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A Collective Licensing Scheme for Lending of Phonograms from Digital Libraries

1. Introduction

Copyright law has always been shaped by the technology of the day. Each new technological development has brought with it discussion of the necessity of renewing the corresponding legislation, followed, as a rule, by changes in laws and regulations. The same holds true with rights related to copyright (below referred to also as related rights). In this process, the position and strength of right-holders has been one of the decisive factors.

The various social and economic implications of the information society serve controversial aims. They require that the specific traditional and well-established (exclusive) rights of right-holders be taken into account. At the same time, it is essential to encourage global exchange of information and development of culture, science, and education.

The main difficulty has, throughout history, laid in finding the appropriate balance among the interests of the right-holders, the users of protected content, and the general public, and that holds today too, as it probably will in the future. In this article, the author concentrates on the legal issues related to the lending of phonograms from digital libraries. When establishing the rules of digital libraries and opportunities for using copyrighted content in the everyday activities of these institutions, one is bound to the current legal framework. The creation of digital libraries brings with it a very crucial legal debate as to whether it would be balanced to limit the existing exclusive rights of right-holders and to what extent this would be justified. Can the balance be based on thinking in old categories ('old thinking'), or should we start an era of 'new thinking', based on different concepts and preferences? The issue concerning digital libraries is one of the challenges for this 'new thinking'.

The author of this article holds the opinion that it should be possible in the digitalised dimension of the global environment to access copyrighted content easily via the Internet in order to use it for scientific, research, educational, and cultural purposes. The possibility of lending the phonograms is important mainly for cultural diversity and development but also serves entertainment purposes. It is difficult to draw a line between cultural purposes and entertainment purposes, just as it is impossible to determine the exact objective of every person accessing the phonograms made available in digital libraries—though, in comparison with books, the phonograms are more likely to serve an amusement or hedonistic purpose.

The necessity of the creation of digital libraries has been under discussion in the European Union for some years now. In 2008, the European Commission issued the Green Paper on Copyright in the Knowl-

edge Economy, which deals also with issues related to digital libraries.^{*1} The purpose of that document was to foster debate on how knowledge for research, science, and education can best be disseminated in the online environment. Copyright ensures the maintenance and development of creativity in the interests of authors, producers, consumers, and the public at large. The Green Paper is aimed at addressing the issues in a traditional 'old' and balanced manner that takes into account the perspectives of right-holders, groups of users, and the general public.

At the EU level, two main projects related to digital libraries have been launched so far—the Europeana Project^{*2} and the Arrow Project.^{*3} The goal of the Europeana Project is to make Europe's cultural and scientific heritage accessible to the public. The main aim of the Arrow (Accessible Registries of Rights Information and Orphan Works towards Europeana) Project is to enable libraries as well as other users to obtain information on who the relevant right-holders are, which the relevant rights concerned are, who owns and administers them, and how and where one can seek permission to digitise the work and/or make it available to user groups.

This article concentrates on some fundamental questions of lending of phonograms from digital libraries and its differentiation from the public lending right exercised in the analogue environment. The main problem is that, whereas the phonogram producers do not enjoy an exclusive public lending right in most EU countries, the making available and reproduction rights of phonogram producers that are being exercised in lending of the phonograms from digital libraries are granted as an exclusive right that requires the digital library to obtain a licence from every single right-holder.

The author contends that, as far as lending of phonograms from digital libraries is concerned, the rights of different stakeholders are at the moment in imbalance and there should be a solution for overcoming this imbalance. The main focus of this article is on finding the solution for balancing the rights of different stakeholders (phonogram producers, digital libraries, and the general public) in a digital environment—i.e., how to enable the public to access the phonograms in digital libraries without unreasonably limiting the exclusive rights of phonogram producers to make available and reproduce the material. The author analyses whether the lending of phonograms from digital libraries should be subject to a collective licensing scheme (compulsory or extended).

2. Public lending right in the analogue environment

The concept of 'phonogram' is a jumping-off point for considering the topic of this article. The legal definition of 'phonogram' derives from Article 2 (b) of the WIPO Performances and Phonograms Treaty^{*4} (hereinafter referred to as the WPPT). The WPPT provides that a 'phonogram is the fixation of the sounds of a performance or of other sounds, or a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work'.

The term 'fixation' is technology-neutral, in that it is not limited to particular forms of fixation such as discs, vinyl records, cylinders, and other forms in which phonograms have been historically embodied.^{*5} According to the legal definition contained in the WPPT, the fixation may also be of 'representation of sounds', which covers the case of phonograms produced by means of digital technology that fixes data and that can be used to generate sounds through use of the appropriate electronic equipment even though no sounds have yet been reproduced as such.

In the definition given by WIPO, the term 'lending' means the transfer of possession of a copy of a work or an object of related rights for a limited period of time for non-profit-making purposes. Unlike rental, lending, in general, is not covered by any international norms for the protection of copyright and related

¹ Green Paper on Copyright in the Knowledge Economy, Brussels, COM(2008) 466/3. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0466:FIN:EN:PDF> (9.10.2011).

² See more information available at <http://www.europeana.eu/portal/>.

³ See more information available at <http://www.arrow-net.eu/>.

⁴ The Republic of Estonia ratified WPPT on 16.7.2006. See: Maailma Intellektuaalse Omandi Organisatsiooni esitus- ja fonogrammipingu ratifitseerimise seadus (Ratification Act of WIPO Performances and Phonograms Treaty). – RT II 2006, 14, 40 (in Estonian). English text available at http://www.wipo.int/treaties/en/ip/wppt/trtdocs_wo034.html.

⁵ M. Fisor. *The Law of Copyright and the Internet. The 1996 WIPO Treaties, Their Interpretation and Implementation*. Oxford University Press 2002, p. 1241.

rights.⁶ WIPO defines rental as the transfer of the possession of a copy or a work or an object of related rights for a limited period of time, and for direct or indirect economic or commercial advantage.⁷

Article 13 of the WPPT stipulates that producers of phonograms shall enjoy the exclusive right of authorising the commercial rental to the public of the original and copies of their phonograms, even after distribution of them, by or pursuant to authorisation by the producer.

The public lending right of phonogram producers as a right independent of rental right is not provided for in international treaties concerning copyright and related rights. The European Union already in 1992 adopted a directive⁸ regulating issues related to the public lending right of phonogram producers.

Mainly in the law of the EU Member States, the right-holders enjoy public lending right subject to various limitations. The legal basis for phonogram producers' public lending right is at the moment quite weak, since phonogram producers enjoy the public lending right only in those countries whose national legislation has introduced it.

For instance, since 15 May 2008, under the Estonian Copyright Act⁹, phonogram producers have not had the right to prohibit the lending of copies of phonograms from libraries, but they are entitled to receive remuneration for such lending. According to §13³ of the Estonian Copyright Act, 'home lending' is prohibited, unless the phonogram has already been legally distributed in Estonia for more than four months. This term may be reduced with the consent of the right-holder. The remuneration will be paid to the collective societies managing the respective rights.

When the concepts of 'rental' and 'lending' rights are under discussion, it is important to note that both of these rights are closely related to the concept of 'distribution', which is the most decisive factor when one is drawing distinctions between lending phonograms from libraries in an analogue environment and lending phonograms from digital libraries.

The term 'distribution' in the broader sense means the making available of the original or copies of a work or an object of related rights to the public (i) by sale or other transfer of ownership or (ii) by rental, lending, or other transfer of possession. In a narrower sense, it is the making available of the original or copies of a work or an object of related rights to the public by sale or other transfer of ownership.¹⁰

Article 1 (d) of the Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms defines 'distribution to the public' as meaning any act by which duplicates of a phonogram are offered, directly or indirectly, to the general public or any portion thereof. Article 12 (1) of the WPPT provides that producers of phonograms shall enjoy the exclusive right of authorising the making available to the public of the original and copies of their phonograms through sale or by other transfer of ownership.

At the level of national legislation, the concept of 'distribution' is given different meaning, either according to its broader sense or in the narrower sense. In Estonia, the distribution right and the rental and lending right have been separated. Clause 70 (1) 3) of the Estonian Copyright Act stipulates that a producer of phonograms has the exclusive right to authorise or prohibit the distribution of said phonograms to the public, and §70 (1) 4) of the Estonian Copyright Act grants a phonogram producer the exclusive right to rental or lending of copies of the phonograms. The author concludes from the foregoing that a separate right of rental and lending is granted through an exception to the exhaustion of the right of distribution with the first sale of (or other first transfer of property in) the copies concerned in respect of their rental.

The principle of exhaustion of rights has been developed in order to avoid conflict of interest between the copyright-owner and the owner of a physical copy of the work.¹¹ Since there is no distribution of physical copies in the digital environment, the author of this article agrees with the opinion that the above-mentioned principle could not cover the public lending of phonograms from digital libraries and, therefore, will not analyse the principle of exhaustion of rights further in this article.

⁶ Guide to the Copyright and Related Rights Treaties administered by WIPO and Glossary of Copyright and Related Rights Terms. WIPO Publications No. 891(E) 2004, p. 294.

⁷ *Ibid.*, p. 307.

⁸ Council Directive 92/100/EEC of 19 November 1992 on Rental Right and Lending Right and on Certain Rights Related to Copyright in the Field of Intellectual Property.

⁹ Autoriõiguse seadus. – RT I 1992, 49, 615; RT I, 6.1.2011, 34 (in Estonian).

¹⁰ WIPO (Note 6), p. 238.

¹¹ P.-L. Haarmann. Tekijänoikeus ja lähioikeudet. Helsinki 2005, p. 166.

The author of this article considers it to be clear that, whether or not the national legislation differentiates between lending and rental rights, most Member States' libraries are authorised within the current legal framework to lend phonograms in the analogue environment quite easily in order to enable the public to access the protected content. As discussed above, in Estonia, the issues related to lending rights in the analogue environment are regulated by uphold the highest standards in the promotion and protection of human rights, and shall fully cooperate with the §13³ of the Estonian Copyright Act.

The author of this article holds that Article 5 of the rental and lending directive mentioned above gives EU Member States very large scale authority to limit the public lending right of authors and other right-holders. According to said directive, there is no strict harmonisation of public lending rights within the EU. Member States have the right to establish their own legal schemes in this field. This is the reason the corresponding copyright regulations concerning the lending right vary greatly from one Member State to the next, yet in most of the EU's Member States the libraries enjoy the right to use phonograms in public lending quite easily.

3. Lending of phonograms from libraries in the digital environment

There are opinions that since, in practice, the lending of phonograms in digital format has the same substance and meaning as the lending of phonograms as physical copies, it would be reasonable to apply the same rental and lending right also in the digital environment.^{*12} At the same time, there are opponents to this approach who claim that the rental and lending must be regarded strictly as the transfer of possession of phonograms that are in physical form.^{*13}

In an analogue environment, a copy of the phonogram not only is the embodiment of it but also constitutes the object of the transaction. With the Internet, ownership of physical copies is no longer transferred. This makes it very difficult to monitor the circulation of copies, as well as to determine whether the copies are made available with the authorisation of right-holders.^{*14}

Phonograms in digital format may be stored locally on the computers of the library or accessed remotely via computer networks. In an analogue environment, the phonograms are located only on the premises of public libraries; this means also that their use is restricted and monitored according to the internal rules of the library in question.

When considering the issues related to lending of phonograms from digital libraries, one has to conclude that the rights of public lending and rental are not involved anymore. The use of phonograms accessible through digital libraries is covered by the right of reproduction and making available.

The substance of the latter right is basically to unite the right of reproduction and that of communication. These two rights are exercised simultaneously when protected content is made available on the Internet, since its communication to users necessitates several acts of reproduction, on different sites, during transmission over the network.^{*15} In fact, in definition of the right of making available, the means and devices by which the phonograms have been made available have no importance.^{*16} The situation described above can be cited as an example of how technological developments and basic principles of copyright law are being confronted. Recent developments in the global information society in these areas have great impact also on the genesis and various changes of copyright law.

The digitisation of the phonogram, as well as its upload and download to and from a computer or to and from the server, constitutes an act of reproduction.^{*17} Therefore, digitisation does involve the exploitation

¹² P. Vandoren. – Future of Copyright in a Digital Environment. B. Hugenholtz (ed.). Kluwer Law International 1996, p. 164.

¹³ J. Passa. The Protection of Copyright on the Internet under French Law. – The Internet and Authors' Rights. F. Pollaud-Dulian (ed.). Sweet & Maxwell Limited 1999, p. 62.

¹⁴ J. Spoor. The Copyright Approach to Copying on the Internet: (Over)Stretching the Reproduction Right? – Future of Copyright in a Digital Environment. B. Hugenholtz (ed.). Kluwer Law International 1996, pp. 77–78.

¹⁵ Y. Goubiac. Remarks about the Internet in International Copyright Conventions. – M. Blakeney (ed.). The Internet and Authors' Rights. Sweet & Maxwell Limited 1999, p. 111.

¹⁶ S. Ricketson, J. Ginsburg. International Copyright and Neighbouring Rights. The Berne Convention and Beyond. 2nd ed. Oxford University Press 2006, p 747.

¹⁷ P. Hugenholtz. Adapting Copyright in the Information Superhighway. – Future of Copyright in a Digital Environment. B. Hugenholtz (ed.). Kluwer Law International 1996, p. 87.

of reproduction rights: changing the format of a work or other protected content such as phonograms from analogue into digital form requires making a reproduction thereof.

Digital libraries provide endless possibilities for everyone who has Internet access. In contrast to a time only a few decades ago, the availability of digitised content is not a prerogative or something really exclusive. Although it is beyond any doubt that promotion of cultural diversity is crucial, one has to ask whether and to what extent easily accessible digital libraries influence the legal market for phonograms.^{*18} It is inevitable that an urgent need arises to determine what would be the best solution for handling the issues related to lending of phonograms from digital libraries.

The author of this article finds that there are two possibilities for regulation of the legal state of play related to the lending of phonograms from digital libraries, including the substance of rights granted to different categories of stakeholders and limitations introduced to those rights. First, one could remain within the current legal framework and make no amendments at all. Secondly, it would be grounded to establish new balance by amending the current principle that phonogram producers enjoy exclusive rights of making available and reproduction, without limitations. The answer as to which approach to choose is given in the next section of this article.

4. Balance between the interests of the stakeholders concerned

The newest challenge in the field of copyright is making it increasingly clear that the traditional system might be incapable of addressing the global exchange of information. The impulse to exchange information freely can be applied to challenge information and cultural ownership because it defies the boundaries that copyright-owners wish to create between themselves and the public.^{*19}

There is no doubt that advances in information technology have disrupted the field of copyright protection. Nevertheless, a number of legislative initiatives have been taken to restore the legal balance between right-holders and users. However, a problem arises in that the technology does not always allow for the maintenance of the balances established by the law and can, in particular, prevent uses that are permitted by the legislation.^{*20}

Copyright legislation, originally designed to protect the author and provide incentives for the right-holder to engage in creation for the benefit of society, is used more and more often nowadays as a mechanism to protect investments, without taking into account the impact on future creativity. This change of paradigm has had a certain influence over the free use of information.^{*21}

Existing copyright laws have traditionally been designed to strike a balance between ensuring a reward for past creation and investment, on one hand, and the future dissemination of knowledge products, on the other, by introducing a list of exceptions and limitations to allow for certain, specific activities that are associated also with scientific research, education, and cultural purposes and the activities of libraries.

The need for balancing of interests has been recognised from the very beginning. Balancing means not only exceptions and limitations; balance among various interests may also be achieved through the way the protection system is established and the rights are granted. It seems evident that the more generous the basic norms of a protection system are and the broader and more general the rights granted, the stronger the need may be for some types of exceptions and limitations, and *vice versa*.^{*22}

The question about balance of interests among phonogram producers, digital libraries, and the general public may be regarded also as that of fixing an equitable balance between economic and social interests in society. From the economic point of view, the phonogram producers would be interested in prohibiting

¹⁸ P.-L. Haarmann (Note 11), p. 334.

¹⁹ D. J. Halbert. *Intellectual Property in the Information Age. The Politics of Expanding Ownership Rights*. Connecticut & London: Quorum Books 1999, p. 141.

²⁰ Ch. Geiger. *The Private Copy Exception, an Area of Freedom (Temporarily) Preserved in the Digital Environment*. – IIC International Review of Intellectual Property and Competition Law 2006 (37) 1, pp. 74–75.

²¹ Ch. Geiger. *Flexibilising Copyright – Remedies to the Privatisation of Information by Copyright Law*. – IIC International Review of Intellectual Property and Competition Law 2008 (39) 2, p. 178.

²² M. Fiscor (Note 5), pp. 257–259.

use of phonograms to digital libraries in all cases wherein lending of the relevant phonogram from digital libraries is economically impractical or even damaging. At the same time, the public need digital access to libraries, including access to phonograms.

In recent years, the lending of phonograms has become a burden to phonogram producers' economic balance. Since only a few EU states have granted phonogram producers an exclusive right to public lending, the lending of phonograms tends to damage the economic interests of phonogram producers. More and more people prefer not to buy phonograms but to borrow or rent them from libraries. Also it is often possible to make copies of the phonogram that was lent or rented. Although lending does not have an economic objective, only the possibility of reproducing phonograms makes lending problematic also from right-holders' point of view.^{*23} Once a copyrighted work is uploaded to the Internet, the ability to control it is reduced to almost zero. It seems beyond doubt that digital libraries should prevent their clients from making reproductions of phonograms.

Until recently, the idea that copyright might conflict with freedom of expression had never occurred to courts and commentators. Moreover, to the extent that any interaction between the two was acknowledged, it was accepted that each serves precisely to enhance the other. At the same time, all exclusive rights will, by definition, impose restriction on the actions of fellow citizens. The inescapable fact is that, as a privately held right, copyright grants an individual the power to dictate the scope of other citizens' lawful behaviour.^{*24}

The public demands easy access to and usage of copyrighted content, while the right-holder wishes to secure as many exclusive rights as possible. The element of freedom of expression is nowhere in sight. To some extent, this makes sense, because, at the end of the day, intellectual property legislation is structured around precisely this fundamental conflict. The entire body of copyright law is nothing but a balancing act, an attempt to accommodate both of those—contradictory—goals.^{*25}

Cultural, social, and scientific research interests as well as pragmatic factors have led to the establishment of limitations to right-holders' exclusive rights, including limits to the lending right. The limitations are necessary to guarantee that people are able to enjoy some of the basic constitutional rights, such as the right to freedom of speech and free self-expression. Although usually one uses the wording 'limitations to exclusive rights', Haarmann finds that it would be more precise and accurate in this context to use the expression 'limits of copyrights', since the limitations are laid down in order to determine the actual limits of exclusive rights.^{*26} It follows that, in order to establish a just and proper balance among the interests of all stakeholders concerned, a system of exceptions and limitation should be used.

The limitations to exclusive rights may be classified under different criteria. First, it is possible to consider the objectives of the limitations—whether a limitation is established in private, cultural, or social interests. Secondly, one is able to classify the limitations on the basis of the type of the protected content—whether the limitation is applicable to a literary work, musical work, performance, phonogram, or audiovisual work. Thirdly, it is possible to divide the limitations into groups based on the nature of the specific exclusive right with respect to which the limitations have been established: whether the right to make reproductions, the right to distribute, or the right of communication to the public. Fourth, the most decisive distinction may be made on the basis of whether the right-holders maintain, despite the limitations, the right to benefit from the use of the protected content or, instead, all terms for the exploitation of protected content, including the licence fee, have been laid down as a result of negotiations between the user and a collective society while the individual right-holder has no ability to influence the conditions of licence agreements or prohibit the use of protected content.^{*27} There is debate, though, as to whether the latter type of limitations Haarmann has mentioned should be regarded as a limitation or, rather, as a form of managing the rights collectively. Member States can adopt legislation concerning the management of rights such as extended collective licences. Those derogations were made because of the extended collective licensing schemes that have been applicable in Nordic countries.^{*28}

²³ J. A. L. Sterling. *World Copyright Law*. 2nd ed. London: Sweet & Maxwell 2003, p. 372.

²⁴ Ch. J. Angelopoulos. *Freedom of Expression and Copyright: The Double Balancing Act*. – *Intellectual Property Quarterly* 2008/3, p. 328.

²⁵ *Ibid.*, p. 332.

²⁶ P.-L. Haarmann (Note 11), p. 154.

²⁷ *Ibid.*, pp. 156–157.

²⁸ *Ibid.*, p. 258.

The primary reason for having such a list of exceptions appears to be to limit Member States' ability to introduce new exceptions or extend the scope of the existing ones beyond what is allowed under the Information Society Directive.^{*29} The list of exceptions as contained in the Information Society Directive has brought about a certain degree of harmonisation; in creating an exhaustive list of exceptions, it does not allow Member States to maintain or introduce exceptions that are not listed. EU Member States have often formulated exceptions narrower than those permitted in the Information Society Directive.^{*30}

According to the provisions laid down in the Information Society Directive, the publicly accessible libraries can benefit from two exceptions, listed in Article 5. Firstly, under Article 5 (2) c), publicly accessible libraries are allowed to make certain reproductions for specific non-commercial purposes. Secondly, according to Article 5 (3) n), they are entitled to use the protected content in acts of communication to the public and making available in order to conduct research or private study by means of dedicated terminals on their own premises.

It follows that, in the current legal framework at EU level, libraries do not enjoy a blanket exception from the right of reproduction. Reproductions are allowed in specific cases only, which arguably would cover certain acts necessary for the preservation of works contained in the libraries' catalogues.

The author of this article finds that, at the moment, when one discusses the lending of phonograms from digital libraries, the rights of the various stakeholders concerned are not balanced. In a digital environment, the phonograms should be more readily accessible. In comparison with the legal state of play in the analogue environment, where the phonogram producers' position is weak, the regulation applicable in the digital environment is too restrictive for the other stakeholders. For finding the proper balance among the right holders, there are many possibilities. First, one could subject the phonogram producers' right of making available, as far as it concerns the lending of phonograms from digital libraries, to legal licence. A second option is to introduce a 'fair remuneration system', while a third approach is to enable the libraries to use the phonograms freely without paying any fee and a fourth is to maintain the exclusive right of phonogram producers but establish a compulsory and/or extended collective licensing scheme in order to facilitate the use of phonograms by digital libraries and the general public. This article concentrates on the legal issues related to a collection-based licensing scheme. Lending of the phonograms from digital libraries and therefore the options for managing the phonogram producers' rights concerning the lending of phonograms from digital libraries are analysed below.

5. Options for managing the lending right

Copyright and related rights can be exercised individually or collectively. In addition to the legal framework of the phonogram producers' right to authorise the lending of phonograms from digital libraries, it is important to examine whether the phonogram producers should be entitled to exercise their right individually or only through societies that manage their rights collectively.

Collective societies provide useful services to all interested parties. These societies are useful to right-holders, in monitoring the exploitation of rights and bargaining on their behalf with respect to the conditions of such exploitation; to users, enabling them to acquire a single licence in a simple and cost-effective manner; and also to society in general.^{*31}

Collective rights management serves three main functions in general. First, it improves the bargaining power of the individual right-holder vis-à-vis users and user organisations. Secondly, by representing a substantial repertoire, collective rights management equally serves the user, as it allows legitimate access to the rights of many right-holders. Thirdly, the collective rights management system operates social and cultural schemes to protect the members and to support emerging artists. In all of these respects, collective rights management contributes to cultural diversity at national and international level.^{*32}

²⁹ Directive of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society.

³⁰ Green Paper on Copyright in the Knowledge Economy, pp. 4–5.

³¹ Ph. Gilliéron. *Collecting Societies and the Digital Environment*. – IIC International Review of Intellectual Property and Competition Law 2006 (37) 8, pp. 966–967.

³² A. Schierholz. *Collective Rights Management in Europe – Practice and Legal Framework*. *European Copyright Law. A Commentary*. M. Fisor, S. von Levinski (eds.). Oxford University Press 2010, p. 1152.

One very important objective of the collective licensing scheme is to facilitate the acquisition of authorisation in the areas where contacting every single right holder would be very difficult and unreasonable or costly.

Collective management, even if it might be possible from the standpoint of the relevant international norms and the *acquis communautaire*, is justified only where individuals' exercise of rights is impossible or at least highly impractical. That might obtain in cases where there are a large number of holders or users of rights or when other circumstances of a particular use justify it.^{*33} In the case of an exclusive right, obligatory collective management may be prescribed only where the relevant international norms allow this, either by permitting the prescription of conditions for the exercise of rights or through its limitation to a right to remuneration in certain cases.^{*34} It follows that when wanting to apply collective licensing scheme to certain exercise of rights, one has to verify whether there is a limitation imposed to that right or whether there is a prescription concerning the conditions for the exercise of rights permitted.

The collective management of exercise of rights may be either voluntary or compulsory. In the case of obligatory collective management, the right-holders have no 'opt-out' option.

An extended collective licensing scheme is a legal institution between a voluntary and compulsory licence. Those right-holders who are not members of the collective society negotiating the terms and signing the licence agreement do not have any opportunity to exert an influence, and for them this kind of legal obligatory representation right for the collection society yields results similar to those that would be seen with a compulsory licence. An extended collective licensing scheme was introduced in Finland in 1961.^{*35}

Collective licensing is exploited mainly in cases of widespread use—for example, broadcasting via radio etc. When taking into consideration the interests of digital libraries and their 'clients' (i.e., the public in general) on the one hand and the interests of phonogram producers on the other hand, one has to note that extended collective licensing might be justified also in this case. Making any limitations to the right to make available, which is the most important exclusive right of the phonogram producers in the digital environment, including limiting the possibility to exercise this right freely, seems to be impossible in the current legal framework. Accordingly, there is a need for introducing some amendments to the legislative rules in this respect.

The Estonian Copyright Act does not include the legal institution of the so-called Nordic model of extended collective management, although it has been laid down in said act that in some specific cases obligatory collective management is required. Exercise of rights by collective management organisations is mandatory upon cable retransmission of a work or an object of related rights and in the cases specified in §§14 (6) and (7), §§15 and 27, §§68 (4) of that act.^{*36}

Considering the current legal practice wherein it is, in general, only the major phonogram producers who are really capable of exercising their right to make available individually, while the smaller ones are willing to pass the exercise of their rights to a collection society, it must be pointed out that, when one considers the situation with a broader and pragmatic approach, application of a collective licensing scheme (compulsory or extended) in lending of phonograms from digital libraries would be reasonable. Although the institution of extended collective licensing is quite a new instrument for copyright regulations, it would be justified in light of the foregoing analysis. Therefore, when talking about a collective licensing scheme to be applied to lending of phonograms from digital libraries, the author of this article finds that there would be, in essence, two possibilities: obligatory and extended collective licensing. Since the right-holders have no possibility of 'opting out' in the case of obligatory collective management, the author of this article holds that a compulsory collective licensing scheme could harm the rights and interest of phonogram producers too broadly, such that balance among the rights and interests of the various stakeholders would not be reached.

³³ M. Fiscor. Collective Management of Copyright in the International Environment. European Conference in the framework of the Hellenic Presidency 7th – 8th April 2003. Culture, Copyright and Information Society. Hellenic Ministry of Culture/EU Direction/Copyright Organisation 2003, p. 48.

³⁴ *Ibid.*, pp. 47–50.

³⁵ P.-L. Haarmann (Note 11), p. 227.

³⁶ Estonian Copyright Act §76 (3).

6. Conclusions

The creation of digital libraries has brought with it a very crucial legal debate as to whether it would be balanced to limit the existing exclusive rights of right holders and to what extent doing so would be justified. Lending rights have in recent years had quite a considerable economic impact on the record industry and others, since it does not exhaust and therefore enables phonogram producers to maintain control over the phonograms that have already been published. Nevertheless, a rigorous and effective system for the protection of copyright and related rights is necessary if we are to provide right-holders with a reward for their input to creativity and to encourage them to invest in creative works and innovation. One has to address the issues in a balanced manner, taking into account the perspectives of right holders, various groups of users, and the public at large.

It is clear that the public is in urgent need of access to phonograms from digital libraries and that it is, in practice, difficult for libraries to obtain all of the corresponding licences from each separate right holder. Therefore, a system of collective management would be the right tool for balancing interests among the stakeholders concerned—phonogram producers, libraries, and the general public.

The author of this article is of the opinion that, for reasons of cultural, educational, scientific, and research purposes in the digital environment, the general public should have access to phonograms in digital libraries. At the same time, there should not be absolutely free access to phonograms in such libraries, because the public lending right being exercised in the analogue environment has less significant economic impact in the exercise of the rights of making available and reproducing.

The author thinks that, as an important tool for encouraging sustainable development in respect of all stakeholders with an interest in the lending of phonograms from digital libraries, an extended collective licensing scheme should be applied. Extended collective licensing schemes may offer the appropriate legal opportunities to ensure sustainable development, when those legal institutions are applied in a balanced manner. This balance has to be arrived at among the rights of three subjects—right-holders, the users of rights, and the users of rights in a broader sense (the public in general).

It follows from the foregoing analysis that extended collective licensing schemes would be an answer to overcome the difficulties that the legal issues of lending of phonograms from digital libraries have brought with them. Collective licensing schemes provide phonogram producers with a guarantee that the collection societies negotiate, on their behalf, fair licensing terms and take into consideration the rights and interests of phonogram producers, whereas on the other side the digital libraries would benefit too, as they are enabled to obtain all of the necessary licensing from a single organisation. The author of this article therefore concludes that for lending of phonograms from digital libraries, an extended collective licensing regulation should be introduced. In the case of an obligatory collective management scheme, the right-holders have no possibility of 'opting out'; therefore, the author of this article holds that instating compulsory collective licensing could impair the rights and interests of phonogram producers too much and balance would not be achieved/maintained among the rights of the different stakeholder groups.