

Digital libraries and copyright : towards balanced legal certainty in Europe

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The mission of libraries has historically been the collection, preservation and safeguarding of works, in whatever support, and their widest dissemination for research, education, information and leisure purposes. In the analogical world, National Libraries and other depository ones have historically benefited of Legal Deposit legislations, which *mutatis mutandis* are, in fact equivalent to what we could call today a legal exception to book trade, for publishers are legally obliged to deposit a certain number of copies at no cost for the library. This system has permitted to build huge repositories that represent the cultural memory of a country or a region and are made available to the public for education and research, the true pillars of the knowledge economy.

The vertiginous development of new technologies (NTICs) opens up new avenues for libraries to accomplish their mission while giving birth, at the same time, to more duties for libraries, such as those required to ensure digital preservation. The advent of the digital environment should, in no way, undermine the mission of libraries. It should at the same time provide appropriate incentives to creators and publishers. Libraries and copyright holders alike, need today the capacity to evolve in a scenario of legal certainty that allow them to pursue their respective missions.

Building on the Green Paper “Copyright in the Knowledge Society” the Commission and the European Parliament should take urgent action in the following fields:

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- The existing exception for libraries and archives should explicitly be extended to the digital environment for the sake of maintaining the balance of interests (right of creators/access to information and culture) which is at the very basis of copyright legislations and also enshrined in art. 27 (.1 and .2) of the Universal Declaration of Human Rights.
- The scope of this exception for publicly accessible libraries should cover :
 1. The current exception for libraries included in art. 5.3.n) of the Directive¹ that allows public communication in terminals located in the libraries' own premises should be extended to on-line access. This access should nevertheless be limited to holders of a Library research card in a web area protected by a specific password.
 2. Legally guaranteed digital preservation across Europe. Due to rapid obsolescence, digital objects have to be periodically migrated to new formats and upgraded versions. Libraries are aware that those migrations affect the right of reproduction. It is, however, important to stress that they are not made for new modalities of use of the works, but rather to maintain the possibility of their consultation along time. Since this is a technological requirement, no limit to the number of reproductions should be fixed for purposes of preservation.
 3. Legal digitization of orphan works. Library holdings include an impressive number of orphan works that, although still protected, cannot be found in the market. They represent an undeniable wealth for research and have started to be digitized by Google. The famous Google Settlement will legally cover digitization of orphan works in the USA under the principle of an "opt-out clause". This solution is heavily contested in Europe considering that it gives Google a *de facto* monopoly on orphan works to the benefit of a private non-European company. The current European solution based in the "due diligence clause" has in fact not proved effective. A harmonized European opt-out clause could be introduced as a library exception and exercised

¹ Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society

by right holders upon appropriate proof of ownership. Should no agreement be achieved, the library could be compelled to retire the “ex”-orphan work of its digital collection. Such an exception to the benefit of digitization by - and public access through - European digital libraries, seems to be a reasonable practical solution that could help Europe to be soon on equal foot with the USA. Libraries are respected public institutions and are best placed to ensure respect to cultural diversity and freedom of publishing.

4. Preservation of digital heritage. In order to accomplish their mission of collecting the national heritage, National Libraries require a specific legal exception allowing them the systematic archiving of born-digital materials of their countries to be found in the Internet, and its selective dissemination both in terminals at their premises and in their web sites. This is very important for research in the years to come since a major part of creative expressions since 2000 is born digital and will most probably never published on physical supports. Current experience shows that Internet is about to become a prominent source for research on the arts and literature, history, sciences, economy, sociology, etc.
- On the contrary, libraries should accept that the digitization of protected works, available in the market, and their inclusion in on-line digital libraries, be subject to collective licences negotiated with appropriate collecting societies. These licences should, however, not be limited in time but rather cover the use of the licensed works as long as they remain included in the digital collections of the library. In turn, libraries should release them to the public under a new European kind of free license allowing full access for private use but limiting re-use.
 - Other aspects appropriate for agreements between libraries and right holders could concern archival materials (newspapers, photos, audiovisual programmes, etc.) where libraries could well offer their services as documentation centers for the enterprises that hold the rights and obtain, in exchange, authorization to include them in the library’s digital collections.