

# Extended Collective Licensing for AI Training

A Viable Solution?

# The Nature & Characteristics of ECL arrangement

“First came the organisations, then the agreements,  
and after that the regulation”

# Proposed structure of this evening's talk

## **Nature & characteristics of the ECL arrangement in the Nordic countries**

- Historical backdrop
- Prerequisites & Characteristics
- Legislative provisions
- Current landscape

## **Practicalities of administration**

- User's perspective
- Rightsholder's perspective

## **Suitability of the ECL model for training of AI**

# Historical backdrop

- Emerged in Sweden in the early 1960's to complement existing collective agreements
- User driven
- Proposed solution to increasing no. non-affiliated rightsholders (“outsider problem”)
- Followed a rejection of a proposal for collectively managed compulsory license
- Corresponded to pre-existing practice of public radio station
- Developed from specific to general
- Introduced for photocopying for educational purposes 1974
- Introduction of a general extended collective license 2013
- Varying degrees of State involvement

# Characteristic of the Nordic ECL model

- History of collective legal solutions (rights management one)
- High rightsholder engagement (incentives provided by the State)
- Low levels of opt-outs
- Relationship between CMOs and users generally good
- Limited Government involvement, no authorisation/approval procedure (until 2017 no supervisory function)
- Transparency & Governance considered ok (if not before, after CRM-directive)
- However, closer look at representativeness criteria and *BUS* vs. *DUR* provides insight into indirect involvement.

# Pre-requisites re-cap

- An organisation, typically a CMO, concludes a *freely negotiated agreement* with a user
- The organisation must be *representative* in its field of works used
- *Extended effect is given to the agreement* to also encompass authors who are not direct members of the CMO, including foreign rightsholders
- The user may lawfully use all works without having to meet individual claims by outsiders and without risk of criminal sanctions
- Non-member rightsholders have *individual right to remuneration*
- Non-member rightsholders have “*opt out*” right re the use of their works

# Legislative provisions

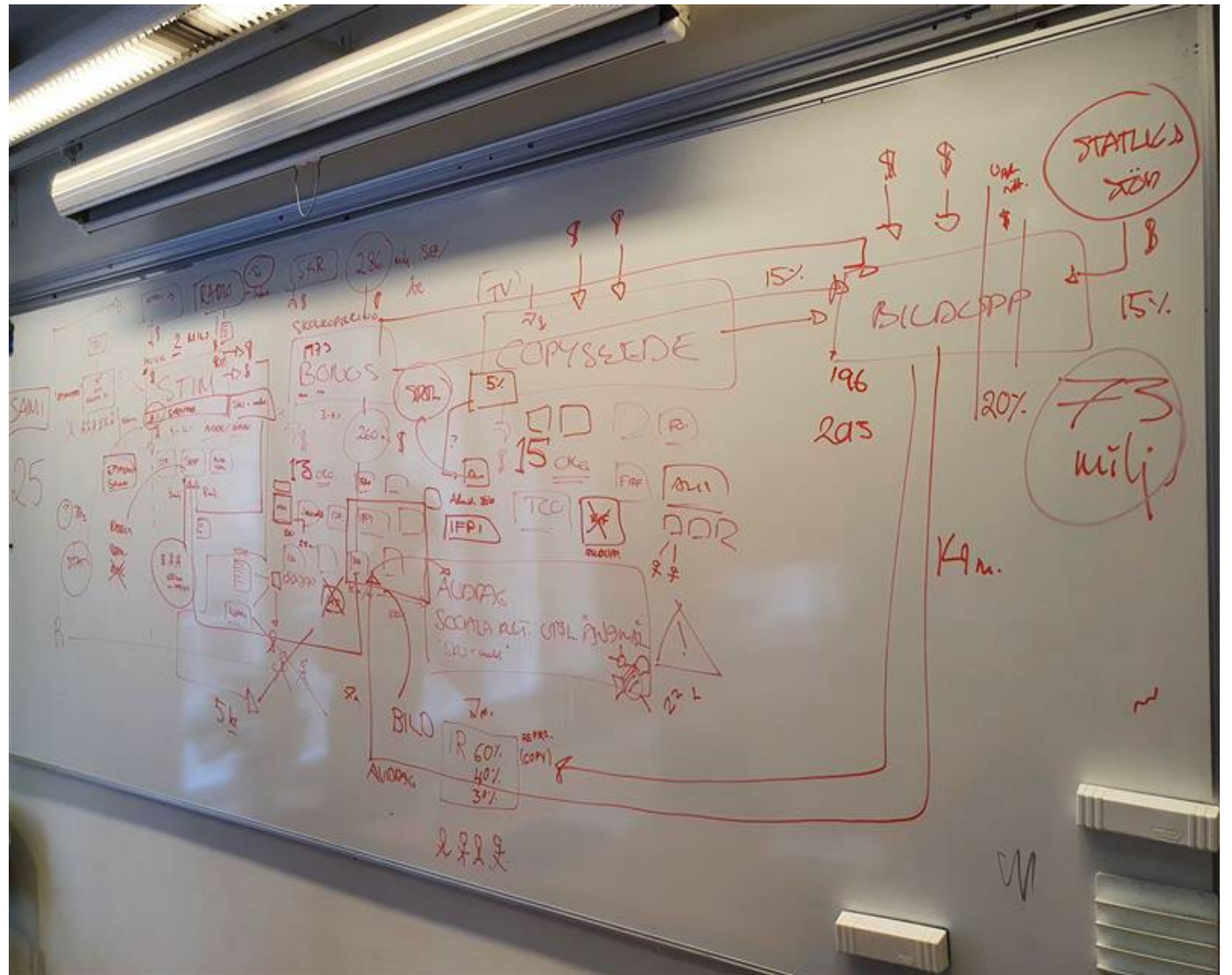
- Common provisions (§42 a)
- Public authorities, companies and other organisations (§42 b)
- Educational activities (§42 c)
- Archives and libraries (§42 d)
- Radio and tv (§42 e, f, g) (original provision!)
- Press publications (§42 h)
- Orphan works (§42 i, j)
- General provision (§42 k)

# Extended Collective License (ECL) landscape

- Currently 28 organisations in Sweden engaged in the activity of collective rights management
- 9 Collective management organisations (CMOs)
- CMOs offering ECL primarily “umbrella organisations” Bonus (educational purposes) & Copyswede (re-transmission, private copy levy).
- Smaller organisations considering ECL for licensing of Swedish language model



Well functioning, for an outsider slightly complex landscape



# Bonus Copyright Access (est. 1973)

- First organisation to provide licenses for school photocopying
- Authors, publishers and editors
- 14 membership organisations representing authors, publishers and editors in the field of text and image based works
  - *Non-fiction and fiction, educational books and materials, newspapers and periodicals, sheet music and lyrics, visual arts and photography*
- Collect, manage and distribute compensation to “the rightsholders”

Note - Mandates of Copyswede and Bonus differ

# Copyswede (est. 1982)

- 14 member organisations representing Swedish authors and performers & 3 partner organisations (Ifpi, Ubos, FRF)
- Offer television retransmission licenses for businesses in a number of areas (TV operators, hospitality industry, shops, organisations, authorities, schools...)
- Distribute revenues to rightsholders directly & via member organisations
- Customers also include importers and retailers within the electronics industry (Private Copy Levy)
- Recent (2022) ECL used as the basis for a remote access license with the National Library of Sweden (illustration of needs driven aspect of ECL)

# Practicalities of admin – user perspective

- Strong bargaining position have led to claims of abuse of dominant position *Kanal 5 & TV4 AB vs. Stim, Sami vs. Hotel du Nord*
- Lack of transparency in negotiations (CRM-directive has met some demands)
- Lack of information to and regarding rightsholders
- However, still a case of flexible negotiations
- Solution based (specific needs of users being a reason to enter into discussions)

# Practicalities of admin – rightsholder's perspective

- ECL's de facto effect of increasing the value / leverage of licenses
- Mandates kept with the rightsholders (freely negotiated terms)
- Safeguards expertise re. market conditions when drawing balance between competing interests
- De facto situation often being one of “extended collective license or no license (nor remuneration) at all”
- Issue of opt-out vis-à-vis exemptions in DSM directive complicated
- Remuneration concerns exists

# Suitability of ECL for training of AI

# Underlying rationales of ECL vs. training of AI

- Apparent demand for mass-use
- Legitimate public interest to make use legal c/r EU Digital Market Strategy
- Exception or compulsory license (managed collectively) deemed too far-reaching
- Potential incompatibility of an exception or compulsory licence with international (or EU) norms

# Suitability of ECL generally

- Need to assess conditions for collective bargaining as a 1<sup>st</sup> step (c/r ECL a proposed solution to make *existing* collective agreements more efficient)
- If conditions for ECL exist, do they apply for training AI? If risk of opt-out high, will ECL work?
- Need to assess benefits in comparison to other alternatives. Note – sector specific responses



# Suitability of ECL for training AI

- Complex situations, changing business models, new ways of producing, distributing and consuming content
- When competing interests need to be carefully considered, negotiation clear advantage in terms of speed & flexibility
- Il-formulated exceptions high risk for litigation
- Existing exceptions focus on input face: Exception does not solve issue of making available, communication to the public
- ECL as a way to deal with output issue (with aim to encourage innovation, need to deal with all potential infringement risks, not only training)

# Suitability of ECL for training AI

## AI specific challenges

- Size of revenues
- High levels of opt-out
- Unintended effect of opt-out
- Representativeness criteria in cross-border context

# Thank you!

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# ANNEX

i.e. extra slides for general discussion

# Assessment of ECL vis-à-vis alternatives

- Statutory license (use without permission, but against payment)
- Compulsory license (obliged to grant permission to use, price & conditions often fixed by authority or board)
- Mandatory collective license (eliminates the possibility of individual exercise of rights, no opt out)
- Presumption of representativeness (grants mandate prior to negotiations)
- Levy based system
- Further exceptions

# The ECL as an exception?

- Discussions whether the ECL de facto amounted to an exception mounted at the time of the implementation of the InfoSoc directive
- Legislator made clear that it is not. So clear, that the ECL provisions were moved from Ch. 2 (exceptions) to a new Ch. 3, named “Avtalslicenser”
- Main point: Need to be a voluntary and freely negotiated agreement *prior* to the extended effect is offered to the user
- Availability of opt-out, purpose to facilitate licensing (c/r difference to statutory (comp) license)

## ...a few words re. *Soulier & Doke*

Did the judgement in *Soulier and Doke* undermine the Nordic ECL model?

- Circumstances of the case & French law fundamentally differs to the Nordic ECL model
- Absence of representativeness (acc. to French law CMO simply appointed)
- French law gave little room for “freely negotiated agreements”
- Nordic ELC, negotiations re. terms and extent of use under the agreement *before* any extension effect is achieved
- Opt-out provisions very different

# Swedish implementation of DSM art. 3 & 4

- What mandate does the ECL provisions de facto provide?
- Opt-out for rights vs. opt-out for specific materials
- Q. whether opt-out requirements amount to a prohibited formality under the Berne convention?



# Thoughts re. way ahead

- Re-writing the current ECL provisions to mandate CMOs to make opt-out with extended effects?
- Start with collective agreements (based on mandate), pilots, to gain support from general public => then ECL
- Remember: User driven solution, Swedish Government actively supported and provided incentives for rightsholders to join CMOs
- Tactic advantage in starting with specific ECLs?

# Thoughts re. way ahead

- Framing of the “problem” key (c/r ECL as a user oriented solution with clear benefits to rightsholders; what problems are we trying to solve with AI?)
- Pre-requisite: support from all stakeholders (government, rightsholders, users)
- ECL clear advantages in terms of flexibility, but long term solution need to be based on policy decisions beyond ambit of copyright legislation
- Sector specific solutions will be necessary (not all collective management set ups suitable for ECL, need to have relevant rights)

# Thoughts re. way ahead

- Importance of stakeholder dialogues to increase/ensure that parties are aware of each other's needs
- Pilot agreements to illustrate benefits to parties concerned & deal with practical implementation c/r Resale right
- National library – access to broadcaster (SVT) content to universities in Sweden, and one in Finland (first cross border case)