Danish Licences for Europe

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Denmark has just completed a modernisation of its Copyright Act with regard to use of TV content online, both linear TV channels and on-demand content. The update means that the provision in the Danish Copyright Act on extended collective licence for third-party use of TV content now encompasses new ways in which content is offered by broadcasters and exploited by TV (programme) distributors. This facilitates services with large-scale exploitation online of TV content, and it includes licensing possibilities regarding content from broadcasters abroad, i.e. it implies what could be called "Danish licences for Europe".

The European Commission launched a stakeholder dialogue called "Licences for Europe" in 2013, following its December 18, 2012 Communication, "Content in the Digital Single Market".[1] The purpose of these initiatives is to support the Commission's effort to review and to modernise the EU copyright legislative framework to ensure that it stays fit for the new digital context with new ways of providing, creating and distributing content online. It is notable that Demark has just completed a modernisation of its Copyright Act with regard to use of TV content online.[2] The Danish solution includes licensing possibilities regarding content from broadcasters abroad, i.e. it implies what could be called "Danish licences for Europe".

In Denmark licensing of TV content online has already been practised for some years, but the provision in the Danish Copyright Act on extended collective licence for third-party use of TV content (s.35) has now been updated to encompass new ways in which content is offered by broadcasters and exploited by TV (programme) distributors. Thus, under specific extended collective licence both linear TV channels and on-demand content, including from foreign European broadcasters, can now be offered by TV distributors to their customers via cable, IPTV, online (web TV/OTT), satellite and DTT, etc. This facilitates services with large-scale exploitation online of TV content in many forms, since the licensing scheme in place covers all copyrights and related rights except those possessed by broadcasters—who must consent to the services individually.

This article describes the newly expanded provisions in the Danish Act on extended collective licence for third-party use of TV content. The Act was passed by the Danish Parliament on May 17, 2014 and entered into force on October 29, 2014.[3]

Introduction

Online distribution of TV content and rights clearance

Online distribution, i.e. distribution via the internet, of TV content is growing fast. Broadcasters offer their content online to individuals (within the home country and to some extent abroad), and third-party TV distributors offer various services online to their subscribers within the territory with accumulated content from many broadcasters (bundles), including broadcasters from other countries. Both the services of broadcasters and TV distributors include linear TV channels (flow TV) and TV programmes on demand or various catch-up possibilities.

Online reception possibilities include HbbTV television sets, other kinds of smart TVs, various boxes connected to the television set, game consoles, PCs, tablets and smart phones, all insofar as they are connected to the internet (cable or Wi-Fi).

The use of TV content involves clearance of a range of copyrights and related rights, for instance rights possessed by journalists, writers, actors, musicians and other performing artists, composers, scene instructors, film instructors, photographers, animators, graphic designers, record companies, producers,[4] and—when a TV distributor is involved[5]—rights possessed by the broadcaster itself. In other words: TV is an area with mass exploitation of rights.

Typically a broadcaster, for instance a public-service broadcaster, only acquires the rights for its own distribution, for instance via DTT and/or satellite and over the internet, and the broadcaster does not acquire the rights for TV distributors' retransmission (i.e. simultaneous and unchanged transmission of broadcast channels). This is the case for the broadcasters who are

[1] See *http://ec.europa.eu/internal_market/copyright/licensing-europe/index_en.htm* and *http://ec.europa.eu/licences-for-europe-dialogue/* [Both accessed October 26, 2014].
[2] The author of this article has participated in evaluating the proposal for this Act as counsel to UBOD. Thus, Lassen Ricard law firm has acted as counsel to and secretariat for UBOD since the establishment of the cable retransmission scheme in Denmark more than 25 years ago. UBOD represents more than 100 broadcasters in relation to retransmission and other exploitation of their TV and radio channels in Denmark. The UBOD members include the Danish Broadcasting Corporation (DR), TV2 Denmark, SVT, TV4 Sweden, NRK, TV2 Norway, YLE, ZDF, ARD, RTL, VG Media representing Sat.1, ProSieben, 3Sat, etc., RAI, TVE, and many more. Lassen Ricard law firm also acts as counsel to and secretariat for similar co-operations of broadcasters in other Scandinavian countries; UBON in Norway, UBOS in Sweden and UBOI in Iceland—together known as UBO. The author of this article advises UBO on a daily basis as partner in Lassen Ricard.
[3] The Act, No.123, in Danish can be found at the website of the Danish Parliament, *http://www.ft.dk/samling/20131/lovforslag/L123/index.htm* [Accessed October 26, 2014].
[4] However, under ss.66 and 67 of the Danish Copyright Act, retransmission is not included in the exclusive rights (copyright) of producers of sound recordings and producers of recordings of moving pictures, but these producers normally possess rights acquired from the participating artists, actors, etc.
[5] Berne Convention art.11bis(ii) provides that a new rights clearance must take place when the original broadcast is retransmitted by "an organization other than the original one", i.e. a TV distributor. This means that also the rights possessed by the broadcaster, for instance the right to the signal and acquired rights, must be cleared.

members of UBOD (Union of Broadcasting Organisations Denmark).[6] It is not possible for a TV distributor to clear on an individual basis, i.e. with single right holders, all the necessary rights in a TV channel. Moreover, if the rights are cleared individually, a single right holder can block the exploitation of a whole work (in practice a programme), thus harming the interests of the other right holders.

When it comes to cross-border use of TV channels, the aforementioned difficulty is the background for the requirement in art.9 of the EU SatCab Directive (93/83) that in relation to cable retransmission Member States must ensure that rights possessed by parties other than the broadcaster are cleared collectively via a collecting society.[7]

This was already ensured long ago in the Danish Copyright Act with the provision in s.35(1) on extended collective licence regarding retransmission.[8]

The existing ss.35(1) and (3) of the Danish Copyright Act

The existing ss.35(1) and (3), which has not been amended, sets out that[9]:

> "(2) Works which are broadcast wireless on radio or television may be retransmitted simultaneously and without alteration via cable systems and may in the same manner be retransmitted to the public by means of radio systems, provided the requirements regarding extended collective license according to section 50 have been met. The provision of the first sentence shall not apply to rights held by broadcasters.
>
> (3) The owner of a system as mentioned in subsection (1) is responsible for an agreement being made regarding retransmission of radio and television broadcasts via the systems. If remuneration to be paid by the owner according to an agreement made in accordance with subsection (1) or an order from the Copyright License Tribunal under section 48(1), is fixed as an amount per connection, the user of the individual connection is under an obligation to pay the owner a corresponding amount."

The background for the new provisions in s.35(4)–(7) of the Danish Copyright Act

When retransmission via the internet emerged some years ago, it was licensed under s.35(1), but discussions and court cases in other European countries on the issue of whether the national retransmission provisions were "technology neutral", i.e. whether "cable" in the law text encompassed the internet,[10] created a need to ensure that such retransmission could continue to be licensed under extended collective licence.

Further, there was a need to make sure that primary broadcasts that are only webcast or broadcast by wire in another way could be encompassed by extended collective licence when exploited by third parties, in the same way as wireless broadcasts that have been the traditional way to broadcast.[11]

Moreover it was found appropriate to spell out that it is not a requirement that the actual physical signal retransmitted by the TV distributor is the one that was used for primary broadcast, but that the signal may be fetched by the TV distributor directly from the broadcaster.[12] In other words, it was felt necessary to clarify that the source for the TV distributor's use is irrelevant and that it is sufficient that a primary broadcast exists.

In reality, TV distributors' on-demand/catch-up services have been licensed in Denmark since 2009 under the so-called general extended collective licence in s.50(2) of the Danish Copyright Act,[13] but the stakeholders wished for better licensing possibilities and stronger legal back-up.

Moreover, TV distributors in Denmark also wished to offer online services with, for instance, the possibility for end-users to record and store TV programmes, i.e. "store TV services". The term NPVR (network personal video recorder), which is a network-based digital video recorder (DVR) stored at the provider's central location rather than in the consumer's private home,[14] has also been used for this kind of service. Store TV services can be cloud-based, but they are always operated with the TV distributor's

[6] See the preamble to the article above and fn.2 regarding UBOD.

[7] Thus the SatCab Directive requires, under art.9, compulsory collective management of copyrights and related rights with an extended effect. In art.10 the broadcasters are exempted from the requirement.

[8] Originally s.22a of the Danish Copyright Act concerned compulsory licence for retransmission, when it was introduced in 1985. Compulsory licence implies that the user may use the work without the copyright holder's consent, but the copyright holder is entitled to remuneration. In 1997 the content of s.22a was moved to a new s.35 and changed from a compulsory licence to an extended collective licence in connection with the implementation of the SatCab Directive. Apart from the present 2014 revision, s.35 has not been revised since 1997.

[9] From the English version of the Danish Copyright Act available on the Danish Ministry of Culture's website, *http://kum.dk/uploads/tx_templavoila/Lovbekendtgorelse%20af%20ophavsretsloven%202010%20engelsk.pdf* [Accessed October 26, 2014].

[10] For instance the German court case Urteil Az. 308 O 660/08, by LG Hamburg, 8 April 8, 2009, *https://openjur.de/u/31270.html* [Accessed October 26, 2014].

[11] For instance the Rome Convention defines broadcasting as "transmission by wireless means for public reception"; see art.3(f). According to its wording, the existing s.35(1) concerns "wireless" primary broadcasts.

[12] This legal status was already established in the explanatory notes to the Danish Copyright Act from 1996 (Act No.1270 of December 27, 1996), where it was stated that it does not matter in which way the signal used for retransmission is picked up and that it may be a non-wireless signal as long as there is a wireless broadcast in Denmark or elsewhere. However, for instance the CJEU decision in *Lagardere Active Broadcast SA v Societe pour la Perception de la Remuneration Equitable (SPRE)* (C-192/04) [2005] E.C.R. I-7199; [2005] 3 C.M.L.R. 48 at [35] concerning the SatCab Directive, where the court found that "it is the signals which must be intended for the public and not the programmes that they carry", created an uncertainty.

[13] See Terese Foged, "Licensing Schemes in an On-Demand World" [2010] E.I.P.R. 20 for a further description of s.50(2) and the 'Start Over' service and on-demand "channel" licensed under it. Section 50(2) is reproduced in fn.18.

[14] See *http://en.wikipedia.org/wiki/Network_DVR* [Accessed October 26, 2014].

technical assistance, and for practical purposes such services do not fall under the Danish copying-for-private-use exception, which is very narrow (especially when it comes to digital copying) and among the strictest in Europe.[15] Besides impeding the exclusive reproduction right (via making of copies), store TV services also interfere with the public performance right, namely when the recorded TV programmes are being streamed from the TV distributor to the end-user who has ordered the recording. Also for this reason, such services cannot be excepted from clearance under the copying-for-private-use exception, which—as it says—is only an exception to the right holders' right to authorise copying, i.e. the exclusive reproduction right.

On the whole the players in the TV distribution sector wished for an update of the existing licensing possibilities so that the new ways in which TV content is being distributed and consumed today are taken into account.

The impact of the new provisions in s.35 of the Danish Copyright Act

Section 35 of the Danish Copyright Act has now been expanded to encompass, among other things, store TV services and various other on-demand exploitation of broadcasters' linear and on-demand offers by third parties using radio or TV programmes, including content from foreign broadcasters and exploitation online.

In the various EU Member States different ways have been sought to support broad and more general licensing agreements to lower the transaction costs and make licensing possible overall. With the new legislation, Danish legislators have created the foundation for licensing standards covering the new ways in which TV is consumed today. Thus, a faster and less complex process of rights clearance is made possible, which should improve the circulation of works and remuneration to right owners and, in turn, enhance the nation's cultural and creative capital. This may set an example that could inspire other EU Member States or even EU legislators in relation to upcoming proposals from their side. For instance the United Kingdom is in the process—inspired by Denmark, among others—of proposing new legislation on the extended collective licence. The licence proposed is general, however, but could possibly also be used with regard to online exploitation of TV.[16]

The aim of this article is to inform the readers about the new and enhanced Danish extended collective licensing scheme with regard to TV.

Extended collective licence under Danish law

What is it?

The extended collective licence is a Nordic legislative concept that has existed in the Danish Copyright Act for more than 50 years.[17]

The extended collective licence has proven to be a well-suited instrument for securing right holders' rights in connection with mass exploitation of their works, for instance in the fields of photocopying for educational use and retransmission of works broadcast on radio and television, while at the same time meeting the users' demands for an easy way to exploit protected works. In short, the advantage for the users is that they need only enter into one single agreement, which reduces the transaction costs, and the advantage for the right holders is that agreements are in fact entered into, securing remuneration for use of works that would otherwise in many instances take place illegally and without remuneration, or would not take place at all.

As a result of the extended collective licence, a user—who has made an agreement on a particular exploitation of a certain type of works with an organisation (a collecting society) comprising a substantial number of right holders of this type of work—obtains the right under the Act to use works of the same type owned by non-members of the organisation and in the same manner and on the terms that follow from the agreement with the organisation. The philosophy is that the commercial terms must be prima facie acceptable for unrepresented right holders if they have been negotiated and accepted by a representative right holders' organisation regarding the same type of work. Thus the rights are obtained regardless of whether the right holders of these works, e.g. foreign right holders or "orphan works" right holders, are represented by the organisation. The right holders not represented by the organisation have a claim for remuneration only against the organisation, not against the user. And the unrepresented right holders may claim an individual remuneration even though represented right holders may not have such a right; the represented right holders obtain payment through their organisation. In all other respects unrepresented right holders have the same rights as represented right holders. If agreement cannot be reached regarding an unrepresented right holder's individual remuneration claim, any of the parties may submit the question to the Copyright Licence Tribunal. The right holders' organisations that wish to enter into agreements with extended collective licence effect must be approved by the Ministry of Culture.[18]

[15] Section 12 of the Danish Copyright Act on private copying does not allow others to be engaged in making digital copies for private use.

[16] See the consultation by the Intellectual Property Office on the UK's new extended collective licensing scheme, "Extending the benefits of collective licensing", which called for responses by January 28, 2014; see *http://www.ipo.gov.uk/consult-2013-ecl.pdf*, and the Government response to the consultation of May 9, 2014, *https://www.gov.uk/government/news/government-response-to-the-ecl-consultation* [Both accessed October 26, 2014].

[17] Copyright Act s.30, with the extended collective licence with regard to the Danish Broadcasting Corporation's (DR's) and TV 2's radio and television broadcasts, was the first extended collective licence, and it dates back to 1961.

[18] See Copyright Act ss. 50 and 51, which hold the general conditions for extended collective licence. The English translation provided by the Ministry of Culture (see fn.9) sets out that:

An extended collective licence is invoked for a single category of right holders at a time, but various categories of right holders may form a joint organisation, something which makes it possible to offer simultaneous clearance of a plurality of rights types for the same use. This is the case with Copydan Verdens TV [Copydan World TV], which is the basis for the well-functioning licensing scheme regarding various uses of TV programmes in Denmark.

The fact that an extended collective licence exists in an area does not mean that the parties are forced to enter into collective agreements within the area. Consequently, extended collective licence is only of relevance if an agreement is in fact entered into by users and right holders and the parties wish the agreement to have extended collective licence effect.

Specific extended collective licences and the general extended collective licence

There are several provisions in the Danish Copyright Act on extended collective licence within specific areas, and there is a general extended collective licence (in s.50(2)).

Under the general extended collective licence the Minister for Culture may approve organisations with a sufficient representation, typically in connection with a particular agreement, so that they may enter into agreements within specified fields, thereby giving the agreements made by the organisation extended collective licence effect (i.e. encompassing unrepresented authors).

With regard to the specific extended collective licences the organisations have typically been approved beforehand by the Ministry of Culture, and agreements then have extended collective licence effect as soon as they have been entered into. On the other hand, in the case of general extended collective licence, approval is sought and given afterwards, so it takes some time and there will be a period of uncertainty before approval.

The specific extended collective licences in the Danish Copyright Act relate to: reproduction for educational use (s.13); reproduction of descriptive articles in newspapers, magazines, etc. by business enterprises, etc. for internal use for the purpose of their activities (s.14); online transfer of texts via libraries (s.16b); recording and distribution of radio and television programmes for visually and hearing impaired persons (s.17(4)); use of works of art in generally informative presentations (s.24a); national public service broadcasters' radio and television broadcasts (s.30); their repeat broadcast and on-demand offer of own productions (the archive provision) (s.30a); and retransmission of works broadcast on radio and television (s.35(1)).

The new extended collective licences in s.35(4) and (5) are also specific, despite the fact that their scope is quite broad, covering many types of third-party exploitation of radio and TV programmes.

Besides the practical matters of having to wait for approval, and the uncertainty of getting approval in this regard, a specific extended collective licence also has the advantage of legal back-up via the indicators that this is an area of general public importance and that it is the intention of the law-makers that rights clearance within this field should take place via the licence, i.e. via a collective scheme.

Opt-out possibility

In most instances unrepresented authors have the possibility to opt out of the licence scheme with regard to specific works. Such an individual prohibition right—which is typically also allowed for represented authors in agreements between right holder organisations and users—ensures that authors can prevent the exploitation of their work.

Under the new s.35(6) pertaining to the new extended collective licences in the new s.35(4) and (5), an individual right holder can issue a prohibition against exploitation of their work to any of the parties to the

"50. — (1) Extended collective license according to sections 13, 14 and section 16 b, section 17(4), and section 24 a, 30, 30 a and 35 may be invoked by users who have made an agreement on the exploitation of works in question with an organisation comprising a substantial number of authors of a certain type of works which are used in Denmark.

(2) Extended collective license may also be invoked by users who, within a specified field, have made an agreement on the exploitation of works with an organisation comprising a substantial number of authors of a certain type of works which are used in Denmark within the specified field. However, this does not apply, if the author has issued a prohibition against use of his work in relation to any of the contracting parties

(3) The extended collective license gives the user right to exploit other works of the same nature even though the authors of those works are not represented by the organisation. The extended collective license gives the user right only to exploit the works of the unrepresented authors in the manner and on the terms that follow from the license agreement made with the organisation.

(4) Rightholder organisations which make agreements of the nature mentioned in subsection (1) and (2), shall be approved by the Minister for Culture to make agreements within specified fields. The Minister may decide that an approved organisation in certain fields shall be a joint organisation comprising several organisations which meet the conditions of subsection (1) or (2).

(5) The Minister for Culture stipulates detailed provisions on the procedure for approval of the rightholder organisations, mentioned in subsection (4).

51. — (1) For exploitation of works according to section 50 the rules laid down by the organisation with regard to the distribution of remuneration between the authors represented by the organisation shall apply correspondingly to unrepresented authors.

(2) Unrepresented authors may claim an individual remuneration although such a right appears neither from the agreement with the user nor from the organisation's rules on remuneration. The claim for individual remuneration shall be directed to the organisation only. If agreement can not be made on the size of remuneration, each party is entitled to bring the dispute before the Copyright License Tribunal, cf. § 47.

(3) The claim for remuneration, which organisations approved according to section 50 (4) wish to present in relation to exploitation of works according to section 35, shall be presented simultaneously to the users.

(4) Section 49 shall apply correspondingly to claims for remuneration based on subsection (1) and (2)."

agreement (i.e. to the right holder organisation or the TV distributor).[19] In contrast, under the existing collective licence on retransmission in s.35(1), no such opt-out possibility exists—which is in line with the collective licensing scheme for cable retransmission under art.9 of the EU SatCab Directive, as that scheme is mandatory.

The authority of the Copyright Licence Tribunal

When an agreement is made under extended collective licence, the Copyright Licence Tribunal can usually make decisions regarding conditions and the size of remuneration if this is found not to be reasonable. This is also the case under the new extended collective licences in s.35(4) and (5); see the new subs.(7)[20]:

> "If disputes arise on whether an organisation approved according to section 50(4) to make licence agreements covered by subsections (4) or (5) stipulates unreasonable terms to such a licence agreement, each party to the licence agreement is entitled to bring the dispute before the Copyright License Tribunal, see section 47. The Tribunal may lay down the terms of the said licence agreement, including terms relating to the size of the remuneration."

The condition for intervention by the Copyright Licence Tribunal ("unreasonable terms") with regard to licensing under subss.(4) and (5) is identical to the condition pertaining to subs.(1),[21] and it is a continuation of the stipulations in the European Agreement on the Protection of Television Broadcasts (art.3(3)) and the EU SatCab Directive (art.12 and Recital 31). As a further elaboration regarding these qualified circumstances, the explanatory notes to the new s.35 note the following[22]:

> "The reasonableness should be assessed on the basis of a general assessment of the circumstances surrounding the actual case, and the decision should take into account general social considerations and competition law considerations, including the principle of non-discrimination."

It appears from the explanatory notes to the new s.35 that the authority of the Copyright Licence Tribunal is also something that distinguishes licensing under the new s.35 from licensing under the general extended collective licence in s.50(2)[23]:

> "In these new areas it is proposed in section 35(7) that the Copyright License Tribunal be granted the right to decide whether a given remuneration is unreasonable. This will be an advantage for the users, who will thus be able to have a dispute settled regarding the reasonableness of specific remuneration claimed by a collective collecting organisation. No such possibility exists under the general extended collective licence."

For retransmission under the existing collective licence in s.35(1) the Copyright Licence Tribunal can, at request, grant the necessary permission and lay down conditions in this respect if a right holder organisation or a broadcaster unreasonably refuses to consent to retransmission or if retransmission is offered on unreasonable terms.[24] In contrast, under the new extended collective licences in s.35(4) and (5) the Tribunal cannot grant such permission, but only adjust the conditions as mentioned above. The explanatory notes explain the following about this difference[25]:

> "Since the areas are new and not subject to EU Directives, the Ministry of Culture finds that it would not be appropriate for the Tribunal to be able to grant consent in case of disagreement between the parties in these new areas that are covered by sections 35(4) and (5). As is the case in respect of the other extended collective licence provisions it will be sufficient that the Tribunal can make decisions on the fairness of remuneration and other terms, but without having a mandate to grant consent as such; this will remain the province of the rights holders' organisation."

All rights are encompassed, except the broadcasters' rights

In the TV field the extended collective licence implies that when UBOD (broadcasters, with right to the signal and acquired rights), Koda (music composers and music publishers, performance rights), NCB (music composers and music publishers, mechanical rights) and Copydan Verdens TV (all the remaining types of copyrights) jointly enter into an agreement with a TV distributor regarding retransmission, store TV, on-demand, catch-up, etc., then *all* necessary copyrights and related rights are encompassed by one single agreement. For all organisations, except UBOD, such agreements are made under extended collective licence.

[19] The wording of the new s.35(6), first sentence is (my translation): "The provisions in subsections (4) and (5) do not apply if the author has issued a prohibition against exploitation of their work to any of the parties to the agreement."
[20] My translation.
[21] Copyright Act s.48(1) in the English translation provided by the Ministry of Culture (see fn.9) sets out that: "If an organisation approved in accordance with section 50(4) or a broadcaster unreasonably refuses to consent to retransmission via cable systems or wireless of works and broadcasts that are broadcast wireless simultaneously and without alteration or if such retransmission is offered on unreasonable terms, the Copyright License Tribunal may at request grant the necessary permission and lay down the conditions in this respect. The provision of section 50(3), first sentence, shall apply correspondingly. The Copyright License Tribunal's decisions as described in the first sentence are not binding on radio and television companies."
[22] Bill No. L 123, put forward on January 29, 2014 by the Minister of Culture, p.17, second column (my translation).
[23] Bill No. L 123, put forward on January 29, 2014 by the Minister of Culture, p.7, second column (my translation).
[24] See fn.21.
[25] Bill No. L 123, put forward on January 29, 2014 by the Minister of Culture, p.17, second column (my translation).

Thus, the broadcasters' rights are not encompassed by the extended collective licence. This is expressly stated in s.35(1) regarding retransmission and in the new s.35(6) regarding other exploitation under the new subss.35(4) and (5).[26]

The obvious reasons are: (1) the fact that broadcasters are large entities, each possessing a bunch of rights itself, which is why it would be too big a handful to encompass broadcasters, and (2) that it is possible for the TV distributors to clear the rights with broadcasters on an individual basis. However, the broadcasters are very much dependent on a well-functioning licensing scheme for third-party distribution of their content, which is why UBOD has been supporting the enactment of the new rules.

Not an exception to copyright

The EU Copyright Directive (2001/29) lists the allowed exceptions and limitations to copyright in art.5. Extended collective licence is not mentioned among the limitations and exceptions. This fact is consistent with Recital 18 of the directive, which provides that the "Directive is without prejudice to the arrangements in the Member States concerning the management of rights such as the extended collective licences". This means that according to the Copyright Directive extended collective licence is not an exception to or limitation of copyright but a way to handle, manage or exercise copyrights.

Subsequently the legitimacy of extended collective licensing was confirmed in the recent EU Directive on Collective Rights Management (2014/26), Recital 12, which provides that the directive:

> "[D]oes not interfere with arrangements concerning the management of rights in the Member States such as ... the extended effect of an agreement between a representative collective management organisation and a user, i.e. extended collective licensing ... ."

Further, as far as I am aware no courts or any international or EU authorities have questioned the legal basis for the extended collective licence.[27]

On the basis of the above, it is my evaluation that like the other extended collective licences in the Danish Copyright Act the new specific extended collective licences in s.35(4) and (5) are in line with EU and international copyright legislation.

The purpose of the new s.35

The preparatory works to the Act amending s.35 set out that its purpose is to[28]:

> "[A]mend section 35 in the current Copyright Act so that it takes into account the technological development relating to the way in which radio and television programmes are being used today and the new ways in which content is offered."

Further it appears that[29]:

> "The proposed amendment of section 35 aims at ensuring that the extended collective licence in section 35 regarding simultaneous and unchanged retransmission of radio and television programmes in cable networks and other networks with wireless distribution of radio and television programmes is modified to take into account the technological development and the new on-demand exploitation possibilities available to third parties. The Ministry of Culture believes that there is a growing need for the set-up of a flexible way in which third parties may clear the rights to such types of services."

And that[30]:

> "The areas in question already fall within the scope of the general extended collective licence in section 50(2). It is proposed that as a result of the technological development in this field, these types of exploitation of broadcasts ought not to be comprised by the general extended collective licence, which by nature is non-specific. The specific extended collective licences are indicators of areas in which it is deemed to be of general public importance that agreements can be entered into with such effect. This calls for a kind of codification so that the extended collective licence is set out in a specific extended collective licence provision, which would lead to a system with greater openness and transparency for users as well as for rights holders in the socially important area of TV. The Ministry of Culture believes that this would contribute to giving the Danes a greater security of supply in the field of TV.
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> ...
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> The Ministry of Culture finds it to be a specific problem that the commercial users such as TV distributors cannot be certain when entering into an agreement whether the agreement has extended collective licence effect. The Ministry of Culture believes that the proposed amendment will make it easier and less risky to establish lawful on-demand services with radio and TV content.
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> The Ministry of Culture finds that the amendment will make the area more technology neutral and make it easier for TV distributors to clear the rights

[26] The wording of Copyright Act new s.35(6), second sentence is (my translation): "The provisions [subss.(4) and (5)] do not apply to rights held by broadcasters."
[27] Some scholars argue that the three-step test that restricts the ability of states to introduce exceptions to the exclusive rights of right holders should be applied to extended collective licence provisions, and that these provisions are at risk of not passing the test; see Thomas Riis and Jens Schovsbo, "Extended Collective Licences and the Nordic Experience — It's a Hybrid but is it a Volvo or a Lemon?"(2010) 33(4) *Columbia Journal of Law and the Arts* 271. The article can also be found at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1535230* [Accessed October 26, 2014].
[28] Bill No. L 123, put forward on January 29, 2014 by the Minister of Culture, p.4, second column; p.5, first column (my translation).
[29] Bill No. L 123, put forward on January 29, 2014 by the Minister of Culture, p.6, first column (my translation).
[30] Bill No. L 123, put forward on January 29, 2014 by the Minister of Culture, p.7, first column — second column (my translation).

for new distribution forms. This would also be an advantage for the TV viewers. The amendment will also improve the legal protection of 'outsider' rights holders, as the specific extended collective licence will make it easier for them to identify the exploitation made of their copyright-protected material through agreements with extended collective licence organisations."

The new provisions concern use by a third party, i.e. not a broadcaster's own use. Thus it appears from the explanatory notes that[31]:

> "The expression 'others' in the proposed subsections 4 and 5 signifies that the provisions will not comprise the exploitation of programme content made by a radio or television broadcaster itself, including catch-up services, simulcast, webcast, apps etc., but only exploitation in other ways made by third parties, including TV distributors. The radio or television broadcasters' own exploitation can still be cleared on an individual basis in pursuance of section 30 a or the general extended collective licence according to section 50(2)."

Third-party use now encompassed by the specific extended collective licence provisions in s.35

With the new provisions in s.35 of the Copyright Act, rights clearance is made possible with regard to (1) retransmission of broadcasts, i.e. linear TV channels; (2) on-demand use and other use, including store TV services and public performance, of broadcasts (linear TV channels); and (3) on-demand use of on-demand content from broadcasters. As for (1)–(3) nothing is limited to a specific platform, i.e. everything in question can be distributed or offered via cable, IPTV, online, satellite and DTT, etc.

Third-party use with regard to these three subdivisions is treated in greater detail below.

Retransmission of broadcasts (linear TV channels)—s.35(1) and the new subs.(4)

Section 35(1) on retransmission has not been amended in connection with the modernisation, but the new subs.(4) cements the fact that retransmission over the internet, which may not be encompassed by subs.(1), is encompassed by the extended collective licence. Further subs.(4) includes retransmission of primary broadcasts that are only webcast, i.e. not transmitted by wireless means. Thus transmission and retransmission over the internet have been fully embraced, both as the retransmission source and the way of retransmission.

Section 35(1) is reproduced above in the section "The existing s.35(1) and (3) of the Danish Copyright Act" above.

The new section 35(4) sets out that[32]:

> "Works which are broadcast in radio or television may, in other ways than what follows from subsection 1, be exploited in other ways [in Danish: *gengivet*] by others, provided that the requirements regarding extended collective licence according to section 50 have been met. The reproduction and the making available to the public of works in such a way that members of the public may access them from a place and at a time individually chosen by them, see section 2(4)(1), must be linked temporally to the broadcast."

With regard to retransmission over the internet it is made clear in the explanatory notes that this is encompassed; as one example of exploitation covered by subs.4 it is stated that[33]:

> "[T]he simultaneous and unaltered making available of broadcasts, irrespective of technical manner, e.g. on the internet, that must be considered to fall outside the scope of section 35(1) of the Copyright Act ... ."

In this way it is also made clear that it is not relevant whether the source for retransmission is a broadcast signal or whether the TV distributor fetches the signal directly from the broadcaster, as long as there is a broadcast, possibly only a webcast. This legal status is independent from possible interpretation by CJEU of the SatCab Directive, as s.35(1) is an implementation of the SatCab Directive's provisions on retransmission, whereas the new subs.(4) is independent from the directive.

With regard to retransmission of primary broadcasts over the internet, the explanatory notes specify in the following way that it is encompassed[34]:

> "Exploitation in other ways [in Danish: *gengivelse*] in the form of flow TV performed by other parties than the radio or television broadcaster that falls outside the scope of section 35(1) (e.g. use of broadcasts that are webcast or broadcast by wire in another way) falls under subsection 4 if the exploitation in other ways takes place simultaneously and without alteration."

[31] Bill No. L 123, put forward on January 29, 2014 by the Minister of Culture, p.17, first column (my translation).
[32] My translation.
[33] Bill No. L 123, put forward on January 29, 2014 by the Minister of Culture, p.7, first column (my translation).
[34] Bill No. L 123, put forward on January 29, 2014 by the Minister of Culture, p.7, second column (my translation).

On-demand use and other exploitation, including store TV services and public performance, of broadcasts (linear TV channels)—the new s.35(4)

The wording of the new s.35(4) is reproduced above in the section "Retransmission of broadcasts (linear TV channels)—s.35(1) and the new subs.(4)". Besides retransmission (which is also dealt with above), the subsection concerns on-demand use, store TV services and public performance, plus other possible exploitation that is relevant to copyright and therefore needs clearance. The explanatory notes put it this way[35]:

> "The types of exploitation covered by subsection 4 are ancillary to the original radio or television broadcast, but the Ministry of Culture nevertheless believe that they may have a great financial impact. Examples would be:
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> ...
>
> - on-demand exploitation of broadcasts by TV and other content distributors (including catch-up),
> - the services of/assistance by TV and other content distributors in connection with the recording of TV content, and
> - public performance of broadcasts in shops, restaurants and other places accessible to the public, etc."

Thus the phrase in subs.(4) "in such a way that members of the public may access them from a place and at a time individually chosen by them" refers to what is also known as on-demand. On-demand is a part of the right of making available to the public.[36] Both on-demand and store TV services involve the right of making available to the public, and this is, of course, also the case with public performance and retransmission as treated in above. Moreover, on-demand use and store TV services involve the reproduction right.[37] The explanatory notes explain why the term "exploitation in other ways" is used in subs.(4) as an umbrella term for the various possible uses[38]:

> "The expression exploitation in other ways [in Danish: *gengivelse*] in the proposed section 35(4) is a well-known copyright term, which is used several times in the present Copyright Act. The expression has been chosen since it comprises public performance as well as reproduction of works."

By including exploitations that may not yet be known, the Danish law-makers have ensured that the new extended collective licence will remain relevant in times like the present where the technological and market situations are evolving very fast.

Subsection (4) concerns only TV programmes that are broadcast, i.e. linear TV channels, not on-demand content from broadcasters; see the explanatory notes[39]:

> "The use of the term broadcast means that in order for others to perform exploitation in other ways that fall under the proposed subsection 4 the works must have been broadcast or be broadcast as linear TV simultaneously by a radio or television broadcaster (in flow). There is no such requirement in relation to the proposed subsection 5.
>
> ...
>
> Works made available to the public on demand by way of preview (i.e. before the works are broadcast) will not fall under the proposed subsection 4 since the works have not been broadcast. Preview as such may, however, be comprised by the proposed subsection 5."

It is of relevance for the TV distributors' on-demand and store TV services that the acts of reproduction and making available to the public must be linked temporally to the broadcast. The explanatory notes introduce a flexible interpretation as guidance for how "linked temporally" should be understood[40]:

> "Any reproduction and making available to the public of works in such a way that members of the public may access them from a place and at a time individually chosen by them, see section 2(4)(1), must have a temporal link to the broadcast.
>
> ...
>
> The expression 'linked temporally' means that programmes made available on demand can be available for a defined period of time only (e.g. catch up). The proposed stipulation is worded in such a way that it is flexible and can be adjusted to fit the circumstances, including the technological and market development. Ultimately it will be up to the contracting parties to define the specific restricted

[35] Bill No. L 123, put forward on January 29, 2014 by the Minister of Culture, p.7, first column (my translation).

[36] See Danish Copyright Act s.2(3) and (4) from the English version available at the Danish Ministry of Culture's website, (see fn.9):

"(3) The work is made available to the public if
(i) copies of the work are offered for sale, rental or lending or distribution to the public in some other manner:
(ii) copies are exhibited in public; or
(iii) the work is performed in public.
(4) Public performance within the meaning of subsection (3)(iii) shall include
i) communication to the public of works, by wire or wireless means, including broadcasting by radio or television and the making available to the public of works in such a way that members of the public may access them from a place and at a time individually chosen by them; and
ii) performance at a place of business before a large group, which would otherwise have been considered not public."

[37] Danish Copyright Act s.2(2) contains the following definition (from the English version available at the Danish Ministry of Culture's website (see fn.9)): "(2) Any direct or indirect, temporary or permanent reproduction, in whole or in part, by any means and in any form, shall be considered as reproduction. The recording of the work on devices which can reproduce it, shall also be considered as a reproduction."

[38] Bill No. L 123, put forward on January 29, 2014 by the Minister of Culture, p.16, second column (my translation).

[39] Bill No. L 123, put forward on January 29, 2014 by the Minister of Culture, p.16, second column, and page 17, first column (my translation).

[40] Bill no. L 123, put forward on January 29, 2014 by the Minister of Culture, p.16, first column — p.17, first column (my translation).

> period. In relation to exploitation in other ways via recordings of radio and TV content that are made available to individual users by a service, for example, it is be the recording itself that must be linked temporally to the broadcast."

I note that the catch-up services "Start Over", "Today and the day before" (up to 48 hours' catch-up), and catch-up on selected programmes subtitled in Danish on neighbouring-country TV channels are already licensed to TV distributors today under the general extended collective licence in s.50(2). In the future these services can be licensed under the new s.35(4). Also, other services involving a longer catch-up period, for instance an eight-day catch-up service on all programmes ("wall to wall", maybe with a few exceptions), may be licensed under this new subs.(4).

On-demand use of on-demand content from broadcasters—the new s.35(5)

The new s.35(5) sets out that[41]:

> "Works which are made available by a broadcaster in such a way that members of the public may access them from a place and at a time individually chosen by them, see section 2(4)(1), may be made available by others in such a way that members of the public may access them from a place and at a time individually chosen by them, see section 2(4)(1), provided that the works are made available to the public in the same way and within the same period of time as they are made available to the public by the broadcaster, and provided that the requirements regarding extended collective licence according to section 50 have been met. Any reproduction necessary for making the works available to the public may be made."

The new subs.(5) concerns only on-demand content offered online by a broadcaster. This means that also programmes that have not been broadcast (as linear TV), i.e. what could be called "on-demand-only programmes" may be encompassed by the new extended collective licence.

As an example, the national public-service broadcaster DR offers an online service called "DR TV", with first and foremost catch-up programmes (i.e. programmes that have been broadcast recently, normally within 30 days in the case of own productions and 8 days in the case of purchased productions), but also programmes from the archive that may have been broadcast many years ago, as well as preview programmes, i.e. programmes that have not yet been broadcast. All this can be licensed for a TV distributor's use under the new subs.(5). Thus, the inclusion of on-demand exploitation in the new subs.(5) means that a TV distributor can offer the same content that is offered by a broadcaster. This ensures that Danes who consume TV content delivered by their TV distributor, who aggregates content from many sources, can have access also to the on-demand content offered by, e.g., DR. Likewise, on-demand content from foreign broadcasters may be licensed.

The explanatory notes stress that the main rule will be a mirroring of the broadcaster's on-demand offer with the TV distributor[42]:

> "The proposed new section 35(5) will make it possible for third parties to mirror a radio or TV broadcaster's on-demand services partially or in their entirety. The programmes must be made available within the same period of time that they are made available by the radio or TV broadcaster. Thus the radio or TV broadcaster and the third party must make the programmes available simultaneously. The proposed provision covers the situation where, as is normally the case, the entire on-demand offer is mirrored in the third-party's service. However, it will be for the individual radio or TV broadcaster to decide whether the entire on-demand offer must be mirrored in the third-party's service, or whether it may be only part of the offer. A third party cannot itself, in pursuance of this provision, choose freely from the content offered on demand by the radio or television broadcaster. There is not the same requirement under subsection 5 as under subsection 4 of a temporal link between the making available to the public and the broadcast itself."

By this inclusion of broadcasters' on-demand content in the TV distributors' offer, the principles of "simultaneous, unaltered and unabridged" known from, for example, the SatCab Directive have been expanded from linear TV to on-demand (non-linear) TV. Thus the retransmission licensing scheme has been expanded to also include the new ways in which TV is distributed and consumed today.

Concluding remarks

The new and enhanced Danish extended collective licensing scheme regarding TV content has adapted the licensing possibilities to the way in which TV is exploited in our present and fast-changing world. Thus, not only retransmission is encompassed, but also third-party store TV services and various catch-up and on-demand exploitation of broadcasters' linear and on-demand offers, on all platforms, including from foreign broadcasters' and online.

Through the legal back-up in setting the framework for such licensing scheme, I believe it to be also demonstrated that in Denmark a balance between the territoriality of copyright and the functioning of the (modern) internal market has been reached as far as use of TV channels and content is concerned.

[41] My translation.
[42] Bill No. L 123, put forward on January 29, 2014 by the Minister of Culture, p.17, first column (my translation).

This Danish initiative offers licences and, hopefully, inspiration to the rest of Europe for a modernised licensing regime, while maintaining the high level of protection under the EU *acquis*.