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**Digital Libraries and Extended Collective Licenses**  
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**Outline**

- What is the copyright challenge for digital libraries?
- European initiatives
- The Nordic system of extended collective licenses (ECL)
- ECLs and digital libraries
- Challenges and interim conclusions

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- **The purpose of libraries is:**
  - to give access to and preserve the cultural heritage

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- “Increasingly if library content is not found on the Web, it effectively does not exist for many potential users”
  - Dame Lynne J. Brindley, the Chief Executive of the British Library

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### The copyright challenges for digital libraries

- Making digital copies is **reproduction** and giving on-line access to digital copies is **communication to the public**
  - requires license or exception
- **Exceptions** for libraries are mainly for the analogue world
- The **territorial nature** of copyright

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### The copyright challenges (cont.)

- Obtaining individual multi-territorial **licences**
  - for the digital use of in-copyright works held by libraries
  - is complicated, time-consuming and costly.
  - and impossible in the case of „orphan works“
- **Which leads to the danger of the 20<sup>th</sup> century “black hole” ...**

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## The 20<sup>th</sup> century “black hole”

- Cultural material **from before 1900** is accessible on the web, but very little material from the more recent past
  - In October 2010 the oldest work in copyright in the British Library dated from 1859
  - 100 times as much information has been created since 1945 as in the whole of human history up to that point

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## What has been done in the EU?

- The i2010:Digital Library Initiative was started in 2005
  - Europeana
  - The Memorandum of Understanding (MoU)
    - on key principles on the digitisation and making available of **out-of-commerce works**
  - Directive 2012/28/EU
    - on certain permitted uses of **orphan works**.



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## Can ECLs address the copyright issues facing digital libraries?

- Impracticability of individual licensing for mass use
- The issue of orphan works
- The question of territoriality and cross-border effect of licenses

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## The Nordic ECL system ...

- ECL is a **license** for the use of
  - in-copyright works
  - in a **specified field**
  - based on an **agreement** that a CMO negotiates with a user and
  - which is **extended** to rightholders that are not members of the CMO

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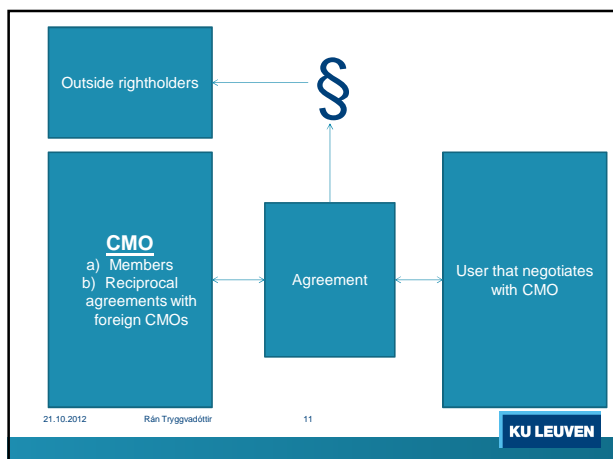
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## Requirements for CMOs that can conclude ECLs

- The CMOs that are able to conclude ECLs have to be representative of **“a substantial number of authors of a certain type of works which are used”** in each respective country
  - Reciprocal agreements with foreign organisations in the same field should secure representation of foreign rightholders
  - Government authorization for CMOs
  - One or more CMOs in each field?

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### What are the benefits of ECLS?

- ECLs are useful where
  - There is **mass use** of in-copyright works and it is in the interest of society that such use is legally possible
  - Individual licensing not practically feasible nor collective licensing because of cost of finding **outside** rightholders, especially for „**orphan works**“
  - When either
    - **free use** based on **exceptions** or
    - **compulsory licenses**
 are deemed to be too far reaching limitations

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### How are the interests of “outsiders” secured in ECLs?

- They have the **same right to remuneration** as members of the CMO
- They have a right to **claim individual remuneration**
- In some cases they have the right to **opt out**
  - The right to opt out varies in the Nordic provision on ECLs
    - The ECL agreement can have an opt out clause even if the provision does not have an opt out clause

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### Criticism of and challenges for ECLs

- It is a **limitation** on the exclusive rights of outsiders
- Too much **opting-out** can make the system unviable
- **Foreign outsiders** have limited possibility to claim their rights
- The system of ECLs is **not universally applicable**

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### Are ECLs compatible with EU legislation?

- Recital 18 of the Infosoc directive
  - This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences.
  - Does this mean all ECLs?
- Service Directive
  - Does governmental authorisation of one or more CMOs to administer ECLs in a specific field go against Art.16 of the Directive on freedom to provide services or does the exception in Art. 17(11) apply to the CMOs?

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### ECLs and libraries

- All the Nordic countries, except Iceland, have an ECL provision for libraries
  - Norway has the widest ranging provision:
    - Article 16a: "Archives, libraries and museums ... can make copies of published works in the collections and make such works available to the public if the conditions of the extended collective licence ... are fulfilled."
    - Does not contain an opt out clause

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### ECLs and libraries: The Bookshelf project in Norway

- ECL Agreement between the Norwegian National Library (NNL) and a reproduction right CMO
  - To make books published in Norway before the year 2001 available on their webpage
    - with a Norwegian IP address.
    - Viewing only of in-copyright works
    - There is an **opt-out** clause in the agreement
  - Remuneration is per page per year

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## ECLs and digital libraries ...

- Relieves libraries of **individual** rights-clearance
  - ... ECL agreement binding for members of the CMO and outsiders because of the ECL provision
- The issue of **orphan works** becomes irrelevant for libraries
  - ... as the CMO will deal with finding right-holders to pay remuneration
  - however, not free use for orphan works as under the OWD ...
- But what about **cross-border** effect?

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## ECLs and libraries: the cross-border issue ...

- Rightholders usually assign the worldwide exploitation rights to CMOs
  - ECL agreement by a national public library with a national CMO **could** provide for a worldwide non-exclusive license of making works available,
    - for **nationally** published literary works
    - for non-profit purposes
    - Safeguard measures

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## Cross-border issues ...

- What about use of others than end-users?
  - For example linking by Europeana ...
  - Or search engines ...
- The issue of linking is not resolved and has been referred to the ECJ

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## Other challenges ...

- The “long tale” theory
- The strong position of English
- Will use of an „opt-out“ render ECL agreements futile?
- Lack of representative CMOs in the area of text?
- Lack of good governance and trust of existing CMOs
- What about the proposed CMO Directive?
- What about the OWD?

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## Interim conclusion

- ECLs are a limitation on the exclusive right of outsiders
  - Have to fulfill international norms for exceptions
    - Opt-out
- Can be used for cross-border use by libraries
  - For national works licensed by national CMOs that have a worldwide exploitation mandate
    - Non-commercial use
    - Published or works made public
- Needs national ECL provisions
  - and provisions on good governance and transparency of CMOs

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## Interim conclusion (cont.)

- ECLs for general cross-border use for all right-holders, including national and foreign outsiders
  - Question about the three-step test
  - Requires national and EU legislation
    - ECL provisions
    - cross-border effect and
    - minimum requirements of CMOs and transparency

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- Comments, observations and questions ...

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