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The implementation of the European Copyright Directive Library lobby in France

MICHELE BATTISTI*

This paper presents a specific case, in other words, the situation in one of the 25 European countries. It goes over the more general aspects that have been presented just a moment ago by my colleague Marco Marandola on the impact for libraries of the implementation of the European Copyright Directive. I have decided to select two aspects. The first part of my paper reviews briefly the French legal background. In the second part, I stress the actions undertaken at present by libraries and documentation associations in France.

The background or a “compulsory fight”¹

*The situation in France: The French droit d’auteur: a right attached to a person*²

In France, as you know, copyright is considered first as a right attached to a person and not a right attached to a document. Anyway, when we touch on the issue of the French copyright, it’s common to consider the author as sacred.³ The aim of French copyright law is to protect the author as a natural person.

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¹ Reprise partielle du titre de l’article de Françoise Danset intitulé « La directive sur le droit d’auteur et les droits voisins : un combat nécessaire, écrit pour le numéro 6, 2004 du Bulletin des bibliothèques de France. Un numéro consacré à la liberté de l’information <http://bbf.enssib.fr/logic/asp/sommaire.asp?ID=8145>

² I must precise that the phrase “droit d’auteur” should not be translated into “copyright” because its meaning is different. Nevertheless, I will use the word copyright and not the phrase “author right” as it seems to fit also a general meaning.

³ Le sacre de l’auteur, Bernard Edelman, Paris, Le Seuil, 2004. Présentation de l’ouvrage : Notes de lecture. Documentaliste-Sciences de l’information, 2, 2005 http://www.adbs.fr/uploads/docs/3760_fr.pdf. Voir aussi : Petite histoire du droit

It's chiefly the XIXe century that has left the mark of a "*triumphant individualism*." ⁴ During this period, especially in France, the concept of moral rights asserted by an author on his work was established, as was the legal definition of copyright as a right attached to a person, and the protection of the author against publishers.

But in France if we favor the concept of the ownership of literary and artistic works, nowadays we have also moved from the "*Belles lettres*" to "*Economic assets*," as it was recently underlined by a French specialist in Intellectual Property during a conference, and now the copyright has become more of an economic concept.

Even in France, in many cases, the idea of the author as a natural person is dying, and another system is taking its place. The related rights allowed to performers, producers and broadcasting organizations have been recognized since 1985 and they are given weight.

So, if copyright is based on a balance of rights, in France one will not find some rights specifically attached to users. France does not have, for instance, a law specifically for libraries. Users' rights exist only in an indirect way, thanks to a list of exceptions to the exclusive rights that exists in the Intellectual Property Code, and to the limited term of the copyright. But, it is an unfortunate commonplace to say that the number of limits is becoming more and more restricted.⁵

A STRICT INTERPRETATION OF COPYRIGHT LAW

To throw light on this issue, I will only pick two examples. They are related to uses that we should not neglect: the quotation and the review. These are expressly recognized by French law, but in a very restricted way. Thus, on November 13, 2003, the French Supreme Court of Appeal delivered

d'auteur, Anne Latournerie, *Multitudes*, mai 2001
http://multitudes.samizdat.net/article.php3?id_article=168 ; Aux sources de la propriété intellectuelle, Anne Latournerie, *Freescape* novembre 2001,
http://www.freescape.eu.org/biblio/article.php3?id_article=109

⁴ Droit d'auteur et art contemporain. Enjeux numériques, Séverine Dusollier, Loïc Bodson, Centre de recherches informatique et Droit, mai 2003 www.mediadesk-vlaanderen.be

⁵ Les professionnels de l'information et le projet de loi sur le droit d'auteur, *Documentaliste-Sciences de l'information*, 2004, vol.41, n°6
http://www.adbs.fr/uploads/docs/3448_fr.pdf

a judgment for a case in which a television channel that had shown several works from a painter in order to promote an exhibition.⁶ Most other European countries – for example, Germany, Belgium or Luxemburg – have in their laws an exception that allows some uses in connection with reporting on current events. The European directive itself proposes this exception in its optional list.

The faculty reviewing a work could also be threatened when a group of French publishers in a charter indicates that it is not allowed to make summaries that provide too much detail. For this use, the reviewers should ask permission from right-holders.⁷ This prohibition is certainly based on the intention to include the review in a database of summaries, and the work of the reviewers would then be considered likely to be unfair competition. Thus, those who plan to summarize a work could be subject to a contract which would be absurd because the review could not be free any more. This is an aspect that is seldom highlighted.

THE FRENCH COPYRIGHT BILL

The European directive intended to harmonize various European copyright laws. This would mean that each State would accept some compromises and would change some of its preconceived ideas.⁸

THE EXCEPTIONS

But in France, only two new exceptions would be added to the existing exceptions. One of them is compulsory: the exception that applies to incidental reproductions that have no independent economic signification. The

⁶ Pour une plus grande flexibilité dans le maniement des exceptions au droit d'auteur, Christophe Geiger, *Auteurs & Media*, 2004/3

⁷ Il s'agit du GESTE (Groupement des éditeurs de service en ligne) <http://www.geste.fr>. Pour plus de détails sur notre analyse. Panorama de presse, résumé et archivage d'articles de presse en intranet. Commentaire d'une fiche publiée par le Geste, *Actualités du droit de l'information*, n°38, juillet-août 2003 http://www.adbs.fr/site/publications/droit_info/juill-aout2003.pdf

⁸ Pour une brève analyse de la directive sur le droit d'auteur, voir : La transposition de la directive sur l'harmonisation du droit d'auteur (1^{ère} partie), Michèle Battisti, *Actualités du droit de l'information*, n° 23, mars 2002 http://www.adbs.fr/site/publications/droit_info/mars2002.pdf ; La transposition de la directive sur l'harmonisation du droit d'auteur (2^{ème} partie), Michèle Battisti, *Actualités du droit de l'information*, n° 24, avril 2002 http://www.adbs.fr/site/publications/droit_info/avril2002.pdf

second exception concerns people with disabilities. But, on that point the French Bill implements the text of the Directive in an enlightened way: with very strict limits regarding the nature of the disability and the nature of the establishment that would be allowed to make those reproductions.

On the other hand – and it's a more positive aspect – some exceptions have provided for three establishments in charge of legal deposits. They could make the reproductions of copyrighted material linked to a preservation mission. It is also written that researchers – but only those that are duly accredited – could consult the works on site. The three establishments are located in Paris. On this point too, the exceptions should have been broadened.⁹

PROTECTION OF TECHNOLOGICAL MEASURES

Regarding the protection of technological measures, the French Bill protects them in the same way as in the Directive. If it is written that the exceptions could not prevent the use of allowed exceptions, this possibility has been only managed for the two new exceptions. As regards private copies, it is only indicated that the right-holders must allow one copy at least. But this could involve, for instance, that the publisher of a CD-ROM could sell two copies duly locked. In case of conflict, it is planned that arbitrators would interpose. This is a procedure that could be heavy and complicated.

In France, as in many other countries, private copies are allowed when there is fair compensation applied to the blank supports. Thus, if the technical protections are added to this system, it could involve a double payment.¹⁰ Besides, technical measures of protections also ask a question of interoperability that librarians could face. For instance, a mere conversion of a protected file downloaded from a specific website could be considered as an instance of the offense of counterfeit. And the dissemination and the publication of the source code that allows such a conversion could also be forbidden. Thus, this provision also forbids also manufacture, distribution, and the use of free software that allows access to protected works. This implies a potential attack on the freedom of expression of the authors of free software and computer scientists.

⁹ L'exception à des fins d'enseignement et de recherche, Michèle Battisti, *Actualités du droit de l'information*, n°25, mai 2002
http://www.adbs.fr/site/publications/droit_info/mai2002.pdf

¹⁰ EUCD : droit d'auteur, vers une Europe du pire ?, Marc Rees, 21 juillet 2005
http://www.pcinpact.com/actu/news/EUCD_droit_dauteur_vers_une_Europe_du_pire_.htm

THE THREE-STEP-TEST¹¹

In France, the three-step-test could be interpreted not only as a test that one should use in order to define the exceptions to the exclusive rights, but also the judge himself could use it during a case. This goes beyond what is indicated in the WIPO Treaties. Thus, in the framework of a recent trial about private copy,¹² the judge reminded that private copy is not a user right but a mere exception. To be admitted, this exception should respect the three-step-test that appears in the Bern Convention and in the TRIPS, an agreement on Intellectual Property managed by the WTO. In this trial concerning the copy of a DVD legally bought by a consumer, the judge wrote in his decision that the copy of a movie on a digital support prejudices “a kind of exploitation essential for this work, essential for the paying off of the production costs and that the payment of compensation for private copy on blank supports don’t compensate the consecutive losses.” Even if there was a later contradictory decision by the Court of Appeal, it is interesting to present this way of thinking.

A CLEAR PREFERENCE FOR CONTRACTS

In France, the Ministry of Culture encourages the use of contracts. This encouragement stands out from all the press releases and interviews. It also stands out from an agreement established between the Ministry of Culture and the Ministry of Education disseminated in March 2005.¹³

¹¹ Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder. See, for instance, SENFTLEBEN, Martin. Copyright, Limitations and the three-step Test. An analysis of the Three-Step Test in International and EC Copyright Law. Éditeur: Prof Bernt Hugenholtz. Kluwer Law International, La Haye, 2004, 340 pp.

http://portal.unesco.org/culture/fr/ev.php-URL_ID=25380&URL_DO=DO_TOPIC&URL_SECTION=201.html

¹² Copie privée : le « mystérieux test des trois étapes aux mains du juge », Laure Marino, 30 avril 2005 <http://www.lauremarino.com/blog/index.php?2005/04/30/51-font-facetrebuchet-ms-size-1-color000000copie-priveeacuttee> ; La copie privée dopée par le droit communautaire, Véronique Morot, Avocat-Publishing, 28 juin 2005 <http://www.avocats-publishing.com/La-copie-privee-dopee-par-le-droit>

¹³ Déclaration commune sur l’utilisation des œuvres et objets protégés par la propriété littéraire et artistique à des fins d’illustration des activités d’enseignement et de recherche, Ministre de l’Éducation et Ministre la Culture, Académie de Besançon, http://ia39.ac-besancon.fr/BaseIA/version2/pages/page_menu/ia2004.php?menu=com&page=4

But librarians fear that they will not be enough strong to negotiate. We can note that library consortia have been created in France, too.¹⁴ I can cite, for instance, the COUPERIN consortium for the University Libraries, or the CAREL consortium for public libraries. But, satisfactory results are difficult to obtain, and any agreement must be renegotiated at regular intervals. Journals remain expensive, especially for small libraries. Even so, they should, however, be able to negotiate access to the journals' information for the small libraries' users.

A recent study performed for the Ministry of Culture¹⁵ makes some positive overtures when it proposes that works that are no more commercially available would belong to a "grey belt." This grey belt information would be available on payment of fair compensation, with the agreement of the publishers, naturally. It has also been proposed to widen the number of libraries that would be allowed to communicate the works to the public, including the main library of each French region. Thus, a person who lives in Pau, the town where I live, would only have to go to Bordeaux – 200 km from his residence – and would not have to go all the way to Paris, as is presently the case. Besides, researchers could access the works at a distance and in the framework of a system that would be protected provided that they pay compensation. If these proposals are more interesting, we take note that they are also based on contracts and that the limits of the "grey belt" are blurred. Besides, these proposals exist in a mere report.

A DIFFERENT CHOICE IN OTHER EUROPEAN COUNTRIES

It is a little difficult to present the situation of the various European countries in a comprehensive way. It implies knowledge of the set of laws of every country, and not only the law that implements the Directive. We know that a study has been financed by the Foundation for Information Policy Research (FIPR) in the UK.¹⁶ But, it is difficult to use it because the writers

¹⁴ Consortium de bibliothèques en France, Sciences de l'information et des bibliothèques en ligne (SIBEL), ENSSIB
<http://sibel.enssib.fr/index.php?m=c&c=556>

¹⁵ La notion de zone grise, Michèle Battisti et Dominique Lahary, *Actualités du droit de l'information*, n°59, juin 2005
http://www.adbs.fr/site/publications/droit_info/adi/adi59.php

¹⁶ Fondation pour la recherche sur les politiques d'information
<http://www.fipr.org>. Guide présentant la situation dans divers pays européens,
<http://www.fipr.org/copyright/guide/> Nous avons fait présenter l'étude commanditée

had no common scheme. It should have been possible, for instance, to define precisely if an exception is managed with or without any compensation, if the compensation is a tax or remuneration, and the method used to calculate it. Nevertheless we tried to make a comparison, though it is not comprehensive.¹⁷

As has been mentioned several times in this conference, if there was a will to harmonize the various copyright laws in Europe, the European Commission appears to have given up. Finally, what was presented is just a long list of options, each of them corresponding to the legal tradition of each Member State.

But I was asked today to approach the implementation of the European Copyright Directive in other countries. I selected two countries – Germany and Belgium – because these countries have a legal system that is very close to the French one. Germany is an interesting case because this country uses Human Rights as a vehicle to provide some rights to the users.¹⁸ Regarding Belgian Law, Belgium just implemented the Directive in May 2005, and it has presented some “extensions” that are more important than the French Bill, though Belgium has the copyright system that is, without any doubt, the closest to the French system.

BELGIUM¹⁹

What is striking when we examine the Belgian revised copyright law is its long list of exceptions. In the Law of 1994, the use for the purpose of teaching and scientific research had been mentioned already. This use was broadened in the revised Law of 2005, but it adds some provisions with one or two parts of the three-step-test and generally corresponds to a legal license.²⁰

par la FIPR dans le numéro 41 de la lettre juridique de l'ADBS l'ADBS
http://www.adbs.fr/site/publications/droit_info/adi/adi47.htm#dossier

¹⁷ See, <http://droitauteur.levillage.org/spip/IMG/doc/paysdeurope-2.doc>.

¹⁸ Les droits fondamentaux, garanties de la cohérence du droit de la propriété intellectuelle ? Christophe Geiger, La Semaine Juridique, n°29, 14 juillet 2004

¹⁹ [BE] TRANSPOSITION DE LA DIRECTIVE RELATIVE AU DROIT D'AUTEUR, IRIS MERLIN [BASE DE DONNÉES D'INFORMATIONS JURIDIQUES RELATIVES AU SECTEUR AUDIOVISUEL EN EUROPE, JUILLET 2007

[HTTP://MERLIN.OBS.COE.INT/IRIS/2005/7/ARTICLE12.FR.HTML](http://merlin.obs.coe.int/iris/2005/7/article12.fr.html) ; 30 JUIN 1994. LOI RELATIVE AU DROIT D'AUTEUR ET AUX DROITS VOISINS, DOSSIER N° 1994-06-30/35, JURIDAT, [HTTP://WWW.JURIDAT.BE](http://www.juridat.be)

²⁰ 1 juin 2005 La Loi sur le Droit d'Auteur dans le monde digital, Reprobél
http://www.reprobél.be/fr/fr_main.htm

The Belgian law handled the issue of quotations in words very close to the French law, although the Belgian law was broadened because the condition of brevity found in the French law was removed from the Belgian law. Instead, only a condition of proportionality to the aims of a quote's use must be taken into consideration.

We also notice that in Belgium's revised Law of May 2005, libraries, educational establishments, museums and archives are allowed to copy works in order to preserve them, as the Directive allows it. Besides, the communication on site is allowed also for private use and is not limited only to researchers as it would be in France. Finally, in cases of use for persons with disabilities, the only limit is the proportionality to the aims in view.

GERMANY²¹

There was already an exception for the use of teaching and research in the German Law.²² Regarding teaching, the system is a bit complicated, but it allows some uses in primary and secondary schools. The exception for the use of scientific research is more interesting. Notable is the way the Germans handle the "big quotation." In certain cases, The German law allows a researcher to copy a whole work. It is important to note that the handling of quotation rights has been approved by the Constitutional Court in a case about a copy of several parts of a play from Bertolt Brecht. The Court recognized this use as being "an element that defines the intellectual and culture climate of an age."

Germany is an interesting case because the exceptions to its copyright protections are justified by the social function of the copyright. As soon as a work is communicated to the public, the link between the author and the work progressively dissociates and becomes an element of the collective heritage. There is a strong link between the copyright and fundamental rights, and it is to be hoped that this notion attracts the attention of France.

²¹ Droit d'auteur et droit du public à l'information, Christophe Geiger, Paris, Litec, IRPI, 2004. Présentation de l'ouvrage : Notes de lecture. http://www.adbs.fr/uploads/docsi/3760_fr.pdf Les limitations et exceptions au droit d'auteur, Thomas Hoeren, Résumé d'une intervention faite lors d'une colloque organisé par l'UNESCO, le 27 mai 2005 ; Germany. Country report prepared for the IFLA CLM meeting, Oslo : August : 12-19, Harald Müller (closed mailing-list)

²² Les exceptions au droit d'auteur à des fins d'enseignement et de recherche en droit allemand, Christophe Geiger, Propriétés intellectuelles, octobre 2002, n°5

In Germany, the Directive will be implemented by two laws: The first one is dated September 2003 and allows libraries to make digital works accessible to close groups of students and researchers and to make reproductions of works for disabled persons. It also prohibits any circumvention of DRM systems. A second Bill was disseminated in September 2004. The proposal concerns the citation right for on-the-spot consultation in libraries, the right of reproduction and document supply, as well as the remuneration for the public domain. Those uses would involve a fair compensation that will be managed by collective copyright societies.²³

Finally, it is important to mention the German case that presently opposes libraries and several publishers that provide an on-line delivery service of articles called SUBITO. It seems that these parties try to substitute the copyright service in return for mere compensation by contracts. There is more about this interesting case in a paper delivered in August 2005 by Uwe Rosemann during the IFLA Conference.²⁴

A MISSION TO MAINTAIN

Culture is now an essential sector of the European Economy and, according to the European Commission, copyright is a field that produces the greatest lobbying efforts, second only to the petrochemicals sector.

Some words about lobbying and French librarians: wait and see.²⁵ French librarians are not accustomed to negotiate at a political level. This can be explained by several reasons:

1. The professional culture of French librarians who are not trained to be negotiators. On the contrary, this dimension has been integrated for a long time by English-speaking professionals who

²³ Ces propositions ne donnent pas entièrement satisfaction. Voir :
« Improvements needed to the amended Copyright Act, Alliance for teaching and research-friendly provisions on user privileges, 28 avril 2004
http://www.hrk.de/eng/presse/95_1635.php

²⁴ SUBITO and German developments in copyright law, Uwe Rosemann, Congrès IFLA : Oslo, 2005, IFLA <http://www.ifla.org/IV/ifla71/papers/097e-Rosemann.pdf>

²⁵ LIBRARY CONSORTIA IN FRANCE, MICHÈLE BATTISTI, AIDA-ECIA INTERNATIONAL SEMINAR: ELECTRONIC PUBLICATIONS. A PROBLEM OF QUALITY AND ACCESS, SIENA, CERTOSA DI PONTIGNANO, AIDA-INFORMAZIONI, ANNO 17, NUMERO 3-4, LUGLIO-DICEMBRE 1999 [HTTP://AIDAINFORMAZIONI.IT/PUB/BATTISTI3499.HTML](http://AIDAINFORMAZIONI.IT/PUB/BATTISTI3499.HTML)

- are used to seeking private funds and who are relatively autonomous in their management.
2. The body of administrative rules governing French libraries is also a serious handicap. The great number of supervisory authorities in charge of libraries in France makes every amalgamation complicated.
 3. The rigid system of rules imposed on public libraries is another obstacle. A French library director is much more a subsidiary administrator than a financial manager.
 4. Centralization – a force always present in France – is paradoxically also an obstacle. One seeks to create optimal conditions for a homogeneous policy. This may encourage wait-and-see behaviour and block individual initiatives.

We can add that there is no library legislation in France and no specific use for them. The concept of private copy is denied by the collective copyright societies, as regards photocopies, for instance. On the other hand, we noticed that in Canada, the Supreme Court handed down an important decision on March 4, 2004 in a trial about photocopies made for barristers.²⁶ The Court broadly interpreted the purpose of photocopying for scientific research and has stated that reproductions on paper made by a barrister or a solicitor are “fair uses,” a concept that exists in Canadian Law. It is also true that the decision was taken about copies made on paper and that in the digital environment this concept of private copy is disappearing.

By contrast, in France, there is no right adapted to libraries’ needs. Each copy required in order to preserve a work needs an authorization, and it can be quite difficult to find the right-holders.

LOBBY AND THE FRENCH BILL²⁷

It is not only the access to information or the transmission of knowledge, but also the preservation of cultural heritage that we defend. Why stress the exceptions ? Because they are tools essential for the balance between the authors and users’ interests. They represent the introduction in

²⁶ La Cour Suprême du Canada rend une décision très importante dans le domaine des exceptions au droit d’auteur, Pascal Kamina, *Communication-Commerce électronique*, n°4, 2004.

²⁷ Les professionnels de l’information et le projet de loi sur le droit d’auteur, Michèle Battisti, *Documentaliste-Sciences de l’information*, 6, 2004
http://www.adbs.fr/uploads/docs/3448_fr.pdf ; Le site de l’interassociation des professionnels de l’information français <http://www.droitauteur.levillage.org>

the copyright law of the concept of principal freedoms and the principal interests of society.²⁸ The exceptions for the use of teaching and research allow fair access to information and are essential to nurture education and stimulate innovation.

We must also read the uses conditions not only with a view toward economics, but also include cultural concerns and the public interest. It is what has been done, in some way in Germany, a country in which the exceptions for the use of teaching and research is justified by the social function assigned to the author.

During the adoption procedure of the Copyright Directive, EBLIDA mounted a watch and actively lobbied.²⁹ EBLIDA is an umbrella association for the European association of librarians and information specialists. Now it is up to the various national associations to lobby in their countries.

In France, common position papers have been disseminated by French associations, but they have not been very influential. It is true that the debate is overwhelmed by the controversy about music downloading on P2P platforms. But after having organized an event during the « Salon du livre » in Paris, in March 2004, we began to get a hearing. A small group of persons from the various associations has come into light. An extranet and a closed mailing list have been created in order to exchange information. In March 2005, a website was opened. I know that we are not particularly inventive, but I want to show you some web pages written on a voluntary base.³⁰

OUR ACTIONS

Here are the acronyms of ten French associations gathered round this action. You will also find a petition with 2,500 signatures from August 2005: http://droिताuteur.levillage.org/spip/article.php3?id_article=24; documents about our actions can be found here: <http://droिताuteur.levillage.org/spip/>; and the five amendments to the Bill that we presented are located at: http://droिताuteur.levillage.org/spip/article.php3?id_article=49.

²⁸ Les exceptions au droit d'auteur dans l'environnement numérique : évolutions dangereuses, Mireille Buydens et Séverine Dusollier, Communication-Commerce, septembre 2001

²⁹ EBLIDA (European Bureau of Library, Information and Documentation Association) <http://www.eblida.org>

³⁰ See, Droिताuteur website <<http://www.droिताuteur.levillage.org/>>.

We also participate in meetings organized by the Ministries, in “Info Days” organized around the issue of Copyright, and in organizing other events on Copyright. For instance, the Conference of the French Library Association (ABF) that took place in June 2005 was briefly presented in “*Le Monde*.”

WE ARE NOT ALONE

Our actions are supported by important associations, like the Conférence des Présidents d’Université (CPU), the Association des maires de France, and the Fédération nationale des collectivités territoriales pour la culture (FNCC). We also hope to be supported by some Members of Parliament: those who answered favorably to our press file sent in June 2005.

THE FIGHT GOES ON ...

We fight for the voice of users to be recognized. We also fight for access for all, for information to be unrestrained for financial reasons, and for solutions, whatever they may be – exemptions, legal license, compulsory resort to collecting societies – to be reasonable and allow us to fulfill the mission given to library and the information centers. In the same way we agitate in favour of the Open access. As you can see, we have several irons in the fire! Copyright is a flexible concept and answers to copyright-related problems can be very diverse.

We also follow the actions about the Future of the WIPO and the project of a Treaty, *Access to Knowledge*.³¹ We also follow the actions of the WTO because the GATS – the Agreement on the liberalization of services – is also a cause for concern. On these two organizations, it is the IFLA that helps us to mobilize.³² Regarding the European directives, EBLIDA is of great help. The action at the national level is chiefly undertaken by librarians and information specialists on a voluntary base. Therefore it is essential to work in cooperation with international associations.

³¹ Voir entre autres les pages du site web de l’association « Consumer Project on Technology <http://www.cptech.org/a2k/>

³² Voir le site de l’IFLA <http://www.ifla.org> et plus particulièrement l’action de la commission Copyright and other Legal Matters (CLM) <http://www.ifla.org/III/clm/copyr.htm>