

CONTENTS

<i>Acknowledgements</i>	vii
<i>Foreword</i>	xi
<i>Acronyms and Abbreviations</i>	xxi

Chapter 1

Introduction	1
1.1. Digital libraries and copyright	1
1.2. Digital libraries and extended collective licences	7

PART I EXCLUSIVE RIGHTS AND EXCEPTIONS RELEVANT FOR THE CROSS-BORDER ONLINE USE OF LIBRARIES	11
---	----

Chapter 2

Definitions and Developments	13
2.1. Libraries	13
2.2. Copyright	17
2.2.1. Copyright and libraries	21
2.2.2. Mass digitisation	26
2.3. The Google Book Search Project	27
2.3.1. The proposed Settlement Agreements	29
2.3.2. Litigations in the USA	31
2.3.3. Evaluation	33
2.4. European developments with regard to digital libraries	34
2.4.1. The Digital Library Initiative	34
2.4.2. Current reform efforts	36
2.5. Conclusion	39

Chapter 3

Exclusive Rights in Online Use	41
3.1. Reproduction rights in online use	42
3.1.1. Definition and development	42
3.1.2. Limitations to the reproduction right in online use	45
3.1.3. Digital reproduction and libraries	51

3.2.	The right of communication to the public and the making available right.	53
3.2.1.	Communication to the public in the EU	56
3.2.2.	The act of communication	58
3.2.2.1.	Communication versus transmission	58
3.2.2.2.	The end-point of communication.	61
3.2.3.	The public.	62
3.2.4.	Hyperlinking and communication to the public	65
3.2.4.1.	“New public”	65
3.2.4.1.1.	“Specific technical means”	66
3.2.4.1.2.	“Restricted access”	67
3.2.4.1.3.	Unauthorised content	68
3.3.	Conclusion	68

Chapter 4

Exceptions and Limitations for Cross-Border Online Use of In-copyright Works by Libraries

4.1.	General	71
4.1.1.	Terminology and definitions	73
4.1.2.	Common law and civil law approaches.	76
4.1.3.	The three-step test	78
4.1.3.1.	Interpretation.	80
4.1.3.1.1.	The first step	82
4.1.3.1.2.	The second step.	84
4.1.3.1.3.	The third step	86
4.1.3.2.	Evaluation.	88
4.1.4.	International developments regarding exceptions and limitations for libraries	88
4.1.4.1.	IFLA Treaty Proposal.	89
4.1.4.2.	Draft WIPO Treaty on Exceptions and Limitations .	90
4.2.	European developments.	90
4.2.1.	The InfoSoc Directive and exceptions and limitations	91
4.2.1.1.	CJEU decisions	94
4.2.1.2.	The three-step test.	96
4.2.2.	The InfoSoc Directive and libraries.	99
4.2.2.1.	The reproduction exception for libraries.	99
4.2.2.2.	The exception for making available by dedicated terminals.	103
4.2.3.	The Orphan Works Directive and libraries	106
4.2.3.1.	Background	107
4.2.3.2.	Beneficiary institutions	108
4.2.3.3.	Orphan works: scope and definition	109
4.2.3.4.	Diligent search and orphan work status	110

4.2.3.5.	Cross-border applicability	113
4.2.3.6.	The end of orphan work status	113
4.2.3.7.	Permitted uses	115
4.2.3.8.	Implementation	117
4.2.4.	Evaluation of current EU exceptions for digital libraries	118
4.2.4.1.	The InfoSoc Directive	118
4.2.4.1.1.	The narrow scope	118
4.2.4.1.1.1.	ART. 5(2)(C)	118
4.2.4.1.1.2.	ART. 5(3)(N)	122
4.2.4.1.2.	Lack of harmonisation	125
4.2.4.1.3.	Exceptions and contracts	128
4.2.4.2.	The Orphan Works Directive	129
4.3.	Conclusions	132

PART II COLLECTIVE LICENCES WITH LEGISLATIVE SUPPORT FOR CROSS-BORDER ONLINE USE BY LIBRARIES	137
--	-----

Chapter 5

The Nordic System of Extended Collective Licences	139
5.1. Introduction	139
5.1.1. Collective licensing	141
5.1.2. General development of the Nordic system	145
5.2. Representative CMOs and dispute settlement	147
5.2.1. Representative organisations	147
5.2.1.1. "Substantial number of authors"	150
5.2.1.2. More than one CMO in a given field	153
5.2.1.3. Governmental authorisation	156
5.2.2. Dispute settlement	159
5.2.3. Evaluation	162
5.3. The extension effect of ECLs: field and scope of application	165
5.3.1. Specific ECL provisions for libraries	168
5.3.1.1. Denmark	168
5.3.1.2. Finland	170
5.3.1.3. Iceland	171
5.3.1.4. Norway	172
5.3.1.5. Sweden	175
5.3.2. General ECL provision	176
5.3.2.1. Denmark	177
5.3.2.2. Iceland	180
5.3.2.3. Norway	181
5.3.2.4. Sweden	182
5.3.3. Evaluation	183
5.4. Measures to secure the rights of non-represented rightholders	187

5.4.1.	Categories of non-represented rightholders.....	188
5.4.2.	Individual remuneration.....	190
5.4.3.	The opt-out	194
5.4.3.1.	Entitlement and process.....	196
5.4.3.2.	The effect of opt-out	198
5.4.3.3.	Opt-out and moral right	200
5.4.4.	Transparency.....	202
5.4.5.	Evaluation	203
5.5.	Conclusion	206

Chapter 6

The Compatibility of the ECL System with International Norms and EU

Legislation	209
6.1. The legal status of ECLs in the international context	210
6.1.1. The approach of the Nordic authorities	212
6.1.2. Discussion	215
6.2. The compatibility of the Nordic ECLs with international norms	222
6.2.1. The national treatment principle	222
6.2.2. Formalities	223
6.2.3. ECLs and the three-step test	224
6.2.3.1. The first step	225
6.2.3.2. The second step	227
6.2.3.3. The third step	229
6.2.3.4. Evaluation	232
6.3. ECLs and EU legislation	233
6.3.1. The InfoSoc Directive and the Satellite and Cable Directive	233
6.3.2. The Orphan Works Directive	237
6.3.3. The CMO Directive	238
6.3.4. CMOs and the Services Directive	239
6.3.5. ECLs and the EU's principle of non-discrimination	241
6.3.6. ECLs and the principle of proportionality	241
6.3.7. Evaluation	242
6.4. Conclusion	242

Chapter 7

Collective Licences with Legislative Support Outside the Nordic

Countries for Making the Cultural Heritage Available	245
7.1. The MoU on out-of-commerce works	246
7.2. France	250
7.2.1. The legislation	251
7.2.2. Court cases	254
7.2.3. The aftermath	254

7.3.	United Kingdom	255
7.3.1.	Relevant licensing body	256
7.3.2.	Prior collective licensing	256
7.3.3.	Representativeness	257
7.3.4.	Code of practice	258
7.3.5.	Opt-out arrangements	258
7.3.6.	Transparency and distribution of licence fees	259
7.3.7.	Informed consent	261
7.3.8.	Authorisation period and reviews	262
7.3.9.	Evaluation	262
7.4.	Germany	263
7.5.	Other initiatives	266
7.5.1.	Europe	266
7.5.2.	Outside of Europe	267
7.6.	Conclusion	269

PART III: TERRITORIALITY OF COPYRIGHT AND CROSS-BORDER ONLINE USE BY LIBRARIES: IN SEARCH OF A SOLUTION . 271

Chapter 8

	Territoriality of Copyright and Cross-Border Online Use	273
8.1.	Territoriality and international treaties	275
8.2.	Territoriality and online use	280
8.2.1.	Private international law	281
8.2.2.	Approaches to localising acts in online use	282
8.2.2.1.	The country of reception	282
8.2.2.2.	The targeting approach	283
8.2.2.3.	Country of origin	284
8.2.3.	Evaluation with regard to ECLs for libraries	288
8.3.	Territoriality and the EU	289
8.3.1.	Territoriality of copyright and the CJEU	290
8.3.2.	Territoriality and the EU copyright legislation	292
8.3.2.1.	The Satellite and Cable Directive	293
8.3.2.2.	The codified exhaustion rule	295
8.3.2.3.	The CMO Directive and multi-territorial licences of rights in musical works for online use ..	296
8.3.3.	Recent developments	296
8.4.	Private international law and EU copyright	299
8.4.1.	Jurisdiction	300
8.4.2.	Applicable laws	304
8.4.2.1.	Contractual obligations	306
8.4.2.2.	Non-contractual obligations	309
8.5.	Conclusion	310

Chapter 9

Options for Legislative Solutions for Enabling Cross-Border Online Use of Works in European Libraries.	313
9.1. ECLs and cross-border online use	314
9.1.1. The situation in the Nordic countries	315
9.1.2. Evaluation	317
9.2. Legal presumption	319
9.3. Mandatory collective management	321
9.4. The multi-territorial licences for online music under the CMO Directive	324
9.5. Exceptions and limitations	325
9.6. Single European Copyright	329
9.7. Conclusion	331

Chapter 10

ECLs for Online Cross-Border Use by Libraries and the International Legal Framework	333
10.1. Requirements of the CMO	335
10.1.1. Representativeness	335
10.1.2. Mandates	338
10.1.3. Good governance and governmental authorisation	339
10.1.4. Transparency	340
10.1.5. Evaluation	343
10.2. Field and scope of use	344
10.2.1. National works	345
10.2.2. Published versus unpublished works	347
10.2.3. Age of works	349
10.2.4. The exclusive rights	350
10.2.5. Commercial versus non-commercial use	354
10.2.6. Evaluation	354
10.3. Safeguard measures	355
10.3.1. Equal treatment	356
10.3.2. Remuneration	357
10.3.2.1. The amount	359
10.3.2.2. Individual remuneration	362
10.3.3. Opt-out	363
10.3.4. Transparency	364
10.3.5. Evaluation	366
10.4. Conclusion	366

Chapter 11

ECLs for Online Cross-Border Use by Libraries and the EU's Legal

Framework	371
11.1. The EU's objectives with regard to copyright	372
11.1.1. Legal certainty	372
11.1.2. High level of protection, including appropriate reward to rightholders.	374
11.1.3. Balance between rightholders and users	375
11.1.4. Evaluation	377
11.2. The Soulier case	378
11.2.1. Arrangements for management of rights and the consent of rightholders.	379
11.2.2. The French legislation and proportionality	381
11.2.3. Evaluation	382
11.3. The DSM proposal for the use of out-of-commerce works by cultural heritage institutions.	383
11.3.1. The proposed solution	384
11.3.1.1. Beneficiaries	384
11.3.1.2. Works	385
11.3.1.3. Uses	386
11.3.1.4. Cross-border effect	387
11.3.2. The conditions for the extension effect.	387
11.3.2.1. A representative CMO	388
11.3.2.2. Equal treatment.	389
11.3.2.3. Opt-out	389
11.3.2.4. Transparency	390
11.3.2.5. Stakeholders dialogue.	390
11.3.3. Evaluation	391
11.3.4. The DSM proposal on collective licensing with an extended effect	393
11.4. Competence of the EU to take action.	396
11.4.1. Provisions on competence.	396
11.4.2. The objectives of the EU Treaties	397
11.4.3. The principles of subsidiarity and proportionality	398
11.4.3.1. Subsidiarity	398
11.4.3.2. Proportionality	399
11.4.4. Relevant integration clauses	400
11.4.5. Choice of instrument.	401
11.4.6. Choice of approach.	402
11.4.7. Evaluation	403
11.5. Conclusion	404

Chapter 12
Conclusion 407
Bibliography 415