

## Copyright as an Individual Author's Right and Collective Licenses

**“But it is pointless to deny that technical, social and political circumstances may, when new inventions, records, movies, and radio have become common use in reproducing intellectual property, easily lead to a crisis of the current copyright system.”** (T.M.Kivimäki)

When Kivimäki stated his prediction in 1948, he contemplated the functionality of the copyright system in the light of social progress. Most probably he did not know that two years earlier the University of Pennsylvania had constructed the first device that could be classified as a computer. Those who have followed recent discussions related to copyright know that his words strike home.

### TECHINCAL DEVELOPMENT AND DISSEMINATION OF CONTENT

The field of computers and electronics has evolved remarkably since the times of Kivimäki. In the information society new technology provides easy possibilities to alter copyrighted works to digital form and transmit them all around the world to an indefinable audience in a matter of seconds. It has been defined that the core of information society is communication and interaction that does not take place face to face but via a digital device. Communication becomes relevant.

The continental copyright theory that roots from the agricultural society is based on a concept of an individual author independently mastering the use of his/her works. However, it is impossible e.g. for **Phil Collins** to individually govern who, when and where listens to his works. After the birth of the first useful mass media (radio), collective licenses have been introduced to administer the use of copyrighted material. Kivimäki described the effect of collective licenses in the following way:

*“Without intention to deny that author's economical interest may become reasonably compensated through a compulsory license and royalty system, one can not admit that after enforcement of the mentioned or comparable arrangements, the author whose work may be reproduced against his will, would be the master of his work, which is the idea the Berne Convention is based on.”*

Since the whole copyright legislation leans on the Berne Convention, it is easy to understand what Kivimäki meant with the crisis of the copyright system. However, widening the field of collective licenses notably has been proposed in the latest proposals for new copyright law (Committee Report 2002:5 and Government Bills 177/2002 [which expired] and 28/2004).

## CONTRACTUAL AND COMPULSORY LICENSE

The first provisions for compulsory and contractual license were taken to the Finnish copyright law for practical reasons in 1961. Although (collective) societies that grant collective licenses have thousands of members, formally the situation is evaluated as an individual author enforcing his/her rights.

Compulsory license was originally born due to the practical impossibility of individually obtaining permissions from right holders. It is regarded as an exemption/limitation in copyright law since it allows the use of protected right without the right holders permission. Therefore it has been described as a measure that deeply affects the right holders position and thus its use requires particularly weighty justifications. Right holders are entitled to have compensation for use.

When contractual license is used, the terms of use are agreed upon between the user and society, prior to the use. The concluded extended contractual license entitles to use all the works that belong to the field of art the particular society administers. What makes the arrangement especially significant is the fact that extended contractual license entitles the user to use the right of those who have not assigned their rights to the society in question. The effect of this extension of the contractual license is called the compulsory license effect. Thus contractual license is according to Government Bill 23/1960 (p.3-4) “undeniably an important limitation in copyright in principle.” The question when contractual license has this extended effect is not addressed in this writing. (Last sentence added to English version.)

In practice the difference between compulsory- and contractual license is that the use of contractual license necessitates permission from the society in forehand but

compulsory license allows the use for compensation to be paid later. It should be noted that the appliance of compulsory license does not necessarily lead to use (in Finland web radios have been silent for long because of disagreement of the price of material licensed by compulsory license). Since in re-broadcasting situations the agreement for the use is concluded in the same contract, the question of if it is rational to separate the license models is highlighted.

There has been an attempt to secure the position of those right holders who are not members of a society by granting them a right to claim compensations for the use of their rights from the society that granted them the license. In practice this is a dead letter in copyright law. It is not always even possible to specify whose rights have been used.

A right to ban the use has been granted to individual non-members as well, but this right is a dead letter of law also. For example the right to ban the use of work provided in the paragraph 25f of the Finnish copyright law (a provision governing radio- and television broadcasting) was used approximately by ten persons during the years 1980 – 1990. To put into effect an individual right of veto in global mass media is most likely impossible. How to globally supervise and ban the use of a certain single musical or other work? In re-broadcasting situations it does not even seem to be possible to grant individual right holders a right of veto.

#### COURT DETERMINES THE TERMS OF USE IN CASE OF DISAGREEMENT

When studying collective licenses, paragraph 54 of the copyright law governing mandatory arbitration or court proceedings must be examined. The paragraph is based on article 6 of The European Convention on Human Rights, which grants everyone a right to “fair public hearing within a reasonable time by an independent and impartial tribunal established by law”.

Users are often dependent on the use of protected rights. For example broadcasting business is currently impossible without a right to play music. Paragraph 54 of the Finnish copyright law is thus in practice a dispute resolution mechanism between users and societies: if a dispute, a court determines the terms of license. At the same

time it forms contractual license into a sort of compulsory license in disguise (Karnell), which again brings up the question concerning the separation of the license models.

#### COLLECTIVE LICENSES: ONLY TO ASSIST USERS?

A common argument in favour for collective licenses today seems to be the relief they bring to users: users get all the permissions at the same time. Statements about societies (“authors”) monopolistic position and users dependence on the rights are peculiarly often disregarded. The important limitations that collective licenses constitute are rarely mentioned either. Collective licenses have always been regarded with reservations since they are limitations in copyright law. **Pirkko-Liisa Haarmann** has e.g. stated that the second legal committee of the parliament barely dared to accept government’s proposal for contractual license in photocopying. In the report (II LaVM 13/1980) the committee among other things stated that “for now one has not been able to provide a better functioning system than the contractual license system”. Criticism towards contractual license system has continued afterwards. **Markku Tyynilä** and **Matti Anderzen** presupposed in a differing opinion that before any extensions of contractual license system one should examine how the problems of principle in the contractual license system could be solved (Committee report 1990:31).

Despite the problems of principle the most recent Government Bill proposes remarkable extensions of contractual license system. And when the Government Bill additionally states that the possibility of a non-society member to ask later for compensation from a society “strengthens the non-society members position in contractual license system and guarantees him a better position than a member has”, one can only deliberate the reasoning of the proposal. Is the purpose of collective licenses fulfilled at all if a right holders position is better when he stays outside the very system? As if the proposed contractual license extensions are reasoned with their own inactivity.

## FULFILMENT OF CONSTITUTIONAL RIGHTS QUESTIONABLE

A strange clause in the Government Bill 28/2004 is an explicit statement that collective society does not have to conclude a contract. If a society would refuse from contracting, several questions would arise concerning the fulfilment of constitutional rights.

If a society would decide not to conclude a contract, would an individual author's constitutional rights for occupation and freedom of speech (e.g. in a form of lyrics of his /her song) be fulfilled? Furthermore, would users, who are dependent on the use of rights, constitutional rights of occupation and freedom of speech, be fulfilled? Finally, since freedom of speech includes a right to receive information, would consumers constitutional right of freedom of speech be fulfilled? These problems arise in information society when rights are being collectively administered and a transmitter of content is defined as the user of content.

Thus, as it comes to collective licensing, compulsory license can be regarded more justified than contractual license. Kivimäki stated already in 1948 that the society is obligated to conclude a contract. In re-broadcasting situation "authors" right cannot even in a best situation be anything but a right to compensation. From later legislation in a form of must carry obligation it can also be seen that the interests of consumer and communication exceed the protection provided by copyright law. According to the must carry principle cable companies are responsible to (re-) broadcast certain transmissions. This obligation was reasoned with the right of freedom of speech. Here copyright protection stepped aside so that transmission could be transmitted. Thus compulsory license has already new grounds: "culture political reasons and a balance for more efficient distribution" (Government Bill 16/1986). Freedom of speech seems to outweigh copyright.

## JUSTIFICATIONS TO EXPAND THE USE OF CONTRACTUAL LICENSE UNCLEAR

According to Sitra's (The Finnish National Fund for Research and Development) report "Finland in a Turning Point from Industrial Society to Information Society", edited by **Antti Hautamäki**, a prerequisite for the development of information society was a renewal of unions and the emphasizing of citizens as independent and self-governing individuals. The purpose of the original copyright ideology is as well to embrace individuality and the personality of an author.

In the recent proposals for new copyright law the most remarkable extensions of collective license system favouring collective societies are suggested without any detailed studies how individualism is carried out afterwards. Therefore, it is justified to ask to what are the suggested contractual license extensions based on, and why comprehensive studies concerning electronic administration of copyrights have not been conducted although it has been explicitly proposed in a memorandum "Copyright in the Information Society" by the Ministry of Education itself? Individual administration of copyright does not comprise constitutional problems and it would be both consistent with the spirit of copyright ideology and in the interests of the information society.

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