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Comments on:

Creative Content in a European Digital Single Market: Challenges for the Future. A Reflection Document of DG INFSO and DG MARKT (22 October 2009)

The National Libraries of Denmark, Finland, Iceland, Norway and Sweden are mandated to collect and preserve all documents in each country containing generally available information. The National Libraries' collections consist of millions of items and millions of hours of audio and motion picture recordings.

The collections are available to the public, who can visit each national library to request and get access to the material. The National Libraries of the Nordic countries now face a major challenge in meeting the needs of researchers, students, consumers and people with disabilities in a way which corresponds with the digital age as well as making the collections available for reuse by other stakeholders.

The National Libraries of Denmark, Finland, Iceland, Norway and Sweden support the comments on the ideas raised in the reflection document in the response submitted by the Conference of European National Librarians (CENL), but would like to submit additional comments on the document specifically as regards extended collective licensing (ECL) and orphans works.

5. Possible EU Actions for a Single Market for Creative Content Online

5.1 Consumer access

Extended collective licensing/orphan works

In the document: *Communication from the Commission: Copyright in the Knowledge Economy*, point 3.1 (*Next steps*), the EU Commission mentions the ECL as one possible solution to the problems faced by libraries. The core issues which emerged in the document concerned the mass-scale digitisation of materials held in the libraries' collections and the dissemination of electronic copies to users. These issues are still very much valid.

The National Libraries in the Nordic countries have rich collections built up over the centuries. The collections offer great opportunities for creativity and should be made use of to a greater extent. For the time being, the National Libraries are holding a great number of works which cannot be copied or otherwise used due to the fact that right holders cannot be identified. The main solution of the issues with orphan works, and possibly also out-of-print works, which the National Libraries advocate is ECL. The Nordic countries have a long tradition in managing rights on a collective basis by ECL.

The use of extended collective license in Norway and Sweden

Examples of the actual use of ECL in the Nordic countries, are the Norwegian project *bokhylla.no* (*The Bookshelf-project*) and the Swedish project *Sveriges Digitala Bibliotek* (*The Swedish Digital Library*).

The ECL contract regarding the digital dissemination of books in Norway (*bokhylla.no/The Bookshelf-project*) was established on April 23, 2009, between The National Library of Norway on the one hand, and Kopinor, an organization of copyright holders, on the other hand.

The project relates to printed books published in Norway during the years 1790–1799, 1890–1899 and 1990–1999, including translated literature. The ECL covers the copyright-protected material, up to 50 000 books with an estimated average of 185 pages. The material is available as individual pages in a digital format to be viewed on a computer screen, for users with Norwegian IP addresses. The users are able to search in the text and search for covers, title pages and tables of

contents, as well as to browse sequentially through individual pages. The users are not able to download or print any copyright-protected material.

In Sweden, a unique document – *Sveriges Digitala Bibliotek (The Swedish Digital Library)* – was recently signed by representatives from the National Library of Sweden, The Swedish Writers’ Union and The Swedish Publishers’ Association. The purpose of the document is cooperation concerning digitisation of the Swedish literary heritage. Older literary works will be digitised and made available on the website of the National Library of Sweden. Books that cannot be bought in printed form or as e-books will be made available to the consumers for free. The Swedish Writers’ Union and The Swedish Publishers’ Association will work to ensure a simple and effective clearing system concerning copyright.

A prerequisite for the project to be realized is that the Swedish Government decides to introduce regulation concerning ECL.¹ The contractors all agree that terms for making the books available online should be regulated by ECL. It should also be mentioned that it is essential that the National Library of Sweden, which will be responsible for the practical work of the digitisation and making works available, receives increased financial resources, through both private and public initiatives, in order for the digital library to become a reality.

The need of partnerships between public and private bodies

In general, the major work with digitising millions of works will need private sector support and recognition of partnerships between public and private bodies. If public private partnership (PPP) are to be realised, a possibility to enter into ECL is required. An exception by law will not be sufficient.

The nature of the extended collective licence

The reflection document focuses on the applicability of the ECL and states “orphan works would only be included in an extended collective licence scheme after a diligent search has confirmed their orphan status”.

The fundamental idea of ECL is that the party representing the right holders is representative of all right holders of the type of works included in the license agreement. This is a prerequisite for the

¹ The Swedish Government is currently reviewing the Swedish Copyright Act. In particular, the Government considers the possibilities to introduce regulation concerning extended collective licensing.



collecting society to be authorised to enter the agreement in order to ascertain that the license agreement will take into account the adequate protection of the creators' rights and will not prejudice their commercial interests unreasonably. There is, therefore, no reason for having special restrictions for using extended licenses agreements in the cases of orphan works

On the contrary, the introduction of ECL completely circumvents the issue of orphan works. It becomes irrelevant whether a work included in an ECL-agreement of, say out-of-print works, is also an orphan work.

It should be pointed out that neither an ECL-agreement nor a diligent search mechanism has to be in place in order to *digitise* any material. The National Libraries can according to the Directive 2001/29/EC digitise a work that is part of the libraries' own collections.

The Nordic response does question the economical benefits of a clearance system based on diligent search mechanisms versus the remuneration costs in a standard ECL-model. When diligent search expenses are accumulated, these expenses will probably exceed the costs of an ECL. Also, an ECL does provide legal certainty.

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