Permissibility of Non-Voluntary Collective Management of Copyright under EU Law

The Case of the French Law on Out-of-Commerce Books

by **Oleksandr Bulayenko***

Abstract: The possibility of the EU member states to adapt copyright legislation to new circumstances and to address unforeseen issues is limited by the list of exceptions and restrictions of the InfoSoc Directive. In spite of this constraint, the EU copyright framework provides for a possibility of introduction of non-voluntary forms of collective rights management that can help to tackle some of the contemporary problems with remuneration and access.

This article is an attempt to deepen the understanding of non-voluntary collective management and its possible use. First, it provides a detailed description of the French mechanism adopted for facilitating mass digitization and making out-of-commerce books available, which was implemented through a new form of collective management of copyright. Then, it examines the mechanism's compatibility with the InfoSoc Directive through comparison with the extended collective licensing.

Keywords: Copyright; EU; Collective Management; French; Mass Digitization; Out-of-Commerce; Books; Mandatory; Extended License; CJEU; C-301/15; Soulier and Doke; InfoSoc; Exceptions; Limitations

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A. Introduction

1 Digitisation of cultural heritage with the aim of its preservation and making available online is one of important public policy objectives in European countries. Acquisition of the necessary permissions from copyright holders is often complicated due to the lack of information regarding numerous rightholders and the fragmentation of rights. In spite of its cultural importance, with a few exceptions, mass digitization undertaken through the usual rights clearance process is financially too burdensome for public institutions and private undertakings. At the same time, many older works still under copyright do not generate any revenues to their rightholders, undermining the significance of copyright protection. In some cases, legal mechanisms facilitating rights clearance may pave a way to solving the problems associated with the copyright architecture, increased access to copyrighted works, and revenues to rightholders.

2 In March 2012, France adopted a law on the digital use of out-of-commerce books of the XXth century[1], providing for a form of non-voluntary collective management of exclusive rights necessary for digital reproduction and providing access to copyrighted works. While some stakeholders were consulted in the legislative process, the legitimacy of the law has been disputed since its adoption. In February 2014, the French Constitutional Council (*Conseil constitutionnel*), replying to a constitutionality request, established that the mechanism complies with the Constitution[2] and does not infringe property

1 Loi n° 2012-287 relative à l'exploitation numérique des livres indisponibles du XXe siècle, *JORF n°0053*, 2 March 2012. Originally, the law introduced 11 new Articles to the Intellectual Property Code of France (CPI). Regarding deleted 22 February 2015 Article L134-8, see *infra* about the third licensing scheme.

2 With Articles 2 and 17 of the Declaration of Man and Citizen

rights.[3] Following persistent opposition, the Council of State (*Conseil d'Etat*) decided on 6 May 2015[4] to submit to the Court of Justice of the European Union (CJEU) the question of whether the mechanism introduced by the law for facilitating exploitation of out-of-commerce books implemented through a collective management organization is compatible with Article 2 (on the reproduction right) and Article 5 (containing the exhaustive list of exceptions and limitations) of the InfoSoc Directive.[5]

3 The first part of the paper will examine in detail the French mechanism for digitization of out-of-commerce books, concluding by difficulties associated with its qualification. The second part will outline a brief overview of the EU legal framework on non-mandatory collective management and continue with a comparative analysis of the French mechanism and the extended collective licensing.

B. Collective Management of Digital Rights to Out-of-Commerce Books

I. General Overview of the Mechanism

4 The French law of 1 March 2012 introduced a statutory mechanism for facilitation of use of so-called "out-of-commerce books" of the XXth century.[6] Out-of-commerce books are defined as books that were published in France before 1 January 2001, are no longer an object of commercial distribution by a publisher[7], and are not in the process of publication

of 26 August 1789. This Declaration is integrated in the corpus of French constitutional law.

3 C.C., 28 février 2014, M. Marc S. et autre, n° 2013-370 QPC, para. 18: "firstly, the regime of collective management applicable to the right to reproduction and communication in digital form of out-of-commerce books does not result in the deprivation of property in the sense of Article 17 of the Declaration; secondly, the framework of conditions under which the rightholders enjoy their rights to intellectual property in their works do not disproportionally prejudice these rights in view of the objectives pursued; by consequence, the complaints alleging prejudice to the right to property have to be dismissed". Some commentators criticised the decision on the grounds that the Constitutional Council confused the "general interests" (mentioned in paras. 12 and 14) justifying limitations to property rights with interests of industry groups, see Emmanuel Derieux (2014), 'Exploitation numérique des livres indisponibles : Déclaration de conformité à la Constitution des dispositions des articles L. 134-1 à L. 134-9 du Code de la propriété intellectuelle', *Revue Lamy Droit de l'Immatériel*, No. 103, p. 36 and Sylvie Nérisson (2015), 'La gestion collective des droits numériques des « livres indisponibles du XXe siècle » renvoyée à la CJUE : le Conseil d'État face aux fondamentaux du droit d'auteur', *Recueil Dalloz*, No. 24, p. 1429.

4 C.E., 6 mai 2015, n°368208, M.S., Mme D., art. 2. Request for a preliminary ruling from the Conseil d'État (France) lodged on 19 June 2015 – Marc Soulier Sara Doke v Ministre de la Culture et de la Communication Premier ministre (Case C-301/15) OJ C 294/35, 7 September 2015. Question referred: "Do the provisions, referred to above [Article 2 on the reproduction right and Article 5 on exceptions and limitations], of Directive 2001/29/EC of 22 May 2001, preclude legislation, such as that analysed in paragraph 1 of this decision [law related to the digital use of out-of-commerce books of the XXth century], that gives approved collecting societies the right to authorise the reproduction and the representation in digital form of 'out-of-print books', while allowing the authors of those books, or their successors in title, to oppose or put an end to that practice, on the conditions that it lays down?".

5 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10.

6 "Livres indisponibles" in original language. This phrase can be literally translated into English as "unavailable books". The translation of "livres indisponibles" as "out-of-commerce books" seems to be more appropriate than the literal translation in light of the definition provided by Article L134-1 of the CPI, the contemporary discourse on out-of-commerce works and the terminology used in relevant European instruments, see Recital 4 of the Orphan Works Directive speaking of "out-of-commerce works" ("œuvres indisponibles dans le commerce") and the Memorandum of Understanding, Key Principles on the Digitisation and Making Available of Out-of-Commerce Works, 20 September 2011, witnessed by Michel Barnier, Commissioner for Internal Market and Services. Nevertheless, some authors prefer to translate the term as "unavailable books" (Marcella Favale, Fabian Homberg, Martin Kretschmer et al. (2013), *Copyright, and the Regulation of Orphan Works: A comparative review of seven jurisdictions and a rights clearance simulation*, Report commissioned by the Intellectual Property Office of the UK, 2013/31, p. 72 and Jane C. Ginsburg (2014), 'Fair Use for Free, or Permitted-but-Paid?', *Berkeley Technology Law Journal*, Vol. 29, p. 1425) or as "out-of-print books" (Sylvie Nérisson (2015), 'Has Collective Management of Copyright Run Its Course? Not so Fast', *IIC*, Vol. 46, No. 5, p. 506), or use "unavailable books" and "out-of-commerce books" interchangeably (Lucie Guibault (2015), 'Cultural Heritage Online? Settle It in the Country of Origin of the Work', *JIPITEC*, Vol. 6, No. 3, pp. 177, 178 and 181).

7 Availability of books on the second-hand market or at libraries is irrelevant for the legal qualification, see, Sénat, Rapport fait au nom de la commission de la culture, de l'éducation et de la communication sur la proposition de loi de M. Jacques Legendre relative à l'exploitation numérique des livres indisponibles du XXème siècle, par Mme Bariza Khiari, Sénatrice, N° 151, enregistré à la Présidence du Sénat le 30 novembre 2011, p. 5, Frédéric Pollaud-Dulian (2012), 'Livres indisponibles. Licence légale. Œuvres orphelines. Numérisation. Bibliothèque', *RTD Com.*, No. 2, p. 339. Some commentators observe with regret that studies, reports, and other documents that were not published in large numbers and were not commercially distributed but are present in library collections in small numbers are outside the provisions regarding the out-of-commerce books, see Emmanuel Derieux (2012), 'Le régime juridique de l'exploitation numérique des livres indisponibles du XX^{e} siècle : Cheval de Troie de Google ?', *Revue Lamy Droit de l'Immatériel*, No. 87, p. 65 and Emmanuel Emile-Zola-Place (2012), 'L'exploitation numérique des livres indisponibles du XXe siècle : une gestion collective d'un genre nouveau', *Légipresse*, no 295, p. 357.

either in paper or in digital form.[8] Since the legislation does not speak of "works", as it is common in copyright law, but refers to "books"[9] (i.e., material media in which literary and other works are fixed), it is important to emphasize that the scope of the mechanism is limited to works published in books (i.e., objects of the digitization process[10]). Books of the XXth century that are not available in the primary channels of commerce and whose works are in the public domain are not concerned by the law.[11]

5 The mechanism is implemented through a form of non-voluntary collective management of copyright with the possibility to opt out. Exercise of rights to reproduce or communicate out-of-commerce books in digital form (digital rights) is undertaken by an assigned collective management organization (CMO)[12] upon expiration of six months since listing of the aforementioned books in a special open and free online database.[13]

6 The CMO managing digital rights of out-of-commerce books has to be assigned by the Ministry of Culture and Communications[14] according to a set of criteria[15] similar to the usual criteria used in French legislation for assigning CMOs for mandatory collective management of certain rights.[16] SOFIA,[17] the CMO already managing the rights of public lending and private digital reproduction of literary works, was assigned with the exercise of digital rights to out-of-commerce books by a Decree ("*arrêté*") of the Ministry of Culture and Communication of 21 March 2013.[18] The assignment is issued for a renewable term of 5 years[19] and it can be withdrawn if the CMO does not comply with at least one of the criteria set for

8 Article L134-1 of the CPI. If books are not available in paper form but only in digital form they cannot be considered as out-of-commerce, see Emmanuel Emile-Zola-Place (2012), *ibid*, pp. 357 and Jean-Michel Bruguière (2012), 'Gestion collective – Œuvres indisponibles : Notion de livre indisponible (Première partie)', *Propriété intellectuelle*, No. 45, p. 347.

9 The draft of the law spoke of "out-of-commerce works", but this wording was criticised by the senator-rapporteur, Bariza Khiari, as not accurately reflecting the content of the legislative act limited in its scope to works published in the form of books, see Sénat, Rapport 2011, *supra* note 7, p. 23. This choice of the legislator to speak of "books" rather than of "works" was criticised by some scholars and the legislator was even described as "ignorant" in regards to the distinction between material objects (media) and immaterial copyrighted works they contain, see Franck Macrez (2012), 'L'exploitation numérique des livres indisponibles : que reste-t-il du droit d'auteur ?', *Recueil Dalloz*, No. 12, pp. 751, 752 and 757. For opposing views, see Jean-Michel Bruguière (2012), ibid, p. 347 and Florence-Marie Piriou (2012), 'Nouvelle querelle des anciens et des modernes : la loi du 1er mars 2012', *Communication Commerce électronique*, No. 10, pp. 8-7.

10 Mass digitization of out-of-commerce books was intended to be undertaken relying on the legal deposit collections kept by the National Library of France (BnF), see Accord cadre pour la mise en œuvre d'un projet de numérisation et de diffusion des livres français indisponibles du XXème siècle entre le ministère de la Culture et de la Communication, le Commissariat général à l'investissement, le Syndicat National de l'Edition, la Société des Gens de Lettres et la Bibliothèque nationale de France, 2 février 2011, Articles C and E. Articles L131-2, L132-3 and R132-1 of the Heritage Code (*Code du patrimoine*) provide that the BnF administers the legal deposit of books (published in France as well as imported to France).

11 Article Art. R134-2 of the CPI.

12 Article L134-3, para. I, of the CPI. Before a legislative proposal was drafted, a consensus on this mechanism, in its general form, was reached among some major stakeholders, see Accord cadre 2011, *supra* note 10, Article B. Société des Gens de Lettres (SGDL) - the French writers' association, participated in the negotiations and signed the agreement as a party defending authors' moral and material interests in the deal.

13 The database, operational since 21 March 2013, is called *Registre des Livres Indisponibles en Réédition Électronique* and is abbreviated as ReLIRE (meaning "to reread" or "to read again"). It was created and is being maintained by the BnF, as a part of its obligation under Article L134-2 of the CPI. The database can be freely accessed from anywhere at: http://relire.bnf.fr. Astonishingly, the current name of the database does not correspond to the name prescribed by the law: "Registre des livres indisponibles du xxe siècle" (Article R134-1, para. 1 of the CPI).

14 Article L134-3, para. I of the CPI. From the wording of certain articles of the CPI it seems that the Ministry may assign more than one CMO for management of the digital rights of the out-of-commerce books (Article L134-3, paras. II and IV, Article L134-7 and Article L134-9 of the CPI). Emmanuel Derieux (2012), *supra* note 7, pp. 66-67. It seems to us that assignment of more than one CMO may undermine the efficiency of this particular mechanism.

15 Articles L134-3, para. III and R327-1 of the CPI. One of the criterion for selection of a CMO concerns the distribution rules. For a CMO to be assigned it needs to ensure in its rules that amounts distributed to authors are not smaller than the amounts distributed to publishers (Article L134-3, para. III, sub-para. 5 of the CPI). Some observers note that although this general rule on distribution of sums collected was criticised for its likely 50/50 outcome, it often leads to higher royalty rates for authors than usual bilateral publishing contracts. In support of this opinion, see Emmanuel Derieux (2012), *supra* note 7, p. 68. At the same time, it can be observed that publishing contracts generally provide royalty payments only to authors. Publishers normally gain their profits as the primary users of the acquired rights through publication and sale of books.

16 E.g., Article L122-12 of the CPI (reprography) and Article L133-2 of the CPI (lending). Sylvie Nérisson (2013), *La gestion collective des droits des auteurs en France et en Allemagne : quelle légitimité ?*, Paris, France: IRJS, pp. 286-287 and Sylvie Nérisson (2015), supra note 3, p. 1428.

17 *Société française des intérêts des auteurs de l'écrit (SOFIA)*: http://www.la-sofia.org. It was created in 1999 on the initiative of SGDL, see Commission permanente de contrôle des sociétés de perception et de répartition des droits, Huitième rapport annuel, May 2011, p. 19. For more information about SOFIA, see Florence-Marie Piriou (2013), *Sociétés de perception et de répartition des droits : Société française des intérêts des auteurs de l'écrit (SOFIA)*, JurisClasseur Propriété littéraire et artistique, Fasc. 1573.

18 Arrêté du 21 mars 2013 portant agrément de la Société française des intérêts des auteurs de l'écrit, NOR: MCCB1307162A, *JORF n°0076*, page 5420, texte n° 27.

19 The renewal is subject to the same criteria as the initial award (Article R327-4 of the CPI).

its selection.[20]

II. Scope

7 The repertoire of digital rights to out-of-commerce books managed by SOFIA consists of rights to books listed in the aforementioned ReLIRE database, whose entry into collective management was not opposed six months following their listing in the database.[21] The database is supplemented with new book titles once a year on the 21 March.[22] Hence, every year there is a six-month period of information campaigns during which the assigned CMO does not manage the digital rights to a selection of the out-of-commerce books listed in the database.[23]

8 The majority of the information necessary for the rights management is provided by the ReLIRE database, which was established and is managed by the publicly funded National Library of France (BnF).[24] A complete list of such books in which digital rights are subject to collective management, can be viewed on the website of the database.[25]

9 Any person has the right to request the listing of a book as an out-of-commerce book in the database, or to report an error in the data by filling out an online form.[26] This possibility can be described as a crowd-sourcing component of building the database.[27] However all suggestions for the listing of books in the database are examined and the titles for listing are determined by a scientific committee composed of three representatives of authors, three of publishers, and one of the BnF.[28] When works become a part of the public domain, they are excluded from the database.[29]

10 The maximum number of rights that can be managed collectively within the mechanism is limited to the works contained in the out-of-commerce books published in France in XXth century. The proposal of the law addressed to the National Assembly estimated the number of out-of-commerce books to be around 500 000.[30]

III. Licensing Schemes

11 The law on the out-of-commerce books of the XXth century prescribes an overall framework under which digital rights to these books should be licensed.

12 Although there is a single repertoire of works rights that are managed by SOFIA, different licensing regimes are presently applied to two groups of rights forming the overall corpus of digital rights to out-of-commerce books. The third licensing scheme for the benefit of public libraries and their subscribers (readers) was revoked on 22 February 2015 without being ever being applied in practice.

13 First, upon entry of the digital rights into collective management, SOFIA has to offer an *exclusive license* to use digital rights for a tacitly renewable term of *10 years* to the publisher, who has rights to reproduction of an out-of-commerce book in paper form.[31] The publisher that accepts the exclusive license32 is obliged to effectively use the work within three years following the acceptance and proof must be provided to the CMO.33 This scheme greatly facilitates acquisition of digital rights to out-of-commerce books by their original publishers who discontinued their publication in paper form.

14 Second, if there is no publisher that has rights to

20 Article R327-6 of the CPI.

21 In case of opposition to the collective management of rights a special mention is made in the database.

22 Article R134-1, para. 1 of the CPI. If 21 March falls on a public holiday, then new titles are uploaded on the next working day.

23 The Memorandum of Understanding on the digitisation of out-of-commerce works (*supra* note 6) states: "Each digital library project shall be widely publicised so that all stakeholders whose rights and interests might be affected can decide whether or not to participate in the project in full knowledge of its scope; and communication to rightholders shall be made sufficiently in advance of any scanning or use." (Principle No. 2, para. 2).

24 Article Annexe to Article R134-1 of the CPI.

25 A complete list of out-of-commerce books rights of which are managed by the assigned CMO can be downloaded from ReLIRE's website at: https://relire.bnf.fr/registre-gestion-collective.

26 Article L134-2, para. 2, of the CPI. Furthermore, the requesting person does not need to demonstrate any interest in the book title he requests to list as out-of-commerce, see Frédéric Pollaud-Dulian (2012), *supra* note 7, p. 339.

27 Jane C. Ginsburg (2014), *supra* note 6, p. 1426.

28 Article R134-1, para. 2 of the CPI. Decree of the Ministry of Culture and Communication of 18 March 2013 determined composition and functioning of the committee. Arrêté du 18 mars 2013 relatif à la composition et au fonctionnement du comité scientifique prévu à l'article R. 134-1 du code de la propriété intellectuelle, NOR: MCCE1307172A, *JORF n°0067*, 20 March 2013, page 4817, texte n° 30.

29 Article R134-2 of the CPI.

30 Assemblée nationale, Proposition de loi relative à l'exploitation numérique des livres indisponibles du XXe siècle, N° 3913, enregistré à la Présidence de l'Assemblée nationale le 8 novembre 2011, p. 4 and Accord cadre 2011, *supra* note 10, Article A.

31 Article L134-5 of the CPI.

32 Mention of acceptance of a 10-year exclusive license by the publisher that has rights for reproduction of the book in paper form is made to the database (Article L134-5, para. 4 of the CPI).

33 Article L134-5, para. 5 of the CPI.

reproduction of an out-of-commerce book in paper form[34], or if this publisher does not accept the 10-year exclusive license, or after accepting it does not make use of the acquired rights,[35] SOFIA offers digital rights to the books to any undertaking through *non-exclusive licenses* for a renewable term of *5 years*.[36]

15 During the legislative process, the senator-rapporteur expressed the view that the original publisher who withdrew a book from the database and did not use the book during the two year period should not have a right of preference[37] for an offer of the exclusive 10-year license, and that the CMO should offer the general terms license of five years to all.[38] At present, the text of the law does not warrant the conclusion that this proposal was implemented. Also nothing prevents original publishers, who did not accept an earlier offer of the exclusive license or after accepting it did not commercially use the book, from obtaining the non-exclusive license.

16 It can be assumed that the duration of licenses imposed by law - 10 and five years respectively - can be shortened in cases when copyright in the works concerned expires before the end of the licenses.[39]

17 According to the conditions defined by SOFIA, both licenses can permit the following two types of uses:

- unit sale of digitized books to the public or to lending libraries;
- making digitized books available through bundling or subscription services to libraries.[40]

18 The amount of royalties to be paid by licensees is established by the General Assembly of the assigned CMO, that is, by a vote of its members.

19 The following royalty rates were approved by an ordinary General Assembly of SOFIA 19 June 2014:[41]

- for exclusive licenses: 15% of sale price net of tax[42] or of all the revenues net of tax for marketing through bundling or subscriptions;
- for non-exclusive licenses: 20% of sale price net of tax[43] or of all the revenues net of tax for marketing through bundling or subscriptions.[44]

20 Out of all the out-of-commerce books added to the ReLIRE database in 2013, 234 publishers obtained exclusive licenses for 27 808 books. In 2014, 76 publishers obtained exclusive licenses for 7 739 books. During these periods rights to more than 20 000 books were licensed under non-exclusive licenses.[45] Due to the standardized conditions and automatization of the rights management, all licenses can be obtained online.[46]

34 Authors or their heirs may demonstrate that the publisher that had rights for publication of books in paper form lost them afterwards. Most of the active publishers are members of SOFIA and hence there should be no big issue finding them.

35 Article L134-5, para. 6 of the CPI. This was characterized by one commentator as an attenuated version of "use it or lose it", see Jane C. Ginsburg (2014), *supra* note 6, p. 1429. In addition to the requirement of use, all the licenses include an obligation for users to report to SOFIA on uses made of the rights and on revenues generated.

36 Article L134-3, para. I, sub-para. 2 of the CPI.

37 During the legislative debate this right was referred as a "right of preference" of original publishers, see Assemblée nationale, Proposition de loi relative à l'exploitation numérique des livres indisponibles du XX^{e} siècle, N° 3913, enregistré à la Présidence de l'Assemblée nationale le 8 novembre 2011, pp. 6, 8 and 9 and Sénat, Rapport 2011, *supra* note 7, pp. 31 and 33. Then this term was also used by some comentators, see Florence-Marie Piriou (2012), supra note 9, p. 10 and Franck Macrez (2012), *supra* note 9, p. 755. From the perspective of rights management, it can also be described as an *obligation* of the CMO to make an offer of an exclusive license to certain users. The Memorandum of Understanding on the digitisation of out-of-commerce works (*supra* note 6) recognized that: "the rightholders [authors of literary and artistic works and publishers] shall always have the first option to digitise and make available an out-of-commerce work." (Recital 6).

38 Sénat, Rapport 2011, *supra* note 7, p. 33.

39 Duration of copyright cannot be extended or reduced contractually. In France, as a general rule, copyright last for 70 years *post mortem* (Article L123-1 of the CPI). On the impossibility to extend the duration of copyright contractually and on particular cases of copyright duration related to wars and to authors who died for France, see Michel Vivant and Jean-Michel Bruguière (2016), *Droit d'auteur et droits voisins*, 3rd edition, Paris, France: Dalloz, pp. 422-425.

40 Minutes of the General Assembly of SOFIA of 19 June 2014, p. 1, available at: http://www.la-sofia.org/sofia/webdav/site/Sofia/shared/docs%20AG/PV%20AG%20%202014.pdf (last visited 15 February 2016).

41 Minutes of the General Assembly of SOFIA of 19 June 2014, p. 2.

42 Royalties due cannot be lower than the guaranteed minimum of 1 euro.

43 Royalties due cannot be lower than the guaranteed minimum of 1 euro.

44 In case holders of non-exclusive licenses commercialise books in non-interoperable formats or through a single channel of commerce, the royalty rate increases to 30%, and the guaranteed minimum to 1,50 euro. An example of such commercialization can be the release of ebooks only through a single proprietary type of ebook reader. This progressive rate, although applied only to non-exclusive licenses, presumably should be encouraging the greatest possible availability of the out-of-commerce books to the public and competition on the market of ebooks. Licensees that obtained non-exclusive licenses need to pay 1 euro annually per book in addition to the payment of amounts proportional to the revenue.

45 SOFIA's website, 'Les licences d'exploitation délivrées en 2014': http://www.la-sofialivresindisponibles.org/2015/licences_delivrees_auteur.php (last visited 15 February 2016).

46 SOFIA's website, 'Souscrire une licence': http://www.la-sofialivresindisponibles.org/2015/souscrire_licence_editeur.

21 With regard to distribution of revenues between authors (including their heirs) on the one hand and publishers on the other, in case of exclusive licenses all the royalty payments in their entirety are directed to authors, and in case of non-exclusive licenses – divided equally[47] between authors and rightholders.[48]

22 While it can be argued that the licensing schemes described above are more beneficial for publishers than for authors,[49] it is interesting to see how authors voted in the General Assembly on licensing and distribution rules.[50]

	For	Against	Abstained
Authors	3 344 voices	228 voices	10 voices
Publishers	450 voices	0 voices	0 voices

23 Voting via a representative group of rightholders is an important democratic element contributing to differentiating this form of collective management from non-voluntary licenses, where tariffs and distribution rules are often determined or validated by governmental authorities, mixed committees involving representatives of users and of the government, and by judicial or quasi-judicial bodies.[51]

24 In addition to safeguarding collection of agreed remuneration, the licensing committee of SOFIA also aims to ensure a certain quality of digitization.[52]

25 Third, the original version of the law on out-of-commerce books of the XXth century foresaw the third type of licenses to be issued by the assigned CMO: *royalty-free licenses to public libraries*, which authorizes them to reproduce and make out-of-commerce books available on a non-commercial basis to their subscribers (readers) in digital form.[53] Under this licensing scheme the CMOs retained a right to a justified refusal of the royalty-free license. Rightholders having rights to the reproduction of such books could request withdrawal of such licenses issued to the public libraries at any moment.[54] Although this provision contained aforementioned safeguards of rightholders' interests it was abrogated by a law of February 2015.[55]

26 Therefore, SOFIA is currently obliged by the law to license digital rights to out-of-commerce books under two different licensing schemes. The obligation of SOFIA to make exclusive offers of some rights of its repertoire to original publishers[56] sharply distinguishes this mechanism from the traditional collective management characterized by an equal treatment of users, non-exclusive licenses, and a possibility to propose licenses covering the entire repertoire (blanket license).[57] It can be further added that the right of the publishers, who have rights to reproduction on paper to an exclusive offer of the digital rights, is likely to prevent entry of digital rights to the most commercially interesting books in the second licensing scheme (more "classic" collective management). It is only in case of the second licensing scheme that the CMO can play a role of a single point of contact, where users can obtain rights to any and all works of the out-of-commerce books not licensed to original publishers through a single transaction. Overall, this licensing mechanism based on the collective management, while sparing publishers from the need to search and negotiate with rightholders for numerous works, does not provide the convenience of a single point of contact, as it is commonly one of the primary objectives of non-voluntary collective management.

php (last visited 15 February 2016).

47 With exception of instances when the guaranteed minimum of 1 euro is paid. It will be divided in the following way: 75 cents to authors and 25 to publishers.

48 Minutes of the General Assembly of SOFIA of 19 June 2014, p. 2.

49 Sylvie Nérisson (2013), *supra* note 16, pp. 309-310 (the critique concerns the conditions provided by the law).

50 Minutes of the General Assembly of SOFIA of 19 June 2014, p. 2.

51 For example, according to Article L311-5 of the CPI remuneration for reproduction made by natural persons for private use is determined by a mixed committee presided by the governmental representative and composed of an equal number of representatives of rightholders on the one hand and of representatives of producers and importers of equipment giving raise to the remuneration on the other hand.

52 SOFIA's Communiqué of 17 September 2013, Livres indisponibles : Quelles seront les conditions d'attribution des licences d'exploitation ?, available at: http://www.sgdl.org/phocadownload/Juridique/gestion_collective/Communique_SOFIA_17_septembre_2013_Conditions_Licenses.pdf (last visited 15 February 2016).

53 The issue of free authorisations to libraries to provide their subscribers with access to digitized out-of-commerce books was a very hotly debated issue in the law making process, see André Lucas, Henri-Jacques Lucas and Agnès Lucas-Schloetter (2012), Traité de la propriété littéraire et artistique, 4th edition, Paris, France: LexisNexis, p. 732.

54 Former Article L134-8 of the CPI.

55 Article 3, para II of the Loi n° 2015-195 du 20 février 2015 portant diverses dispositions d'adaptation au droit de l'Union européenne dans les domaines de la propriété littéraire et artistique et du patrimoine culturel (1), JORF n°0045, 22 February 2015.

56 Some concerns were raised regarding the conflict of interest caused by the fact that publishers are members of the CMO and users at the same time, see Frédéric Pollaud-Dulian (2012), supra note 7, p. 342.

57 In support of this view see Sylvie Nérisson (2015), *supra* note 3, p. 1431. In general, French law recognizes and promotes blanket licenses (Article L132-18 of the CPI). On the non-excludability of collectively licensed uses as a key feature of collective management, see Daniel J. Gervais (2011), 'The Landscape of Collective Management Schemes', *Columbia Journal of Law & the Arts,* Vol. 34, No. 4, pp. 596-601.

IV. Opting Out

27 The non-voluntary form of collective management introduced by the law provides rightholders with possibilities for opting out[58] of the mechanism and exercising their rights individually. To be more precise, there are two distinct options for opting out: *a priori* opt out and *a posteriori* opt out.[59]

1. A Priori Opt Out

28 During the six months[60] following the listing of book titles in the database,[61] authors (including their heirs) and publishers that have rights to reproduction of the out-of-commerce books in paper form may opt out[62] from the mechanism by notifying the BnF in writing.[63] A simple request is sufficient, there is no need for demonstration of any particular reasons. Essentially, the role of the described period during which the exercise of the digital rights concerned is not affected[64] is to inform rightholders about the future exercise of their rights by the assigned CMO and to provide them with the possibility to opt out even before entry of the rights into collective management.[65]

2. A Posteriori Opt Out

29 In case authors, their heirs, or publishers did not oppose the exercise of the digital rights through the assigned CMO during the six-month period following publication of their book titles in the database (i.e., before collective exercise of the rights), they may still opt out from the system afterwards (i.e., once rights enter into the collective management, but not necessarily after issue of a license). The following three scenarios are possible:

- The author of an out-of-commerce book may opt out if he considers reproduction or public digitization of his book may be harmful to his reputation.[66] As it is formulated, this possibility is provided to protect moral rights of authors. This is important because the mass digitization project does not foresee work on the content, and all the books will be digitized as they are.[67] Furthermore, even if SOFIA is undertaking efforts to ensure licensing conditions enforce a certain quality of digitized books and are as a result constantly improving technological tools to enable this goal, some errors are always possible[68];

- The author may withdraw his digital rights at any moment, provided that he supplies proof that he is the only rightholder of digital rights.[69] In general, publishing contracts concluded in the XXth century do not explicitly mention reproduction of books in digital form and making them available online,[70] with the exception of

58 During the legislative process the English term "opt out" was explicitly used to describe the essence of the mechanism, see Sénat, Rapport 2011, supra note 7, pp. 14, 20 and 29). The term is now often used in the French doctrine to describe the withdrawal of rights from the mechanism, see André Lucas, Henri-Jacques Lucas and Agnès Lucas-Schloetter (2012), *supra* note 52, p. 732, Pierre Sirinelli (2016), *Propriété littéraire et artistique*, 3rd edition, Paris, France: Dalloz, p. 106 and Marie-Christine Leclerc-Sénova and Nathalie Orloff (2013), 'La gestion collective en matière d'écrit', in Patrick Tafforeau (ed.), *Pratique de la propriété littéraire et artistique*, Paris, France: LexisNexis, p. 59.

59 This novel terminology for nuancing the two opt out possibilities of the mechanism was used for the first time by Emmanuel Emile-Zola-Place (2012), *supra* note 7, p. 360.

60 Several commentators criticised this period as being too short, see Frédéric Pollaud-Dulian (2012), supra note 7, p. 340 and Franck Macrez (2012), *supra* note 9, p. 756.

61 During this period, the Ministry of Culture and Communication, CMOs managing rights to literary works, and professional organisations in book publishing organise a nation-wide campaign informing rightholders about their rights and the mechanism (Article R134-11 of the CPI).

62 Original publishers that are opposed to this are obliged to publish out-of-commerce books within the two years following the announcement of opposition. If they do not comply with this requirement, the books concerned will be subjected to collective management (Article 134-4, para. II of the CPI).

63 Article L134-4, para. I, sub-para. 1 of the CPI. The documents that authors need to provide for opting out are very minimal. An identification document and a statement testifying the quality of an author suffice. Heirs need to add to the aforementioned documents a document confirming their status of legal successor. Publishers would need to show a document demonstrating their publishing rights (e.g., a publishing contract).

64 I.e., the rightholders may exercise their rights as they wish. Christophe Caron (2015), *Droit d'auteur et droit voisins*, 4th edition, Paris, France: LexisNexis, p. 419.

65 Senator-rapporteur, when examining the draft law, expressed an idea to provide a possibility for rightholders to mention their books that they would not want registered on the database of out-of-commerce books on a special website, and hence to be included in the mechanism, see Sénat, Rapport 2011, *supra* note 7, pp. 27 and 32. This suggestion did not make it to the final text, probably being considered tautological and complicating the two-stage system.

66 Article L134-4, para. I, sub-para. 3 of the CPI.

67 Authors will not be provided with a possibility to update or correct their works, or to alter them in any other manner. From a cultural perspective there might be an inherent value in preserving works of the past as they are without "improving" them.

68 Some anxiety with regard to the quality of digitized books was expressed by some critics of the law, see Franck Macrez (2012), *supra* note 9, p. 757.

69 Article L134-6, para 2 of the CPI.

70 Assemblée nationale, Proposition de loi relative à l'exploitation numérique des livres indisponibles du XXe siècle, N° 3913, enregistré à la Présidence de l'Assemblée nationale

contracts that were subsequently amended[71]. The obligation to prove was introduced in the law because of the assumption that there is a valid contract between the authors and the publishers of the books that were published. It seems reasonable to estimate that the vast majority of books published in the 20th century in France, were published with the necessary authorizations of their authors. Although since 1957 contracts need to specifically refer to the uses foreseen by the contract (Law n°57-298 of 11 March 1957), under older publishing contracts authors generally transferred all of their rights to publishers (use of their works in any form). With the development of digital uses, some publishers concluded with authors' amendments or supplements to the contracts signed after 1957 in order to cover digital uses. Secondly, in France it is possible for an author to terminate a publishing contract when the book is not effectively utilized by the publisher (is out-of-print), by undertaking certain acts prescribed by the law (Article L132-17 of the CPI). In the absence of undertaking acts specified by the law, the contract is valid even if the book is not effectively used by the publisher;[72]

- The author, jointly with the publisher, possessing rights to reproduction of his out-of-commerce book in paper form may withdraw the digital rights to the book.[73] In case of such joint withdrawal, the publisher is obliged to start using the out-of-commerce book within 18 months following their notification of withdrawal.[74]

30 The law provides for a high level of security for licensees in the case that rightholders opt out from the collective management (the last two of the three above-mentioned possibilities),[75] since rightholders cannot oppose the use of out-of-commerce books on the basis of previously issued authorizations by SOFIA for the duration of their licenses (but for the period not exceeding five years) and on a non-exclusive basis. SOFIA notifies users about withdrawal of rightholders.[76] Some rightholders may find this period too long (since it is equal to the duration of non-exclusive licenses) and that their interests are insufficiently protected in comparison to the interests of users.

31 As a book constitutes an indivisible union of digitization, the mechanism does not provide for opting out of some rights to a book. That is, if at least one person holding rights to the out-of-commerce book opts out, the book is considered to be out of the system.

32 One of the secondary differences between the *a priori* and the *a posteriori* opt out is that the former is made through the BnF (on the ReLIRE database) and the latter through the CMO.[77]

33 From the statistics on the requests for opting out received since 2013,[78] it is clear that the proportion of rightholders choosing to opt out is decreasing.

ReLIRE database	2013	2014	2015
Number of books added to the database in March	63 096	45 897	85 896
Number of books objects of opt out requests	5 760	544	53
Number of books objects of status change in the database (commercial availability, foreign books, etc.)	3 532	970	263
Number of books which digital rights are currently managed collectively	53 804	44 383	-

34 There are no formal obstacles in place for rightholders that opted out from the collective management and changed their opinion to mandate their rights for collective management voluntarily afterwards.

le 8 novembre 2011 and pp. 5-6 and Emmanuel Emile-Zola-Place (2012), *supra* note 7, p. 356.

71 Emmanuel Derieux (2012), *supra* note 7, p. 65.

72 Due to the described-above uncertainty, this line of argumentation is supported by Florence-Marie Piriou (see Florence-Marie Piriou (2012), *supra* note 9, pp. 8-9). Nevertheless, some scholars criticise the assumption and consequentially a need for the author to prove the negative fact that he did not assign his rights to anybody and that he is the sole rightholder, which they interpret as being too burdensome and contrary to the general assumption of authorship, see Franck Macrez (2012), *supra* note 9, pp. 756-757, Frédéric Pollaud-Dulian (2012), *supra* note 7, pp. 341 and 343, Emmanuel Emile-Zola-Place (2012), *supra* note 7, p. 361. Jane Ginsburg, while also being critical about the mechanism ("the law gives to the publishers what they may not have received by contract" and "the law expropriates authors not for the public benefit of nonprofit libraries, but for the benefit of for-profit publishers"), observes that "without the licensing scheme, the authors would have derived no revenue from the books that otherwise would have remained out of commerce", see Jane C. Ginsburg (2014), *supra* note 6, pp. 1427-1428.

73 Article L134-6, para. 1 of the CPI.

74 The diversity of periods prescribed by the law for use of works by publishers, ranging from 3 years to 18 months, was criticised by Emmanuel Derieux (2012), *supra* note 7, p. 68.

75 Frédéric Pollaud-Dulian (2012), *supra* note 7, p. 341.

76 Article L134-6, para. 5 of the CPI.

77 Articles L134-4, R123-6, R134-7, R134-8 and R134-9 of the CPI.

78 SOFIA's website, Les retraits depuis 2013: http://www.la-sofialivresindisponibles.org/2015/demandes_sortie_auteur.php (last visited 15 February 2015).

V. Supervision

35 SOFIA, alike any other CMO in France, is subjected to an oversight by the Ministry of Culture and Communication and by a special commission at the Court of Auditors (*Cour des comptes*) called *Commission permanente de contrôle des sociétés de perception et de répartition des droits* (the Commission controlling CMOs).[79]

36 The supervision is generally explained by a de facto monopolistic position often held by CMOs on respective markets and by the public mission they fulfil with regard to facilitation of availability of creative works. Reasons for enhanced governmental control are even stronger when the collective exercise of rights is non-voluntary and involves rightholders who are not members of organizations exercising their rights, but rather operating on their behalf and for their benefit. Presumably for these reasons the legislator added supplementary tools for controlling activities of the CMO managing digital rights to out-of-commerce books.

37 The assigned CMO has to report annually to the Ministry of Culture and Communication about use of amounts collected from the use of out-of-commerce books whose rightholders could not be identified or located.[80]

38 The Commission controlling CMOs formulates recommendations regarding improvement of research aimed at identification and location of rightholders, and reports annually to the Parliament, to the government and to the General Assembly of the CMO.[81]

VI. Difficulty with Qualification

39 Legal doctrine does not yet clearly and unanimously classify the form of collective management created for the management of digital rights to out-of-commerce books.

40 The proposal of the law qualified the non-voluntary form of collective management as "mandatory collective management",[82] and compared it to the mandatory collective exercise of exclusive rights to the cable retransmission.[83] However, documents prepared by SOFIA avoid any explicit classification by merely stating that it is not a "mandatory collective management".[84] Some observers characterized the form of collective management as "mandatory" (but not completely),[85] "hybrid, half-voluntary and half-mandatory",[86] "semi-mandatory",[87] "presumed collective management",[88] or as "extended collective management", comparing it with the systems existing in the Nordic countries.[89]

41 While there is quite some hesitation as to how to name the novel form of collective management, a consensus seems to be emerging that it is neither voluntary nor mandatory but a new type for the French legal system.[90] The author prefers the term

79 Articles L321-3, L321-6, L321-9, L321-12, L321-13, R321-1, R321-8 and R325-1 – R325-4 of the CPI. For analysis, see Nathalie Piaskowski (2010), 'Collective Management in France', in Daniel J. Gervais (ed.), *Collective Management of Copyright and Related Rights*, 2nd edn., Alphen aan den Rijn, The Netherlands: Kluwer Law International, pp. 195-203 and Sylvie Nérisson (2013), *supra* note 16, pp. 8, 439, 446-448 and 470-475. Although French legislation provides for a special regime of regulation of CMOs, the aforementioned observers consider competences of the bodies to be limited to some extent and not fully suited to their tasks.

80 Article L134-9, para. 2 of the CPI. During the legislative debate a great emphasis was put on the state supervision of the CMO managing rights to out-of-commerce books and on their activities related to the research of rightholders for distribution of collected remuneration, see Sénat, Rapport 2011, *supra* note 7, p. 31.

81 Article L. 134-3, para. IV of the CPI.

82 I.e., a system under which, as a general rule, rightholders cannot exercise their rights on an individual basis.

83 Assemblée nationale, Proposition de loi relative à l'exploitation numérique des livres indisponibles du XXe siècle, N° 3913, enregistré à la Présidence de l'Assemblée nationale le 8 novembre 2011, p. 7: "Le mécanisme de *gestion collective obligatoire* [mandatory collective management] envisagé ne repose pas sur une cession légale des droits à la société, comme cela est prévu pour le droit de reprographie, mais sur un simple transfert de l'exercice des droits à la SPRD comme dans le précédent du droit de retransmission par câble. La ou les sociétés agréées sont dotées de la faculté d'ester en justice pour la défense des droits concernés par le dispositif." (emphasis added).

84 SOFIA, Synthèse 2013 et résultats de l'Assemblée générale 2014, p. 10, available at: http://www.la-sofia.org/sofia/webdav/site/Sofia/shared/docs%20AG/synthe%C2%A6%C3%87se2014-planche-e%C2%A6%C3%BCcran.pdf (last visited 15 February 2016).

85 Sylvie Nérisson (2013), *supra* note 16, p. 310, while acknowledging the possibility for authors to oppose the collective exercise of their rights; Franck Macrez (2012), supra note 9, pp. 749 and 753, clarifying on p. 755 that the possibility for opting out makes the mechanism a new form of mandatory collective management imposed by law but optional or, at least, presumed; Marie-Christine Leclerc-Sénova and Nathalie Orloff (2013), supra note 57, pp. 49 and 59.

86 Jean-Michel Bruguière (2012), 'Gestion collective – Œuvres indisponibles : Régime du livre indisponible (Seconde partie)', *Propriété intellectuelle*, No. 44, pp. 411-412.

87 Michel Vivant and Jean-Michel Bruguière (2016), *supra* note 38, p. 779.

88 Emmanuel Emile-Zola-Place (2012), *supra* note 7, p. 360 and Sylvie Nérisson (2015), *supra* note 3, pp. 1429 and 1431.

89 Florence-Marie Piriou (2012), *supra* note 9, pp. 7 and 10.

90 André Lucas, Henri-Jacques Lucas and Agnès Lucas-Schloetter (2012), *supra* note 52, p. 731, Emmanuel Emile-Zola-Place (2012), *supra* note 7, pp. 356 and 360 and Jean-Michel Bruguière (2012), *supra* note 85, p. 411.

"presumed collective management".[91]

42 Some of the commentators, which qualified the mechanism as a form of non-voluntary collective management, also referred to it as a non-voluntary license.[92] At the same time, the legislative proposal reveals that the recourse to a form of non-voluntary collective management was motivated precisely by a wish to avoid introduction of an exception or limitation.[93]

43 These kind of doubts and uncertainties surely contributed to the decision of the Council of State to refer the question about compatibility of the mechanism with the definition of reproduction right of Article 2 and the closed list of exceptions and limitations of Article 5 of the InfoSoc Directive to the CJEU. If the mechanism is qualified as an exception or limitation, then it will not be in line with the EU law.

C. Permissibility Test Based on the Extended Collective Management

44 Having described the new form of non-voluntary collective management of copyright in the first part of the article, this section examines the compatibility of the mechanism with the InfoSoc Directive through a proposed test based on the permissibility of the least restrictive forms of the extended collective management.

I. EU Law on Non-Voluntary Forms of Collective Management

1. Mandatory Collective Management and the EU Law

45 Mandatory collective management is explicitly authorized in some domains by a few EU Directives.[94] Although copyright scholars and experts agree that remuneration rights can be subjected to mandatory collective management, as well as exclusive rights in cases when exceptions and limitations are permitted by international and EU law, there are different views on the permissibility of the mandatory collective management of exclusive rights in all cases and whether it constitutes an exception or limitation to these rights.[95]

46 In the case of the French mechanism of collective management of digital rights to works in out-of-commerce books (i.e., works that were once put on the market with the consent of the rightholders), the authorization of rightholders to the CMO is presumed,[96] but an opt out from the system, with a subsequent individual exercise, is possible. The latter possibility of individual exercise is not permitted under mandatory collective management.[97]

91 See *infra* on the impossibility to qualify the mechanism neither as "mandatory" nor as "extended".

92 Frédéric Pollaud-Dulian (2012), *supra* note 7, p. 340, Florence-Marie Piriou (2012), *supra* note 9, pp. 8 and 9, Sylvie Nérisson (2015), *supra* note 3, p. 1429.

93 Assemblée nationale, Proposition de loi relative à l'exploitation numérique des livres indisponibles du XX^{e} siècle, N° 3913, enregistré à la Présidence de l'Assemblée nationale le 8 novembre 2011, p. 5. In support of this qualification, see Christophe Caron (2015), *supra* note 63, p. 419.

94 Article 9 of the Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission [1993] L 248/15: "Member States shall ensure that the right of copyright owners and holders or related rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a collecting society.". Article 6(2) of the Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art [2001] OJ L 272/32: "Member States may provide for compulsory or optional collective management of the royalty provided for under Article 1 [resale rights royalty]"; and Article 5(4) of the Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) [2006] OJ L 376/28: "Member States may regulate whether and to what extent administration by collecting societies of the right to obtain an equitable remuneration [for the rental] may be imposed."

95 Silke von Lewinski (2004), 'Mandatory Collective Administration of Exclusive Rights – A Case Study on Its Compatibility with International and EC Copyright Law', *UNESCO e-Copyright Bulletin*, January-March 2004, Mihály Ficsor (2003), 'Collective Management of Copyright and Related Rights at a Triple Crossroads: Should it Remain Voluntary or May it Be "Extended" or Made Mandatory?', *UNESCO Copyright Bulletin*, October 2003, Mihaly Ficsor (2010), 'Collective Management of Copyright and Related Rights from the Viewpoint of International Norms and the Acquis Communautaire', in Daniel J. Gervais (ed.), Collective Management of Copyright and Related Rights, 2nd edn., Alphen aan den Rijn, The Netherlands: Kluwer Law International, pp. 42-59, Christophe Geiger (2007), 'The Role of the Three-Step Test in the Adaptation of Copyright Law to the Information Society', *UNESCO e-Copyright Bulletin*, January-March 2007, pp. 9-12, Christophe Geiger and Franciska Schönherr (2014), 'Limitations to copyright in the digital age', in Andrej Savin and Jan Trzaskowski (eds), *Research Handbook on EU Internet Law*, Cheltenham, UK / Northampton, MA, USA: Edward Elgar, pp. 138-141, Séverine Dusollier and Caroline Colin (2011), 'Peer-to-Peer File Sharing and Copyright: What Could Be the Role of Collective Management?', *Columbia Journal of Law & the Arts,* Vol. 34, No. 4, pp. 825-827 and Mihály Ficsor (2002), *Collective Management of Copyright and Related Rights*, WIPO Publication No. 855, pp. 138-139.

96 Sénat, Rapport 2011, *supra* note 7, p. 32 and Jean-Michel Bruguière (2012), *supra* note 85, p. 412.

97 See for example, management of cable retransmission rights (Article L123-20-1 of the CPI), of rights to reprogra-

Therefore, the mechanism in question should not be equated to the mandatory collective management. It is important that the compliance of the French legislation on the out-of-commerce books with the EU law is not confused with the question about the capacity of the member states to introduce mandatory collective management of exclusive rights.[98]

2. Extended Collective Management and the EU Law

47 In its most general sense, extended collective management of copyright is a form of non-voluntary collective exercise of rights based on the statutory-enabled extension of a license concluded between a user and a CMO to cover rights of rightholders non-members of the CMO (extended collective license). Extended collective licensing was created in the Nordic countries long before adoption of the EU instruments in the domain of copyright,[99] and is being used in an increasing number of areas.[100] Similarly to the qualification of the permissibility of the mandatory collective management, there seems to be a consensus that extended collective management is permitted in cases when exceptions and limitations to the exclusive rights are permitted by international and EU law.[101]

48 Texts of several EU copyright directives seem to indicate that establishment of the extended collective management of exclusive rights in areas not covered by the exceptions and limitations is permitted. While the InfoSoc Directive provides for an exhaustive list of exceptions and limitations that member states may adopt, Recital 18 states that the "Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences", excluding the extended collective management of copyright from the scope of its exceptions and limitations.[102] Furthermore, the Satellite and Cable Directive,[103] the Orphan Works Directive[104] and

phy (Article L122-10 of the CPI) and of rights to remuneration for lending of works by libraries (Article L134-4 of the CPI).

98 In support of this concern, see Sylvie Nérisson (2015), *supra* note 3, p. 1429.

99 With the entry into force of the post-war Copyright Acts: 1960 in Sweden, 1961 in Denmark, Finland and Norway, and 1972 in Iceland. See Birger Stuevold Lassen (1963), 'Collectivism and Individual Rights in Norwegian Copyright Law', *Scandinavian Studies in Law*, Vol. 7, p. 89 and Gunnar Karnell (1991), 'Peculiar Features of Nordic Copyright Law, the Extended Collective Licence, the Photograph as a Copyright Outcast, the Non-Employed Employee', *Nordiskt Immateriellt Rättsskydd*, Vol. 1, p. 16.

100 See Tarja Koskinen-Olsson (2010), 'Collective Management in the Nordic Countries', in Daniel J. Gervais (ed.), *Collective Management of Copyright and Related Rights*, 2nd edn., Alphen aan den Rijn, The Netherlands: Kluwer Law International, pp. 283-284.

101 Gunnar Karnell (1991), *supra* note 99, p. 434, Mihály Ficsor (2003), *supra* note 95, pp. 9-10, Alain Strowel (2011), 'The European "Extended Collective Licensing" Model', *Columbia Journal of Law & the Arts,* p. 668.

102 Vappu Verronen (2002), 'Extended Collective License in Finland: A Legal Instrument for Balancing the Rights of the Author with the Interests of the User', *Journal of the Copyright Society of the USA*, Vol. 49, p. 1156 ("explicit references in the Infosoc directive are formulated in such a way that it is clear that as regards the scope of this directive, collective arrangements are not considered restrictions to copyright."), Alain Strowel (2011), *ibid*, p. 666 ("ECLs [extended collective licenses] are presented as a management system in this Directive. Except for cable retransmission, the E.U. framework does not provide for ECLs, but admits their existence under national laws"), Silke von Lewinski (2004), *supra* note 95, p. 13, Felix Trumpke (2012), 'The Extended Collective License – A Matter of Exclusivity?', *Nordiskt Immateriellt Rättsskydd*, Vol. 3, p. 293, Anna Vuopala (2013), *Extended collective licensing: A solution for facilitating licensing of works through Europeana, including orphans?*, Finish Copyright Society Articles and Studies, No. 2, p. 13, available at: http://www.copyrightsociety.fi/ci/Extended_Collective_Licensing.pdf (last visited 15 February 2016), Johan Axhamn and Lucie Guibault (2011), 'Solving Europeana's mass-digitization issues through Extended Collective Licensing?', *Nordiskt Immateriellt Rättsskydd*, Vol. 6, pp. 513-514 (footnote 10). Tarja Koskinen-Olsson (2010), *supra* note 100, p. 303 ("This [Recital 18] makes it clear that the nature of an ECL [extended collective license] is a modality concerning rights management. The statement in the Preamble is seen as a general statement that applies not only to already existing ECL provisions but also leaves a freedom to establish new ones."). This understanding of the text is based on its literal and historic interpretation (the Recital was included because of concerns raised at the Directive negotiations by delegations of the Nordic countries).

103 Article 3(2) provides member states with the possibility of introducing extended collective management for the right of simultaneous communication to the public by satellite of terrestrial broadcasts, see Jan Rosén (2014), 'The Satellite and Cable Directive', in Irini Stamatoudi and Paul Torremans (eds), *EU Copyright Law: A Commentary*, Cheltenham, UK / Northampton, MA, USA: Edward Elgar, p. 213 and Thomas Dreier (2013), 'Satellite and Cable Directive', in Michel M. Walter and Silke von Lewinski (eds), *European Copyright Law: A Commentary*, New York, NY, USA: Oxford University Press, pp. 430-431.

104 Recital 24 ("This Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences, legal presumptions of representation or transfer, collective management or similar arrangements or a combination of them, including for mass digitisation.") and Article 1(5) ("This Directive does not interfere with any arrangements concerning the management of rights at national level.") of the Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works (Text with EEA relevance) [2012] OJ L 299/5, see Uma Suthersanen and Maria Mercedes Frabboni (2014), 'The Orphan Works Directive', in Irini Stamatoudi and Paul Torremans (eds), *EU Copyright Law: A Commentary*, Cheltenham, UK / Northampton, MA, USA: Edward Elgar, pp. 656 and 662.

the Collective Management Directive[105] leave to the member states the discretion of establishing extended, as well as some other non-voluntary forms of collective management. Of course, this is not to say that any mechanism named "extended collective license" passes the threshold just by virtue of its name[106] or that the InfoSoc Directive can exempt member states from the need to comply with obligations under the international treaties.[107] There are also some firm views that extended collective management of exclusive rights in the domains not covered by exceptions and limitations is not permitted.[108] Such views lead to the conclusion that legislative provisions of the EEA states on the extended collective licensing of exclusive rights in the domains not covered by exceptions and limitations are in breach of the EU law. An example of reliance on the extended collective management of exclusive rights in the domain not covered by exceptions or limitations for the purpose of mass digitization and making books available is the contract regarding the digital dissemination of books of 30 September 2012, concluded between the National Library of Norway and KOPINOR, Norwegian CMO managing rights to literary works (the project is called "Bokhylla", translate as "Bookshelf").[109] Exclusive rights of rightholders non-members of KOPINOR are covered by the contract by virtue of its Article 3 relying on the extended collective license clauses of the Norwegian Copyright Law.[110]

49 It is important to note that there is no single model of the "extended collective licensing". Different provisions on extended collective licensing with different characteristic effects on the protected rights and their exercise can be found in the copyright laws of the Nordic countries. The EU law does not provide for a definition of the "extended collective licensing" to which it refers, nor does it mention a list of attributes of such licensing. As Thomas Riis and Jens Schovsbo put it: "The acceptability of the ECLs [extended collective licenses] in terms of general EU law [...] depends on the actual wording of the rule and the administration in the agreements."[111] For example, some models of extended collective license clauses do not foresee a possibility to opt out from the system for rightholders whose rights were coved by collective licenses by virtue of the extension effect,[112] and others impose mandatory arbitration in case of disputes with the CMO issuing extended collective licenses.[113]

50 Without going further into the analysis of the permissibility of different variations of extended collective management under the EU law, further inquiry builds on the assumption that extended collective management of exclusive rights in the domains not covered by exceptions and limitations, at least in its least restrictive form, is compatible with the EU acquis.[114] This assumption implies that other

105 Recital 12 ("This Directive [...] does not interfere with arrangements concerning the management of rights in the Member States such as individual management, the extended effect of an agreement between a representative collective management organisation and a user, i.e. extended collective licensing, mandatory collective management, legal presumptions of representation and transfer of rights to collective management organisations.") and Article 7(1) of the Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (Text with EEA relevance) [2014] OJ L 84/72 ("Member States shall ensure that collective management organisations comply with the rules [...] in respect of rightholders who have a direct legal relationship by law or by way of assignment, licence or any other contractual arrangement with them but are not their members."), see Lucie Guibault (2014), 'Collective Rights Management Directive', in Irini Stamatoudi and Paul Torremans (eds), *EU Copyright Law: A Commentary*, Cheltenham, UK / Northampton, MA, USA: Edward Elgar, pp. 727-728.

106 Thomas Riis and Jens Schovsbo (2010), 'Extended Collective Licenses and the Nordic Experience – It's a Hybrid but is It a Volvo or a Lemon?', *Columbia Journal of Law and the Arts*, Vol. 33, Issue IV, pp. 478-479.

107 Felix Trumpke (2012), *supra* note 102, pp. 283-287.

108 Mihály Ficsor (2003), *supra* note 95, pp. 9-10.

109 For analysis of the project, see Vigdis Moe Skarstein (2010), 'The Bookshelf: digitisation and access to copyright items in Norway', *Program: electronic library and information systems*, Vol. 44, No. 1, pp. 48-58.

110 Translation of the contract in English is available on the website of the National Library of Norway: http://www.nb.no/pressebilder/Contract_NationalLibraryandKopinor.pdf (last visited 15 February 2016).

111 Thomas Riis and Jens Schovsbo (2010), *supra* note 106.

112 Felix Trumpke (2012), *supra* note 102, pp. 279-280 and Thomas Riis and Jens Schovsbo (2010), *supra* note 106, pp. 479 (footnote 13: "the possibility of opting out is often described as an integrated feature of ECL [extended collective licensing], which it is not") and 485-486. Lucie Guibault (2015), *supra* note 6, p. 181 ("An ECL system without the possibility to opt-out would be akin to a mandatory licence."). On the basis of this important characteristic, some copyright experts when admitting extended collective licensing of exclusive rights in the domains not covered by exceptions and limitations do not extend this qualification to the extended collective licensing without an opt out clause, see Daniel J. Gervais (2003), *Application of an Extended Collective Licensing Regime in Canada: Principles and Issues Related to Implementation*, p. 40. For an exhaustive list of domains in which an opt out from the extended collective management is not possible see Johan Axhamn and Lucie Guibault (2011), *Cross-border extended collective licensing: a solution to online dissemination of Europe's cultural heritage?*, Final report prepared for EuropeanaConnect, p. 43.

113 According to some authors such a model "reduces the ECL-clauses to compulsory license-clauses in disguise", Gunnar Karnell (1985), 'Extended Collective License Clauses and Agreements in Nordic Copyright Law', p. 77, Gunnar Karnell (1991), *supra* note 99, pp. 17-18, Vappu Verronen (2002), *supra* note 102, pp. 1148 and 1160.

114 In our view it is difficult to give different interpretation to the wording of the EU *acquis* without ignoring the ordinary meaning to be given to the terms of the Directives in their context and in light of their object and purpose (assuming

less restrictive forms of non-voluntary collective exercise of exclusive rights in domains not covered by exceptions and limitations should be permissible. Hence, taking the extended collective management in its least restrictive manifestation as a benchmark, I propose to compare it to the new French form of collective management in order to examine whether it is more or less restrictive of the exclusive rights (to conduct an "extended collective licensing test", so to speak). If this assumption is correct and the examination leads one to the latter conclusion, the new model should be compatible with the InfoSoc Directive.

II. Application of the "Extended Collective Management Test" to the French Mechanism of Collective Management of Digital Rights to Out-of-Commerce Books

51 This section compares some key features of the French mechanism designed for management of rights to out-of-commerce books and of the extended collective management, choosing its least restrictive variations.

52 As a preliminary remark of comparison, it is important to note several observations regarding similar *raisons d'être* for both mechanisms.

53 The main rationales behind the introduction of the extended collective management are the decrease of transaction costs and avoidance of hold-up problems.[115] Both rightholders and users are in need of a practical solution when it is virtually impossible to reach individual rightholders to ensure legal use of their works.[116] As Gunnar Karnell put it: "the ECL-model may serve best in fields of application where authors' exclusive rights should indisputably be maintained as an ideal state of affairs, but where the exercise of such rights is impossible because of the insurmountable difficulty of finding the individual rights-holders or bringing together all of the rights needed for a specific use of protected works. An ECL-system should then serve as a means of guaranteeing the implementation of rights, insofar as may be possible, where *there would otherwise be rights but no implementation*."[117]

54 Comparable to the areas where extended collective licensing is introduced, transaction costs involving clearance of rights for numerous books, typically of low market value (out-of-commerce books are by definition works that are currently not enjoying market success and are not generating revenues for their rightholders) are most often disproportionate to the possible benefit. For example, time and costs necessary for identification, location and negotiation with numerous authors of out-of-commerce books of the XXth century containing numerous chanters written by different authors and/or numerous photographs, maps, drawings and diagrams created by different authors effectively prevent digitization and commercialization of such books. In such situations, granting exclusive rights within an ever-extending period without effective mechanism for their exercise is like granting rights in the absence of an effective mechanism for their enforcement. Economic rights without condition for their material implementation do not fulfill their purpose.

1. Scope

55 All of the out-of-commerce books, rights to which are or will be managed by the CMO, are *exhaustively defined* in the freely accessible database, where they are published once a year.

56 Extended collective licenses are characterized by an extension clause, by virtue of which they extend users' access from only the CMO's own repertoire to include all rights to works in a specific field, which are outside the system of collective rights management. Usually, *the exact number* of protected subject matter, rights to which are managed through the extension effect, *is not known*. Protected subject matter can be subjected to the extended collective management without any prior notice. Extended collective management also usually deals with a certain type of rights for protected subject matter in a defined domain.[118]

57 Both the French mechanism and the extended

in particular that the use of words "arrangements", "management" "collective licensing", "exceptions and limitations" in the InfoSoc Directive and other directives is not accidental).

115 Thomas Riis and Jens Schovsbo (2010), *supra* note 106, p. 478.

116 Vappu Verronen (2002), *supra* note 102, p. 1159.

117 Gunnar Karnell (1985), *supra* note 113, p. 81 (emphasis added).

118 Just to give an example, in Norway, extended collective licensing is foreseen in the following domains: use in educational activities; reproductions for domestic (internal) use by public authorities, companies and other organisations; use in archives, libraries and museums; certain forms of reproduction for the benefit of persons with functional disabilities; primary broadcasting; use of television programs stored in broadcasting organisations' archives; and cable retransmission of broadcast works, Johan Axhamn and Lucie Guibault (2011), *supra* note 112. Of all the Nordic countries, only in Denmark use of extended collective licenses is not limited by an exhaustive number of domains by virtue of Article 50(2) of the Danish Copyright Act. For analysis see, Thomas Riis and Jens Schovsbo (2010), *supra* note 106, pp. 476-477 and 487-489.

collective management apply to the works that were previously published with the consent of their authors.

58 It can be added that out of several legislative mechanisms studied (presumption- or extension-based) facilitating digitization and making available of cultural heritage in eight European countries (Denmark, Finland, France, Germany, Norway, Slovakia, Sweden and the UK), the French law on out-of-commerce books has the narrowest scope.[119] The decision of the CJEU may have important repercussions for the existing presumption-based systems (e.g., in Germany and Slovakia) and on the possibility of other member states to introduce such mechanisms.

2. Application in Time

59 The French mechanism of collective management of digital rights to out-of-commerce books is a legislative provision of a *temporary nature*, to some extent related to the digital transition of book publishing and distribution. It applies only to rights of out-of-commerce books that were published before 1 January 2001. With every year of its existence, the mechanism is inevitably losing its significance as works of the XXth century continue to gradually become a part of the public domain. Provided that the law is not changed, the mechanism will be ineffective some years from now, i.e., the mechanism has "an expiration date", so to speak.

60 Extended collective management is a *permanent mechanism*. Furthermore, statutory provisions do not limit the length of extended collective licenses that CMOs may conclude with users.

3. Protection of Nonmembers

61 Both systems provide for the equal treatment of members and non-members by CMOs managing their rights, and for other safeguards of their interests. As the French mechanism extends to a relatively restricted and defined category of works published in France and is accompanied by a nation-wide information campaign, it is more likely that the rightholders concerned will be informed about use of their rights, revenues will be distributed to them, and/or it will be easier for them to take actions they consider appropriate in the case that their rights are taken advantage of, rather than issues of usual extended collective licensing. The French law obliges the assigned CMO to actively search for non-members whom it represents in order to distribute royalties collected for them. Protection of rightholders non-members should be reinforced through the implementation of Article 7 of the Collective Management Directive. In practice, due to the larger scope of the extended collective licenses, it is seemingly more difficult for non-members to, for example, be informed about uses of their works, to opt out of the system if they wish, or to claim remuneration.

4. Supervision and Control

62 French CMO representing rights to out-of-commerce books have to be assigned by the Ministry of Culture. In all the Nordic countries, with exception of Sweden, CMOs cannot conclude extended collective licenses if they are not approved by a respective governmental authority[120] (by the Minister of Culture in Denmark,[121] by the Ministry of Education, Science and Culture in Iceland,[122] by the Ministry of Culture in Norway,[123] by the Ministry of Education and Culture in Finland[124])

63 The Collective Management Directive - the most recent of the EU copyright directives and which is still being implemented by the member states - provides for a harmonized framework for good governance and transparency of collective management of copyright across the EU. As it was previously described, the French mechanism already provides some tools for supervising the assigned CMO.

5. Opt Out

64 Authors and publishers of out-of-commerce books can opt out from the system and exercise their rights individually even before their rights are managed collectively (*a priori* opt out). Once the rights are subject to collective management, the authors that have all the rights to their works can opt out either before or after a license is issued by the CMO to a user (*a posteriori* opt out). Publishers can opt out *a posteriori* only jointly with authors. An opt out from the mechanism results in a special mention in the

119 Lucie Guibault (2015), *supra* note 6, pp. 181-183.

120 Jan Rosén (2002), 'Administrative Institutions in Copyright: Notes on the Nordic Countries', pp. 168 and 172 (footnote 16), Anna Vuopala (2013), *supra* note 102, pp. 15 and 21.

121 Article 50(1) of the Danish Copyright Law. Thomas Riis and Jens Schovsbo (2010), *supra* note 106, pp. 475 and 493, and Jan Rosén (2002), *ibid*, pp. 170-171.

122 Articles 15, 23, 23a, 25 and 45a of the Copyright Law of Iceland.

123 Jan Rosén (2002), *supra* note 120, pp. 172-173.

124 Since 2005. Tarja Koskinen-Olsson (2010), *supra* note 100, p. 296.

database of the out-of-commerce books, ensuring that the book will not be reinserted in the system.

65 Rightholders may opt out from the extended collective management of their rights only once an extended collective license concerning their rights was granted to a user. This possibility represents only a part of the *a posteriori* option described above. It appears that in case of opt out from one extended collective license there is no guarantee that the rights will not be included in another extended collective license.

66 To this point, comparing the possibilities for opting out demonstrates that the law provides a greater chance for rightholders of out-of-commerce books to withdraw their rights from the system and to manage them individually. However, although rightholders that opted out can exercise their rights to out-of-commerce books individually, they cannot prohibit licensees that had previously received licenses from the assigned CMO to continue using their works for the duration of their licenses but for the period not exceeding five years. While the concerns about legal certainty for users acquiring licenses from the CMO are well-understood, the five-year term can be considered too long by some rightholders.

6. Representativeness of CMOs

67 The proportion of rightholders represented by CMOs through direct mandates from rightholders or agreements with foreign CMOs, (representativeness), is an important feature of the extended collective management, as a high level of representativeness is considered one of the preconditions for the extension of collective licenses.

68 Copyright Acts of the Nordic countries require CMOs to represent a "a substantial part of the authors of works used in Norway" (Article 38a of the Norwegian Copyright Act), "numerous authors of works used in Finland" (Article 26 of the Finish Copyright Act), "substantial number of authors of a certain type of works which are used in Denmark" (Article 50(1) of the Danish Copyright Act), "substantial portion of Icelandic authors" (Articles 15, 23, 23a and 25 of the Copyright Law of Iceland)[125] or "substantial number of Swedish authors in the field concerned" (Article 26i of the Swedish Copyright Act). The latter representativeness criteria are the lowest, as they require only representation of a substantial number of national rightholders.[126] The Danish and Swedish provisions do not mean that CMOs have to represent a majority of rightholders in the domains concerned.[127]

69 Comparison of the representativeness criterion of the two models of collective exercise of rights appears to be problematic because of the very purpose for which the French mechanism was designed. Unlike extended collective licensing targeting all works in a particular domain, it is aimed exclusively at the facilitation of exercise of rights to works published in the form of books *that are out-of-commerce*, explicitly excluding rights of works that are actively exploited. By definition, the mechanism focuses on the rights that are "underused" (excluding works that are commercially successful), as authors or their heirs might be lacking the capacity to make use of their intangible possessions (factual and legal information, etc.). Alike some of the secondary uses of works subjected to extended collective management, most of the out-of-commerce books of the XXth century in paper form will never be commercialized again legally without a licensing arrangement or an exception or limitation due to the associated transaction costs.

70 For the sake of consistency regarding the comparison with the extended collective management, it can be stated that the French law does not contain a clear requirement to a CMO to represent a substantial number of rightholders.[128] However Articles L134-3, para. III, sub-para. 1 and R327-1 of the CPI contain a somewhat similar requirement obliging CMOs to prove the diversity regarding categories of members, the number of rightholders they represent, economic importance, and editorial genres in order to be assigned with management of the digital rights to out-of-commerce books (*de jure* analysis). In 2010, the year preceding adoption of the law, SOFIA represented "more than 6 000 authors and 200 publishers constituting 80% of sales revenues of French publishing" (*de facto* analysis).[129] Furthermore,

125 Article 45a refers to a "substantial portion of Icelandic performers and producers".

126 The Finish Copyright Act of 1961 contained a similar low representativeness requirement (see Tarja Koskinen-Olsson (2010), *supra* note 100, p. 296) and so did the Danish Copyright Act prior to 2001 (see Lund Harald Christiansen (1991), 'The Nordic licensing systems – extended collective agreement licensing', *European Intellectual Property Review*, Vol. 13, No. 9, p. 349 and Thomas Riis and Jens Schovsbo (2010), *supra* note 106, p. 490).

127 Jan Rosén (2002), *supra* note 120, p. 168 and Lucie Guibault (2015), *supra* note 6, p. 178.

128 The Memorandum of Understanding on the digitisation of out-of-commerce works signed on the European level (*supra* note 6) requires that "Licences for works that are out of commerce will only be granted by collective management organisations in which a substantial number of authors and publishers affected by the Agreement are members, and appropriately represented in the key decision making bodies." (Principle No. 2 "Practical Implementation of Collective Agreements", para 1).

129 Commission permanente de contrôle des sociétés de perception et de répartition des droits, *Huitième rapport annuel*, May 2011, p. 19. Another CMO active in the domain is CFC

SOFIA had experience with representation of non-members and distribution of revenue to them, as it already managed remuneration to authors and publishers for private copying and public lending.

71 Presently it is possible that the percentage of rightholders in a particular domain directly represented by CMOs in the Nordic countries[130] is higher than the percentage of holders of rights to out-of-commerce books[131] represented by SOFIA through direct mandates. Nevertheless, it is important to observe that while a high level of representation of rightholders is considered to be one of the features of the collective management in the Nordic countries today,[132] the extended collective licensing has certainly had a role to play in encouraging rightholders to directly join CMOs. Theoretically, all the rightholders (members and non-members) are equal with regard to the CMO managing their rights, but in practice the rightholders members are "more equal". Members can more effectively supply CMOs with rights management information crucial for accurate distribution of revenues collected; contemporary online accounts of members permit them to follow collections and to receive relevant information rapidly and comfortably; members may have an impact on the functioning of their CMOs through participation in their governing bodies, etc. Therefore, while under some systems of non-voluntary collective management rightholders may choose not to be members of CMOs, such systems greatly facilitate increase of CMOs' membership, and hence their representativeness.[133] Therefore, after a few years of its functioning, the French system, which aims at a restricted number of books may achieve a higher level of representativeness (given the limited number of out-of-commerce books) than the Nordic CMOs concluding extended licenses for use of works of the entire world in a particular domain. Representativeness is an important feature reinforcing the legitimacy of representation of outsiders (the more rightholders are represented through direct mandates, the fewer nonmembers need to be covered by a legal presumption). Without questioning the situation with representativeness at the moment of enactment of the French mechanism, it is worth noting that it is a dynamic feature, and that installment of a system of non-voluntary collective management facilitates non-members to join CMOs.

7. Tariff Setting

72 In both systems, tariffs are not set or validated by a public authority or a mixed-committee involving representatives of users and the government, or by judicial or quasi-judicial bodies as it is common for some remuneration rights. Tariffs are set by CMOs or in negotiations with users. Extended collective management models where tariffs can be set by an intervention of a special body are excluded from the comparison.

8. Foreign Works

73 Extended collective licenses also cover rights of foreign rightholders, in addition to the domestic rightholders.

74 The situation with the collective management of digital rights to out-of-commerce books is also rather straightforward (*de jure* analysis). Works published in books in France in the XXth century are covered by the mechanism without any further qualification. Hence, the literal interpretation of the law leads to the conclusion that it does apply to translations of foreign works published in France.[134]

75 In practice, the situation with translated foreign works is very different (*de facto* analysis), as the French mechanism is not being applied to them.[135] Certain (partial) reasons for this non-application of the mechanism can to a certain extent be drawn from the following facts. The ministry of culture did not foresee its application to translations of foreign works published in France.[136] The mass digitization

(*Centre Français d'exploitation du droit de Copie*), which, among other things, ensures mandatory management of rights to reprography. According to the latest statistical information and estimates made available by SOFIA, the organisation represents more than 7000 authors and 300 publishers corresponding to 85% of sales revenues of French publishing, SOFIA's website, 'La Sofia, faits et chiffres': http://www.la-sofia.org/sofia/Adherents/sofia.jsp (last visited April 2016).

130 Thanks to direct mandates from rightholders but mostly to the gradual developed of a number of agreements with foreign CMOs

131 Percentage from the total hypothetical number of rights to out-of-commerce books.

132 Lund Harald Christiansen (1991), *supra* note 126, p. 347 and Tarja Koskinen-Olsson (2010), *supra* note 100, p. 289.

133 On a brief historic account on how rightholders in the domain of reprography in the Nordic countries were coerced to self-organise for introduction of extended collective licensing instead of exceptions or limitations and on an encouragement for authors to "group" themselves, see Anna Vuopala (2013), *supra* note 102, pp. 15 and 22.

134 In support of this statement, see Jean-Michel Bruguière (2012), *supra* note 8, p. 348.

135 ReLIRE's website, 'Vous êtes auteur ou ayant droit d'un auteur': https://relire.bnf.fr/vos-droits-auteur-ayant-droit (last visited 15 February 2016) and SOFIA's website, 'Foire aux questions': http://www.la-sofialivresindisponibles.org/2015/faq.php (last visited 15 February 2016).

136 Emmanuel Emile-Zola-Place (2012), *supra* note 7, p. 357.

involving public funds[137] is primarily aimed at digitally publishing French cultural heritage in its traditional understanding, i.e., written by French authors and in French language. Additionally, when in the course of a legislative debate an issue of translations of foreign works published in France was mentioned, it was suggested that the coordination among CMOs of different countries can permit gradual introduction of respective rights in the system of collective management.[138]

76 In spite of the existing practice, the current legal situation leaves room for application of the mechanism to translations of foreign works (presumably when appropriate copyright infrastructure is established in different countries by actors concerned and reciprocal arrangements are put in place).

9. Cost of Management

77 Collective management is typically financed through management fees deduced from the revenues collected for rightholders. This is the case for extended collective management in the Nordic countries.

78 Uniquely, this is a part of the French mechanism, although it is indirectly financed by the state budget. The database of out-of-commerce books was created and is maintained by the BnF and the out-of-commerce status of books if verified by a scientific committee[139] - both bodies are publicly funded. The database provides the CMO with an essential and costly way to establish rights management information (book titles, names of publishers, authors, years of their death, where applicable, other bibliographic information, etc.).

III. "Specific Solution" to Address Mass Digitization Issues Related to Out-of-Commerce Books

79 A European normative framework for facilitation of mass digitization of copyrighted works is represented by the Orphan Works Directive,[140] the Memorandum of Understanding on the digitization of out-of-commerce works agreed among some major stakeholders,[141] and the Commission Recommendation of 2006.[142]

80 Principle No. 2 "Practical Implementation of Collective Agreements", para. 4 and 5 of the Memorandum of Understanding states the following:

> For the purpose of such an Agreement, where a rightholder whose work was first published in a particular Member State has not transferred the management of his rights to a collective management organisation, the collective management organisation which manages rights of the same category in that Member State of first publication *shall be presumed to manage the rights* in respect of such work. [...]
>
> *Rightholders shall have the right to opt out of and to withdraw all or parts of their works* from the licence scheme derived from any such Agreement. (emphasis added)

81 Recital 4 of the Orphan Works Directive of 25 October 2012 explicitly clarifies that the EEA member states are free to introduce national solutions to tackle broader mass digitization issues other than the use of orphan works: "This Directive is without prejudice to *specific solutions* being developed in the Member States to address larger mass digitization issues, such as in the case of so-called 'out-of-commerce' works." (emphasis added). The French law on out-of-commerce books was adopted through an urgent legislative procedure 12 March 2012 in anticipation of the Directive.[143] Given how the preexisting provisions on the extended collective licensing influenced the wording of the InfoSoc Directive, it might well be that the standing French legislation on out-of-commerce books had an impact on the subsequent European instruments. Given this background, the French mechanism can be qualified as "specific solutions" at a national level for mass digitization and online publishing of out-of-commerce

137 Accord cadre pour la mise en œuvre d'un projet de numérisation et de diffusion des livres français indisponibles du XXème siècle entre le ministère de la Culture et de la Communication, le Commissariat général à l'investissement, le Syndicat National de l'Edition, la Société des Gens de Lettres et la Bibliothèque nationale de France, 2 février 2011, Articles C and D.

138 Sénat, Rapport 2011, *supra* note 7, pp. 24-25.

139 *Supra* note 27.

140 Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works (Text with EEA relevance) [2012] OJ L 299/5.

141 The Memorandum was signed by the Association of European Research Libraries (LIBER), Conference of European National Librarians (CENL), European Bureau of Library, Information and Documentation Associations (EBLIDA), European Federation of Journalists (EFJ), European Publishers Council (EPC), European Writers' Council (EWC), European Visual Artists (EVA), Federation of European Publishers (FEP) Federation of European Publishers (FEP), International Association of Scientific, Technical & Medical Publishers (STM) and International Federation of Reprographic Rights Organisations (IFRRO).

142 European Commission, Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation (2006/585/EC) (OJ L 236/28, 31 August 2006).

143 Franck Macrez (2012), supra note 9, pp. 749 and 757.

works, complementary to the mechanism provided by the Orphan Works Directive.

82 This article demonstrates that the key issue is that the EU is projecting a rather "soft" character, while not directly impacting upon qualification or non-qualification of a national legislative measure as an exception or limitation to copyright within the meaning of the InfoSoc Directive. Thus, this provides a valuable indication of the compatibility of the French mechanism with the EU copyright *acquis*.

D. Conclusions

83 The analysis of the French mechanism for facilitating digitization and making out-of-commerce books available, and its comparison with the extended collective licensing, leads us to the conclusion that, overall, the French law is compatible with the EU copyright *acquis*. Nevertheless, the analytical exercise revealed some methodological difficulties related to the comparison of the two models, notably with regard to the representativeness criterion. The following amendments to the French law would help to evade some concerns about the mechanism:

- The amendment of the criteria stipulated in Articles L134-3, para. III, sub-para. 1 and R327-1 of the CPI, or their interpretation in the way requiring representativeness of an assigned CMO, even if the currently assigned CMO is sufficiently representative;
- Reduction of the period of validity of the license issued by the CMO before opting out by a rightholder;
- Making the application of the mechanism to foreign works subject to respective arrangements with foreign rightholders or their representatives (e.g., CMOs).

84 For some time, discussion on non-voluntary forms of collective management of copyright has been predominantly limited to mandatory and extended. This paper contributes to fostering understanding of the freedom granted to EU member states for designing and introducing other forms of non-voluntary collective management for solving contemporary issues with remuneration and access.

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