

IHU

Copyright Issues Pertaining to the Digitisation of Cultural Heritage

Thesis

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Copyright Issues Pertaining to the Digitisation of Cultural Heritage

I. Introduction

After the recent revision of the Directive on the re-use of public sector information (Directive 2003/98/EC, the 'PSI Directive') Directive 2013/37/EU (entered into force on 17 July 2013), the issue of digitisation of public cultural heritage and its re-use is entered as a new obligation in the perspective of providing new resources to the private sector. On the other hand, private sector cultural institutions often opt for the digitisation of part of their collections. At the same time, international legal instruments call for digitisation for preservation, safeguarding and information reasons.

In the digitisation process, copyright protection is relevant, as it prevents any interference with the protected works. IP rights clearance and identification of the right holders are essential for the completion of the work. Besides, current national and EU law facilitates digitisation on the basis of the existing limitations and exceptions (orphan works, out of commerce works, etc).

Furthermore copyright also dictates the ways of exploitation of the digitised works. Accordingly, a legal debate about the existence of copyrights on the digitised work has arisen. While jurisprudence has not decided yet, contractual licensing, either by tailor-made or by standard form licences, could offer a viable solution and setting the boundaries for further dissemination of the digitised works.

II. Definition of Cultural Heritage

There is no single universal definition for the definition of “cultural heritage” and sometimes the term is used interchangeably to the terms “cultural objects”, “cultural property”, “cultural goods”, “cultural assets” or even “works of art” and “artworks”. Seeing the words separately, there is no universal definition for those either, but we could agree that there is a core notion that is universally understood. According to that “culture” refers to the cumulative deposit of knowledge, experiences, beliefs, values, attitudes, meanings, hierarchies, religion, notions of time, roles, spatial relations, concepts of the universe, and material objects and possessions acquired by a specific group of people in the course of

generations through individual and group striving. Culture in its broadest sense is cultivated behaviour through social learning of that specific group and is related to its way of life, encompassing the behaviours, beliefs, values, and symbols that they accept, generally without thinking about them. “Heritage” on the other hand connotes something that comes to possession of a person by reason of birth, something that is passed from generation to generation and is conserved for upcoming generations. In the same time the context where the notions are used changes their meaning, so that in everyday language and non-legal fields “cultural property” or “cultural heritage” may be used without distinction, whereas while applying a Convention where usually those terms are specifically defined in the first articles, the results may be quite different. Combining the two notions above, “cultural heritage” law refers to the protection of the heritage defined for the enjoyment of present and next generations; a term that is somehow remote to the strictly legal notions of property ownership¹, which focuses on the duties to protect and to preserve. ICCROM Working Group “Heritage and Society” states that cultural heritage is the entire corpus of material signs – either artistic or symbolic – handed on by the past to each culture and, therefore, to the whole of mankind².

One of the many classifications of cultural heritage is in “tangible” and “intangible”. The term “**tangible cultural heritage**” concerns things either movable, as paintings, sculptures, coins, manuscripts or immovable, such as monuments, archaeological sites, and so on³. Those material evidences of culture were the first to be recognised and protected as such via national and international laws; the variation in terminology and the several distinctions of cultural property reflects the graduated conferred and the scope of cultural property covered⁴.

The illicit trade in cultural objects (thefts, forgery, ransoms, and smuggling operations) has long been recognized as one of the most prevalent categories of international crime, with its proceeds being second only to drug and human trafficking, and

¹ (Stamatoudi, 2011, pp. 4-5)

² (Jokilehto, 2005)

³ The distinction of cultural property in movable and immovable is of secondary importance, since it is not always consistent and not easy to make, as it highly depends on the national applicable law. See for example how through the concept of English law “*fixtures*” a door and a doorframe (Philips v. Lamdin) and tapestries (Norton v. Dashwood) were treated as immovable for reasons of applicable law, while some frescoes (Ville de Genève et Fondation Abegg v. Consorts Margrail) were treated as movable.

⁴ The location, where that heritage is found, either on land or underwater is not relevant, but it may signal a different protection status (shipwrecks, underwater ruins and cities). To that matter, the 2001 UNESCO Convention on the Protection of the Underwater Cultural Heritage is relevant.

it is several times interrelated to money laundering and funding other criminal activities. The police and international community have long recognised the importance of good documentation, facilitating the recovery and return of the missing objects to the victims. To that matter **Object ID**⁵ has been developed. This is an international standard for describing cultural objects (art, antiques and antiquities) developed through the collaboration of the museum community, police and customs agencies, the art trade, insurance industry, and valuers of art and antiques, conceived⁶ as an instrument to combat art theft, promoted by major law enforcement agencies, including the FBI, Scotland Yard and Interpol, UNESCO, museums, cultural heritage organisations, art trade and art appraisal organisations, and insurance companies. Once the descriptive standard is achieved, it facilitates documentation of cultural property and brings together organisations around the world that encourage its implementation. Object ID helps to identify both the cultural property and its owner.

“Intangible cultural heritage” refers to those aspects which are not or cannot be incorporated, or that their transformation to objects is just an expression, such as practices, skills, oral traditions, performing arts, rituals, know-how. Alongside to the above “the instruments, objects, artefacts and cultural spaces associated therewith” are also protected⁷. The protection of that category of cultural heritage often falls under the scope of national copyright laws. Internationally there is only one convention that protects intangible cultural heritage, perhaps due inherent to the difficulty to define and intangible cultural heritage, which was overpassed with the use of an overlapping definition, encompassing the both the spiritual and the material aspects of this heritage. As a means of protection the Convention promotes the indexing of the practices falling under its scope and their listing as part of the Intangible Cultural Heritage of Humanity⁸. One of the best practices promoted accordingly by UNESCO is the digital preservation of folklore and traditional music archives of Sudan, via the digitisation of the audiovisual collection of traditional Sudanese music housed in the Folklore and Traditional Music Archives of the University of Khartoum. The collection contains more than 3,000 audio recordings and

⁵ Object ID™ is a trademark of the J. Paul Getty Trust.

⁶ The Object ID project was initiated by the J. Paul Getty Trust in 1993 and the standard was launched in 1997. From 1999 to 2004, the Object ID project was housed at the Council for the Prevention of Art Theft (CoPAT). In October 2004, the International Council of Museums (ICOM) signed an agreement with the J. Paul Getty Trust for ICOM's non-exclusive worldwide use of the Getty's Object ID standard. <http://archives.icom.museum/object-id/index.html>.

⁷ See art. 1 of the 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage.

⁸ Art. 12 and 20 (for inventorying) and 16 – 17 (for insertion in the List of Intangible Cultural Heritage of Humanity) of the 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage.

photographs of traditional Sudanese music collected since 1963. The fragile state of the Archives proved challenging to the whole process, since it required fast capacity-building in order to create an improved mechanism for data acquisition, digitization, storage and retrieval and for ensuring the security and safety of the Archives⁹. Another example was the creation of an inventory in the form of an electronic database of Albanian folk-isophony¹⁰.

III. How copyright is relevant.

The call for digitization of analogue tangible and intangible heritage subscribes in the international wave of new technologic advancements and is abundantly promoted by the European Union in what is called the Fifth Freedom of EU¹¹, following the freedom of movement of goods, people, services, capital and knowledge, in order to create a more competitive and appealing research and development European space, based on inter alia “facilitating and promoting the optimal use of intellectual property created in public research organization so as to increase knowledge transfer to industry, encouraging open access to knowledge and open innovation, launching a new generation of world class research facilities”¹², along with “a vibrant cultural industry¹³”.

Access to information and to cultural goods, as well as the preservation of the existing cultural heritage becomes increasingly important in the digital age, since a growing number of people use the digital resources available via the internet as their main source of information, entertainment, and education and for research purposes. That is why cultural institutions, especially those such as libraries, archives and museums, strive to digitise their collections not only for the purpose of preservation, but also to make Europe’s and the world’s heritage available to the public. The advantages of unimpeded access to digitalised cultural heritage, the possibilities of creative re-use of the accessed knowledge in

⁹Digitization of Sudan folklore and traditional music archives (<http://www.unesco.org/culture/ich/en/news/digitization-of-sudan-folklore-and-traditional-music-archives-00046j>).

¹⁰ The electronic database is available at <http://isopoli1.w03.wh-2.com/Default.aspx>. Inventory of Albanian folk iso-polyphony (<http://www.unesco.org/culture/ich/en/assistances/inventory-of-albanian-folk-iso-polyphony-00495>).

¹¹ First proclaimed by J. Potocnik, European Commissioner for Science and Research, in his speech opening the Informal Competitiveness Council in Germany, 2007 (Potocnik, 2007, p. 2).

¹² The Fifth European Freedom was fully endorsed by European Council in its Presidency Conclusions in Brussels (Council, 2008, pp. 6-7) and repeated by European Commission in its 2008 Annual Report (Commission, Report from the Commission - Annual Report on Research and Technological Development Activities of the European Union in 2008, 2009, p. 2).

¹³ (Commission, COM(2007) 242 - European Agenda for Culture in a Globalizing World, 2007, p. 3)

comparison and recombination to others and the economic benefits arising from business innovation and increased employment and financial flows, either in the cultural sector or in others benefiting make the digitalisation a growing need for the hosting cultural institutions and for the countries that promote it¹⁴.

The sudden development of electronic technologies since the beginning of 21st century has given birth to new terms, as “digital heritage”, “digital humanities¹⁵” and “digital curation”. “**Digitisation**” of cultural heritage is the “conversion of analogue information in any form (text, photographs, voice, etc.) to digital form with electronic devices (scanners, cameras, etc.) so that the information can be processed, stored and transmitted through digital circuits, equipment and networks¹⁶”. The digitisation process (digitisation lato sensu) constitutes in three basic activities with the aim of creating and using sustainable digital heritage: the digitization stricto sensu, referring to the process of conversion of analogue objects into digital form, the access to the digital heritage, ensuring that the user shall be able not only to see but also to have efficient and intuitive resource discovery tools as well as its long term-preservation, the proper guarantees that digital objects created will be available in the future, intact in their form ready to be rendered and used¹⁷. Copyright is relevant to the digitisation procedure and the further exploitation of digital material, as cultural heritage under digitalisation consists of works in the sense intellectual creations that are in principle protected by the norms of copyright law¹⁸.

1. Absolute and exclusive rights to content

First of all the legal protection of the works is achieved via attribution to the author of absolute and exclusive rights to the content, of economic and moral nature. The economic rights seek to ensure the fruitful exploitation of the work by the author, whereas the moral rights seek to protect the author’s personal interest in the work. Those rights are absolute in that they can be asserted by the author against any violator and exclusive in that the natural person creator of the work is the first to bear those rights¹⁹. Copyright on one’s

¹⁴ (Klass & Rupp, 2014, pp. 951-952)

¹⁵ An umbrella term covering a wide range of activities, from data mining to online preservation and digital mapping and the use of geographic information systems, data visualization, and digital publishing. Whitney Humanities Center of Yale University.

¹⁶ www.businessdictionary.com

¹⁷ (Sotirova, Peneva, Ivanov, Doneva, & Dobрева, 2012, p. 26)

¹⁸ (Koumantos & Stamatoudi, 2014, p. 21).

¹⁹ (Koumantos & Stamatoudi, 2014, p. 19)

work is obtained for a limited time²⁰, without the fulfilment of any formality and practically results in exerting the power of permitting permit or denying the use of one's work and consequently asking for due consideration for its contractual use or due compensation for its illicit one. The time limitations in those absolute and exclusive rights serve the purpose of striking a balance in the author's personal and economic interests and the society's need to advance and build on past new creations. This ends up in a situation where every work is either copyright protected or has fallen in the public domain. It goes without saying that for works in public domain, no author permission or compensation is needed.

Furthermore during the digitization process, even of works in public domain, new derivative works are created, which may be entitled of their own copyright protection. Copyright may be of help from the early stages of the digitisation process, when the automatic or contractual transfer of author economic rights is predicated. Clearance of copyrights can be a challenging issue for cultural heritage institutions, because due to contractual agreements the economic rights holder may not (or not fully) coincide to the moral rights holder, who will usually be the author, leaving no other way but to demand permissions for more than one person.

2. Rights in databases

In the second phase, the digitised works are usually included in electronic databases for indexing purposes. Such a database may also be protected by copyright if selection or arrangement of its materials constitutes its author's intellectual creation and in any case, it will be protected under the database *sui generis* right from acts of temporary or permanent reproduction and other unpermitted usage of its content. In the case of electronic databases not even private reproduction is allowed.

3. Reproduction and distribution or communication to the public limitations

Digitisation itself means making a copy. The requirement for broad access to digitised cultural heritage is satisfied by means of reproduction of the digitised material, in whole or partially, in various ways (thumbnails, etc) and communicated to the public, by wire or wireless means or by any other means, including the making available to the public in such a way that members of the public may access them from a place and at a time

²⁰ Copyright term of protection may vary according the nature of the work, but it ends after a time past the author's death.

individually chosen by them (on demand). The digitised material may also be distributed in material form for reasons of promotion, marketing, etc. That been said, Cultural heritage Institutions are designated as important, albeit often overlooked stakeholders in the copyright system.

IV. European legal regime in respect of digitisation

As a base rule of European law, harmonisation of national laws in other issues rather than the economic sector, is not justified, unless the proportionality requirement is satisfied, namely if the intervention is necessary, proportionate to the result and is exerted in the most not invasive way. The most common way of harmonising national laws is thought to be via directives, because they leave to the Member States the discretion to decide how to achieve the intended result. Since copyright law grants exclusive and absolute national rights, influencing the trade within the European Union, harmonisation is sought through Directives, in order to reduce internal barriers and at the same time to abide by international legislative obligations of the EU and its Member States.

Current European law does not provide expressly for digitisation in copyright law; however some of its legislative choices have been used to deal with copyright problems in view of digitisation projects.

1. The Information Society Directive.

The Information Society Directive (2001/29/EC) is one of the few Directives²¹ that aims to harmonise horizontally copyright and related rights issues to a larger extent in comparison to other Directives, not aiming to harmonise more than the relevant to the Internal Market issues²². In great deal it implements in European law the WIPO Treaty²³ and the WIPO Performances and Phonograms Treaty²⁴.

a. Reproduction by libraries and archives²⁵.

Article 5 par. 2 (c) of the InfoSoc Directive, provides that *“Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the*

²¹ The Orphan Works Directive, the Collective Rights Directive and the Enforcement Directive follow a similar approach.

²² (Geiger & Schoenherr, 2014, p. 397).

²³ The WIPO Copyright Treaty, adopted in Geneva on 20/12/1996.

²⁴ The WIPO Performances and Phonograms Treaty (WPPT), adopted in Geneva on 20/12/1996.

²⁵ Art. 22 L. 2121/1993 “It shall be permissible, without the consent of the author and without payment, for a non-profitmaking library or archive to reproduce one additional copy from a copy of the work already in their permanent collection, for the purpose of retaining that additional copy or of transferring it to another non-profitmaking library or archive. The reproduction shall be permissible only if an additional copy cannot be obtained in the market promptly, and on reasonable terms”.

following cases ... (c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage". Reproductions even for digitisation purposes are prohibited by the exclusive economic and moral right of reproduction; they are allowed only if they come under the specific requirements of the above limitation²⁶, which has been interpreted as covering acts of digitisation. The implementation of the limitation requires publicly accessible, not-profitmaking libraries, museum or archives, not intended to use the digital material for economic or commercial advantage. However the strict wording of the said limitation seems to refer to isolated acts of reproduction and not to mass-digitisation projects of entire collections that entail making available to the public the digitised materials²⁷.

b. Reproduction by libraries and archives.

Article 5 par. 3 (n) of the InfoSoc Directive permits the *"use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections"*. Nevertheless this limitation also deals with cases similar to the premises of a physical library, meaning that the cultural heritage institution is only permitted to make available digital works through a terminal on the spot, not covering distance transmission of the digitised material²⁸.

2. The Orphan Works Directive

The Orphan Works Directive deals with rights clearance issues, when the author of a work, especially of audiovisual works or works cited in journals or newspaper, is hard to identify or to locate, forming thus a sort of an intermediate category between copyright protected works and public domain works²⁹. The Directive applies to the kinds of works enumerated in article 1 par. 2, art. 3 - 4, basically leaving out of its scope standalone photographic works. The Directive establishes a legal framework permitting cross-border online access to orphan works, enabling cultural heritage institutions to proceed with their digitisation and dissemination project with a minimal risk of liability. The reduction of risk is

²⁶ On the difference between "exceptions" and "limitations" and why art. 5 (c) of the InfoSoc is deemed to host a latter one, see (Geiger & Schoenherr, 2014, pp. 438-439)

²⁷ (Axhamn & Guibault, 2012, p. 2)

²⁸ (Axhamn & Guibault, 2012, p. 3)

²⁹ (Suthersanen & Frabboni, 2014)

based on a due diligent search throughout European Union³⁰, which results in mutual recognition of the status of orphan works among Member States³¹.

The exception is set up in favour of a large group of non-profitmaking indiscriminately public³² or private institutions and institutions engaging in digitisation non-profit projects, as long as the digitisation falls under their public interest missions to preserve, to restore, to provide cultural and educational access to their collections³³, however commercial uses and individuals are excluded from the benefits awarded by the Directive. Interestingly though public-private partnerships with commercial entities for digitalisation purposes in the pursuit of the organisation's non-profit missions of public interest are not hampered³⁴.

3. Collective Management Directive³⁵

Title III of the Collective Management Directive is dealing with multi-territorial online licensing of musical works only³⁶. It establishes the "European passport", which enables rights holders to be represented in other EU Member States either by a collective management organisation, which is not necessarily seated in the same Member State with the rights holder and promotes the cooperation among collective management organisations of different EU countries, in order to ensure broader representation to their members.

The implementation date for this Directive has not expired yet, still serious doubts have risen as to the viability and the desirability of the so called "passport" option³⁷.

4. Evaluation of the current legal Framework

a. Legal Uncertainty

The means by which European Commission seeks to harmonise national laws have the inherent advantage of flexibility in the way that the intended result will be reached. This has led to a paradox situation, where the strict wording and interpretation of the limitations or exceptions provided in the Directives, which do not allow a more up-to-date

³⁰ Article 3 of the Orphan Works Directive.

³¹ Article 4 of the Orphan Works Directive.

³² For film/audio heritage institutions their formal designation from the Member State is required.

³³ Recital 20 and article 6 par. 1(b) of the Orphan Works Directive.

³⁴ Recital 22 and article 6 par. 4 of the Orphan Works Directive. It is however clear that the commercial partner will not obtain any right over the orphan works.

³⁵ Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works of online use in the internal market. The Directive should be brought into force by Member States by 10/04/2016.

³⁶ Article 23 of the Collective Management Directive.

³⁷ (Josef Drexler, 2012)

interpretation, along with the strict implementation of the three-step-test³⁸, which is normally regarded as a way to balance rapid development in real world to the slow legislative rhythm, do not allow the refreshing of the current framework to the ongoing developments, even though in several points it appears to be obsolete.

In addition to the above, the discretion of implementation of the Directives allowed to Member States has led to a worse fragmentation than the one sought to avoid. Especially the inconsistent implementation of the InfoSoc Directive has led to a mosaic of national legislations in matters of limitations and exceptions, increasing the uncertainty of cultural heritage institutions³⁹.

The solution here would be the making mandatory of more than one limitations⁴⁰, in order to create a consistent environment throughout European Union, and the expansion of the existing limitations, so as article 5 par. 2(c) to cover not only “specific acts” of reproduction, but reproduction and making available to the public in view of digitisation projects⁴¹.

b. Use of Orphan and Out of commerce works

The Memorandum of Understanding on out-of-commerce works⁴², whereas is not a legislative or otherwise legally binding instrument, rather than a gentlemen’s agreement in the sector, is inscribed in the European Commission’s Digital Agenda for Europe aiming to further the development of european digital libraries, through facilitating the digitisation and making available of out-of-commerce books and journals by means of voluntary licencing agreements with the relevant collective management organisations. The innovative points are that both commercial and non-commercial uses are allowed; moral rights of attribution and integrity should expressly be respected; a presumption of representation of the rights holders by the collective management organisations, irrespective of whether the authors have transferred their management rights, with an

³⁸ The so called “three-step-test” inspired by the US fair use doctrine was inserted in European law through the transposition of the art. 10 of the WCT into Article 5(5) of the Information Society Directive. Nevertheless provisions in the Computer Programs Directive, Rental Right Directive and Database Directive were already formulated after the three-step test.

³⁹ “For instance, until recently (2014), UK law does not currently provide any exceptions for private copying or parody, and exceptions like the one for archiving are narrower than what is allowed under the Directive”. (Rosati, 2014)

⁴⁰ In the InfoSoc Directive, art. 5 par. 1 (transient or incidental copies) apart from the optional exhaustive list of exceptions and limitations contains one sole limitation whose transposition was mandatory for the Member States.

⁴¹ (Fallon, 2015)

⁴² (Commission, 2011)

additional opt out right for the right holders. The MoU works complementarily to the Orphan Works Directive, in that implies that rights holders of orphan works may be represented by collective management organisations⁴³.

V. Examples of digitisation of cultural heritage

1. Pandektis⁴⁴

As part of a large number of institutional repositories, Pandektis is a digital platform, developed, implemented and supported by the National Documentation Center. The platform contains 11 important collections, with more than 40.000 entries and 23.000 archives available in digital form, constantly enriched, of Greek history and culture provided by the three humanistic Institutes of the National Hellenic Foundation for Research⁴⁵: Institute of Neohellenic Research, Institute of Greek and Roman Antiquity and Institute of Byzantine Research. Another important characteristic of Pandektis is the existence of relationships among items of different sub-collections and communities that is reflected in the user interface and the content's navigation.

Using simple rules of search, Pandektis can assure free and instant accessibility to complete and well documented digital collections contained, for scientific and scholar purposes, to people with no specific searching skills. The platform can fulfil all of the platform's user requirements by providing him with the ability to customise the search criteria.

A large amount of additional, to the platform's search results, information can also be provided to the users, in both Greek and English, including the author's name, the title of the work, the edition (date and location, number of editions), a brief description of the work, its size (pagination, volume) for literary works or dimensions in centimeters for illustrative works (eg. black and white slide), its genre (image, prose, journal, etc.), information on ownership (private collection), information about its content (spatial and temporal identifiers and context), its type and information on the documentation responsible.

⁴³ (Suthersanen & Frabboni, 2014, p. 663)

⁴⁴ <http://pandektis.ekt.gr/dspace/>

⁴⁵ <http://www.eie.gr>

The amount and type of the content and the documentation available to the users, along with the technical infrastructure, place Pandektis to the top three of Greek institutional repositories.

2. Google Books

Based on the mission of Google, “to organize the world’s information and make it universally accessible and useful”, Google Books became a dream come true on 1996. This ambitious program consisted in the digitization of vast book collections, using an algorithm to index the content of the books and to analyse the connection between them. Libraries and publishers started to engage with the project during 2005, when it took the name “Google Books”⁴⁶.

At this point, it is an online tool of searching for books via World Wide Web. All types of books are included in the Google Books program, from novels and children’s books, to cook books and dictionaries. Google uses techniques which transform the scanned copies into searchable data. When searching the Google Books database⁴⁷, the basic bibliographic information about the book shows up and in many cases also some paragraphs or pages of the text containing the keywords, which the user has searched online. In case that the book is out of copyright, the user is possible to view and download the entire book, and for every case, there are links directing to online bookstores and libraries where the book can be found.

Google Books now contains more than 1 million digitised books and serves as a gigantic card catalogue and library. Google creates immense intellectual possibilities in providing something similar to a library, accessible worldwide. However, compared with other online libraries or repositories, Google Books creates revenue from books that were previously regarded as without a clear licence holder.

Today the programme is consists of two branches, namely the Partner Programme, where the received permission for digitisation and making available to the public comes directly from the rights holder and the Library Project, where the relevant permission comes from the library hosting the books. The Partner program relies on the relevant rights holders (publishers and authors), in view of better marketing of the books. The sustainability of the programme is achieved by means of a self-service approach, since the

⁴⁶ <https://www.google.com/googlebooks/about/history.html>

⁴⁷ <https://www.google.com/googlebooks/partners>

rights holders themselves provide Google with a copy of their book in order to be included in the digital library of Google, indicating also how much of the book will be displayed.

In the past, the Library Project has given rise to legal battles in the U.S., over the whether the digitisation of the works. Given that the obtaining permission for each and every of the rights holders of the collections Google intended to digitise, it developed an opt out approach, meaning that it promoted the idea that the whole project of digitisation fell under the fair use exception, offering the choice to rights holder who did not wish to participate to opt out. This technique brought Google facing a class action from the biggest organisation for book authors in the US, Authors Guild and Association of American Publishers, resulting in long-term litigation and a settlement, an amended settlement between Google, the authors and the publishers and an affirmation by the Court that Google's practice falls under the fair use doctrine⁴⁸. In Europe, Google adopted a different approach and proceeded to the digitization of material already in the public domain⁴⁹.

3. Europeana

Europeana is a very large-scale metadata repository and aggregation service for all kinds of cultural heritage information from Europe. With more than 3500 data providers and more than 1700 members, Europeana is the largest network of cultural heritage institutions and professionals across Europe. Currently, in this repository there are 108 partners from 23 countries, working on new projects on the creation of regional and local aggregators (specific type of information from multiple online sources) of digital artefacts.

Considering how important the cultural heritage Institutions are, the idea of Europeana was born when the European Commission announced its strategy to promote and support the creation of a European digital library, as a strategic goal within the European Information Society i2010 Initiative, which would also aim to foster growth and jobs in the information society and media industries.

The initial idea was to to make European information resources easier to use in an online environment. In that way, digitization would provide many opportunities to make data, collections, libraries etc. more accessible, create new audiences and enrich web users' engagement with the information provided in new ways. On 2005, major cultural institutions, museums, national libraries etc., across Europe provided with more that 4

⁴⁸ (Chant, 2014)

⁴⁹ (Krazit, 2009)

million items, which were digitised. The repository went live on November 2008 and during 2013 Europeana was visited by more than 4 million unique users.

The platforms contains a large amount of information and digital items such as books, newspapers, letters, diaries and archival papers, paintings, drawings, maps, photos and pictures of museum objects, , music and spoken word from cylinders, tapes, discs and radio broadcasts, films, newsreels and TV broadcasts.

Europeana enables users to access a vast range of cultural expressions in the public domain. All material is available in all EU languages, which can help users to search and navigate in digitised collections of European libraries, museums and files. However, none of the aggregated collections are actually held by Europeana. It does not act as a custodian to these collections, hosting within the portal only a thumbnail preview and the metadata, according to that the user is taken outside Europeana to where the content provider of the digital object resides⁵⁰.

As mentioned above, several projects has been created in order more cultural content to be presented through Europeana. ATHENA⁵¹ (2008-2011) for example aimed to bring together relevant stakeholders and content owners from all over Europe, evaluate and integrate standards and tools for facilitating the inclusion of new digital content into Europeana, and also merge relevant projects (in progress or completed) such as EuropeanaNet, MICHAEL etc. and connect them directly with the repository.

VI. Other relevant issues

1. Public Sector Information Reuse

The Directive⁵² on the re-use of public sector information (PSI Directive) provides a common legal framework for a European market for government-held data (public sector information), based on transparency and fair competition. It is concerned with the exploitation of most of the information lying in the public sector as possible, which evaluates it from an economic aspect rather than on citizens' access to that information.

It regulates access to material held within their scope by public sector bodies in the Member States, at all levels, such as ministries, state agencies, municipalities, and public

⁵⁰ <http://en.unesco.org/creativity/monitoring-and-reporting/periodic-reports/innovative-examples>

Innovative examples the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions

⁵¹ <http://www.athenaeurope.org>

⁵² Directive 2003/98/EC, as amended by the Directive 2013/37/EU, on the re-use of public sector information.

funded or public controlled organisations (e.g. meteorological institutes)⁵³. After the 2013 amendment, the previously exempted content held by museums, libraries and archives falls within its scope of application.

Information in forms of written texts, databases, audio files and film fragments are covered to the exception of information found at the educational, scientific, broadcasting and cultural sectors, except for information found in libraries, museums or archives⁵⁴. That information can in general be re-used beyond its initial purpose of collection for both commercial and non-commercial purposes. If the information accessed is held by museums, libraries and archives, then it can be re-used only if it is made available by the institutions for re-use⁵⁵. Conditions for re-use shall be non-discriminatory for comparable categories of re-use. So far charges for re-use are concerned, in the case of museums, libraries and archives, they may be shaped in a way that enables those institutions to recoup digitalising costs, including costs related to preservation (data curation and data storage costs) and rights clearance (time/effort spent identifying and obtaining permission from rights-holders)⁵⁶ by generating sufficient revenue⁵⁷, considering also charges of the private sector for similar information. For digitising purposes, cultural institutions are allowed to enter in exclusive arrangements of maximum duration of ten years.

The PSI re-use gives an answer to the question if and under which circumstances should cultural heritage institutions make available to the public, their digitised collections and explicitly allows public-private sector partnerships to that extent, like with Google.

2. Creative Commons

“Creative Commons is a nonprofit organization that enables the sharing and use of creativity and knowledge through free legal tools⁵⁸”. It develops standardised licences or economic copyrights on conditions that vary from “all rights reserved” to “some rights reserved”. CC licences do not stand for abolishment of copyright, instead they work alongside with copyright rules, leaving to the rights holder the choice of the suitable licencing scheme, not affecting legal rights and freedoms that the law grants to users of creative works, such as exceptions and limitations to copyright law like fair dealing. Getting

⁵³ Article 2 par. 1 of the PSI Directive.

⁵⁴ Article 2 par. 2(c) of the PSI Directive.

⁵⁵ Article 3 par. 2 of the PSI Directive.

⁵⁶ Point 4.2.1 of the Guidelines on recommended standard licences, datasets and charging for the reuse of documents.

⁵⁷ Article 6 par. 2(a -b) of the PSI Directive.

⁵⁸ (Commons)

permission according to copyright law, unless the license does not expressly allow, is mandatory. The use of technological measures to restrict access to the work by others is not permitted.

The CC standardised licences offer a licensing unilateral declaration on which copyright rights the rights holder prefer for one's work, choosing over the right to deny alterations and creation of derivative works and the right to deny commercial use of one's work and to "share alike", the use of the derivative work should be licenced under the same conditions as the original. But from the above, the rest of the licenses confer to the user the rights to access, reproduce, distribute, display and perform the work verbatim and make digital public performances of the work, internationally for the time period that the work is eligible for copyright protection, with the burden of the attribution right of the rights holder. Accordingly, six possible combinations exist:

a. Attribution only license, is the broadest license allowing both commercial exploitation and derivate works, not requiring subsequent usage under the same terms as the original.

b. Attribution–Non-Commercial license, allowing derivate works, but not commercial exploitation, without though requiring subsequent usage under the same terms as the original. File-sharing or other means of communicating the work on a non-profitmaking basis satisfies the license requirements.

c. Attribution–NoDerivs license, allowing commercial exploitation, but not derivate works, not requiring subsequent usage under the same terms as the original.

d. Attribution–Non-Commercial–NoDerivs license, allowing neither commercial exploitation nor derivate works, but not requiring subsequent usage under the same terms as the original.

e. Attribution–ShareAlike license, allowing both commercial exploitation and derivate works, and requiring subsequent usage under the same terms as the original.

f. Attribution–Non-Commercial–ShareAlike license, allowing derivative works, but not commercial exploitation and requiring subsequent usage under the same terms as the original⁵⁹.

There have been developed also some special licenses:

g. A "Public Domain Dedication" is a "No Rights Reserved" decision, when the rights holder does not want any control over the work.

⁵⁹ (Liang, 2004, pp. 78-79). The attribution right of the author has been standardized not optional, under the 2nd generation of CC licenses.

h. “Founder’s copyright” is a method through which the rights holder opts for a shorter term of copyright protection of 14 years, extendable once more.

i. “Sampling Licenses” are three licenses (green, yellow and red), specially designed for musical works, that enable subsequent usage of parts of the licensed work. The “Sampling Third parties” license limits further exploitation, even commercial, of the work in that it prohibits advertising. Copying and distribution of the entire work is not permitted. The “Sampling Plus” license allows further non-commercial copying, sharing and distribution of the entire work via file sharing networks or other means. On the other hand “Non-Commercial Sampling Plus” license restricts the allowed uses of Samples, prohibiting all commercial uses; non-commercial distribution of the entire work.

j. The “Share Music A” license allows to download, copy, share, trade, distribute, and publicly perform of the musical work, but does not allow derivative works or any commercial exploitation of it.

k. The “Developing Nations” License allows the user to copy, distribute, display, and perform the work and to make derivative works, as in attribution license, but limited in the “developing world”. It is geographically limited license “developed’ world⁶⁰.

Cultural heritage institutions⁶¹ could benefit from the standardised licenses, since they elude the national borders of copyright protection, without relinquishing any legal right, and they attach to an internationally recognised licensing scheme, that offers legal certainty over the uses and the exceptions covered. However it should not elude one’s mind than, given that those standardised licenses are detouched from any legal order, the interpretation of its terms and the filling of any gaps, as well as the compliance to non-overriding mandatory rules of a national legislation will be dependent on the law of the relevant competent Court.

3. Open Access

“Open Access (OA) stands for unrestricted access and unrestricted reuse⁶²” of works lying on the web, for research purposes. The OA movement has been mainly defined in the Budapest Open Access Initiative⁶³, the Bethesda Statement on Open Access Publishing⁶⁴, and the Berlin Declaration on Open Access to Knowledge in the Sciences and

⁶⁰ (Liang, 2004, pp. 78-81)

⁶¹ It is perhaps indicative of the success of the CC standard licenses that they are chosen among others by Google and Europeana.

⁶² (PLOS)

⁶³ (Read the Budapest Open Access Initiative, 2002)

⁶⁴ (Bethesda Statement on Open Access Publishing, 2003)

Humanities⁶⁵. Open access asks for “*free availability on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself*”⁶⁶. Sole the rights to paternity of the work and the right to integrity are considered justified, as they do not seem to influence in a negative way research and educational evolution⁶⁷.

The OA movement focuses on journals (gold OA) and scientific repositories (green OA), which are distinguished by the fact that OA journals perform their own peer review, whilst OA repositories host and disseminate articles peer-reviewed elsewhere as well as by the person from whom they obtain permission, namely the former directly from the rights holder, whereas the latter ask depositors to obtain permission of their own⁶⁸. The above influence the costs and the breadth of the permission acquired.

There is no formal stand for OA, but for the facilitation it provides in relation to a US fair use exemption; depending on whether the OA web institution has removed the price copyright barriers, being free of royalties (“gratis”) or it has also lifted at least one permission as well (“libre”), the user benefits of an easier access to research information. Nevertheless in the libre OA some copyright licensing restrictions may appear, since the possible permissions that a rights holder may confer depend on the various exploitation ways of the work. It goes without saying that works with signaling “All rights reserved” may never be OA, since it means that permission must be sought for every possible way of exploitation of the work.

OA licenses are not limited only to texts but may cover every kind of digital or digitized information helpful to the researcher. To that extent, such licenses might be used by cultural heritage organisations, which host digital or digitized heritage willing to offer it for research purposes. OA licenses are open access licenses as the CC licenses are but they are not standardized enabling, thus, tailor-made solutions for the users that will opt for them. As the CC licenses do, they do also not compete against the copyright system of protection, but instead they are completing it. The choice between the standardized licenses and the OA licenses will be related to the purpose of the licensing agreement, as well as to the cost of customization of such a license to the institution’s needs.

⁶⁵ (Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities, 2003)

⁶⁶ (Read the Budapest Open Access Initiative, 2002)

⁶⁷ (Suber, 2012, pp. 6-7)

⁶⁸ (Suber, 2012, pp. 52-53)

VII. Conclusions

The current legislative European environment is not that digitisation friendly, in that it does not provide expressly for digitisation projects. At the same time it appears too strict regarding the existing limitations, not facilitating the information of the legislature by the real practice. Significant steps remain to be made regarding harmonisation of European national legal orders, clarification of the wording of existing exceptions and limitations and advancement of the certain uses of orphan and out-of-commerce works. Rendering mandatory the transposition of at least a number of limitations and exceptions would certainly confer to the creation of a more stable legislative environment.

Regulating the licensing agreements through collective management organisations might be one way to mitigate some of the above obstacles. Using international licensing schemes deals significantly with most of the issues, but still depends on the user's will to cooperate, while, simultaneously, some interpretation issues remain open and susceptible to territorial fragmentations. Relying on the new PSI free re-use regime, does not deal with the digitisation hampers at early digitisation phases, but rather, ensures the possibility of public - private partnerships that would be otherwise prohibited.

Furthermore, the existent European legislation does not deal with issues of new ways of exploitation, which had not been around when the relevant Directives were drafted. Namely there are no provisions for exploitation of user generated content⁶⁹, nor do the text and data mining search techniques seem to be expressly addressed⁷⁰.

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⁶⁹ (Kuhlen, 2013)

⁷⁰ (Prat, 2014)

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