditions of an ECL, it would probably be difficult to claim representation with figures like these. Therefore the ‘representativeness’ element should be dealt with carefully and in doing so, the UK could learn from the manner in which Denmark has approached it.

A final and third noteworthy aspect can be highlighted in relation to the distribution of remuneration. In Denmark, in terms of remuneration from foreign countries, the

¹⁴⁸ Riis T., & Schovsbo J., Extended Collective Licenses in Action [2012] 43(8) *International Review of Intellectual Property and Competition Law*, pp. 930-950 at p. 937. Foged T., Licensing Schemes in an On-Demand World [2010] 32(1) *European Intellectual Property Review*, pp. 20-28 at p. 22.

¹⁴⁹ Case No. 1/2010 and Case No. 4/2010. The Tribunal held that “a substantial number of rights holders means a plurality of rights holders or approximately 50%; and an organisation that represents a substantial amount of Norwegian rights holders ... cannot also be presumed to represent a substantial number of authors of works that are used in Norway”.

¹⁵⁰ See Stobo V., Deazley R., & Anderson I. G., *Copyright and Risk: Scoping the Wellcome Digital Library* [2013] CREATE Working Paper, University of Glasgow, p.18. Available at: <https://zenodo.org/record/8380/files/CREATE-Working-Paper-2013-10.pdf>

figures represent that it is not favourable to Danish rights holders.¹⁵¹ For example, in 2011, *Copydan* sent 10.6% of total remuneration to foreign rights holders, whereas only 0.5% of total remuneration was received from foreign collecting societies that manage rights for the same type of usage.¹⁵² The “imbalance in the flow of remuneration” can be attributed to the fact that the amount of foreign works used in Denmark is larger than the amount of Danish works used in foreign countries. In the UK, the opposite could very well be true – with more British works being used outside of UK, than foreign works within the UK. Under the Danish ECL scheme, it is also interesting to note that remuneration is distributed to foreign organisations (as opposed to foreign rights holders) who have entered in to an ‘A-Agreement’ with *CopyDan*.¹⁵³ As CMOs begin to set up ECL schemes in the UK, it will be interesting to note the manner in which remuneration will be dealt with, in comparison to a system such as the one established in Denmark.

Looking Ahead to UK’s ECL Scheme?

One year since *The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014* came into force on 1st of October 2014¹⁵⁴, and at the time of writing this paper, none of the collecting societies have yet made an application to the Secretary of State to run the scheme.. However, some collecting societies have begun to lay the steps towards implementing the scheme.

This could be explained by the fact that, as mentioned above, the UK ECL regulations require that licensing organisations wishing to run such a scheme satisfy at least three main criteria, before they actually make an application to set up an ECL scheme. First, an interested organisation must prove that they have a ‘substantial proportion of voting members’ whose works they intend to license through the scheme. Secondly, their members must consent to it and thirdly, the collecting society has an obligation to publicise the scheme to those affected by it, so that non-members could opt out before the scheme begins.¹⁵⁵

¹⁵¹ Riis T., & Schovsbo J., Extended Collective Licenses in Action [2012] 43(8) *International Review of Intellectual Property and Competition Law*, pp. 930-950 at pp. 946-947.

¹⁵² *Ibid.*

¹⁵³ See *supra* n. 112.

¹⁵⁴ SI 2014/2588.

¹⁵⁵ See *supra* ‘The Application Process: Section 5(1) – 8(6)’.

Further details on these three criteria, amongst others, are also set out in a document published by the UK Intellectual Property Office, setting out guidance for licensing bodies applying to run ECL schemes.¹⁵⁶ Apart from providing guidance for ECL applications, the document details how collecting societies should publicise the scheme to all members through their websites; with the British Copyright Council (BCC) and with relevant rights holders groups.¹⁵⁷ Collecting societies that have reciprocal agreements with collecting societies abroad are encouraged to publicise the scheme through each of them.¹⁵⁸

A collecting society, which has got the process underway by publicising and seeking consent from its members, is the Authors Licensing and Collecting Society (ALCS).¹⁵⁹ ALCS, along with the Publishers Licensing Society (PLS) is a member of the Copyright Licensing Agency Ltd (CLA)¹⁶⁰ who has indicated that it intends to apply for an ECL to support the collective licences it provides to the education, business and public administration sectors. The initiative is being backed by its two members – ALCS and PLS. In 2015, ALCS ran a poll, which requested ALCS members' receiving CLA income to vote on the question of an ECL scheme.¹⁶¹ The application relates to CLA's 'blanket licences' which enable licensed organisations to copy limited extracts from the published materials, such as books, magazines and academic journals in their collections.¹⁶²

On the other hand, The Design and Artists Copyright Society (DACS) have the following statement on their website in relation to the ECL scheme: "we don't currently have plans to set up our own extended collective licensing scheme,

¹⁵⁶ UK Intellectual Property Office, *Extended Collective Licences: Guidance for Licensing Bodies Applying to Run ECL Schemes* (London: Intellectual Property Office; 2014) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/360120/extended-collecting-licensing-application-guidance.pdf

¹⁵⁷ *Ibid.*, Section 6: Publicity, at p. 6.

¹⁵⁸ *Ibid.*

¹⁵⁹ ALCS, Extended Collective Licensing – Members' Poll available at <http://www.alcs.co.uk/ALCS-Testing/Extended-Collective-Licensing>

¹⁶⁰ See, <http://www.cla.co.uk/>

¹⁶¹ ALCS, Extended Collective Licensing FAQ's, available at <https://www.alcs.co.uk/Documents/ECL-FAQ-final.aspx> The poll requested that ALCS members' receiving CLA income to vote on the question of the ECL application.

¹⁶² ALCS, Extended Collective Licensing – Members' Poll available at <http://www.alcs.co.uk/ALCS-Testing/Extended-Collective-Licensing> A Survey asking for members' permission can be found here <http://dotmailer-surveys.com/97762e-76141y69>

particularly as we have systems in place that are working well. But we are always keen to ensure that visual artists' rights and royalties are protected, so we will monitor the effects of this new legislation and keep our members updated".¹⁶³

It is clear that the setting up of the ECL scheme is a complex process, which requires a number of criteria to be met at the outset. With each collecting society taking its own stance on the matter, at present, it will be interesting to see how the scheme unfolds in time to come.

Conclusion

This paper outlines the development and coming in to being of *The Copyright and Rights in Performances (Extended Collective Licensing) Regulations 2014* on 1 October 2014 following the recommendations of the Hargreaves Review 2011 in Part One. Drawing a line through the consultation process; technical consultation on the draft legislation and the legislation itself, there is much to be applauded. Furthermore, the UK Intellectual Property Office's publication¹⁶⁴, setting out guidance for licensing bodies applying to run ECL schemes signals that the system is moving in the right direction.

However, in looking ahead to the future, there is much that UK's licensing organisations can learn from ECL schemes such as those in Denmark. Accordingly, Part Two of this paper took an insight in to one of the oldest ECL schemes – in Denmark – and questioned whether UK can learn any lessons from Denmark in looking ahead to the future. In relation to the latter point, the paper highlighted three areas drawn from the Danish system – broadcasters' rights; representativeness and remuneration, – which are noteworthy for licensing organisations as they prepare to set up ECL schemes in the UK. Whilst there should be room for flexibility in considering the representativeness element of ECL schemes, the system will benefit from further guidance, particularly in relation to broadcasters' rights.

¹⁶³ DACS, extended Collective Licensing at <http://www.dacs.org.uk/knowledge-base/ecl-frequently-asked-questions>

¹⁶⁴ UK Intellectual Property Office, *Extended Collective Licences: Guidance for Licensing Bodies Applying to Run ECL Schemes* (London: Intellectual Property Office; 2014) available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/360120/extended-collecting-licensing-application-guidance.pdf

A final version of this paper will appear in the European Intellectual Property Review (EIPR) in April 2016. Issue 4, Volume 38; pp. 208-220.

Part Two of this paper also analysed the regulations, which have now been in place for more than one year and explored the progress of the licensing organisations in implementing an ECL scheme. It is interesting to note that whilst CMOs such as ALCS and PLS are moving ahead with putting in place the necessary steps for implementing an ECL scheme, DACS has not yet committed to it whilst other collecting societies have been silent about the process. As we move to the second year of the regulations being in force, it will be interesting to see the response from CMOs in setting up ECL schemes in line with the arguably stringent conditions, which have to be met.

In concluding this paper and in looking ahead to the future, it is vital to recognise the importance of the Hargreaves recommendations leading to copyright reform and the implementation of the ECL regulations in the UK, which is a step in the right direction. At the same time it is also important to appreciate the complex nature involved in setting up such a scheme, which can prove time-consuming as outlined above. Understanding such challenges on the one hand whilst learning lessons from an established system such as Denmark on the other will prove useful as the UK prepares to embrace a new ECL system within its copyright framework.