

EBU

**EXTENDED
COLLECTIVE
LICENSING**

A VALUABLE
CATALYST FOR THE
CREATIVE CONTENT
ECONOMY IN
EUROPE

QUESTIONS AND ANSWERS ABOUT THE FUNCTIONING OF ECL

- What is collective rights management?
- What does extended collective licensing (ECL) mean? What is “extended” as compared to other types of collective rights management?
- Does ECL mean less individual rights for rights holders?
- Do ECL systems comply with international and EU copyright and competition rules?
- Which conditions must be met to enable extended collective licensing?
- How does ECL work in practice? What types of use does it allow?
- Is ECL suitable only for the Nordic countries, or can it be applied in any EU Member State?

What is collective rights management?

Authors (writers, film directors, composers...), performers (actors, singers, musicians...), film and music producers enjoy respectively authors' rights and neighbouring rights. As a general rule, all rights holders have the right to authorise or prohibit the use of their creative content and attach certain agreed conditions to their use. In certain specific cases, however, such as for the broadcasting of sound recordings, the performers and producers of such recordings are entitled by law to receive equitable remuneration, to be administered on a collective basis, but otherwise cannot prohibit that specific use.

For certain types of use, individual management of rights is practically impossible. Should a musical composer have to individually contact every single radio or television station, every restaurant and club to negotiate licences - i.e. authorisations for use - and remuneration for each use of his works, he could simply forget about writing music and become a full-time negotiator! Conversely, it is not possible for a broadcasting organisation to seek permission on an individual basis from every author whose works are used. Collective rights management, which can be defined as the exercise of copyright and neighbouring rights by organisations (collective rights management organisations) acting in the interest and on behalf of the owners of rights, therefore offers a valuable practical service for both parties.

There are various kinds of collective management organisations depending on the category of works (music, dramatic works, films, etc.) and the category of uses (public performance, broadcasting, reproduction...) involved. Their key function is to facilitate dissemination of works, at lower transaction costs than with individual licensing, and to administer the remuneration collected from the users and distributed to the rights holders. It saves a tremendous amount of time, costs and hassle. Collective rights management organisations have a duty to keep the rights holders informed about the way they manage their rights, as well as to collect remuneration from the users and distribute it to the rights holders.

What does extended collective licensing (ECL) mean? What is “extended” as compared to other types of collective rights management?

The term “extended collective licensing” is often misunderstood. It does not make collective licensing compulsory by law; nor does it mean that collective licensing should extend to all types of use.

The term “extended” simply means that the licence (authorisation for use), granted by a collective rights management organisation on behalf of its members, is extended by law to cover also all non-member rights holders of the same category. Thus the provisions of an ECL agreement cover not only the individual mandates given to them by the members in their membership agreement, but is extended by law to encompass also other rights holders of the same category which are not members of the collective rights management organisation.

In practice it is often used for clearing of rights for mass use. For instance authorisation for Internet use of a bunch of audiovisual programmes would be delivered to a broadcaster by an authors’ collective rights management organisation for all authors concerned, including those who are not members of that collective rights management organisation.

Does ECL mean less individual rights for rights holders?

The answer is clearly no.

Like for other types of collective rights management, the collective rights management organisation has a mandate to authorise the use of a certain repertoire, for a given type of use, in full respect of the law. The specificity of ECL resides in the fact that the mandate to represent rights holders who are not members of the collective rights management organisation is given by a national authority or follows directly from the requirements under the law.

ECL systems remain voluntary: both the user and the rights holders must agree on contractual provisions. For that purpose, collective rights management organisations need to request a mandate from their members. Finally, any non-member rightholder who would not wish to be part of this agreement retains the possibility to opt out. Use under the terms of an ECL is thus subject to authorisation and to payment to the rights holders; at the same time, the users have the legal certainty that they are allowed to use the copyright-protected content.

Do ECL systems comply with international and EU copyright and competition rules?

Yes. ECL-agreements have been in existence for years in a number of European countries, in accordance with Community law and international treaties (Berne and Rome conventions notably) on authors' rights and neighbouring rights. The EU Directive 1993/83 on satellite broadcasting and cable retransmission explicitly allows for such systems to be maintained or put in place in any Member State. Also the Directive on copyright and related rights in the information society (Infosoc Directive 2001/29/EC) expressly acknowledges the validity of these systems.

ECL systems are lawful instruments already set up by a number European Member States. Academic research¹ has addressed their compliance with European and international law and it is now widely recognised that, subject to clear provisions in national laws and good governance of collective rights management organisations, ECL is clearly compatible with European and international law.

¹ See notably IViR Report "Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage?" prepared for Europeana Connect by Johan Axhamn and Lucie Guibault, August 2011, pp 44-55 (http://www.ivir.nl/publicaties/guibault/ECL_Europeana_final_report092011.pdf).

The report addresses in detail the compatibility between ECL schemes and international rules in the Berne convention, TRIPS and WTO agreements, as well as between ECL schemes and the European legal framework.

Which conditions must be met to enable extended collective licensing?

A certain number of rules and conditions must be framed in the law of any given country to allow collecting societies to offer extended collective licensing on a voluntary basis. The type of use covered and the rightholders' category concerned by the extended licence must be clearly defined, either by law or within the licence agreement.

Any collective rights management organisation must fulfil a key condition: it must be strongly representative of the certain category of rights holders within its field. It must also be capable of remunerating rights holders who are members of a foreign collective rights management organisation through agreements with the latter.

Transparency and effectiveness in terms of licensing conditions, tariffs setting, administrative costs, rules for distribution of remuneration are other important requirements for such rights management organisations. This should be subject to regular supervision by a national authority.

All rights holders concerned, members and non-members are remunerated under equal treatment rules, and any non-member rightholder who would not wish to be part of this agreement is free to opt out at any time. In addition, collective rights management organisations have a duty to search for any author or other rightholder who cannot be identified or located at the time when the licence for use is granted. The remuneration reserved for this rightholder shall be kept aside during a minimum number of years so that all chances are given for the rightholder to be informed and paid.

In this way, the user is able to legitimately use a given entire repertoire as soon as it has received authorisations for each category of rights holders (usually authors, performers and producers). The licensing procedure can thus be relatively easy and quick, while all rights holders of the category concerned - members and non members of the collective rights management organisation - are guaranteed remuneration for the agreed use.

How does ECL work in practice? What types of use does it allow?

Like for 'traditional' collective rights management, ECL is based on prior authorisation for use of creative content against payment to the rights holders. It is neither a tax nor a levy system. Tariffs are set and reviewed according to national rules, most often on the basis of negotiations between representatives of users and rights holders.

ECLs were first introduced in the 1960's. Over the years, the ECL model has expanded to a variety of uses: primary broadcasting, simulcasting (Web TV), retransmission of broadcasts, reprography of prints, reproduction of music or audiovisual material for teaching or scientific research purposes, on-demand streaming of archive productions such as out-of print books, use of clips from archive productions in new productions, etc. Not only broadcasters, but also educational establishments, public libraries, civil authorities... use ECL for licensing a wide range of uses.

ECL should be applied only for clearly defined categories of content and types of use, in situations where there is an obvious need for collective licensing, i.e. where individual licensing would not be feasible or would be clearly disproportionate to the massive number of rights holders involved. It is also desirable in cases where authorisations for uses would be blocked as soon as one rightholder (out of many) was not represented (not member of a relevant collective rights management organisation) or was missing (not identified or not locatable).

Is ECL suitable only for the Nordic countries, or can it be applied in any EU Member State?

ECL is completely neutral, as it entirely depends on the agreement between the parties involved. It is in principle applicable anywhere, provided that proper management of the rights holders' rights is ensured. ECL systems in the Nordic countries are designed in varied ways, and some elements thereof can be found in various other EU countries like Poland, Germany or the Czech Republic. Provisions enabling a voluntary system of ECL are also currently discussed in France, and in the UK they have been included in draft legislation currently being considered by Parliament (Enterprise and Regulatory Reform Bill 2012).

ECL is also compatible with the cross-border use of content: via the traditional network of bilateral agreements (or via multi-territorial licensing if relevant), collective rights management organisations can deliver authorisations to users outside their national borders.

Compliance with instructions set by the legislator is a prerequisite for all collecting societies to have the mandate to conclude ECL collective agreements. Consequently, ECL systems introduce clear incentives for the collective rights management organisations to meet the necessary requirements.

The European internal market would benefit from having a common licensing toolkit for national ECL systems to be introduced and implemented in Member States. Member States would be given the impulse to set up such systems in order to allow its use in situations where they deem it appropriate.

Use of this scheme would at present be particularly useful for broadcasters and for rights holders' representatives to agree on conditions for making broadcasters' archives available to the public on the Internet throughout Europe. Unlike other types of works, each audiovisual work usually involves a high number of rights holders. Major broadcasters have very rich archives, which could be used by broadcasters if all necessary authorisations from the rights holders are obtained. ECL enables both members of a collective rights management organisation and all other relevant rights holders to be remunerated, while protecting their interests at the same time. This would ultimately benefit all European citizens interested in viewing or listening to this rich cultural content.

EXTENDED COLLECTIVE LICENSING:

- offers economic and practical benefits for rightholders and users
- is compatible with international and EU law and is in principle fully implementable in EU Member States' national legislation
- is a catalyst to the development of online services in Europe
- can facilitate EU citizens' access to archive footage.

The promotion of extended collective licensing schemes can greatly facilitate the development of offers of creative content in the Single Market and the possibility for broadcasters' to make their archives available to the public on the Internet. This would ultimately benefit all European citizens as well as right holders and users of music and film.

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