

# Can Nordic Extended Collective Licence Be Transplanted to China?

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*Collective Management Organizations' lack of good governance and transparency is incompatible with the Extended Collective License (ECL). The ECL might be unfit for the digital world. National treatment for foreign rightsholders is not guaranteed. The ECL arrangement cannot pass the three-step test. The ECL in the draft of the third amendment of the Chinese Copyright Act may result in an unbalanced competition between Chinese copyright holders and foreign copyright holders. In the online world, the implementation of an ECL may be risk violating international copyright conventions. In light of not only China's poorly established CMC but also Chinese CMOs' lack of good governance, ECLs either should be put on hold (at least for now) or should only be exercised in special cases in which international copyright conventions permit the use of a non-voluntary licence. With regard to the possible abuse of ECLs, this article proposes the establishment of either mandatory international regulations or soft-law guidance.*

**Keywords:** extended collective licence, CMOs, good governance

## I. INTRODUCTION

The draft of the third amendment to the Chinese Copyright Act<sup>1</sup> creates an “extended collective licence” (“ECL”),<sup>2</sup> which originated from the Nordic copyright acts (1960-61). The ECL originally dealt with broadcasting, gradually

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extending to other core areas, including photocopying by educational institutions, business enterprises and libraries, for use by the visually impaired, and the national public television companies and cable companies (for retransmission).<sup>3</sup> The ECL has been described as a subtle mixture of autonomy and state intervention with an effective advantage in the field of mass licensing, more than individual or traditional collective licensing.<sup>4</sup> Although the ECL has been labelled as a “modality of rights administration or management,”<sup>5</sup> this label makes no sense in determining whether the ECL is a rule that limits copyright.

When determining the legal essence of an ECL, its practical effects should be considered as the decisive element.<sup>6</sup> ECLs’ distinct designs have imposed varying degrees of limitations on copyrights. In contrast with other copyright limitations *e.g.*, compulsory licences, the test is whether an ECL as a limitation to copyright is subject to the efficiency, transparency, and accountability of the collective management organizations (“CMOs”). In other words, the legal essence of an ECL must be *contextually* judged. [Emphasis added]. Therefore, it is uncertain whether an ECL *per se* represents a limitation, if the CMOs’ actual operating states are not taken into account. Only an ECL in a well-established collective management of copyright system (“CMC”) will be easily exempt from limitations on copyright. Nevertheless, existing ECL laws suggest that even in a well-established CMC, ECLs seem to be closer to a system of copyright limitation<sup>7</sup> that either fully or partially prevents the possibility that non-members can exercise copyrights on an individual basis.<sup>8</sup> The ECL provides a solution for outsiders such as non-members, foreigners and unknown parents of orphan works<sup>9</sup> so that it is regarded as the appropriate method of ensuring successful copyright management in the digital age.<sup>10</sup> The ECL has thus greatly facilitated both access and distribution. Increasingly fragmented<sup>11</sup> copyrights have frustrated users seeking multi-source or legitimate authorizations. This reduces the value of copyright because some users simply abandon the search for authorization.<sup>12</sup> With an ECL, users do not have to seek out very rightsholder for permission. Theoretically, all rightsholders can be compensated and consequently the interests of almost all of the stakeholders are realized. With respect to public interest, the ECL could be a quick way to establish tariffs for the use of materials that educators wish to access.<sup>13</sup> An ECL might be a method that is conducive to copyright realization and clearance in the digital age. The ECLs may thus accelerate the acquisition of rights<sup>14</sup> with the effect of