

Rough Justice or Zero Tolerance? - Reassessing the Nature of Copyright in Light of Collective Licensing (Part I)

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“The ideal solution would be to obtain all the data concerning all performances of all works and to distribute the royalties accordingly. This is, however, impossible, or, at least, not feasible. ... As a consequence, an element of "rough justice," more or less, but necessarily, appears in the distribution system.

- WIPO's Introduction to Collective Management of Copyright and Related Rights in 2002¹

“The standpoint of Teosto is that importing even a single recording should be criminalized. ... We require zero tolerance.”²

- Executive Director of collecting society Teosto in 2002.

1. Introduction

This paper is the first of two articles which examine collective licensing in Finland.³ As the Copyright Directive (Directive 2001/29/EC) was implemented in Finland, the legislator increased the amount of collective licensing and renewed the system in order to secure the rights of right holders and users in the digital environment. However, it is clear that the collective administration of rights is the opposite of the individual administration of rights, which is the starting point of the continental copyright ideology. Therefore, this paper reassesses the nature of copyright: what is the reality of copyright if its execution is often in opposition to its ideological starting point? The above citations highlight an

¹ See WIPO's Introduction to Collective Management of Copyright and Related Rights, Document prepared by the International Bureau of WIPO, combined from Sections 53 and 54. The document can be found on

<http://www.uatm.com.ua/laws/int/Introduction%20to%20Collective%20Management%20of%20Copyright%20and%20Related%20Rights.pdf>.

² Tiina Pelkonen, "Voiko varastaa vain osittain", IPRinfo Magazine 2/2002, Available at, http://www.iprinfo.com/page.php?page_id=36&action=articleDetails&a_id=117&id=11. Teosto is the largest collecting society in Finland.

³ The second article shall examine how collective licensing takes into consideration the position of users and the distribution of collected compensations. It examines whether solutions other than exclusivity in collective licensing could be regarded as more justified.

unclear situation: WIPO argues for rough justice when it comes to the collective administration of rights by collecting societies, but at the same time collecting societies argue for zero tolerance.⁴ It is true that the citations as such do not prove that a copyright system is contradictory since the announcements are rhetorical, and one is related to distribution of compensations while the other is related to the enforcement of rights. However, both are related to securing compensations for right holders in the end. Thus, they do prove that arguments from one extreme to another have been used within the copyright system when securing compensations for right holders. Therefore, this paper shall examine, which approach – zero tolerance or rough justice – is more realistic when it comes to today’s copyright landscape. The answer will give us guidance when we look for solutions to possible problems in the copyright system. Strict sanctions have not taught people to respect copyright, but have instead lead to an opposite result, e.g. the increased popularity of the Pirate Party. Thus, what is a realistic direction when examining solutions to problems in the online environment?

In order to examine the realities of copyright, individualistic copyright ideology shall be compared to its opposite, i.e. to the collective licensing of rights. However, when we start to contemplate the nature of copyright in the aforementioned way, a noteworthy and ambiguous feature should be noted: according to the legislator, the renewed contractual license (a collective license in Finland) contains only beneficial features for all, and no obligations or problems. Surprisingly, according to the legislator in the best position are those who do not take part in the system at all. In other words, Government Bill 28/2004 (which describes the “renewed” contractual license system) does not contain a single line describing possible problems/challenges the system might have. Government Bill 28/2004 states that in the contractual license system a non-affiliate author (a right holder who has not assigned his/her rights to a society) is “*in a better position than an author*

⁴ The Finnish copyright act implementing the so called Infosoc-Directive came into effect 1.1.2006 and zero tolerance for importing copied recordings was introduced, as demanded by a representative from a collecting society. At the same time, new extended collective licenses were introduced providing new ways for collecting societies to collect and distribute compensations with “rough justice.” What makes the situation eye-catching is that in both cases the result favored the view of collecting societies.

represented by the society".⁵ The statement naturally provokes the following questions: Is the purpose of contractual licensing fulfilled at all if a right holder's position is "better" when he stays outside of the system? Are the collecting societies functioning as required, and do we need them if one has a "better position" when not assigning rights to a society? Since all legal instruments contain both rights and obligations, it is clear that critical examination of the system is justified.

2. A Short Introduction to Copyright Law in Finland

2.1. General Remarks

The first statute governing printing (the statute on "censorship and book trade") in Finland was passed in 1829. In 1928 Finland ratified the Berne Convention (Convention de Berne pour la protection des oeuvres littéraires et artistiques, 1886) on copyright and in September 1970 the Convention Establishing the World Intellectual Property Organization became effective. Finland also ratified the 1952 Universal Copyright Convention (in 1963), the 1961 Rome Convention (in 1983) and the 1971 Geneva Convention (in 1973). Finland is also bound to the TRIPS Agreement (Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994).⁶ In general, intellectual property falls within the administrative domain of the Ministry of Trade and Industry, but in copyright matters the relevant body is the Ministry of Education.

The Copyright Act⁷ that preceded the harmonization of the Copyright Directive⁸ was a result of Nordic co-operation during the 1940s to 1960s. The aim of the co-operation was to harmonize Nordic copyright legislation. It is for this reason that Nordic copyright laws

⁵ Government Bill 28/2004, vp., p. 64 (emphasis added) and p. 145. Traditionally, non-affiliates have been considered to be in a bad situation since a society grants a license also on behalf of them and, hence, their exclusive right to administer their property has been limited. The traditional approach may be read about in e.g. Committee Report 1974:21 (p.37), which states that the "contractual license system includes rules, which intend – as far as it is possible – to place non-members in an equal position with members when it comes to the distribution of compensations".

⁶ Niklas Bruun, *Intellectual Property Law in Finland*, Kluwer Law International, 2001 (hereafter Bruun 2001), p. 18 and 22.

⁷ Copyright Act, No. 404 of July 1961 (hereafter Copyright Law or FCA).

⁸ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society (hereafter Copyright Directive).

are similar in many ways. However, since 1961 the Copyright Act has been amended several times and despite the joint Nordic preparation committees, the amendments have not always been harmonized between the Nordic countries. Thus, Nordic copyright laws are not as harmonized as they used to be.⁹ In 1995, Finland became a member of the European Union, which led Finland to harmonize community law with the Finnish Copyright Act (hereafter FCA).¹⁰

The latest step in the harmonization process has been the implementation of the Copyright Directive. The implementation process should have been ready already in December 2002, but was postponed due to the end of electoral period in 2003. In fact, the proposed Government Bill (177/2002) encountered harsh criticism,¹¹ which led to the delay as well as some later amendments.¹² The new law implementing the Copyright Directive came into force on the first of January 2006. Finland also enforced the WIPO Performances and Phonograms Treaty¹³ and, later, Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art.¹⁴

⁹ Bruun 2001, p. 22.

¹⁰ Directive of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (96/9/EC), Proposal for a European Parliament and Council Directive on the resale right for the benefit of the author of an original work of art (96/C 178/05 COM (96) 97 final 96/085 (COD), Council Directive of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (93/98/EEC), Council Directive of 27 September 1993 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (93/83/EEC), Council Directive of 19 November 1992 on rental rights and lending rights and on certain rights related to copyright in the field of intellectual property (92/100/EEC) and Council Directive of 14 May 1991 on the legal protection of computer programs (91/250/EEC).

¹¹ The Committee for Education and Culture gave a letter to the Ministry of Education to reconsider certain proposals. See (in Finnish): <http://www.effi.org/tekijanoikeus/laki/sivistysvaliokunta-2003-02-18.html>.

¹² For example, The Constitutional Law Committee (PeVM 7/2005) later found that some of the proposed amendments in the following Government Bill (28/2004), which aimed to implement the Copyright Directive, were in contradiction with the Constitution of Finland. Following this, both the Committee for Education and Culture, and Law Committee gave their memorandums (SiVM 6/2005 and LaVL 5/2005) discussing the implementation. Finally, the proposal was passed to the Grand Committee (SuVM 1/2005), which decided not to amend it.

¹³ WIPO Performances and Phonograms Treaty, adopted by the Diplomatic Conference on December 20, 1996.

¹⁴ 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.

Besides the Copyright Act, other relevant sources of law are the Copyright Decree¹⁵ and the case law of the Supreme Court of Finland and courts of appeal.¹⁶ The advisory opinions of the Copyright Council (Tekijänoikeusneuvosto, TN) are also relevant sources of the interpretation of the Copyright Act in individual cases. However, while its opinions are not legally binding, they are advisory in nature and may, therefore, have an impact on possible court proceedings.

Finally, some terminological remarks should be made. The terms “collecting society” or “society” refer to societies which apply for collective licenses in order to collect adequate compensations.¹⁷ Thus *collecting* societies (or societies) grant *collective* licenses (in mass use situations). The terms “non-member” and “non-affiliate” refer to those right holders who have not assigned their rights to a society. In practice, they are all the people in the world who have not assigned their rights to a society.

2.2. Ideological Background of Copyright in Scandinavia

If we make a distinction between Anglo-Saxon “*copyright*” and continental “*droit d’auteur*” ideology, Finnish (and Scandinavian) copyright legislation would find its roots in the latter. This European copyright concept has developed from agricultural society, and has traditionally been regarded as being based on values arising from natural rights which emphasize the freedom of an individual author as mastering the use of his/her property.¹⁸ The starting point can still be read e.g. from the Committee Report 1980:12,

¹⁵ Decree No. 574 of 21 April 1995.

¹⁶ According to Bruun, the Court of Appeal of Helsinki and the Court of Appeal of Turku are the most important. Bruun 2001, p. 23.

¹⁷ The most important collective societies in Finland are Teosto (representing composers, lyricists, arrangers and music publishers), Gramex (representing performing artists and phonogram producers) and Kopiosto (representing “authors, performers and publishers.” In practice, Kopiosto grants licenses e.g. for printing and taping TV and radio programs in educational institutions). From the legal point of view, they are non-profit associations governed under the Law of Associations (1989/503).

¹⁸ Although, in practice, the differences between Anglo-Saxon and continental systems may have diminished during recent years, the *droit d’auteur* ideology emphasizing *an individual author* as the initial owner of the copyrighted work, has prevailed in Finland (and Scandinavia). See e.g. Pirkko-Liisa Haarmann, Tekijänoikeus & Lähioikeudet, Kauppakaari Oyj. Helsinki 1999 (hereafter Haarmann 1999), p. 5 – 8.

which includes the following: “Copyright legislation has been built on individualism. Copyright should not be restricted unless particularly weighty justifications require.”¹⁹

T.M. Kivimäki’s book *Copyright* from 1948 is still the only Finnish book which describes the traditional theory behind copyright in great detail.²⁰ Therefore, Kivimäki’s elaborations shall be used in order to explain the peculiar nature of “collectivism” in light of traditional individualistic copyright theory. When T.M. Kivimäki described the traditional individualistic copyright doctrine, he explained that copyright has a positive as well as a negative function. The positive function was the author’s right to dispose the work. Negative function reflected the exclusive element in copyright: It granted the individual right holder a right to prevent others from using the work without the author’s permission.²¹ It can be seen that Kivimäki’s starting point follows the traditional features which constitute private property: we should have the exclusive right to determine the use of our property.²² Of course, nowadays it is often argued in Europe that copyright could be seen as an economic institution rather than as a law providing protection for an individual author.²³ When it comes to collective licensing this should be obvious: the collective administration of rights is the opposite of the starting point of continental copyright ideology, i.e. the individual administration of rights.²⁴ Therefore, the intention of this article is to open doors (further) to alternative ways of understanding different

¹⁹ Committee Report 1980:12, p. 120-121.

²⁰ T.M. Kivimäki, *Tekijänoikeus*. Helsinki 1948 (hereafter Kivimäki). Kivimäki was a professor of civil law, but also the prime minister of Finland from December 1932 to October 1936. The Finnish word “tekijänoikeus” is not a literal translation of the word “copyright.” An accurate translation of the word “tekijänoikeus” would be “author’s right.” Pirkko-Liisa Haarmann’s *Tekijänoikeus & lähioikeudet*, 3d. and the latest edition by Talentum in 2005 (hereafter Haarmann 2005) could be mentioned as a comprehensive book on copyrights in Finland. However, neither Haarmann nor others discuss theoretical standpoints as thoroughly as Kivimäki does.

²¹ Kivimäki, p. 23 and 237.

²² For more information on the traditional concept of property in Finland see e.g. Leena Kartio, *Esineoikeuden perusteet*. Tampere 1991, p 155 - 165.

²³ See e.g. Copyright, Mass Use and Exclusivity, On the Industry Initiated Limitations to Copyright Exclusivity, Especially Regarding Sound Recording and Broadcasting. Helsinki 2006. p. 87 ff. <http://et-hesis.helsinki.fi/julkaisut/oik/yksit/vk/huuskonen/copyrigh.pdf>.

²⁴ Kivimäki has already argued this. See Kivimäki p. 66 – 67, footnote 4. See also Martin Kretschmer, *The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments*, E.I.P.R Issue 3, Sweet & Maxwell Limited (2002) (hereafter Kretschmer), p.131, available at http://www.cippm.org.uk/pdfs/kretschmer_eipr_032002.pdf and William Fisher, *Theories of Intellectual Property*, New Essays on the Legal and Political Theory of Property, Cambridge University Press 2001.

phenomena surrounding copyright, especially collective licensing. First, it shall be explained why we have collective licensing in the first place.

3. Background of Collective Licenses

3.1. *An Individual and Control?*

The individualistic ideology behind copyright theory can already be seen from paragraph 1 of the FCA, which states that the individual who has created a work shall have copyright thereto.²⁵ In other words, an individual author, or authors, holds the copyright to his/her creations.²⁶ If copyright protection is attained, copyright grants authors the rights which are defined in paragraph 2 of the FCA (e.g. the right to copy and make the content available to the public). It is often described that a right holder has the right to *control* the use of his content as defined in paragraph 2 of the FCA.

But what is this often referred to “control” in practice? To the author’s understanding, the only possibility for a right holder to *actually* control the use of his/her content is by means of a live performance situation when the right holder is performing his/her own content. In other words, a right holder cannot *de facto* prevent anyone else from using his/her works. For example, it is difficult to see how a right holder could, in practice, prevent anyone else from singing his/her song publicly, even if the right holder was present on the occasion. How could a right holder in such a situation obstruct its use? In this respect, it might be argued that there cannot be – nor has there ever been – any actual control over the created content.²⁷ Thus, it may be asked that if absolute control over

²⁵ The only exception in the FCA concerning initial authorship is Section 40b, which states that rights to computer programs and databases are automatically transferred to the employer. The Finnish copyright doctrine does not include similar “Works Made for Hire” rule as e.g. Section 101 of the 1976 USC does.

²⁶ See e.g. Government Bill 235/1985, p. 7. It should be noted that in joint works copyright belongs to the authors jointly. A work is a joint work if contributions cannot be naturally separated. Joint proprietors may exploit their right only together. Bruun, p. 31 - 21.

²⁷ The problem related to right holder’s right to prevent someone else from using his/her works may be illustrated with the following theoretical example. It is questionable to argue that a right holder would have a right e.g. to “silence” a person who performs (e.g. sings in a restaurant or whistles!) a protected song in a public place without permission from the right holder. How could the right holder legally “silence” the “thief” in question? The question becomes even more problematic, if there are several singers. Even if every man’s right to apprehend a person as included in the Coercive Measures Act (450/1987) were applicable, it could easily be in contradiction with the whistler’s right to bodily integrity. Even if the right

copyrighted content is not possible, what is control in copyright actually about? To the author, it seems that copyright is a certain way of determining what should be regarded as using the content of others. In other words, usage situations as defined in paragraph 2 of the FCA form the basis for the business model behind traditional copyright thinking (and industry).²⁸ However, since copyright ideology is not based on business model, the traditional approach shall be taken here when examining the tension between the individualistic and collectivistic administration of rights.

3.2. Impact of Technological Development on Dissemination of Content

When the first useful mass media (radio) emerged, collective licenses were introduced to administer the use of copyrighted material. In Finland the first contractual and compulsory licenses were introduced to the FCA in 1961 and were applied to the use of protected rights in radio and TV broadcasting. In such mass use situations, it was considered clear enough that an individual author was not in a position to control the use of her/his content personally. (We all know that it is [and has been] impossible e.g. for Phil Collins to individually control who uses his works and when and where they are used.) Thus, in the collective licensing system, e.g. a radio or television company buys a mass license from a collecting society entitling the broadcaster to use all types of copyright protected music. Thus, collective licensing was introduced for practical reasons.²⁹ It has been argued that collective licensing actually exists to benefit both

holder had such a right to apprehend the person, s/he could not apprehend more than one at a time and even then the person could easily continue using the content immediately after the right holder leaves the premises. These examples indicate that there are no practical possibilities for a right holder to prevent use in a sensible and “controlled” way. In practice, the right holder should sue the person using his/her content and could get his/her compensations only after the use, i.e. s/he could not prevent the use in such a situation. The only situations when use may be stopped permanently are those in which the user is a company and the company’s operations are being closed down.

²⁸ The notion related to business models applies to all copyright industries which collect compensations, as indicated in paragraph 2 of the FCA, not only collecting societies. It should also be mentioned that one could argue that since there cannot have ever been any actual control, copyright is – as it always has been – a protection for business. However, this argument cannot be acceptable since this has never been – at least in Europe – the publicly accepted theory behind copyright and thus it could be asked if the people (voters) have actually been misled about the nature of copyright since its inception.

²⁹ See e.g. Committee Report 1953:5, p. 78 and Government Bill 23/1960 p. 3 – 4. Committee Report 1953:5 discussing the rights of performing artists explicitly mentions that without such an arrangement, it would be impossible to obtain permission from a performing artist. The impossibility as justification was

individual right holders and users alike. Without collecting societies granting collective licenses it would be impossible for users to find all individual right holders and vice versa.³⁰

It is commonly known that in today's information society new technologies provide constantly easier means of transferring copyrighted works into digital form, as well as transmitting them around the world to an indefinable audience in a matter of seconds.³¹ In practice, all who have a computer and access to the Internet are able to distribute content. Therefore, as an attempt to cover usage situations, an increasing number of collective licenses have been introduced.³²

However, as mentioned, the individualistic copyright theory is the ideological starting point of copyright, and the collective administration of rights is the opposite of the individual administration of rights. The problem related to the collective administration of rights is more ideological if an individual right holder has willingly assigned his/her rights to a society. However, the problem is prominent in cases when an individual right holder has not assigned his/her rights to a society, but the licensing system still permits the use of her/his rights. In other words, the license effectively deprives the non-affiliate right holder of exclusivity, which makes the situation similar to compulsory licensing situations. For this reason, both collective license forms have been traditionally seen as one form of restriction in copyright.³³

brought up later as well when the legislator justified contractual licenses. See e.g. Committee Report 1980:12, p. 129, Government Bill 1980/70, p. 3 and Government Bill 28/2004 vp. p. 62.

³⁰ See e.g. Committee Report 1908:12, p. 130.

³¹ It has been explained that the core of the information society is communication and interaction which do not take place face-to-face but via a digital device. See e.g. SITRA's (The Finnish National Fund for Research and Development) report: Antti Hautamäki (edit.), *Suomi teollisen ja tietoyhteiskunnan murroksessa, Tietoyhteiskunnan sosiaaliset ja yhteiskunnalliset vaikutukset*, Helsinki 1996, <http://194.100.30.11/tietoyhteiskunta/suomi/st2f.htm>.

³² Since the emergence of radio, there has been a widening of the scope of collective licensing in cases where the volume of used material has been vast and individual control has been deemed impossible. See e.g. Committee Report 1990:30, p. 62 and 68. See also Government Bill 28/2004 vp., p. 62.

³³ As shall later be shown, this problematic feature related to collective licensing is peculiarly often left without any notice. It is also ambiguous that, according to the legislator, a contractual license (a collective license in Finland) contains only beneficial features for all.

3.3. Background of Restrictions

Restrictions on copyright have been justified by saying that the work of the author is a combined result of the author and society: the intellectual environment where the author lives (the society) has had an impact on the creation process as well. From this point of view, the restrictions are seen as a “reimbursement for the companionship of the society.”³⁴ Since the restrictions have been seen as exceptions from the main rule, it has often been argued that restrictions on copyright should be interpreted narrowly.³⁵ In practice, this has meant that when the right holder’s rights have been limited, one should interpret the restrictions in favor of the copyright holder. However, as shall be explained, it is questionable if this rule should hold when it comes to collective licensing.³⁶

At the international level, the collective management of rights is regulated in Articles 11bis (2) and 13(1) of the Berne Convention³⁷ and Article 12 of the Rome Convention.³⁸ The articles state that member states may define the conditions for applying collective management to certain rights.³⁹ In Finland, compulsory license has often been described

³⁴ Kivimäki, p. 64-65.

³⁵ The norm for the narrow interpretation of limitations in the FCA is rooted in Committee Report 1953:5. It has been reiterated in later preparatory acts as well. Committee Report 1953:5, p. 53, Committee Report 1980:12, p. 24 and Government Bill 1980:70, p. 4. See also Haarmann 1999, p. 119-120. It should be mentioned that nowadays the norm for narrow interpretation is often criticized as well. See e.g. Tuomas Mylly, Tekijänoikeuden ideologiat ja myytit, Lakimies 2004, p.228-254.

³⁶ When we examine contractual licensing, it should be clear that the rule for narrow interpretation should not apply. According to a literal reading of the headline of Chapter 2 of the FCA, contractual license is no longer a limitation. However, surprisingly, Government Bill 28/2004 states that “the limitations *and* rules governing contractual license in the Chapter 2 [of the FCA] should be interpreted narrowly in individual cases.” Government Bill 28/2004, p. 38-39, emphasis added. How is this possible if contractual license is no longer a limitation? Also, the new starting point in the law is that contractual license is no longer a limitation, but merely a “means for the collective administration of rights.” The preliminary material seems to be in contradiction with the headline in the law which states that contractual license is no longer a limitation. This is problematic when one considers the hierarchy of statutes, i.e. the relative hierarchy between the literal text of the (copyright) law and Government Bill. Traditionally, laws are higher in the hierarchy of statutes and, thus, if there is a contradiction with a norm of lower grade, the law should prevail. Also in this respect, the statement in Government Bill 28/2004 should yield to the law and hence the rule for narrow interpretation should be not applicable when contractual license is applied.

³⁷ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886 (the Berne Convention).

³⁸ International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of October 26, 1961.

³⁹ See also Articles 2(6) and 14bis (2) of the Berne Convention, which stipulate the governance of rights. In general see: Komission tiedonanto neuvostolle, Euroopan parlamentille ja Euroopan talous- ja

as more limiting in nature than a contractual license. This is because it allows the use of protected right without the right holder's permission⁴⁰ (a right holder is entitled to compensation), whereas the contractual license necessitates permission from a society beforehand.⁴¹ However, whether this difference makes contractual license actually less limiting shall be examined next.

In the Finnish Copyright Act, restrictions to copyright have been traditionally divided into three types.⁴² First, in certain occasions the work may be freely used, without any need to ask permission or pay remunerations. For this reason, such ("free use") occasions have been described as forming the harshest restrictions. The Berne Convention does not contain statements about contractual licenses. However, since the whole copyright legislation depends on the Berne Convention embracement of the idea of an individual author mastering the use of his/her works, it is often described that second and third types of restrictions have traditionally been both compulsory and contractual license systems.⁴³ This seems also quite clear when we read the preliminary material of the FCA from the

sosiaalikomitealle tekijänoikeuksien ja lähioikeuksien hallinnoinnista sisämarkkinoilla KOM (2004) 261, lopullinen.

⁴⁰ See e.g. Committee Report 1990:30, p. 61, Committee Report 1992:4, p. 105 and Government Bill 287/1994, yleisperustelut, Section 1.1.1. Nykyinen lainsäädäntö.

⁴¹ Contractual license has been preferred to compulsory license already in Committee Report 1974:21. The reasoning was that contractual licenses urge the parties to reach an agreement through negotiations. However, compulsory licensing also necessitates negotiations at some point, leaving this reasoning unclear. The fact that also compulsory licensing necessitates negotiations was also acknowledged in the aforementioned committee report. See Committee Report 1974:21, p. 34 and 36. Furthermore, it should be mentioned that Committee Report 1974:21 did not stipulate that contractual license would be preferable to compulsory license in light of individuality. For later similar statements see also Committee Report 1980:12, p. 118, 151-152. Committee Report 1990:31, p. 61. Committee Report 1992:4, p. 105. See also Government Bill 287/1994, headline "1.1.1. Nykyinen lainsäädäntö." In Committee Report 1980:12, it was stated that in the contractual license system one could take into consideration the possible vulnerability of the used material since it is possible to ban use (and the use of contractual license would be consistent with other countries in Scandinavia). Committee Report 1980:12, p. 118, 151-152. See also Government Bill 70/1980 vp., p.7. However, there are no practical opportunities for an author to ban the use of his/her work even if contractual license is being applied, as shall later be explained.

⁴² It should be mentioned that Section 9 of the FCA defines those works which are excluded from protection (Section 9 is not part of Chapter 2 which is about limitations in general.)

⁴³ It should be noted that a compulsory license does not necessarily mean that the use of right has been governed under a collective license, but only entitles the use without permission, and the author is entitled to collect compensation directly from the user. However, in Finland compulsory licensing is, in practice, conducted through collective licensing and the only way an individual author is able to collect his/her compensation is by claiming it from the society that has collected it from users. Only if the author has agreed to a contract directly with the user may s/he request compensation directly from the user. In these cases of direct contracting between authors and users, users should not be obliged to pay remunerations to societies. Contractual licenses have been regarded as limitations especially because they extend their effect to the rights of non-affiliates.

1960s, 1980s and 1990s.⁴⁴ Respectively, paragraphs for contractual licenses have always existed in Chapter 2 of the FCA, which discusses limitations to copyright.

Hence, it has been argued that special reasoning should be introduced in order to enact collective licenses. In cases of contractual licensing, especially the position of those right holders who are not members of the society has been regarded problematic. This can already be seen from Government Bill 23/1960, which stated that the contractual license is “undeniably an important limitation of copyright in principle.”⁴⁵ In 1980, when the use of contractual license was broadened, it was used to regulate photocopying,⁴⁶ Committee Report 1980:12 explained: “The contractual license system constitutes a limitation for those who are not members of the society.”⁴⁷ Therefore, it has also been argued that the extended contractual license has a compulsory license effect on non-members.⁴⁸ Following this logic, Committee Report 1980:12 required weighty justifications for contractual license that was later required for compulsory licensing.⁴⁹ Thus, it is not surprising that when the contractual license for photocopying was introduced, the second

⁴⁴ One may question whether the license models from the year 1961 actually were compulsory and contractual licenses or similar collective arrangements. However, the terminology used throughout the legislative history of collective licensing in Finland seems to confirm this. Committee Report 1953:5, (p. 78) clearly states the term “compulsory license.” However, Government Bill 23/1960 (p.4) does not specify any title for the license, but the text implies that a contract is needed in order to use the works. This indicates that the license in Government Bill 23/1960 would be closer to contractual license than compulsory license. Committee Report 1974:21 (p.66) finally explicitly confirms this, followed by Committee Report 1980:12 (p. 12). For example, Committee Report 1980:12 explicitly states that when introducing contractual license to photocopying, contractual license is not a new instrument but has already been in use in radio and TV broadcasting (referring to Section 22 of the then FCA, which was introduced in 1961). Committee Report 1990:30 elaborates that the contractual licenses after the first one are more “modern.” This is probably because the position of the non-member has been examined more thoroughly in the later preliminary material, especially in Committee Report 1980:12. Finally, Committee Report 1990:30 (p.68) explicitly states that the oldest contractual license was enacted in 1961, when the FCA came into force. Therefore, it is justified to say that Finnish copyright legislation has had both contractual and compulsory licenses since 1961. See also Committee Report 1992:4, p. 104.

⁴⁵ Government Bill 23/1960 p.3-4. See also Mogens Kocktvedgaard, - Marianne Levin, *Lärobok I immaterialrätt. Upphovsrätt – fötorätt – patenträtt – mönsterrätt – känneteckenrätt is Sverige, EG och internationellt.* Norstedts Juridik, Stockholm 2004, p. 35.

⁴⁶ Amendment to FCA 897/1980. However, this was already anticipated in Committee Report 1974:21, p. 34 ff and 64 ff.

⁴⁷ Committee Report 1980:12, p. 120-121. See also Committee Report 1990:30, p. 61.

⁴⁸ See Haarmann 2005, p. 227. See also Gunnar Karnell, *Avtalslicenskonstruktionen, principiella och praktiska frågor*, in a book Karnell om upphovsrätt, Juridiska fakulteten i Stockholm; Skriftserien, 1990, NIR 1981, p. 150.

⁴⁹ “Particularly weighty justifications” were required in Committee Report 1980:12 (p. 120-121) for contractual license and Government Bill 1985/235 (p. 5) for compulsory license.

legal committee of the parliament barely dared to accept the government's proposal. In the report (II LaVM 13/1980), the committee among other things stated that "for now one is not able to provide a better functioning system than the contractual license system."⁵⁰ Thus, since the 1960s the basic idea of collective licensing has remained the same and their problematic nature has been reiterated.⁵¹ However, since the copyright directive was enacted, it has been argued that the nature of the contractual license has changed.⁵²

3.4. The Changed Status of a Contractual License?

The fact that one has traditionally considered both license models as limitations has led to the interpretation that the contractual license system could also be used only in cases where the Berne Convention allows free use or compulsory licensing. According to an alternative, more liberal interpretation, one should examine the contractual license system in accordance with the restrictions governing the right of reproduction stated in Article 9, Subsection 2 of the Berne Convention (a so-called three step test). However, since the implementation of the copyright directive, the heading of the Chapter 2 of the FCA states the following: "Restrictions to Copyright *and* the Rules Governing Contractual License."⁵³ This would indicate that a contractual license is not a restriction. According to Government Bill 28/2004, the intention was to "emphasize the nature of contractual licenses as a means for the collective administration of rights."⁵⁴ Hence, the new heading

⁵⁰ Haarmann 1999, p. 166 and Haarmann 2005, p.229.

⁵¹ See e.g. Committee Report 1990:31, p. 61 and 67. See also the differing opinion of Markku Tynnilä and Matti Anderzen from the 1990s in which they argued that before any extensions of the contractual license system were carried out, one should examine how the problems of principle in the contractual license system could be solved. See their differing opinion in Committee report 1990:31 p. 203 – 207. General questions related to contractual license in the same Committee Report, p. 61 – 62.

⁵² The current legal technical construction for the contractual license system was adopted when amending the FCA in 1995. (Law for changing the Copyright Act 446/1995.) The elements that are common to all contractual licenses have been taken into Section 26 of the FCA. Otherwise, each contractual license has a sector-specific section of its own.

⁵³ Emphasis added. Also compare the heading of Chapter 2 of the FCA to the old heading of Chapter 2 of the FCA which merely stated "Restrictions to Copyright," although the paragraph on contractual license was previously also in Chapter 2 of the FCA.

⁵⁴ Government Bill 28/2004, p. 81. See also Pirjo Kontkanen, *Tekijänoikeudet yliopistotutkimuksessa -ja opetuksessa*. IPR University Center 2006 (hereafter Kontkanen 2006), p.118. The attempt to emphasize the collective nature of the contractual license system in Government Bill 28/2004 seems rather trivial: what else could contractual licensing be but a tool for administering rights collectively? See also Government

of Chapter 2 of the FCA and the wording in the preliminary material allows the interpretation that contractual licensing is no longer a limitation.⁵⁵

However, the *contractual licensing system did not change in practice*. Practically no new rights were introduced nor explanations given of how individuality – especially the position of a non-member – had been taken into consideration in the "new" system.⁵⁶ This means that we cannot find much help in descriptions of the law or its preliminary material when we examine whether a contractual license system is a limitation or not. Thus, when doing the evaluation we have to examine how the contractual licensing system works in practice.

4. Collective Licensing System in Finland in Detail

4.1. A Compulsory License

A *Compulsory license* is basically a rather straightforward tool: a user may use the protected right from the field a compulsory license covers, provided that the user later pays compensation to the right holder. In other words, the right holder does not have the exclusive right to forbid use but his/her right is limited to the right to compensation for any use.⁵⁷ Hence, a compulsory license has been seen as a restricting license model because it deprives the individual right holder's right to exclusively master the use of

Bill 28/2008 vp., p. 62: "Contractual license is not intended to be used when an individual work is being used for a singular purpose."

⁵⁵ It should be mentioned that literal reading of preamble 18 of the Copyright Directive does not clearly take any stance on the nature of collective licensing. It merely states that "this Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licenses." These extended licenses refer to the contractual license system used in Scandinavia. See e.g. Government Bill 28/2004 vp., p. 144 and Haarmann, 2005, p. 157-158 and Copyright Directive Article 5 and preamble 18.

⁵⁶ It might be argued that the descriptions in Government Bill 28/2004 e.g. about a non-affiliates' opportunities to license individually or their right to ban use (these shall be explained later in more detail) would be some kind of renewals of the system. However, these rights should have already been in the system before its nature was changed.

⁵⁷ In foreign literature, compulsory license is often described as a "statutory license" or a "compulsory license." When one applies for statutory license, the law grants the right to use provided that compensation is paid. In cases where a compulsory license has been enacted, the law obliges the right holder to grant permission, but also grants him the ability to negotiate the terms of use. In case of disagreement, administrative or legal authorities grant permission and determine the amount of compensation. Committee Report 1990:31, p. 60. According to Pirkko-Liisa Haarmann the compulsory license system in Finland is singular compared to foreign systems. Haarmann 2005, p. 157.

his/her property. In practice, compensation is collected by societies. For example, at the moment the right to publicly perform the works of performing artists and record producers is licensed under a compulsory license in Finland. However, according to the individualistic copyright theory, a non-affiliate right holder should be entitled to agree and collect the compensation by her/himself, if he is able to.

4.2. A Contractual License

A contractual license is slightly more complicated. In the contractual license system, the user concludes a contract with a collecting society which represents right holders from a certain field of rights used in Finland.⁵⁸ The terms of use should be agreed upon between the user and the society *prior to the use*. The need for permission beforehand demonstrates the exclusive nature of copyright and, hence, a contract with a society should be concluded first.

A contractual license is not that problematic from the viewpoint of those right holders who have assigned their rights to the society in question. By assigning their rights, individuals in practice accept that they lose the ability to administer their rights individually, but that they are entitled to compensations the society may later pay. However, what is problematic in the contractual license system, is the so-called extended effect of the contractual license.⁵⁹ The extended effect means that a concluded contract between a user and a society entitles a user to use also the works of those who have *not assigned their rights to the society in question*.⁶⁰ Thus, a problem from the viewpoint of individualistic copyright theory is that the extended effect of the contractual license

⁵⁸ Previously, contractual licenses were granted to societies that represented Finnish right holders. However, it was considered that this statement could be discriminatory to authors from other countries. Therefore, the clause was amended to its current form (“works used in Finland”). According to Government Bill 28/2004 (p. 63), the changes were brought to the FCA since the Commission of European Union had already informed Denmark, which had similar clause in its copyright act, that it might be discriminatory. For original situation see e.g. Government Bill 23/1960, p. 3-4.

⁵⁹ FCA 26 §, Subsection 1.

⁶⁰ This was already stated in Government Bill 23/1960 (p. 3-4) and followed by the Committee Report 1980:12, (p. 119), and reiterated later e.g. in Committee Report 1990:31 (p. 61), Committee Report 1991:33 (p. 70) and Government Bill 287/1994.

entitles a user to use material of a non-affiliate without her/his explicit consent.⁶¹ The effect of this extension of the contractual license to a non-member is often called the compulsory license effect of the contractual license.⁶² It should be noted that the contractual license and its extended effect covers only those areas of use that the contract between a user and society covers. In other words, a user may not use material of a non-affiliate if the contract between the user and a society does not cover it, even if the society would be able to grant a license for such use.⁶³

Because collective licensing extends its effects to those right holders who have not assigned their rights to the society in question, some extra rights have been reserved for non-affiliates. One could say that they exist especially in order to save individuality. Firstly, both compulsory and contractual license systems include the right for non-affiliates to later collect compensation from the society which has granted the license. Secondly, a contractual license system also contains the right to separately ban use of the work. Whether these rights save individuality in the collective licensing system or influence the nature of the collective licensing system as a restriction shall be examined next.

4.3. Position of a Non-affiliate Right Holder in the Collective Licensing System

4.3.1. A Non-affiliates Right to Compensation

Since it is, in practice, impossible for a non-affiliate to supervise the use of her/his works in all usage situations, a separate right to compensation has been granted to non-affiliates.

⁶¹ The extension is possible only if stated explicitly in the law. Committee Report 1980:12, p. 114. See also Committee Report 1990:31, p.61.

⁶² See e.g. Haarmann 2005, p 227.

⁶³ For example, it is possible that a contractual license for educational use between the Ministry of Education and collecting society Kopiosto does not include the right to use foreign movies in education. This means that a teacher cannot use such movies in his teaching at all. Even the extended effect of the contractual license does not cover such use. In other words, the extended effect of the contractual license does not extend to the rights of non-affiliates unless that field of use has been covered in the contract. It should be noted that this holds true although the extended effect *comes from the law* and *not from the license* granted by the society. The situation is different when it comes to compulsory licensing. The effect of a compulsory license comes directly from the law and, hence, a user is entitled to use all the rights from the area the compulsory license covers.

When it comes to compulsory licensing, collecting societies collect the compensations and distribute them to their members. A non-affiliate right holder should also direct her/his claim for compensation to the society which has collected the compensations (47a §).⁶⁴

In the contractual license system, a non-affiliate's right to compensation was introduced to the FCA in 1961 as the first contractual license emerged.⁶⁵ The contractual license that was introduced for photocopying in 1980 followed a similar structure.⁶⁶ However, this time the position of non-members was examined a bit more carefully. It was explicitly stated that the rules and decisions a certain society decided to apply for distribution of compensation to its members applied to non-members as well. Remunerations should be divided according to same principles between non-members and members. The Committee Report continued to state that foreign non-members were also entitled to compensation.⁶⁷ In case a society decided to use the collected allowances for grants etc., non-members ought to be entitled to these benefits according to same principles as members. A non-member would not need to resign oneself to the rules and decisions made in a society, but s/he was entitled to collect compensations personally.⁶⁸ A non-member's right to personal compensation has also been reiterated in the later preliminary material.⁶⁹ Today, if a usage situation is covered by a contractual license, a non-member's general right to compensation is stated in paragraph 26 of the FCA.⁷⁰

⁶⁴ The FCA states clearly, that claims for compensation should be directed to a society. See e.g. FCA 26, Subsection 26: "Compensation is conducted by the society mentioned in Subsection 1 of the paragraph" (Subsection 1 mentions the society administering use of a certain field of art used in Finland). FCA 47a § also states that "the right to compensation expires unless it is submitted *to the society* ..." See also Harenko, Niiranen, Tarkela, Tekijänoikeus, WSOYpro, Helsinki 2006, p. 246 and Herkko Hietanen's doctoral dissertation: *The Pursuit of Efficient Copyright Licensing, How Some Rights Reserved Attempts to Solve the Problems of All Rights Reserved*. Lappeenranta University of Technology. Digipaino 2008 (hereafter Hietanen), p. 232.

⁶⁵ See e.g. Government Bill 23/1960, p. 3-4.

⁶⁶ Committee Report 1980:12 granted a non-member the right to claim compensation from a society. A non-affiliate's right to compensation was actually stated already in a Committee Report 1974:21, which anticipated the upcoming contractual license for photocopying. Committee Report 1974:21, p. 37 - 38.

⁶⁷ Committee Report 1980:12, p. 137 - 141.

⁶⁸ Committee Report 1980:12, p. 137 - 138.

⁶⁹ Committee Report 1990:31, p. 67. See also Government Bill 287/1994.

⁷⁰ It should also be mentioned that a non-member's right to claim compensations expires if s/he does not state his/her claim during a period of three years, starting from the end of the year when the use took place. See FCA Sections 26 Subsection 5 and 47a Subsection 4. When the contractual license institution was introduced in the 1960s, Government Bill 23/2060 did not state anything about any specific time period. In

However, distributing compensations to non-affiliates is only possible if the use is covered by collective licensing, the use has been reported, and adequate compensations have been paid to the society in question. If the use has not been reported, proving the use becomes practically impossible. Similarly, if the author whose content has been used is unknown to the user and/or to the society, the use cannot be sufficiently reported. The idea is that the societies pay the requested compensations according to reported and estimated usage. In some areas of art, the administration system is technically fairly detailed. For example, in music the main broadcasters in Finland provide itemized reports for societies detailing use. If the use has been reported, the societies ought to pay the compensation based on the reports.⁷¹ However, in cases of smaller users (often in “secondary use” situations) the data is based on sampling.⁷² *This means that – as the WIPO citation in the beginning of the paper proves – even the members of a society cannot obtain compensations with 100% accuracy.*⁷³

It is a fact that non-members do occasionally collect some compensation from societies. In theory, a non-affiliate also has the right to compensation, even if a society decides not to distribute remunerations to its own members (but instead uses them e.g. for common purposes).⁷⁴ However, situations in which a society has made a decision preventing its members from receiving remunerations cannot affect an individual member’s overall position too negatively. From an individual member’s perspective, the main function of a collecting society should be concluding contracts with users and disbursing the collected

the 1980s, a one-year time period was granted, which was later extended to three. Committee Report 1980:12, p. 141. See also the differing opinion of Berndt Godenhielm, in the same Committee Report, p. 195-196.

⁷¹ The information is based on an interview between Olli Vilanka and Satu Kangas, on 23rd November 2006 and an interview between Olli Vilanka and Jukka-Pekka Timonen, on 21st December 2006. Satu Kangas is the executive in legal matters in The Federation of the Finnish Media Industry, but has worked for 16 years in Teosto. Jukka-Pekka Timonen is the Executive Vice President of Kopiosto.

⁷² See e.g. Annual Report of Kopiosto 2005, p. 3. See also Hietanen, p. 222. The usage reports are provided only for the societies, and not for the non-affiliates who remain uninformed if their rights have been used. This is true especially if a non-affiliate right holder is a foreigner. All a non-affiliate can do is to trust the information provided by a society.

⁷³ The impossibility to precisely evaluate what and whose content has been copied shall be examined in detail in Part II.

⁷⁴ The recently amended Section 26 (Subsections 3 & 4) of the FCA is not different from its predecessor when it comes to non-members’ right to compensation. See also Government Bill 28/2004, vp. p. 64.

compensations to its members. A society would act against its main purpose if it, in a wide-ranging manner, rewards someone other than the author whose content was used.⁷⁵

Therefore, it is not surprising that the compensation amounts that non-affiliates have received are very low. According to the annual report of Kopiosto (2005), it collected almost 24 million Euros worth of compensations from photocopying, television broadcasts and compensatory payments.⁷⁶ During the same year, Teosto collected approximately 47 million Euros for distribution.⁷⁷ There is no objective information available describing how often non-members ask for compensation from societies. In general, the given numbers are small. Kopiosto's estimation is that non-affiliates collect compensation in the amount of around 5000 to 10 000 Euros a year.⁷⁸ Similarly, the estimation for Teosto was 10 000 Euros per year.⁷⁹ Thus, the amount that non-affiliates are compensated per year is roughly estimated as a bit more than *one tenth of a per mille* (‰) of the total amount of distributed compensations. From this it may be concluded that in practice a non-affiliate's right to remuneration in the collective licensing system is with a few exceptions a dead letter in law.⁸⁰ Hence, it remains to be examined if the right to ban use of a work rescues the rights of individual authors.

⁷⁵ Committee Report 1980:12, p. 138-139. Non-affiliates do have the opportunity to get grants etc., e.g. from Kopiosto, but there is no official regulation describing how grants ought to be distributed. It should also be mentioned that possible grants provided by the societies do not seem to alleviate the position of non-members either. Committee Report 1980:12 explains: "The fact is that in all cases when remunerations are being used collectively, non-members are either left without them or have only a relatively uncertain opportunity to get a grant etc." It is self-evident that not all non-affiliates can receive a grant. Hence, the right to a grant does not seem to make a non-affiliate's situation any better either.

⁷⁶ Annual report of Kopiosto 2005, p. 4.

⁷⁷ Annual report of Teosto 2005, p. 33. See also Hietanen about the amounts the members of Teosto receive. "Royalties are only a small part of an artist's income. In Finland only 190 Finnish song writers out of 16,110 received more than 20,000 € in annual royalties and half of the members did not get any." Hietanen, p. 23, footnote 126. In 2007, Teosto had approximately 19,000 customers and 208 of them received more than 20,000 euros a year in annual royalties. Annual Report of Teosto 2007, p. 1 and 12. Still in 2007, half of the members did not receive any royalties.

⁷⁸ The number is based on an interview between Olli Vilanka and Jukka-Pekka Timonen, on 21st December 2006.

⁷⁹ The number is based on an interview between Olli Vilanka and Satu Kangas, on 23rd November 2006. It should be mentioned that Kangas emphasized that the number she gave is a guess rather than based on collected data.

⁸⁰ See also Tynnilä and Anderzen's differing opinion in Committee report 1990:31 p.203-207 explaining this problem. In this respect, it is ambiguous that the legislator claims that a non-affiliate's position would be better than a member's position. See footnote 6. Finally, it could be mentioned that in light of individualistic copyright theory, a slight paradox is that collecting societies tend to claim an administration

4.3.2. A Right to Ban – a Theoretical Substitute for Exclusivity

As explained, after the contract has been concluded between a society and user, the extended effect of the contractual license creates a compulsory license effect allowing a user to use the rights of non-affiliates (as widely as stipulated in the contract). The right to ban use is an additional and separate right granted to a non-affiliate as an attempt to secure exclusivity.

Following the individualistic ideology, the FCA stated already in 1961 that cases of contractual licensing use (by a radio or a television company) were possible only if an individual author did not ban use or there were no other reasons to assume that s/he would oppose using the work.⁸¹ The goal was same in the 1980s when the scope of the contractual license was widened to photocopying, but the solution was slightly different. It was stated that a non-member had the right to claim compensation, but the law contained no statements about the right to ban use.⁸² According to Committee Report 1980:12, the right to ban was not considered necessary, since the society administering the rights for photocopying could include necessary bans in its copy contract.⁸³ In the current system the right to ban use has been explicitly stated in each paragraph providing a contractual license, if granted.⁸⁴

fee from the non-members when they ask for their compensation; a non-affiliate must pay before s/he gets to claim her/his own compensation.

⁸¹ See e.g. Government Bill 23/1960, p. 3-4 and provided Section 22 Subsection 2.

⁸² In general, see Committee Report 1980:12, p. 122ff. See also the differing opinion of Berndt Godenhilem, p. 145-146.

⁸³ Committee Report 1980:12, p. 131. See also Government Bill 1980/70, p. 6, Government Bill 1984/32, p. 4 and Committee Report 1990:31, p. 61. However, see the differing opinion of Berndt Godenhilem in Committee Report 1980:12, p. 145-146. It should also be mentioned that the possibility of executing such rights in a copy contract, at least in a detailed manner, are theoretical. Including a ban in a contract would mean that the right holder banning use should exercise his right prior to a contract between a society and user is concluded. Furthermore, if such a ban is included in a contract, it is rather clear that it cannot be redrafted too often. It is not practically feasible for thousands of non-affiliates to constantly (e.g. weekly) pose new bans and/or delete old ones from the contractual licenses the society has granted to different users. It is also impossible to supervise e.g. the use of each photocopying machine. In other words, the system cannot have provided 100% control to right holders to decide the use of their content even if a ban is included into a copy contract.

⁸⁴ Government Bill 28/2004 vp., p. 62 and p. 105. It should be noted that literal reading of the preliminary material does not indicate that only a non-affiliate has the mentioned right. However, since a member is obliged to conclude a customer contract with a society, it may be considered that s/he does not have such a right unless included in the contract.

It should be mentioned that the right to ban the use does not exist if a compulsory license has been enacted. The right to ban would undo the intention of the compulsory license system. Thus, a separate right to ban the use in the extended contractual license system constitutes a theoretical step back from compulsory license towards exclusivity. However, according to copyright theory there should be no need for any separate right to ban use since use should be already forbidden without any bans. In other words, the law provides (at least it should provide) exclusivity directly. Now, the extended effect of the contractual license overrides exclusivity and grants a separate right to ban use, which is an attempt to fix the problem by “granting back” exclusivity. One problem is that, in practice, it is impossible to grant individual bans for each usage situation. If it were possible, we would not need contractual licensing: individuals could control the use of their material by banning use when needed. Therefore, the problem in creating the right to ban in the contractual licensing system is that its existence in theory saws off the branch of the system it is itself sitting on: why do we need collective licensing, if it is possible to ban (“control”) use individually?

In theory, one should be able to create very detailed bans, for example on the use of certain works, for explicit time periods as well as for certain specific usage situations. For example, a right holder should be able to determine if his/her specific content could be used in specific schools in a specific usage situation during a certain period of time. Imposing and supervising such bans globally or even nationally is simply not possible. The problem of the right to ban as a savior of individualism is sealed in situations when the right to ban *does not exist at all*. According to Government Bill 28/2004, the right to ban use is nowadays included only in those sector-specific contractual license sections when use of the work constitutes “primary use.” In cases of “secondary use” practical reasons are considered as outweighing the right to ban.⁸⁵

⁸⁵ In light of individualistic copyright theory, limiting the right to ban only to situations of “primary use” is problematic also since it is impossible to know when an individual author would want to ban use – perhaps especially when the use is described as “secondary.”

Thus it is not surprising to see that the right to ban as a rescuer of individualism is also a dead letter of law in practice.⁸⁶ For example, when it comes to the use of music, the right to ban use of a work in radio and television broadcasting was used by approximately *ten persons during the years 1980-1990*.⁸⁷ This proves how theoretical and unimportant the right to ban – “the remnant of exclusivity” – actually is for an individual.

Finally, the challenge of exclusivity in light of individualistic copyright theory becomes clear when we examine the given justifications for situations when the right to ban does not exist. The right to ban use does not exist in cases of photocopying and rebroadcasting.⁸⁸ According to Government Bill 28/2004, there is no longer a right to ban use in photocopying because the usage situations are singular, the meaning of the produced copies “insignificant” and the effects only local.⁸⁹ Until now, nothing in copyright theory had suggested that the right to produce copies would be “insignificant.”⁹⁰

In cases of rebroadcasting, Government Bill 24/2008⁹¹ states that there is no right to ban use because such a right would enable a singular author to ban a whole broadcast. This would be problematic from the viewpoint of access to information and other authors. This is because the whole broadcast would be banned and, hence, it would not be rational for the user to buy rights from any other right holder either. The given explanation is true. However, it also reveals that other interests have been considered more important than the exclusivity of an individual right holder. In other words, if the right to information and the ability of other authors to sell (and users to buy) their rights are endangered,

⁸⁶ To the author’s understanding, there may be only a few situations in which invoking the right to ban in mass use situations would make sense in practice. Firstly, there may be personal, e.g. private, reasons to ban the use of a certain work in the media. Secondly, someone may wish to ban use in order to grant a certain user e.g. an exclusive right to use the work or license it in some other way individually.

⁸⁷ Committee Report 1990:31, p. 72.

⁸⁸ Government Bill 28/2008, p. 145.

⁸⁹ Government Bill 28/2004, p. 145.

⁹⁰ Committee Report 1980:12 stated about the same right that a right to ban was reserved for individual non-affiliates in cases of photocopying because the right had “a special principled meaning.” Committee Report 1980:12, p. 113.

⁹¹ Government Bill 28/2004, p. 145.

exclusivity may be restricted. It should also be mentioned that the same problem would occur should a society refuse licensing in a rebroadcasting situation.⁹²

Therefore, it is justified to conclude that the exclusive right to control the use of one's works is purely theoretical. The right does not always exist and even if it did, individuals do not seem to be interested in invoking it. It is, therefore, not possible to accept that the right to ban saves individuality in copyright.⁹³ The legislator has also argued that the meaning of produced copies may be regarded as "insignificant." Finally, before reexamining the nature of collective licenses as restrictions, the position of members shall be examined.

4.5. A Member's Right to Grant an Individual License?

It is rather clear from the viewpoint of individualistic copyright doctrine, that individual licensing should be a starting point.⁹⁴ However, collecting societies limit this freedom of individuals. When signing a customer contract (an adhesion contract) with a society, individual right holders assign their rights to a collecting society. In these contracts,

⁹² From the viewpoint of individualistic copyright theory it is even more difficult to justify the right of a society to decline licensing. Neither should a society be entitled to decline the granting of a license when the abovementioned rights are endangered.

⁹³ Thus it is not possible to accept e.g. Henry Olsson's view that with the right of veto, individual authors would retain control. Olsson e.g. writes: "... outside right-owner has a right to file an individual prohibition against the use of this work or contribution, he still has the *full rights to control* his work. ... Such a right [of prohibition] may well be included in the collective agreement that is the basis for the operation of the system." Olsson under "4., The nature of the extended collective license" (emphasis added). Olsson does not mention at all that the right to control is totally theoretical or any other problems of principle related to collective licensing and individualism. See Henry Olsson, *The Extended Collective License as Applied in the Nordic Countries*. Kopinor 25th Anniversary International Symposium, 2005, Chapter 4 (hereafter Olsson). Olsson's writing can be found at:

http://www.kopinor.org/hva_er_kopinor/kopinor_25_ar/kopinor_25th_anniversary_international_symposium/the_extended_collective_license_as_applied_in_the_nordic_countries.

⁹⁴ "Ideally, the management of copyrights should be exclusively individual, because it is a great freedom for all acting parties and specifically creators, who are individuals." Hearing on collecting societies European Parliament – 7 October 2003, Marc Guez, Managing Director of French collecting society SCPP, France, p. 3.

<http://www.europarl.eu.int/hearings/20031007/juri/guez.pdf>. See also Hietanen, p. 217, especially footnote 3 where Hietanen brings up John Stuart Mills view (John Stuart Mill, *On Liberty* 148 (1863)) on the importance of an individual's right to decide the use of his/her work. See also Hietanen, p. 223.

societies, in practice, demand all relevant rights from the joining right holder.⁹⁵ This has occasionally resulted in disputes in Europe.

The basic relationship between an individual right holder and a society was set in three GEMA-rulings by the Commission, which in particular enabled individual right holders to join foreign societies to manage their rights in cases when a national society merely acted through reciprocal contracts with foreign societies. In the SABAM-case, the European Court of Justice decided that collecting societies were not entitled to retain the rights of right holders for five years after a member had withdrawn from a society. In 1995, the British Monopolies and Mergers Commission determined that members should be free to administer certain categories of rights by themselves. Finally, in a recent decision (the so-called DraftPunkt-case) the Commission considered that a requirement necessitating individual right holders to assign all of their rights to a society, would lead to the abuse of a dominant position.⁹⁶ The Commission stated that a society cannot refuse to derogate from its rules without exceptional and objective reasons.⁹⁷

Thus it can be seen that individuals are occasionally interested in licensing individually. During recent years, the possibilities for individual licensing have increased tremendously. In the United States, where parallel individual licensing is possible, right holders have also occasionally used this option.⁹⁸ On some occasions, members have

⁹⁵ In theory it is of course possible to resign from a society and reclaim the possibility to license individually. However, that would hardly be a feasible option in practice.

⁹⁶ Martin Kretschmer, *The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments*, E.I.P.R Issue 3, Sweet & Maxwell Limited (2002) (hereafter Kretschmer), p. 132, ff. Cases referred are GEMA I of 20.6.1971, EYVL L 134/15, GEMA II, of 6.7.1972/22, EYVL L 166 and GEMA III, of 4.12.1981, EYVL L 94/12 by the Commission and Case 127/73, BRT v. SABAM [1974] E.C.R 313 by the European Court of Justice and Performing Rights (1996) H.M.S.O Cm 3147 by the Monopolies and Mergers Commission. See also *Banghalter et Homem Christo v. Sacem* (“Draftpunk”-case), case COMP/C2/37.219 of 6.8.2002. In USA parallel licensing is possible. See e.g. Einhorn, Michael A., *Intellectual Property and Antitrust: Music performing Rights in Broadcasting*, in *Columbia – VLA Journal of Law & the Arts* VOL. 24 NO. 4, 2001 (p.355): “Consent degrees quickly followed that specified, among other things, that licensing practices must be non-exclusive and that licenses and individual members/affiliates should be allowed to directly contract with one another.”

⁹⁷ As a result of the case *Sacem* modified its rules in the following manner: “Notwithstanding the provisions of this Article, the administrative Council, on receipt of a reasoned request and by a majority of its members, may accept that an author who is a citizen of the European Union does not assign certain of his rights to (Sacem) or to one or several other collecting societies. Its decision shall be reasoned.” See also Hietanen, p.232. The number of cases may increase due to the increased amount of individual licensing. However, the threshold for an individual right holder to sue a society is high. The interest in one particular case is low and the risk of legal expenses is always present.

⁹⁸ See e.g. *Wired* magazine issue 12.11. *Sample the Future*, <http://www.wired.com/wired/archive/12.11/sample.html> and *Rip. Sample. Mash. Share, The WIRED CD*, <http://creativecommons.org/wired>. Hietanen p. 219.

used their own material against their customer contracts, e.g. by placing it on their MySpace webpage.⁹⁹ In theory, individuals are acting against the law when doing so.

However, in proportion to the number of right holders, the number of disputes between individuals and societies do not seem to be that significant.¹⁰⁰ The majority of members have not been that interested in administering their rights individually.¹⁰¹ In general, it may be argued that the practice of using adhesion contracts by the societies is legal since copyright acknowledges the freedom of contract. Thus, the problem related to collective licensing in this respect is more of an *ideological one*. However, it may be argued that collecting societies disrespect individualistic copyright ideology when they refuse to grant parallel rights to their affiliates. In theory, individuals should be allowed to retain maximum rights and assign societies only the rights they need. In other words, every time a society in practice refuses to grant a certain right to an individual, the refusal can be understood as a sign of contempt against individualistic copyright ideology on the society's behalf.¹⁰²

4.6. Concluding Remarks – Changing the Main Rule?

A restriction is typically something that deprives the right holder's rights. For example, traditionally a compulsory license has been regarded as a restriction since it limits the exclusivity of the right holder to a right for compensation. However, as was shown, despite the used license model, copyright can at best constitute the right to compensation for an individual. Individual right holders either accept this (by assigning their rights to a

⁹⁹ See e.g. article "Tuleeko nettimusiikin jäykistelylle stoppi?" in internet journal Digitoday on 25.3.2009. It should be mentioned that so far societies have not intervened in the conduct of their members.

¹⁰⁰ Challenges related to releasing parallel individual licensing are practical in nature. Optional licensing possibilities might increase administration in the societies. Thus it may be difficult to approve the change in practice, especially when it comes to members who do not wish to license individually. See also Hietanen, p. 236.

¹⁰¹ An interview between Herkko Hietanen and Olli Vilanka on 28th April 2009. This indicates that those who use individual (such as Creative Commons) licenses are not members of collecting societies. This reinforces the notion that for a member of a society, copyright is seen as a means for generating income through a society instead of a tool to administer the use of rights individually.

¹⁰² It may be argued that since individuals are not often interested in administering their rights individually, there is not even an ideological problem. However, this argument is not convincing: if individuals are not interested in invoking their individual rights, why do we have individualistic copyright theory in the first place?

society) or do not care about having exclusive rights (by keeping the rights themselves and not bothering to ban use in cases in which it would, in theory, be possible).¹⁰³ Actually, this has always been the situation in the contractual license system: it has never been possible in practice for individuals to de facto control the use of their works in mass use situations. In other words, an individual right holder cannot expect anything but compensation from the system and, therefore, the main rule must be the right to compensation, not the exclusive right to control the use of works. The fact that societies demand exclusive rights from individuals enforces the inflation of the individualistic copyright ideology.

Thus, it may be concluded that since a contractual license is no longer deemed a restriction and it merely provides a means for compensating the right holder, *the right to compensation should be accepted as a main rule in copyright*. This should also have an impact on the way in which collective licenses should be interpreted. As mentioned, because restrictions have been seen as exceptions from the main rule, it has been argued that restrictions in copyright should be interpreted narrowly. However, since the right to compensation is de facto the main rule and both of the collective licenses provide only means for compensation, *there should be no reason to apply the principle of narrow interpretation in cases of collective licensing*.¹⁰⁴

¹⁰³ Most probably non-affiliates (if they know that they have the right to ban use) do not exercise their right to ban use since they understand the theoretical nature of it. Haarmann has argued that since in compulsory license situations the user is not obliged to inform the author, it is often only by chance that the author might receive information about the use at all. Haarmann 2005, p. 156. However, for non-affiliates, especially foreigners, this is always the case. Also, it should be remembered that it is impossible for individual authors to supervise the use of their rights globally or ever nationally, no matter what license model (compulsory or contractual) is being used. Hence, the problem is not related directly to the nature of exclusivity, but to the possibility of getting information if content is used. Some users have also considered it more rational to agree on the terms of use prior to use also in cases of compulsory licensing. In doing so, they avoid later possible surprises concerning the terms of use. Finally, as an example it should be mentioned that not even the societies know exactly whose content has been used. Thus even they are unable to distribute the content with 100% accuracy to appropriate right holders, as shall be explained in the second article (Part II) in more detail. Therefore, applying contractual license does not necessarily mean that the right holder is informed either.

¹⁰⁴ The general rule that limitations should be interpreted narrowly has lately faced criticism from other authors also. See e.g. Tuomas Mylly, Tekijänoikeuden ideologiat ja myytit, Lakimies 2/2004, s. 243. Pirkko-Liisa Haarmann does not seem to take an explicit stand on the question anymore. Compare Haarmann 2005, p. 163 – 166 and Haarmann 1999, p. 119 -120.

Finally, when examining the nature of collective licenses we should take into account that the legislator has compared contractual license to collective labour agreements. Therefore, the relationship between collective labor agreements and the contractual license system shall be examined next in case this might help us to understand the nature of collective licensing in a new way.

5. Collective Licenses as Collective Labor Agreements?

5.1. About the Nature and Effect of Collective Labor Agreements

The legislator has argued that the contractual license is a reminder of the *generally binding nature* of the collective labor agreement system.¹⁰⁵ In order to evaluate the “generally binding nature” of collective labor agreements, a short introduction to the collective labor agreement system will follow.

According to the Law Regulating Collective Labor Agreements, a collective labor agreement is an agreement which is concluded between the employers (or registered societies of employers) and registered societies for employees.¹⁰⁶ The legal effects of collective labor agreements (hereafter CLAB) are exceptional.¹⁰⁷ Normally contracts have only inter-party legal effects. In other words, normally the parties cannot set terms which bind a third party, unless the third party has consented to the terms. However, collective labor agreements are so-called *norm contracts*. In the law of obligations, a norm contract means a contract whose purpose is to stipulate beforehand the content of contracts that may be concluded later. Since the purpose of a collective labor agreement is to agree on terms which also affect the contracts of other parties; as norm contracts,

¹⁰⁵ See e.g. Government Bill 28/2004, p. 9-10 and 63.

¹⁰⁶ Section 1 of the Law Regulating Collective Labor Agreements. According Section 2 of the Law Regulating Collective Labor Agreements, the agreement must be in writing. In Finland, they are often referred to as *the participants* of the agreement. “Participants” is a translation of the Finnish word “osalliset.”

¹⁰⁷ About the regulative history for contracts of employment in Finland see Kaarlo Sarkko, *Työehtosopimuksen määräysten oikeusvaikutukset*, Suomen lakimiesliiton kustannus Oy. Helsinki 1973 (hereafter Sarkko), p. 8ff. For the history of collective labor agreements, see e.g. Jorma Vuorio, *Työsuhteen ehtojen määrääminen, Tutkimus suomen työoikeuden normijärjestelmästä*. Suomalaisen lakimiesyhdistyksen julkaisuja B-sarja N:o 76. Turku 1955. p. 9ff.

they deviate from “regular” contracts. In practice, this means that a major part of the terms the labor market organizations agree on in collective labor agreements have automatic effects on the legal relationships of individual employers and employees.¹⁰⁸ Therefore, on a general level one could argue that the effects of CLABs are reminiscent of the extended effect of the contractual license since its effect extends to right holders (“employees”) who are not party to the actual contract. However, in order to compare the generally binding nature of a CLAB and the effects of the contractual license, the examination must be deepened further.

First, it should be noted that the effects of CLABs are not identical for all who are bound to them. Only the central organizations (or those employers or employee societies who have actually concluded the CLAB) are *participants* in the CLAB. The societies who have not concluded the actual contract, but are members of the central organizations (or those employers or employee societies who have actually concluded the CLAB), are not participants of the contract, but they are *bound* by it. Thus, affiliated associations in employment legislation are bound by the CLAB although they did not personally agree to the contract. This is something that should be noted since the effects of a CLAB are different if one is a participant in a CLAB or merely bound by a CLAB.¹⁰⁹ However, the segregation of participants and those who are merely bound by a CLAB is not directly related to the generally binding nature of a CLAB either. In other words, *being bound* to the CLAB of participants *does not refer to the generally binding nature of a certain CLAB*, which is the effect the copyright legislator makes the comparison to when explaining the nature of contractual license in copyright.

¹⁰⁸ Naturally implementing collective labor agreements necessitates that the agreements also contain provisions, which have an effect on the relationships of the concluding labor market organizations. See e.g. Sarkko p. 3 ff. Since collective labor agreements also contain peremptory provisions, it has been considered that a special law for collective labor agreements has been needed to enforce their effect. There is no separate law for collective licenses in copyright although the effects of collective licenses in copyright are, in practice, peremptory as well.

¹⁰⁹ If one is a participant in a CLAB, even retiring (or getting fired) from a central organization does not free an employer or employee organization from the effect of the CLAB. It is possible to later join a CLAB provided that the participants give their consent. See, Sarkko p. 26ff and Vuorio p. 306ff.

The generally binding nature of a CLAB extends the CLAB's effects even further.¹¹⁰ A CLAB may be defined as having a generally binding nature in some countries, if a CLAB covers at least half of the labor force in a certain area.¹¹¹ In order to have a “generally binding” nature in Finland, the CLAB should be applied nationwide and regulate a certain appropriate branch.¹¹² If these requirements are fulfilled, a CLAB extends its stipulations to bind *all employers and employees under the certain geographic and vocational area that the contract covers*. Whether this generally binding effect may be compared to contractual license in copyright shall be examined next.

5.2. Comparing Collective Labor Agreements and Contractual Licenses

A contractual license is concluded between a collecting society and a user.¹¹³ The relevant users are defined by interpreting copyright law. A special feature in the extended contractual license system is that after the contract has been concluded between a user and a society, the user may also use works of those authors who are not represented by the society (the extended effect).¹¹⁴ Therefore, it has been stated in the preliminary material of the FCA that a contractual license is similar to the *generally binding nature* of the collective labor agreement system.¹¹⁵

Since collective licenses in copyright extend their legal effects to external parties, they could be compared to *norm contracts*. In a way, collective licenses also set certain standards for the terms of use: a user gets permission to use all the licensed material with the same license and non-affiliates should also be paid according to the same

¹¹⁰ [Contracts of Employment act of 26.1.2001, Chapter 7, Section 7.](#)

¹¹¹ Kerstin Ahlber and Niklas Bruun, *Kollektivavtal i EU. Om allmängiltiga avtal och social dumpning*. Juristförlaget, Stockholm 1996. p. 17 and 106ff.

¹¹² However, if an employer is obliged to follow a specific CLAB, s/he may follow it instead of being obliged to follow the generally binding (other) CLAB. See e.g. *Komiteamietintö 2001:1, Työsopimuslakikomian mietintö*, p. 81-82 and *Contracts of Employment Act, Section 7, Subsection 1*.

¹¹³ See e.g. *Government Bill 28/2004, vp.*, p. 63. The Ministry of Education approves a society to administer rights from certain fields of art.

¹¹⁴ The same applies if a compulsory license has been enacted, although the user does not need permission before use.

¹¹⁵ See e.g. *Government Bill 28/2004, p. 9-10 and 63*. It could also be mentioned that all the member organizations of collecting societies are bound to the contract.

standards.¹¹⁶ However, it is difficult to see that collective licenses in copyright have a “generally binding” effect comparable to a CLAB. A contractual license does not bind all employers and employees under the “certain geographic and vocational area the contract covers.” Furthermore, there are no rules similar to the employment legislation stipulating that if a contractual license, e.g. covers at least “half of the labor force in a certain area,” it may be defined as having an extra (“generally binding”) effect.

Finally, it may also be asked to what extent it is rational to compare the work of an employee to the work of a right holder. A work relationship is a contractual relationship between the parties in question, but copyright has roots in the concept of property. For example, a non-affiliate’s position in an extended contractual license system is similar to the situation when a compulsory license has been enacted. (A user gets a license for use without the non-affiliate’s permission, but is obliged to pay compensation.¹¹⁷) This would mean that the effect of compulsory licensing is analogous to the generally binding nature of employment legislation. The comparison is difficult because in Labor Law the use of an employee’s work differs from situations in which the work of an intellectual property right holder is being used. In labor law, there is no “work” an employer could use without the right holder’s consent as in copyright law. Property rights, as defined in copyright legislation, exist even after the death of the author, but it is clear that no work contribution, as defined in employment legislation, can be expected after the death of the employee.

The background of the license models also differs totally. The idea behind having a binding or generally binding effect for CLAB in employment law is to prevent an employer from using inferior terms with his/her so-called “wild employees.”¹¹⁸ Thus, in

¹¹⁶ It should be mentioned that CLABs set minimum requirements for employers to follow, but when it comes to contractual licenses, the extended effect does not bind the non-affiliate in a similar way: a non-affiliate may freely decide the terms of his/her individual license. However, if a non-affiliate decides to collect the compensations from a society, s/he is bound to the level the society has asked from a user.

¹¹⁷ Karnell om upphovsrätt, Avtalslicenskonstruktionen, principiella och praktiska frågor, p. 150: ”Att inte medge individuell förbuds rätt är att utsätta en dissiderande utomstående upphovsman för just effekten av en tvånglicens, ja, kanske rentav något för honom värre.” As explained, a non-affiliate’s right to ban use does not in practice create a difference between the systems. Non-affiliates do not always have the right to ban use and even if they did it is, in practice, impossible for them to always use the right.

¹¹⁸ See e.g. LCLA Section 4, Subsection 2.

employment legislation it was the employers who opposed the introduction of collective labor agreements.¹¹⁹ However, in light of individualistic copyright theory, collective licenses in copyright have the opposite effect: they deprive the individual author of the freedom to individually control the use of her/his property, but they have, nevertheless, been justified as tools which assist users (“employers”). Thus, the initial reasoning behind collective licensing agreements in employment legislation and copyright legislation are mutually opposed.

Therefore, it could be concluded that there are similarities between the two licensing systems since they both are norm contracts. However, whether the extended effect of the contractual license is comparable to the generally binding nature of a CLAB could be called into question.

6. Concluding Remarks on Individualism and Collective Licensing

After a work has been published,¹²⁰ the author of the work loses his/her ability to control use of the work in practice. It is impossible for a right holder to control who uses copies and where and when they are used. When s/he assigns her/his rights to a society s/he merely expects compensation from the society. It is irrelevant if the rights have been governed under compulsory or contractual license since there are no practical opportunities for an individual to control the use of her/his works regardless of the license model. The right to ban use does not provide reparation to the situation. Therefore, it is even misleading to argue that copyright could provide exclusive rights for an individual to control the use of her/his content.¹²¹ Already the legislator has stated that an exclusive right to reproduce copies may be considered as an insignificant right.¹²²

¹¹⁹ On negative employer attitudes towards collective labor agreements see e.g. Vuorio p.10 ff.

¹²⁰ In the FCA (8 §) there are two similar terms referring to publishing (“julkaista” and “julkistaa”). The term “publish” is used here as a general term referring to an act when an author releases copies of his/her work to public.

¹²¹ Since it is not possible for an individual to exclusively control the use of her/his works, it may be asked (especially in the light of individualistic copyright theory) how we can justify that the society granting collective licenses could have such a right. The consequences of periods when no contract is in force shall be examined in Part II.

¹²² To the author it seems quite clear that the Committee for Constitutional Law did not understand the nature of collective licensing when it without criticism stated that a right holder has the right to ban use and

Traditionally, it has been argued that both compulsory and contractual licenses are restrictions. Nowadays, a contractual license is no longer officially a restriction. However, it may be argued that, in practice, it never has been anything else but a system which collects and distributes compensations to right holders. In other words, from an individual's perspective (whether they belong to a society or not), a contractual license does not differ from a compulsory license when it comes to exclusivity: both merely provide the possibility of getting compensations.¹²³ Therefore, it may be concluded that when it comes to collective licensing *the main rule for an individual in copyright is not exclusivity, but the right to compensation.*¹²⁴ Therefore, it is difficult to see why one should apply the rule of narrow interpretation when the administration of rights takes place thorough collective licensing: when collective licenses are being applied, the main rule is to collect and distribute compensations.

Comparing contractual (or collective) copyright licensing systems to collective labor agreements is justified to some extent: both collective licenses and collective labor agreements are so-called norm contracts. However, it is difficult to see that a contractual

that non-affiliates have more extensive rights to get compensation from a society than affiliates. See the report of the Committee for Constitutional Law (PeVL 7/2005), p. 6.

¹²³ It may be argued that contractual license (including the right to veto) is economically more beneficial for right holders than compulsory licensing. However, it should be noted that this argument is purely based on the economical interests of collecting societies and those right holders who have assigned their rights to the societies, and not on individualistic copyright theory (with an individual author determining use). The claimed harmfulness of compulsory license has also been disputed in a recent dissertation. Mikko Huuskonen, Copyright, Mass Use and Exclusivity. On the Industry Initiated Limitations to Copyright Exclusivity, Especially Regarding Sound Recording and Broadcasting. Academic dissertation by the Department of Private Law, University of Helsinki, p. 45 - 46.

¹²⁴ It may be argued that also international conventions are open to wide interpretations as it comes to defining whether something is a limitation or not. When the provisions governing contractual licensing in photocopying were drafted in 1980, the legislator referred to amendments made to the Berne Convention Stockholm conference in 1967 and Paris conference in 1971. Following these amendments, it was stated that reproducing large numbers of copies does not necessarily unreasonably infringe right holders' interests provided that the right holder is entitled to compensation. In Committee Report 1980:12 (p. 112), the following requirements were set for a contractual license to be accordant with the Berne Convention: 1. The terms of use should be reasonable for right holders, 2. The right holders should be entitled to ban use, 3. A right holder, who is not associated with the society, is granted the opportunity to claim compensation even if the members were entitled to compensation, 4. In case of disagreement on the terms of use, only in cases of taking photocopies for educational purposes may the user ask for the dispute to be taken to arbitration proceedings. As explained, sections 2 and 3 are mere theory. The first does not give much detailed guideline since the terms of use should be determined in individual negotiations between users and right holders. (What is reasonable anyway?) The fourth section has been provided to protect users.

license is as “generally binding” in its nature as collective labor agreements may be. Also, the backgrounds of the two systems are very different. However, the comparison lets one assume that collective licenses in copyright law need not be understood as instruments for “zero tolerance control.” In the author’s opinion, the legislator’s analogy indicates that “rougher instruments” in copyright could be allowed in order to secure compensation levels. Unlike collective labor agreements, there is no separate law governing collective licensing, but such provisions are in the copyright law itself. Since collective agreements in both labor law and copyright set peremptory provisions and regulate the legal relations of external parties, the responsibility of the concluding parties should be emphasized. From a user’s perspective, the responsibilities today seem quite clear: the payment of adequate compensation. However, when it comes to the responsibilities of a society, the law remains ambiguously silent, especially on the topic of societies’ responsibilities to users and consumers.¹²⁵ Having a separate law for collective licensing in copyright might compel the legislator to evaluate all pros and cons of the system.¹²⁶

Finally, it may be argued that collective licensing systems have worked well in practice: Right holders have received remunerations and users have been able to operate. However, another matter is the question of whether collective licensing systems have much – if anything – to do with the original individualistic copyright theory. It may be even argued that administering rights through collecting societies does not directly resemble any notion of individualistic copyright theory. Societies do not create anything by themselves in practice, as the starting point (FCA 1 §) of the individualistic copyright theory postulates (their members/customers do). The administration of rights they execute is not individual either (but the opposite of collective), which is the second assumption set in

¹²⁵ Between the 1960s and 2006, the legislator has only once stated, in the Committee Report 1990:31 (p. 67), that collecting societies use extensive authority. In Government Bill 28/2004, although use of the system was extended and amended, the position of societies was not evaluated at all. Merely a short reference to competition law was made. In practice, Government Bill 28/2004 only implies that all the parties involved in the contractual licensing have only “beneficial” positions. In other words, it seems that the obligating features of the system were left unexamined.

¹²⁶ This possibility has also been presented in Committee Report 1990:31, p. 67.

the copyright theory (FCA 2 §).¹²⁷ The collective administration of rights merely resembles a certain way of collecting and distributing money, but not the core ideology of copyright itself.

How should the current reality of copyright be understood then? In the author's opinion, copyright is about forming and defining points where right holders (or representatives of right holders) and users (or their representatives) should meet and agree on the terms of use. One could describe these places e.g. as negotiation points. At the moment those points are defined in Article 2 of the FCA. To the author it seems clear that nothing in the current reality of copyright prevents the creation of new negotiation points in order to secure the rights of content producers and other members of the society. For example, a negotiation point where right holders would meet consumers in order to negotiate the terms of online music use could be drafted. Or in other words: nothing in our current reality of copyright prevents it. Thus, the criticism presented here does not mean that the collective administration of rights (via collective licenses or other legal tools) should be abolished. However, it means that it is misleading and ambiguous to expect people to strictly honor the individualistic copyright ideology under threat of harsh criminal sanctions as, in reality, *copyright is already merely about collecting compensations for the use of content in a roughly correct way. Thus nothing prevents us from looking alternative solutions to secure rights of different parties.*

¹²⁷ It should be mentioned that the Finnish Collecting Society Teosto has published a document called "The Ideal Strategy of Teosto" (author's translation of the Finnish name "Teoston aatteellinen strategia"). It is difficult to understand what the "ideological" foundations for such a document are. Arguing for the concept of freedom of contract (which enables right holders to assign their rights) has nothing to do with embracing the individualistic copyright ideology. See also Kretschmer, p 132-135 where he argues "that the collective administration of music copyrights does not straightforwardly reflect a single underlying concept of private property—perhaps not even a notion of copyright as property." It is also a bit paradoxical that these societies are officially non-profit organizations, although their main purpose is to generate income.

Bibliography

Official sources

Amendment to FCA 897/1980.

Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886 (the Berne Convention).

Copyright Act, No. 404 of July 1961 (the Finnish Copyright Law or FCA)

Contracts of Employment act of 26.1.2001.

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society

Directive of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (96/9/EC)

Proposal for a European Parliament and Council Directive on the resale right for the benefit of the author of an original work of art (96/C 178/05 COM (96) 97 final 96/085 (COD)

Coercive Measures Act (450/1987)

Council Directive of 29 October 1993 harmonizing the term of protection of copyright and certain related rights (93/98/EEC)

Council Directive of 27 September 1993 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable re-transmission (93/83/EEC)

Council Directive of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (92/100/EEC)

Council Directive of 14 May 1991 on the legal protection of computer programs (91/250/EEC).

Committee Report 1953:5

Committee Report 1974:21

Committee Report 1980:12

Committee Report 1990:30

Committee Report 1992:4

Committee Report 2001:1

Decree No. 574 of 21 April 1995 (Copyright Decree)

Government Bill 23/1960

Government Bill 1980/70

Government Bill 287/1994

Government Bill 28/2004

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations of October 26, 1961

The Law of Associations (1989/503)

The Law Regulating Collective Labor Agreements

Komission tiedonanto neuvostolle, Euroopan parlamentille ja Euroopan talous- ja sosiaalikomitealle tekijänoikeuksien ja lähioikeuksien hallinnoinnista sisämarkkinoilla KOM (2004) 261.

| Letter from The Committee for Education and Culture to the Ministry of Education to re-consider certain proposals. Available at (in Finnish): <http://www.ffi.org/tekijanoikeus/laki/sivistysvaliokunta-2003-02-18.html>.

Report of The Constitutional Law Committee (PeVM 7/2005)

Report of the Committee for Education and Culture (SiVM 6/2005)

Report of the Law Committee (LaVL 5/2005)

Report of the Grand Committee (SuVM 1/2005)

WIPO Performances and Phonograms Treaty, adopted by the Diplomatic Conference on December 20, 1996.

Literature

Kerstin Ahlber and Niklas Bruun, Kollektivavtal i EU. Om allmängiltiga avtal och social dumping. Juristförlaget, Stockholm 1996.

Annual Report of Kopiosto 2005 and 2008

Annual Report of Teosto 2005 and 2007

Niklas Bruun, Intellectual Property Law in Finland, Kluwer Law International, 2001 (Bruun 2001).

William Fisher, Theories of Intellectual Property, New Essays on the Legal and Political Theory of Property, Cambridge University Press 2001.

Introduction to Collective Management of Copyright and Related Rights, Document prepared by the International Bureau of WIPO. Available at <http://www.uatm.com.ua/laws/int/Introduction%20to%20Collective%20Management%20of%20Copyright%20and%20Related%20Rights.pdf>.

Pirkko-Liisa Haarmann, Tekijänoikeus & Lähioikeudet, Kauppakaari Oyj. Helsinki 1999 (Haarmann 1999)

Pirkko-Liisa Haarmann's Tekijänoikeus & lähioikeudet, 3d. and latest edition by Talentum in 2005 (Haarmann 2005).

Harenko, Niiranen, Tarkela, Tekijänoikeus, WSOYpro, Helsinki 2006.

Herkko Hietanen, The Pursuit of Efficient Copyright Licensing, How Some Rights Reserved Attempts to Solve the Problems of All Rights Reserved. Lappeenranta University of Technology. Digipaino 2008.

Mikko Huuskonen, Copyright, Mass Use and Exclusivity, On the Industry Initiated Limitations to Copyright Exclusivity, Especially Regarding Sound Recording and Broadcasting. Helsinki 2006. Available at: <http://et-hesis.helsinki.fi/julkaisut/oik/yksit/vk/huuskonen/copyrigh.pdf>.

Gunnar Karnell, Avtalslicenskonstruktionen, principiella och praktiska frågor, in the book Karnell om upphovsrätt, Juridiska fakulteten i Stockholm; Skriftserien, 1990, NIR 1981.

Leena Kartio, Esineoikeuden perusteet. Tampere 1991

T.M. Kivimäki, Tekijänoikeus. Helsinki 1948 (Kivimäki).

Mogens Kocktvedgaard, - Marianne Levin, Lärobok I immaterialrätt. Upphovsrätt – fötorätt – patenträtt – mönsterrätt – känneteckenrätt is Sverige, EG och internationellt. Norstedts Juridik, Stockholm 2004.

Pirjo Kontkanen, Tekijänoikeudet yliopistotutkimuksessa –ja opetuksessa. IPR University Center 2006.

Martin Kretschmer, The Failure of Property Rules in Collective Administration: Rethinking Copyright Societies as Regulatory Instruments, E.I.P.R Issue 3, Sweet &

Maxwell Limited (2002) (Kretschmer). Available at
http://www.cippm.org.uk/pdfs/kretschmer_eipr_032002.pdf

Tuomas Mylly, Tekijänoikeuden ideologiat ja myytit, Lakimies 2004.

Henry Olsson, The Extended Collective License as Applied in the Nordic Countries. Kopinor 25th Anniversary International Symposium, 2005 (Olsson). Available at:
http://www.kopinor.org/hva_er_kopinor/kopinor_25_ar/kopinor_25th_anniversary_international_symposium/the_extended_collective_license_as_applied_in_the_nordic_countries.

Tiina Pelkonen, ”Voiko varastaa vain osittain”, IPRinfo Magazine 2/2002. Available at, http://www.iprinfo.com/page.php?page_id=36&action=articleDetails&a_id=117&id=11 SITRA’s (The Finnish National Fund for Research and Development) report: Antti Hautamäki (edit.), Suomi teollisen ja tietoyhteiskunnan murroksessa, Tietoyhteiskunnan sosiaaliset ja yhteiskunnalliset vaikutukset, Helsinki 1996. Available at:
<http://194.100.30.11/tietoyhteiskunta/suomi/st2f.htm>.

Teoston aatteellinen strategia (”The Ideal Strategy of Teosto”)

Kaarlo Sarkko, Työehtosopimuksen määräysten oikeusvaikutukset, Suomen lakimiesliiton kustannus Oy. Helsinki 1973 (Sarkko).

Jorma Vuorio, Työsuhteen ehtojen määrääminen, Tutkimus suomen työoikeuden normijärjestelmästä. Suomalaisen lakimiesyhdistyksen julkaisu B-sarja N:o 76. Turku 1955.

Interviews

An interview between Olli Vilanka and Satu Kangas, on 23rd November 2006.

An interview between Olli Vilanka and Jukka-Pekka Timonen, on 21st December 2006.