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Legal Restrictions and the Digital Library – is Digital Access to knowledge achievable?

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Abstract:

Why has the focus been on Orphan Works instead of trying to find the solution to the conundrum of copyright in the 21st Century; i.e. how to enable mass usage of copyright protected works in library corpus etc.? The real issue is how to clear the rights for large numbers of works irrespective of whether they are orphan or not. The problem is not the Orphan Works as such but rather the Outsiders [non members of Collective Management Organizations as well as Orphan Works]. The commercial and the cultural sector desire to make such work available. But traditional licensing solutions do not provide the means for such enterprises. France, Germany and Sweden has already introduced Extended Collective Licensing (ECL) to enable mass digitization and making available on the Internet and United Kingdom has presented legislative proposals of the same kind. ECL enables mass usage of copyright protected works including Outsiders. The European Union (EU) and national governments encourage national libraries to enter into Public Private Partnerships. These efforts are extremely costly - a private partner is in many cases a prerequisite. Both the library and the private partner will need a license. One possible solution could be the ECL. I.E. - There is a need for flexible ECL agreements apt to the 21st Century enabling business, creators and consumers to use copyright protected works. Is that possible? Could ECL be the solution? If it is, effective collective rights management systems are of the utmost importance for the development of the Digital Library in the European Union but also in the US, and I would argue on a global level. In addition to copyright another legal and complex issue is integrity although not much focus in general has been on the subject so far. Given all these legal obstacles, is Digital Access to knowledge achievable?

Keywords: Copyright, Orphan Works, Outsiders, Collective Management Organizations, Integrity

PAPER

Why has the EU/US focused on Orphan Works instead of trying to find the solution to the conundrum of copyright in the 21st Century; i.e. how to enable mass usage of copyright protected works in library corpus etc.? The real issue is not to focus on Orphan Works but how to clear the rights for large numbers of works irrespective of whether they are orphan or not. In this respect effective collective rights management systems are of the utmost importance for the development of the Digital Library in the European Union but also in the US, and would argue on a global level.

Copyright

When mass digitizing and making available on the Internet a library will need a collective licence. To clear rights on an individual basis work for work, rights holder by rights holder is not only unpractical – it is impossible. Collective Management Organization (CMO) can provide collective licensing solutions but traditionally such licensing solutions has had one restriction: a license is granted on behalf of the members of such CMO: s, hence excluding millions of works by rights holders who are not members of a CMO.

The problem from a copyright perspective when a library wishes to mass digitize with the intent to make such content available on the Internet is not primarily the lack of CMO: s – although that can be a problem in some countries – it is what has been referred to as the so called Outsiders, i.e. non members of CMO: s as well as Orphan Works. A CMO can only provide a licence on behalf of its members if the CMO has acquired a mandate to enter into negotiations on behalf of its members. To represent a non-member is not possible.

In the Nordic countries though it has existed since some 50 years a licensing regime called Extended Collective Licensing (ECL). The licence is by law extended to non-members of the CMO. Such a licence does also include OW. So for the past 50 years it has existed a solution to the problem with the Outsiders.

Out-of-commerce works

Out-of-commerce works are works that are still protected by copyright but are no longer commercially available because the authors and publishers have decided neither to publish new editions nor to sell copies through the customary channels of commerce. In the past works such as books were referred to as being either “in-print” or “out-of-print”. Today, with the advent of electronic channels of commerce, the term “out-of-commerce” is used (with electronic publishing a book will be "in commerce" even if only available in electronic form).

While publishers may not have a financial interest in maintaining older and less commercially successful books in commerce, libraries – in particular when we talk about those books which they have in their archives and which are part of the cultural heritage of the country, region or city where they are situated – may want to digitise and make them available online. For many libraries this is part of their public interest mission, made possible thanks to digital technology and networks. For the European citizen, this is an unprecedented opportunity to have access to books that would have otherwise fallen into oblivion.

Libraries do not own the copyright to the works contained in their collections. Therefore, they must seek the permission of the right holders – authors and publishers – before they can digitise out-of-commerce works and put them online as part of their digital library projects.

Financing the digitization

With very few exceptions libraries can´t afford to digitize the entire library corpus. Consequently has the EU Commission and national governments encouraged national libraries to enter into Public Private Partnerships for the obvious reason - these efforts are extremely costly hence a private partner is sometimes even a prerequisite for the digitization to take place. Given that both the library and the private partner will need a license to utilise the digital files. But the business environment changes over time and the market place tends to be more and more complex, i.e. there is a need for flexible collective licensing agreements apt to the 21st Century enabling business, creators, consumers and scholars to use copyright protected works. Is that possible? Could Extended Collective Licensing be the solution?

A Solution to the copyright conundrum of the 21st century?

Libraries will as a rule not be able to provide the same digital content as the commercial stakeholders – the libraries would compete with the commercial stakeholder and if the licence fee for the content provided by the library is paid by the government the consumers will choose the content that is for "free". Hence libraries will not be on the same market place with the same content as the commercial stakeholders. Libraries though will be able to make so-called Out of Commerce Works available, i.e. works not provided by the commercial stakeholders. ECL enables the mass digitization of out of commerce works.

Memorandum of Understanding on Out-of-Commerce Books and Learned Journals

The driving political force in the EU is EU's digital libraries initiative, i.e. all Europe's cultural resources and scientific records accessible to all through Europeana - a single access point. But the EU initiative is not the only driving force. Google Settlement 1.0 and 2.0 have had a significant impact on the political process in the EU. The Google settlement was in essence an ECL although not underpinned by legislation and hence not an option. Nevertheless, the EU Commission had to provide some kind of solution to how tom ass digitize and make available copyright protected works which are out of commerce. The question was how to reach the objective – mass digitization. Mass digitization would have to include Outsiders [non members of CMO: s as well as Orphan Works].

In "Creative Content in a European Digital Single Market: Challenges for the Future. A Reflection Document of DG INFSO and DG MARKT" (22 October 2009) ECL was mentioned. And in the Digital Agenda for Europe 2010: Commission said it would convene a stakeholder dialogue on the interactive making available of out-of-print works. The reason was that the EU Commission had recognised that there existed a solution to the problem with the Outsiders when mass digitizing – ECL.

The following fall the EU Commission invited certain Stakeholders to initiate this Stakeholder Dialogue with the aim at reaching an understanding on the principles, which should guide any and all mass digitization project. Initially all forms of media included but very soon it became evident each media should be discussed separately. In the next 8 months a MoU setting "Key Principles on the Digitisation and Making Available of Out-of-Commerce Works was negotiated.

At the first meeting some Stakeholders were asked to provide a briefing on existing solutions in Members States on the problem with the Outsiders. I presented a project called the Swedish Digital Library, which is a MoU concerning the digitization of the Swedish literary heritage entered in and between the Swedish Writers' Union, the Swedish Publishers' Association, the National Library of Sweden and the Visual Arts Copyright Society in Sweden. The basic principles in the MoU are that:

- The Digital Library provides access to digitized books that are not available in commerce [print or E-book].
- Additional financial means will be necessary through government initiatives as well as Public Private Partnership.
- The best way to adapt the making availability of the Digital Library is for the Parties to:
  - Negotiate an agreement [ECL] and
  - Modulate such an agreement when needed
  - Heads Up / Early Warning [e.g. Advertise]

What are the main features / prerequisites of the ECL? First of all, the ECL is a license and as such a result of free negotiations and it is extended to non-members of a CMO, including unknown right holders so-called Orphan Works. This effect is underpinned by legislation. The main prerequisite though is that the application of the conditions of the agreement concluded by the CMO is extended to right holders that have not transferred the management of their rights to the CMO. The CMO must

therefore be representative of the category of right holders, which are concerned. The agreement is by law made binding on non-represented rights holders, but non-represented right holders have a right to prohibition against the use of their works as well as individual remuneration on the basis of the law. Since ECL-agreements are granted on the basis of free negotiations both exclusivity and contractual freedom are respected and different rights holders are treated equally. As a consequence a library can use digitized books not running the risk facing individual claims from ”outsiders” or having to face criminal sanctions – i.e. legal certainty.

In the fall of 2011 a MoU on Out of Commerce Works was finalized - essentially an ECL and a blueprint on ECL legislation - and signed by the European Writers' Council (EWC), the Federation of European Publishers (FEP), the European Publishers' Council (EPC), the International Association of Scientific, Technical and Medical Publishers (STM), the European Bureau of Library, Information and Documentation Associations (EBLIDA), the Conference of European National Librarians (CENL), the Association of European Research Libraries (LIBER), European Visual Artists (EVA), the European Federation of Journalists (EFJ) and the International Federation of Reprographic Rights Organisations (IFRRO).

The aim of the Memorandum of Understanding (MoU) on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works is to facilitate the digitisation and making available by European libraries and similar institutions of books and learned journals in their collections which are out-of-commerce. The MoU will serve as a blueprint for collective licensing agreements negotiated amongst right holders, libraries and collecting societies as well as ECL legislation in Member States in the EU.

The MoU forms part of the Commission's overall objectives in the Digital Agenda for Europe and the Strategy on Intellectual Property Rights to further the development of digital libraries in Europe and provide the widest possible access to our cultural heritage. The Stakeholder Dialogue brought together representatives of the right-holders community (publishers and authors), libraries and collecting societies. Out-of-commerce works are works that are still protected by copyright but are no longer available in customary channels of commerce. The MoU deals specifically with books and learned journals. The purpose of the Key Principles contained in the MoU is that they will encourage and underpin voluntary licensing agreements to allow cultural institutions to digitise and make available online these type of works while fully respecting copyright.

It is important to stress that the MoU is the outcome of a stakeholder dialogue facilitated by the Commission but negotiated by European authors, publishers, libraries and collective management organisations. The parties have agreed on a solution, which takes account both of the interests of authors and the publishing sector on the one hand, and of libraries and mass digitisation projects on the other. Collecting societies representing right holders in books and learned journals will play a key role in the practical implementation of the MoU which should substantially facilitate the negotiation and acquisition of the licences that libraries and similar cultural institutions need to digitise and put on line an important part of their archives (i.e. the books and learned journals in their collections which are out-of-commerce).

The MoU on out-of-commerce works stems from the Digital Agenda for Europe and the more recent Communication on a Single Market for Intellectual Property Right. This non-legislative initiative is complementary to the Commission’s adopted legislative proposal on orphan works. The EU Directive on Orphan Works says:

This Directive is without prejudice to specific solutions being developed in the Member States to address larger mass digitisation issues, such as in the case of so-called 'out-of-commerce' works. Such solutions take into account the specificities of different types of content and different users and build upon the consensus of the relevant stakeholders. This approach has also been followed in the Memorandum of Understanding on key principles on the digitisation and making available of out-of-commerce works, signed on 20 September 2011 by representatives of European libraries, authors,

publishers and collecting societies and witnessed by the Commission. This Directive is without prejudice to that Memorandum of Understanding, which calls on Member States and the Commission to ensure that voluntary agreements concluded between users, right holders and collective rights management organisations to licence the use of out-of-commerce works on the basis of the principles contained therein benefit from the requisite legal certainty in a national and cross-border context.

Such agreements are now possible to negotiate provided it is underpinned by national legislation.

The MoU have the features/prerequisites of an ECL but in addition the MoU has some features which you don´t find in the ECL such as

- It is sector specific, providing solutions for books and learned journals.
- It is based on voluntary licensing agreements to be negotiated in the country of first publication of the works.
- The determination of the out-of-commerce status will be decided in the country of first publication according to criteria defined by the parties.

According to the MoU a work is out of commerce when the whole work, in all its versions and manifestations is no longer commercially available in customary channels of commerce, regardless of the existence of tangible copies of the work in libraries and among the public (including through second hand bookshops or antiquarian bookshops). The method for the determination of commercial availability of a work depends on the specific availability of bibliographic data infrastructure and therefore should be agreed upon in the country of first publication of the work. Furthermore the contracting parties agree on the type and number of works covered by the Agreement and on the fact that these works are out of commerce Determination by parties whether a work is out of commerce or not shall be conducted according to the customary practices in the country of first publication of the work. Each agreement shall stipulate the steps to be taken in order to verify whether a work is out of commerce.

It is recommended represented right holders are notified individually by right holders organisations and CMO: s. The MoU includes translations but it is recognised that a specific procedure should be undertaken in order to reach the right holders in translated works.

The EU Commission adopted a recommendation in November 2011 on the digitisation and online accessibility of cultural material and digital preservation. In the recommendation the EU Commission says it encourages the setting up of dialogues involving stakeholders to achieve similar results to those achieved in the print sector with the MoU of 20 September 2011 setting “Key Principles on the Digitisation and Making Available of Out-of-Commerce Works”. Furthermore the EU Commission recommends that Member States encourage partnerships between cultural institutions and the private sector to create new ways of funding digitization of cultural material and to stimulate innovative uses of the material and creating the legal framework to underpin licensing mechanisms identified and agreed by stakeholders in the MoU. The Recommendation is a non-binding act and it aims at giving policy orientations and can prepare future legislation – cp. the MoU on Orphan Works. Member States are invited to report to the European Commission on action taken in response to this recommendation 2 years after its publication and then every second year.

As mentioned above the MoU will serve as a blueprint for collective licensing agreements negotiated amongst right holders, libraries and collecting societies as well as ECL legislation in Member States in the EU. Since the MoU was signed in 2011, Member States of the EU like France, Germany and Sweden has enacted ECL legislation to enable mass digitisation and making available on the Internet and the United Kingdom has began to legislate on ECL.

The existing MoU on Out of Commerce Books and Learned Journals was the outcome of the Stakeholder dialogue the EU Commissioned initiated in 2010 and which was finalized 2011. At the very first meeting all the parties concluded that audio-visual works are so different compared to

printed material - hence audio-visual works was not dealt with. It was understood the EU Commission would have a separate Stakeholder dialogue regarding AV-Works. The EU Commission initiated such a dialogue in February 2013. In addition the EU Commission initiated a dialogue on other topics such as text and data mining and user generated content. Text and Data Mining is very technical and I would argue IT security issues will be more of a challenge compared to copyright. Google Settlement 1.0 provided for a licenses including non-consumptive use, i.e. text mining). Under Google settlement 1.0 the copyright protected works Google had digitized would have been made open to in-depth textual analysis by researchers. It's called "non-consumptive" research, as researchers wouldn't be reading, or consuming, the material; they would simply be analysing text—from simple repetitions of words to far more complex linguistic structures. It would allow analysis that would be logistically impossible with physical books.

All of this form part of the EU Commissions strategy Licences for Europe, which cover more or less all of the aspects of the Google settlement. Could Licences for Europe also be Licences for the World? Will this be the beginning of a new era in Copyright?

The situation in the USA

On March 22, 2011, the U.S. District Court for the Southern District of New York rejected a proposed settlement in the copyright infringement litigation regarding Google's mass book digitization project. The court found that the settlement would have encroached upon Congress's ability to set copyright policy with respect to orphan works. Or as the Ministry of Justice puts it “it is a bridge too far”.

In the recent federal court decision by the United States District Court Southern District of New York in the Authors Guild v. Hathitrust case, the court conclude that the Authors Guild lack Statutory Standing under US Law. The Court also concludes that the foreign CMO: s does have Statutory Standing under foreign law.

Thus these decisions illustrate the need for legislation in the US.

The Copyright Office has issued a notice of inquiry on Orphan Works and Mass Digitization and the request for public comments. As far as Fair Use is concerned it is confined to the jurisdiction of US courts, i.e. not applicable across borders and hence it does not meet the demand for cross border access to copyright protected works. Will the EU Soft Law solution (MoU) underpinned by national legislation trigger the US to introduce the same kind of solution? In February 2013, the U.S. Copyright Office and the Kernochan Center sponsored a symposium at Columbia Law School exploring these issues. A year before Professor Robert Darnton, Harvard Library, addressed the same problem and referred to the Scandinavian way of clearing rights, i.e. ECL.

The situation in Australia

The Australian Law Reform Commission (ALRC) released in June 2013 a Discussion Paper for the copyright inquiry and refer in the document to the MoU as well as ECL http://www.alrc.gov.au/publications/11-libraries-archives-and-digitisation/mass-digitisation.

WIPO

In November 2010 at a WIPO Global Meeting on Emerging Copyright Licensing Modalities – Facilitating Access to Culture in the Digital Age stakeholders and academics such as Professor Lawrence Lessig referred to collective licensing as how to make cultural material available in the digital world and ECL was mentioned explicitly. But what kind of roll, if any, could WIPO play as far as licensing? This is yet to be seen.

Integrity / Legislation

The legislation regarding integrity as the one in the EU might very well be much a greater problem compared to Copyright. At the present Member States are negotiating a EU Law on Data protection – – the motto is "The Right to be forgotten" which is in the draft apply to all sectors, including the cultural. Is it possible that the new EU Law will marginalise the Digital Library? Will the Digital Library not be for the many but for the few and fortunate who qualify as researchers?

Who Will Bring Order To All Data?

In the EU there is directive on the reuse of public sector information. The directive is aiming at making it easier for the private sector to reuse public information, including library collections although items protected by third party copyright is excluded. The notion is that public sector information should be made available for the private sector to utilize and hence capitalize on consequently creating economical growth. But will that in effect undermine Europeana as an aggregator and at the present the Political Driving Force? This has a clear interface with the problem of finding the financial means to create and develop the digital library.

Conclusions

There are many legal restrictions that may be persieved as impediments while striving for digital access to knowledge. Is the goal – digital acceess - an illusion? As far as copyright is concerned I do not believe that is the case. Integrity issues may trigger legislation that might constitute a far bigger problem compared to copyright. The overall biggest problem in my view though is the lack of financing and to some extent non existing "business models". Given the scarce resources it is difficult to see that government will provide the necessary funding. This issue though is something which is not a legal restriction, rather than an economical one.