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Ran Tryggvadottir, *European Libraries and the Internet: Copyright and Extended Collective Licences*. Cambridge: Intersentia, 2018. xxiii + 448 pages. ISBN: 9781780686745. EUR 105.

This book addresses the problem of how libraries can operate in the digital world and provide access to copyright-protected works online, especially in the European Economic Area and

within the bounds of EU Law. The analysis is primarily concerned with digital libraries and cultural heritage institutions, but has broader implications other types of licensing of mass uses of protected works, a category which covers much of the creative content we encounter online daily. The author focuses on one possible “practical” option to solve the problem: collective licensing with legislative support, in particular the legal mechanism of “extended collective licensing” (ECL), which was “invented” in the Nordic countries (Tryggvadottir is Icelandic).

The book, published in 2018, was particularly timely. It provided much needed research into the topic of ECL at a time it was advanced as a solution to the problem of mass online licensing in the context of what would become Directive (EU) 2019/790 on Copyright in the Digital Single Market Directive (DSM Directive). The DSM Directive contains a number of specific ECL rules, including, in Article 12, the first general provision in the EU *acquis* on collective licensing with extended effect.

Article 12 DSM Directive identifies three possible “licensing mechanisms” with extended effect, which are touched upon in the book. The first is ECL proper. Under this regime, a collective rights management organization representing copyright-holders (CMO) enters into a licensing agreement for the exploitation of works and such agreement is extended to apply to rights of non-represented rights holders (also known as “outsiders”). The second mechanism is where the CMO has a legal mandate to represent rights holders who have not authorized the organization to do so. The third mechanism refers to a situation where the representation powers result from a legal presumption.

The book is structured in three parts. I will briefly critically discuss the key points in each part. Part I contains a descriptive overview of the European regime of exclusive rights and exceptions relevant for the cross-border online uses of libraries. It sets the baseline legal understanding of the problem and its context, sometimes stepping outside the European experience to discuss mass digitization projects in other geographies, such as the Google Books dispute in the US. On the relevant points of law, the author concludes that the making available to the public of in-copyright works by libraries is a restricted act requiring permission by the rights holder or a legal exception. This conclusion still holds today despite the flood of ECJ judgments on the right of communication to the public that have come out after the publication of the book.

As regards copyright exceptions, the author argues for a flexible interpretation of the regime of the so-called three-step test in international and EU law. In her view, this test should be interpreted also in the public interest to enable digital access to cultural heritage in libraries. Despite this, Tryggvadottir rightly notes that the then-current regime in EU law, characterized by an exhaustive and optional list of exceptions, does not provide “a basis for smooth cross-border use necessary for proper online use” (p. 132). In that light, she proposes the expansion (and mandatory nature) of an existing exception in Article 5(3)(n) of Directive 2001/29/EC (InfoSoc Directive) to facilitate online (and offsite) consultation by users. In other words, she advocates a strong legal authorization for remote access to libraries. Nevertheless, after expressing some doubts as to the legal and economic feasibility of this approach, she favours the licensing option through ECL.

At this stage, it bears noting that the DSM Directive did confirm some of Tryggvadottir’s concerns as to the feasibility of a sufficiently broad exception for libraries. In fact, the final text of the Directive contains a limited exception in Article 5 for the use of protected content in digital and cross-border teaching activities. But this exception excludes educational uses by other types of institutions, like libraries and museums. Furthermore, Article 6 DSM Directive sets forth an exception for acts of reproduction of certain works made by cultural heritage institutions for purposes of – and to the extent necessary for – preservation. Some activities of digitization or dissemination by these institutions are facilitated by a new regime in Articles 8 to 11, but this applies only to “out-of-commerce works”. All in all, the new rules offer insufficient flexibility for libraries to provide the type of remote access to cultural heritage the book is concerned with.

Part II then discusses Tryggvadottir’s preferred ECL option in national laws (within and outside the Nordic countries of origin) and the EU copyright *acquis*. A key aspect of the

discussion focuses on the compatibility of ECL systems with international and EU law, especially as it concerns national treatment, the prohibition on formalities, and the aforementioned three-step test. In particular, it is highly debated whether ECL constitutes an exception to copyright (subject to the usually restrictive three-step test) or a mere arrangement concerning the management of rights (unrestricted by the test). Contrary to the pre-DSM Directive generally held belief, Tryggvadottir argues that ECL is indeed subject to the test, mostly because the system applies to the works of outsiders that have not consented to the use, by virtue of its “extension effect”. She further notes that most ECL systems in the Nordic countries would pass this test and thus be valid under international and EU law, despite falling outside the exhaustive list of admissible exceptions in Article 5 InfoSoc Directive.

Although the author’s arguments are compelling, I disagree on both counts. On the first, as argued elsewhere, there are strong arguments to consider that an ECL system affects the exercise rather than the nature of the right it applies to. Without belabouring the point, the characteristics and safeguards of most ECLs, including the mechanism of opt-out many of them recognize, favour a qualification of the regime as an arrangement for the management of rights. In any case, the point has lost some of its relevance, since Article 12 DSM Directive sets out a regime that demarcates collective licensing with extended effect – with specific requirements and safeguards (such as opt-out) – from mandatory collective management and, in my view, from exceptions and limitations.

On the second point, it appears systematically difficult to argue that (1) if ECL qualifies as an exception, then (2) it is admissible under EU law, since (3) Article 5 InfoSoc Directive contains an *exhaustive* list of exceptions that Member States can implement. In very simple terms, Tryggvadottir’s innovative argument here is as follows: if an ECL system complies with the *international* three-step test, then it will *under EU law* qualify as an arrangement for the management of rights. But it is difficult to see how the ECJ would accept this conceptual multi-level distinction of legal qualifications (Tryggvadottir considers it may be a legal fiction) in a world where international and EU copyright law are so intertwined and, for the most part, aligned in the fundamental concepts of law.

For new ECL systems, the new regime in Article 12 will probably render the point moot, since it sets out the specific requirements in EU law (separate from the three-step test). Tryggvadottir’s argument may however remain relevant should the validity of pre-existing ECL systems be challenged. This is because the DSM Directive is somewhat unclear on the interface between the new regime and pre-existing ECLs in national law, despite references to this in Article 12(4) and Recital 46.

Part III of the book then engages in a discussion on the territoriality of copyright and a possible solution for cross-border online use of protected works by libraries. First, as regards the principle of territoriality, the author proposes a country-of-origin approach for ECL agreements. This would be the country where the library and CMO negotiating the agreement are established. A similar approach, it is noted, was *partially* adopted at EU level for the use of out-of-commerce works by cultural heritage institutions in Articles 8 and 9 DSM Directive.

Second, in discussing options for legislative solutions, the author concludes that the ECL system provides the best (even if not a perfect) tool to enable libraries to provide cross-border access to the cultural heritage in their collections. By her own admission, this conclusion is based on pragmatic considerations around “the current legal structure and absent a unified copyright title” (p. 332). To a certain extent, the experience with the recent DSM Directive aligns with such prescient considerations.

In the final chapters of the book, Tryggvadottir sets out in detail the requirements for ECL agreements and attendant legislation to be compatible with international norms and EU law. As noted, much of this analysis has been superseded by the regime set out in Articles 6 (preservation of cultural heritage), 8 to 11 (on out-of-commerce works) and 12 (collective licensing with extended effect) of the DSM Directive. Still, Tryggvadottir’s book provides valuable historical, conceptual and normative context to all ECL mechanisms that have made it into the DSM Directive. For that reason, as well as for its structural and analytical clarity, it will

remain a useful and valuable contribution to understand future national implementations and interpretations of the DSM Directive's provisions.

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