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Copyright exceptions and limitations relating to libraries and archives in digital era

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Abstract

This dissertation was written as part of the MA in Art Law and Economy at the International Hellenic University.

The current dissertation aims to study the copyright exceptions and limitations that are relating to libraries and archives and regulating their activities concerning copyright issues. It elaborates on the rationale behind the existence of copyright exceptions and in particular those established for libraries and archives. An attempt is made for their importance to be explained as well as the conditions in which they have been created, in an era still functioning in analogue forms. The legal framework that exist is overviewed on international and European level, examining international treaties and European directives. In addition, common law doctrines of "fair use " and "fair dealing" are compared in proportion. Further below the impact of digitization is analyzed, the affect it has in traditional copyright terms and what are the issues with private copying, the use of technological measures and how orphan works are treated. Case law is used to underline the complications that digitization has created to the application of the existing provisions and to give examples of provided clarifications by the Court of Justice of European Union. Finally a short representation is attempted of social and economic aspects of the issue and the proposal of International Federation of Library Associations and Institutions concerning the adaptation of the existing provisions.

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Introduction

“Never memorize something that you can look up.” This famous quote of probably the most influential scientific figure of the contemporary era, Albert Einstein, succeeds to summarize a belief that meant to become an actual need during our high paced and demanding times. Shifting the focus on constantly reaching for higher achievements in science, faster solutions in everyday life and a wider diversity of experiences in culture, transformed modern societies, particularly in the western world, to societies pulsating in the beat of information. The wider the access to documented knowledge, the faster and easier the progress and creation. A vast part of this knowledge is the fruit of individual creation, imprinted in various formats, the accessing of which is acknowledged as a matter of great public interest. The common benefit of "information consumption" is lying alongside the individual interest of the creators themselves that are expecting to be rewarded for their personal investment, effort and achievement, leading apparently to conflict or, to state it differently, in two opposite standpoints, none of which could possibly work in an absolute form. Copyright law provides for rules regulating the issue and while in the majority of cases is given prominence to the importance of creators' rights, of copyright holders', there are also provisions that aim to balance those with the general interest of society. This type of provisions, observed both at a national and international level, are introducing restrictions on copyright holders' rights and, therefore, are referred to as exceptions and limitations. The case of exceptions and limitations concerning libraries and archives forms the subject of this paper.

The importance of these provisions for the functionality and organizing of libraries' and archives' has been proved crucial and determining in reaching their goal. This, in turn, affects its social role and becomes a decisive factor for the public accessibility, use and interest for their material. Dissemination of information and the ensuing effects and benefits seem to be highly dependent upon the sufficiency of the

existing legal framework, as well as its compatibility with practical issues arising from technological changes and digital demand. Furthermore, the ongoing need for preservation of libraries' and archives' materials, often leads institutions to consider digitisation as a solution that still meets obstacles in outdated provisions regulating copyright.

Initially, the importance of those exceptions and limitations will be clarified by presenting the rationale behind them, the distinctiveness of the case concerning libraries and archives and the principle reasons for digitisation. Then the existing legal framework covering the issue will be examined, principally in the European Union legislation but also in other countries' legislation. Following, the way digitisation may affect traditional copyright terms will be inspected, the limits of "private use" and "communication to the public", as well as the digitisation of orphan works. Subsequently, some notable cases will be presented, their respective outcome and the possible proposals for amending legislation. Finally, a short presentation of the social and economic aspects of the issue will be attempted.

Some basics

Trying to understand Copyright purpose and pursuits, we realize its binary nature. It serves both the need for fair exploitation and the necessity of providing a motive. Creators enjoy the benefits of their individual effort, investment of time and financial resources, their personal talents, and creativity. Meanwhile, the exact exclusive nature of their rights, that prevent the use or exploitation without authorization or remuneration, consists great incentive for further creativity. Besides the personal motivation, copyright makes the whole process worth achieving, by attributing the profits to creators and allowing them to maintain themselves.

Under certain circumstances, this exclusivity in exploitation is upended and rightholders might find themselves in a position that uses of their works are accepted and permitted, considered as non-conflicting with the normal way of exploitation and not prejudicing their legitimate interests¹. There are different ways and terms used in a wide variety of legal systems establishing these off the beaten track uses. Limitations to rightholders' rights may be of a general form and receptive of multiple approaches depending on each case special characteristics. "Fair use" and "fair dealing" doctrines, both encountered in common law jurisdictions as those of United States of America and United Kingdom respectively, are examples of limitations set in general way, giving the opportunity to the Judge to decide whether the preconditions are met and determine the use as a copyright infringement or not. At European level, on the other hand, dominated by civil law jurisdictions, the limitations are embodied more specifically in provisions. Either they are dictated by general values and the spirit of the legal system, such as the restriction of "right's abuse" that would set limits to otherwise legitimate rights, or, as the concern here, they are embodied in copyright clauses. The uses are being specified, enumerated and justified by definite ratio. Such a copyright norm can be followed concerning the function and use for Libraries and Archives.

¹ Koumantos G, Stamatoudi I. , "Greek Copyright Law" ,2014 ,p 90.

According to a WIPO study over the matter of limitations and exceptions for Libraries and Archives in 2008², the function of those, is dealt with a great diversity among different countries. In some, there is no special mention in state copyright legislation. Some others provide only for a general type of provision and countries that include this type of exceptions in their system, are doing so with differences in scope and effect. In respect to European Union, within the text of Directive 2001/29/EC "on the harmonisation of certain aspects of copyright and related rights in the information society"³ is given to the Member States the discretion to establish exceptions and limitations, among others, for acts of reproduction made by "*publicly accessible libraries, educational establishment or museums or by archives*" with the precondition that this would not be affiliated with commercial interest, directly or indirectly (art 5§2c). The same stands for the right of distribution (art 5§4), requiring in both cases to "not conflict with normal exploitation and not unreasonably prejudice the legitimate interests of the right holders"(art 5§5), establishing the so-called three-step test that is valid for all exceptions and will be further analyzed later on.

As in any other case of exception, this way of regulating serves purposes of corresponding social needs. Next to rights of creators, authors, rightholders, the rights of individual users consisting a social demand, asks for attention and protection too. Libraries, as well as Archives, are institutions that have a unique social role and purpose. Throughout centuries, they have been the cradle of literal, and cultural in general, heritage by preserving works and ensuring access to the public, at least up to a level depending on the circumstances. This has been their binary goal. To help and assist people accessing their collections for reasons of work, study, research and of course for leisure and entertainment. Those institutions seem to be "gates" for knowledge and creativity, providing the raw material, that being information. Simultaneously, working constantly on managing their collections, have become irreplaceable also from the aspect of preservation. Works of past and contemporary era not only need to be viewed

² Crews Kenneth , Study on Copyright Limitations and Exceptions for Libraries and Archives (SCCR/17/2) , World Intellectual Property Organization, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109192 .

³ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, Official Journal L 167 , 22/06/2001 P. 0010 – 0019 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32001L0029> .

and accessed by current generations but also preserved and ensured for the future. Preservation already done is what allows us to enjoy them nowadays and this is exactly part of libraries' and archives' mission for the future⁴. New technologies, the use of the internet and the benefits of digital forms have created possibilities for digitisation, new ways of communication to the public, essentially access, as well as new ways of preserving, storing in various formats and even creatively re-use of their material⁵. But the digitisation is not just an option of technical scope.

Digital means have changed the way of preservation and distribution of works covered by copyright in a fundamental way. The character of use becomes wider and international, reaching multiple countries and jurisdictions. Considering, as mentioned before, the great differences among them, it seems that a new approach is needed not only to modernize the way libraries and archives link themselves to their custom, regular audiences and secure their collections but also as an effective solution for legal inconsistency that is getting more prominent in times of globalisation in commerce, finance, law and culture.

By enacting international provisions about libraries and archives, not only dissemination would be promoted but also, rightholders of works covered by copyright would be prepared and secure about their rights treatment by those institutions. Moreover, providence and an efficient assisting system could be provided for highly demanding groups of users, such as educators, researchers, students and even individuals with special conditions of sight or mobility. The transition to e-libraries and e-archives is struggling through existing limitations and exceptions, revealing not only problems but also the guiding lines for new binding principles. Whether that would be a general free use with consistency to fair practice or specifically set provisions about reproduction rights for reasons of preservation, education and research, electronic loans, special care for disabled, is a process still in debate. Limitations and exceptions, being an actual tool of balancing all kind of different interests involved, had their importance clearly underlined by the Green Paper of 2008 adopted by European

⁴ Access & Preservation, The International Federation of Library Associations and Institutions (IFLA) <http://www.ifla.org/node/5862>.

⁵ Angelopoulos Christina "The myth of European term harmonisation - 27 public domains for 27 Member States" International Review of Intellectual Property and Competition Law 2012, 43(5), 567-594.

Commission, describing its intention to "foster a debate on how knowledge for research , science and education can best be disseminated in the online environment. The Green paper aims to set out a number of issues connected with the role of copyright in the "knowledge economy" and intends to launch a consultation on these issues"⁶. Furthermore, on international level, World International Property Organisation having its own standing committee on Copyright and related rights ,acknowledging the global issue in an already digital environment is pointing out that "in order to maintain an appropriate balance between the interests of right-holders and users of protected works, copyright laws allow certain limitations on economic rights...due to the development of new technologies and the ever-increasing worldwide use of the Internet, it has been considered that the above balance between various stakeholders' interests needs to be recalibrated"⁷

⁶ Green Paper of the Commission of the European Communities on Copyright in the Knowledge Economy, Brussels , COM(2008) 466/3 http://ec.europa.eu/internal_market/copyright/docs/copyright-info/greenpaper_en.pdf .

⁷ World Intellectual Property Organization - Limitations and Exceptions <http://www.wipo.int/copyright/en/limitations/index.html> .

Evolution of Legal Framework

Libraries and equivalent archives have been existed in premature forms even since the dawn of human history, providing proof of its course and achievements and preserving it at the same time. Throughout centuries, physical materials being used had been scarce and valuable and the process itself of creating literary works had been strenuous and time-consuming. That had been determining and circumscribing of the activities that libraries had been undertaking to carry out. Copyright had not been a matter usually taken into consideration. Libraries' role was mainly the preservation and the simple rotation of the physical copies they had already in their possession. The concept of copyright and the ensuing debate about establishing exceptions for libraries' activities became relevant when certain practical, economic and political circumstances became ripe. The ability to make hard copies started to become common practice for libraries for filling their gaps and preserving their collections, also an even more frequent practice available to their users⁸. Those factors affected the history of legislative enactment accordingly to each country and also on international level. Attempting to understand the legal framework concerning copyright exceptions for libraries and archives we are about to focus firstly on international level regulation, the Berne Convention, TRIPs Agreement and WIPO Copyright Treaty, secondly on the European Union's Information Society Directive on European level, the Directive on Orphan Works and MoU on Our-of Commerce Works, and thirdly, we will look into two examples of legislation doctrines from common law tradition countries.

⁸ Ginsburg, Jane C. "Copyright without walls?: speculations on literary property in the library of the future." *Representations* (1993): 53-73 .

A. INTERNATIONALLY

I. The Berne Convention (1886, last amended in 1979)

Among the international treaties concerning copyright, the Berne Convention for the Protection of Literary and Artistic Works is probably the most notable and certainly the oldest. Dated in the last quarter of 19th century, in 1886, has been proved long-standing and resistant. Its endurance has been of course marked by multiple revisions and amendments as country members have been facing varying international conditions and ever changing ways of creation and needs of protection. The already 168 countries being adhering parties⁹, are obliged to reform their legislation concerning copyright so as to conform to Berne's preconditions, be able to join it and enjoy the common protection among its members.

Among several provisions dealing with the rights of the authors and protection of their works, Berne Convention provides for rules governing special occasions of exceptions and limitations. Only one of them has an obligatory character, that being the exception of quoting from published work and in article 10 is described the requirement to "... be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose..¹⁰. All the other cases are subject to the national legislators' discretion. Nevertheless there is no provision, even reference, which would positively allow exceptions concerning the activities of libraries and archives. As a consequence, any possible attempt for an equivalent provision to be adopted could rely only on the legal text of article 9, concerning the right of reproduction.

⁹ WIPO-Administered Treaties, Berne Convention
http://www.wipo.int/treaties/en/ShowResults.jsp?lang=en&treaty_id=15 .

¹⁰ Berne Convention for the Protection of Literary and Artistic Works , Art 10(1)
http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=283698#P144_26032 .

Article 9 and most specifically its second paragraph, introduces, in reality, a general rule, a test with three conditions that any potential exception should conform to, in order to be adopted. It is well known as the "three step test" and it had been crucial as a cornerstone for copyright exceptions worldwide as well as a model for other treaties (TRIPs Agreement, WIPO Copyright Treaty etc)¹¹. What is of our interest, is that this is the way for a possible exception for libraries or archives to be introduced and regulated.

We should point out that the acceptable exceptions are only those in respect to reproduction right since the test is embodied in the relevant article 9 and it works in relation to this. The three conditions to be abided are: firstly, to concern special cases, secondly, to not conflict with the normal exploitation of the work and lastly, to not unreasonably prejudice the legitimate interests of the author. The opinion that "special cases" should be conceived as those circumstances justifying a special purpose or public benefit, has been put forward¹². The main role of libraries, the public access to information or in other words, to knowledge, has been claimed to be as such a public interest. Nevertheless, according to a report of World Trade Organization in 2001¹³, a more faithful to text interpretation was given, asking for an exception to be of limited application or to have an exceptional scope. In other words "special" was equated with "narrow" in a quantitative or a qualitative way, thus restricting the national legislators. Normal exploitation as a second condition is rather easily conceived and an exception is expected not to restrict or compete commercially with the copyright holder. A pro rata legal-normative approach was held by the World Trade Organisation panel also for the third condition, interpreting the "legitimate interest of the right holder" as legal interests, already foreseen, recognized and sanctioned by law avoiding a broader approach of "justifiable interests" by social and public-benefit criteria¹⁴. By repeating its second condition's dictum for terms "unreasonable" and "prejudice", WTO panel

¹¹ Gervais, Daniel J. "Towards a new core international copyright norm: the reverse three-step test." *Marquette Intellectual Property Law Review* 9 (2005): 1 .

¹² Ricketson, Sam. *Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*. Centre for Commercial Law Studies, Queen Mary College: Kluwer, 1987.

¹³ World Trade Organization, "United States – Section 110(5) of the US Copyright Act -Report of the Panel", (June 15,2000) https://www.wto.org/english/tratop_e/dispu_e/1234da.pdf .

¹⁴ Gervais, Daniel J, supra note 4 .

seemed to confuse those last steps resulting in really to flexibility for the national legislators.

We could make few remarks about the three step test of article 9(2). Although it was introduced to impose limits to the too-excessive use of exceptions that could erode the protection to the authors and rightholders, it has provided a guideline through which exceptions and limitations could be adopted on national level with a relatively broad discretion. That stands for exceptions in general, including exceptions for libraries and archives although it's not based on a specific model for the particular needs of their activities. In fact, it turned out to work more as a test of proportionality, setting a borderline to what an acceptable exception would be¹⁵. The downside of its function is the dependency for its enforceability to the each individual country, as is Berne convention in whole, no matter the adherence indicated to WIPO. But the compliance became enforceable by incorporating the three step test into TRIPs Agreement¹⁶.

II. TRIPs Agreement (1994)

Included in the World Trade Organization agreements that were adopted in 1994 during the Uruguay Round was the Agreement on Trade Related aspects of Intellectual Property Rights, known as TRIPs agreement. .It incorporated the three step test, as well as other provisions of Berne Convention, with almost intact wording. What is different to the Article 13 of TRIPs Agreement, embodying the three step test, according to its phrasing, is the mandatory character of its declaration. The steps described in Berne's text as prerequisites while adopting exceptions and limitations are now required firmly as indicated by the choice of words "Members shall confine.."¹⁷. Also, the subject of

¹⁵ Open Society Institute (OSI) Hugenholtz, P. Bernt, and Ruth Okediji. "Conceiving an international instrument on limitations and exceptions to copyright." Study supported ,March 6.2008 (2012) https://www.opensocietyfoundations.org/sites/default/files/copyright_20080506.pdf .

¹⁶ Crews, Kenneth D, Study on Copyright Limitations and Exceptions for Libraries and Archives (2008) (SCCR/17/2) , The World Intellectual Property Organization (WIPO), http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=109192 .

¹⁷ World Trade Organization "Agreement on Trade-Related Aspects of Intellectual Property Rights , Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization", signed in Marrakesh, Morocco on 15 April 1994 https://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm .

interests being protected is not "authors" as creators, but a more general term, that one of "right holders" is being used. Even more critical is the fact that the test is not incorporated into a specific right's provision, as it was in article 9 of Berne convention, concerning the right of reproduction.

Most important aspect of the incorporation of the three step test into TRIPs is the fact that this is an enforceable agreement. In Part III of it, are contained provisions dealing with enforcement, general obligations as well as procedures measures and remedies. Drifted along, the three step test is being included in national statutes with the legislators showing a high degree of diligence to meet the obligations towards TRIPs and World Trade Organisation panel, either as a stand-alone statute or, as in our case of interest, as part of adopted exception for libraries¹⁸.

And finally, as a remark, the separate and stand-alone position of article 13 of TRIPs, indicates the application of it to the whole range of owner's rights. That means, in turn, that it can be applicable in cases of multiple rights involved or in cases of emerging rights of new or complicated nature and character, such as those being created in the digital era of internet.

III. WIPO Copyright Treaty (1996)

Using the ability to commit themselves with special agreements, member states of Berne Convention, few years after TRIPs, adopted a copyright treaty issued by the World Intellectual Property Organization. In reality, the character of WIPO Copyright Treaty, as it is called, was wider than confirmative of Berne's provisions. Besides repetition of the parallel way, to the three step test that countries could adopt exceptions, the main contribution to copyright law, was the introduction of "technological measures" and the provisions against their circumvention. The existence of technological measures in text, had been itself evidence of the new forms of works,

¹⁸ Crews, Kenneth D , supra note 9.

already being digital. Digital form leads ipso facto to new ways of perception of access and exploitation of works. The WCT provides for "legal protection and effective legal remedies against circumvention of technological measures"¹⁹ as long as they concern the protection of right holders. The breakthrough, was the conscious attempt to control "access" itself, disconnected from its consequences to moral or economic rights, as in digital world, access has different and more perplexed content. But also, article's 11 text, referring to restricted acts which are not "authorized by authors or permitted by law" implies the ability for some acts, although circumventing those technical measures, to be incorporated in provisions of exceptions and limitations. It is acknowledged the need, under some conditions, to limit the prohibitions to provide balance between author's rights and users that have been transfigured under the new way of digital access.

No matter the potentiality that is given for precise and detailed exceptions, according to a WIPO study, only a few of the countries having enacted the prohibition of circumvention, (twenty-six out of seventy-nine) have also enacted exceptions concerning libraries, with the rest showing hesitation²⁰.

B. THE EUROPEAN UNION

The European Union, encompassing already twenty-eight European countries, is a unique case from every aspect. Not being an international organization and still remaining far from being a federation, carries out efforts, along with convergence in other sectors, for legal harmonization among its member states. That is commonly done by issuing Directives, as a result of a long and complicated process, which member states undertake the responsibility to enact into their national legal systems by conforming those to Directive's requirements. The same also applies in the field of Copyright Law.

¹⁹ WIPO- Copyright Treaty (1996) Article 11 <http://www.wipo.int/wipolex/en/details.jsp?id=12740> .

²⁰ Crews, Kenneth D , supra note 9 .

I. European Union's Information Society Directive (D. 2001/29/EC)

Several Directives have been issued related to copyright, regulating different aspects of it such as the "Resale Right Directive"²¹, the "Software Directive"²², the "Database Directive"²³ or the "Orphan Works Directive"²⁴. Among those, comprising the European copyright law, the "InfoSoc" Directive²⁵ stands out dealing with exclusive rights, as well as different types of exceptions, essential to harmonizing.

Article 5 contain all those exceptional uses that do not need prior authorization from the right holders (although they are still subject to compliance with the three step test). Observing the exceptions, we can distinguish two types. One, mandatory exception, is provided in Article 5 concerning the copies of works made in a transient or incidental manner due to digital form and the technology required for accessing those²⁶. The rest of the exceptions are a list of exhaustive and specific on purpose, provisions, that member states are permitted to enact and incorporate in their national legislations. One of those optional exceptions pertains to libraries. In respect to the right of reproduction, the exception is described in article 5(2) as subcase (c) for "specific acts of reproduction".

In institutions granted this type of exceptions, are included libraries, archives, museums and educational establishments. Those should meet additionally two more conditions. Firstly they should be publicly accessible. This is suggestive of the width of public interest and benefit that it could justify such an exception. It does not restrict the application to public entities nor exclude private institutions. Secondly, those acts should not be committed by those entities, in order to result in economic or commercial

²¹ Directive 2001/84/EC on the resale right for the benefit of the author of an original work of art , OJ L 272, 13.10.2001, p. 32–36 , <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32001L0084>

²² Directive 2009/24/EC on the legal protection of computer programs , OJ L 111, 5.5.2009, p. 16–22 <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32009L0024> .

²³ Directive 96/9/EC on the legal protection of databases, OJ L 77, 27.3.1996, p. 20–28 <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A31996L0009> .

²⁴ Directive 2012/28/EU on certain permitted uses of orphan works Text with EEA relevance, OJ L 299, 27.10.2012, p. 5–12 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012L0028> .

²⁵ Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10–19.

²⁶ Article 5(1) of Directive 2001/29/EC.

benefit, or in parallel with such an outcome. This condition, disconnecting the exception from commercial exploitation, underlines the public interest as its only and safeguarded aim and the attempt to avoid any possible prejudice against the right holders, trying to strike a balance between those two.

Same discretion is provided for member states, under the same rationale and under same conditions for the right or distribution in article 5(4). The aforementioned three step test is basically restated with fairly the original wording of Berne Convention and TRIPs Agreement, in article 5(5) "...special cases ...that do not conflict with normal exploitation... and don't unreasonably prejudiced the legitimate interests of the rights holders". What is interesting in this case is that here, the test is described as a principle, working as a guideline for the national legislators establishing exceptions, rather than an effective tool to enforce harmonization²⁷.

And while article 3 provides for the "communication" and "making available to the public" right, establishing those for the authors as exclusive right of authorization or prohibition, in article 5(3) an exception is included for the members states to adopt concerning the ability of the libraries and the rest of the aforementioned establishments, to communicate or make available to the public, material of their collections, designated for private study or research.

Another article that is regulating and affecting exceptions and limitations is article 6 dealing with technological measures, the prohibition of their circumvention and the exception to this prohibition. Although the article tries to define what constitutes circumvention of those technological measures, it seems that according to its reasoning this is defined by the absence of authorization of the rightholders rather than the infringement of copyright itself²⁸. This is a favorable attitude against rightholders in contrast to users. It is stipulated that even in this case, the exceptions provided in article 5, including the beneficiary of paragraph 5(2)(c) (those being libraries, archives and the rest institutions as stated above) should be respected and ensured by national

²⁷ Gervais, Daniel J, supra note 4.

²⁸ Lepage, Anne. "Overview of exceptions and limitations to copyright in the digital environment." Copyright Bulletin, March (2003), The United Nations Educational, Scientific and Cultural Organization (UNESCO) <http://unesdoc.unesco.org/images/0013/001396/139696E.pdf> .

legislators implementing the directive, unless there is other contractual relations , to which is given priority. It is, therefore, restricted the effect of the application of exceptions and undermined the obligation of the member states to ensure its respect.

The truth is, an argument has been expressed about new technologies. It is claimed that they lead to new type of measures required for rights holders to be protected and that those new means would create insecurity to authors about their right and, therefore, they would be hesitant to share their material this way. A legal framework would be needed for matters to be regulated and clarified. Nevertheless, the Directive has restricted itself to terms of basic protection of intellectual property. Exclusivity to reproduction or communication rights provided in articles 2 and 3, for instance, is not actually that innovating in copyright law. The real issue has been the harmonization of national laws including digital technology and the real challenge in this, the implementation of exceptions and limitations due to the different legal background in each country²⁹.

II. Orphan Works Directive (D. 2012/28/EU)

Trying to claim consent from the respective right holders in order to achieve right clearance and avoid infringements, private users or institutions like libraries and archives may trip over material that has no information whatsoever about the right holders' identity or the rights themselves, or these could be outdated and proved non-useful. For those cases of so-called "orphan works", there has been, as part of the Digital Agenda flagship of the Europe 2020 Strategy, the adoption of the Directive on certain permitted uses of orphan works (Directive 2012/28/EU)³⁰.

²⁹Doherty Michael, Griffiths Ivor "The harmonisation of European Union copyright law for the digital age" European Intellectual Property Review. 2000, 22(1), 17-23.

³⁰ European Commission - Communication from the European Commission, Europe 2020- A European strategy for smart, sustainable and inclusive growth, COM (2010) 2020, 03.03.2010, p.12
<http://ec.europa.eu/eu2020/pdf/COMPLET%20EN%20BARROSO%20%20%20007%20-%20Europe%202020%20-%20EN%20version.pdf> .

The Orphan Works Directive³¹ covers certain cases of using orphan works when this is committed by publicly accessible libraries, archives, museums and other educational establishments and institutions in order to meet their goals and missions related to public interest. What is allowed is, the communication to the public and reproduction of orphan works, as it was provided in the InfoSoc Directive, described beforehand. The new exception is provided in article 6 entitled as "Permitted uses of orphan works"³². As in principle, those entities are bound by copyright and ought to respect the exclusive rights of the authors the same way as any other entity, the directive connects the allowed cases with aims of public interest "... in particular the preservation of, the restoration of, and the provision of cultural and educational access to, works and phonograms contained in their collection"³³.

Along with the general, public benefit that would justify the use, the directive establishes standards on the diligent search of the right holders as a compulsory requirement based on a report of a copyright working group³⁴ and a Memorandum of Understanding (2008)³⁵. That digital search should be carried out in good faith in pursuing the identification of the right holder in order for the use to be considered falling under the exception of article 6. Although this obligation is described in article 3, in practice, each member state is responsible for determining these standards. Institutions that are carrying out such diligent search in order to monitor works as orphan and take advantage of the directives provisions are also obliged to keep track of those activities in detail, recording the results of their efforts in publicly accessible databases³⁶. The directive itself provides not for a licensing system nor for a relevant mechanism for revenues since licensing is out of directive's scope. Nevertheless, existing such systems agreed to each member state, are dealt without prejudice³⁷, letting us assume that are

³¹ Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, Official Journal L 299/5, 27.10.2012.

³² Orphan Works Directive, Article 6.1.

³³ Orphan Works Directive, Article 6.2.

³⁴ European Commission - Digital Agenda for Europe, EU's High Level Expert Group on Digital Libraries, "Report on Digital Preservation, Orphan Works and Out-of-Print Works, Selected Implementation Issues" http://ec.europa.eu/information_society/newsroom/cf/itemlongdetail.cfm?item_id=3366 .

³⁵ IRIS Merlin Database- European Digital Libraries Initiative, Memorandum of Understanding on Orphan Works 4 June 2008 <http://merlin.obs.coe.int/iris/2008/7/article6.en.html> .

³⁶ Orphan Works Directive Article 3.4b .

³⁷ Orphan Works Directive, Recital 24: "This Directive is without prejudice to the arrangements in the Member

not in conflict with the role of the Directive. The fact that for unauthorized uses of orphan works, no remedies are provided, implies that copyright still applies and infringements are still encountered with same provisions.

III. Memorandum of Understanding (MoU) on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works (2011)

The case of out-of-commerce is a special one, faced up also by the libraries. Those are works that are still under the copyright protection but they are not available in commerce due to authors' and publishers' decision to not publish or sell more copies through customary ways of commerce. That used to be the print publishing channel but since the digital way of publishing became part of customary commerce, "out of commerce" includes this notion too. Libraries have encountered cases of books that were intended to be part of their digitization project as part of fulfilling their public interest goal. While publishers or authors had no interest in maintaining those editions in commerce, they were still the right holders from whom, each library, should ask for permission in order to proceed in digitizing, not being themselves the owners of copyright of their collections' material. Understanding the benefit for the European citizens to get access to material otherwise lost and the growing interest for digitization of such material, parties proceeded in an agreement negotiated amongst organizations representing libraries and publishers on one side, authors and collecting societies on the other. The difference compared to orphan works case is, that the right holder of an out-of-commerce work is known, so that a library would have no difficulty to come in contact with. The problem, in this case, is the handling of works' licensing. The final agreement that would allow the licensing, digitizing and making available to the public books and

States concerning the management of rights such as extended collective licenses, legal presumptions of representation or transfer, collective management or similar arrangements or a combination of them, including for mass digitisation”.

journals that are out-of-commerce, contained elements reflecting key principles of parties.

The agreement provides for further voluntary agreements, each time between relevant parties, configures the scope of them as well as the remuneration of the right holders that they should mutually consent to. It is clearly stated that the already existing exceptions and limitations, which ask for application, cannot be prejudiced by those agreements while it verifies the possible uses that are authorized, being commercial or not³⁸. Authors, besides the acknowledgment of their authorship, have also the right to object to actions harming their honor or reputation. As for the digital libraries themselves, every project should be wide publicized so that all right holders get full knowledge of the facts before they decide their participation, keeping the right to opt out of such an agreement. The whole process should be handled by collective management organizations that would also decide about the cross-border access of works in such digital library.

Since those works are still covered by copyright, they could only be handled through mutual agreements of the rightholders and not by a legislative initiative. Nevertheless, that MoU and the Commission's Directive on orphan works are both part of the same approach that was described in the Digital Agenda for Europe³⁹, aiming to develop digital libraries and access to cultural heritage. The phenomenon of mass digitization asks for answers, not only about the need of locating the authors for orphan works, but also about the separate, but complementary, need for licensing concerning large numbers works and rights holders.

A European Commission Initiative and a proposal for a Regulation on Copyright in the context of its "Digital Single Market Strategy" , including provisions for copyright exceptions, has been recently announced and it is described in the following chapter Digitization - title V (page 31).

³⁸ European Commission - Memorandum of Understanding (MoU) on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works , The European Bureau of Library, Information and Documentation Associations <http://www.eblida.org/activities/position-papers/making-out-of-commerce-works-available-in-eu-member-states.html> .

³⁹ European Commission - Digital Agenda: Commission outlines action plan to boost Europe's prosperity and well-being http://europa.eu/rapid/press-release_IP-10-581_en.htm?locale=en .

C. COMMON LAW TRADITION COUNTRIES

Shaping Copyright Law follows the general legal tradition of each country. While most of the European countries fall under the category of civil law tradition, there are jurisdictions of common law of great importance, due to their size and their share in copyrighted material production worldwide. Doctrines like fair dealing in United Kingdom, of fair use in United States of America, provide for different regimes for cases to be excluded from copyright protection, differentiating from exceptions and limitations system of civil law.

I. Fair Use Doctrine (United States of America)

Fair Use, a legal doctrine originated in the United States, grants legally acceptable use of copyrighted material. It does not include any list of exhaustively referenced entities, cases or acts. Instead, it considers the use of material as fair and consequently non - infringing, without the permission of the right holder in case it follows four certain criteria. According to paragraph 107 of title 17 U.S.C.⁴⁰, firstly, the character of the specific use and the purpose why it is committed. It counts in the respective balancing, whether the purpose is of commercial reasons or, for example, of educational nature. Secondly, it is examined the work itself and its own nature. Since the use is justified in the name of public benefit, there is more leeway to use part of factual works than works of fiction that have more personal character. Furthermore, due to authors right on first publication, it is far more easily proved a case of fair use when the work is already published than not. Thirdly, what is crucial is, the amount of the whole work that is protected by copyright that is being used, as well as the fact that

⁴⁰ 17 U.S.C. § 107 , Copyright Law of the United States of America and Related Laws Contained in Title 17 of the United States Code <http://copyright.gov/title17/92chap1.html> .

this could be a substantial part of the work that characterizes it. The smaller the size of the part used or the less memorable, the more probable for the use to be considered fair. Lastly, it is seriously considered the possible effect that this use might have to the value of the work, whether undermines a potential market or deprives the right holder's income, which could trigger legal procedures.

This four - factor test of fair use doctrine is intended to provide balance between the rightholders and the public benefit by allowing the dissemination and use of works of creation inside certain limits, that otherwise would be considered as infringing of the exclusive rights provided by copyright. Unlike civil law exceptions and limitations that are provided as an enumerated list of specific cases already described , sometimes even in a vague way, the only way for the doctrine to be used and for a case to be categorized as such ,is to be resolved in federal court with judge to resolve disputes ,using those factors as guidance. They always have the discretion to adapt their decision case by case and therefore the determination of the use is not as predictable as with exceptions and limitations, based on case law rather than copyright legislation.

II. Fair Dealing Doctrine (United Kingdom)

Fair dealing, which is also encountered in other common law jurisdiction of the Commonwealth, based on U.K Copyright Act of 1911⁴¹, is another approach of exception of copyright exclusivity for authors. It differs from fair use doctrine as it consists of a list of specific situations of works protected by copyright that dealing with is permitted under some requirements. "Fair dealing" is connected to specific purposes of use, unlike "fair use", and these usually are justifying teaching, using of libraries and archives,

⁴¹ Copyright Act 1911, Geo.6 5(1911) c.46 , Official Home of U.K Legislation <http://www.legislation.gov.uk/ukpga/Geo5/1-2/46/enacted> .

criticism and review.⁴² Nevertheless, there is no statutory definition of fair dealing. It is a matter of each case impression, just as in fair use doctrine.

The exception of the U.K law concerning the libraries is nowadays a separate statute that describes in detail the cases that use is allowed as fair⁴³. It has been made possible for the institutions to make copies themselves due to purposes of archiving and preservation, but also limited copying is allowed for non-commercial research and private study for the users while libraries are permitted "to offer access to copyright works on their premises at dedicated electronic terminals for research and private study"⁴⁴. The general criteria of fairness that would make a use a non-infringing one, is the necessity of the part of the worked used. No more than needed should be used. Generally, factors that are considered while assessing fairness is the purpose and character of the dealing, the amount of work used and the alternatives to such dealing , the nature and the effect of the use to the actual work used.

⁴² Gervais, Daniel J, supra note 4.

⁴³ Intellectual Property Office Online , Changes to copyright law - Exceptions to copyright: libraries, archives and museums
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/375956/Libraries_Archives_and_Museums.pdf .

⁴⁴ Exceptions to copyright: libraries, archives and museums, supra note 26.

Digitization

While monitoring the implementation of copyright legislation, predominantly of the European Union Directive in the member States, issues arise and are detected regarding their application in real, practical conditions. In the Knowledge Economy, as all those economic activities that generate values based on intellectual resources are commonly described, the dissemination of knowledge has a significantly important role. In an increasingly and more dominantly digital environment, copyright law and the exceptions that legislation provides against the exclusivity of authors' rights, is being proved of essential importance for research, education and science. The new digital form of material has also changed the way of its use, transforming therefore in practice the content of terms being used in legal texts.

Digitization, in the case of libraries, archives and other similar institutions and entities, has been introduced as an alternative way of preserving their collections of material subjected to decay, while at the same time, providing material in digital form started being a new way of making their content available to the public. Accordingly, the issues that have emerged are distinguished into two core categories. On one hand, the reproduction of the existed material and the production of new digital copies of it and on the other hand, the delivery of that already digitized material to users, libraries and archives audiences, through online procedures. Whether this new situation is compatible with the existing copyright legislation, is a matter to be examined, reviewing the provided exceptions.

I. The reproduction right

Current legal framework and more specifically the Directive 2001/29/EC on copyright, establishes an exception to the exclusive right of reproduction regarding libraries. But this exception is not a generic, blanket arrangement. Article 5(2) provides for a library exception⁴⁵ for reproduction under the condition of non-commercial, directly or indirectly, purposes. But the restriction of exceptions validity goes on, allowing the reproduction of copies not in any non-commercial act but only in specifically determined cases. The text of the provision makes a direct reference to the paragraph 5 of the same article⁴⁶, in which the codified three-step test requires the exception to be confined to "certain special cases". The specific wording leads to the assumption that reproduction and copies are allowed only when acts are considered necessary for library's or archive's preservation goals, leaving without clarification factors such as the format of these allowed copies or the legitimate number of copies able to be made. Flicking through the recitals of the Directive we point out the remark that ".. Such an exception or limitation should not cover uses made in the context of on-line delivery of protected works or other subject-matter"⁴⁷.

Maybe the common practice among libraries and archives is to keep their collections in a durable format and making hard copies, but the increasing need for accessible catalogues and search engines leads in undertaking digitization projects in an increasing pace. Converting material originally in hard copy to digital form, entails performing the act of reproduction. In fact, through the scanning process creating firstly an image and secondly a text file from it, constitutes two distinguishable phases of reproduction, if not two separate reproductions. Considering the reason of permitted exception, which is the preservation of collections in favor of public interest, institutions that are benefited, creating hard copies, should be granted the same ability for digital reproduction, regardless the means and the technology, since it is used to serve the

⁴⁵ Article 5(2)(c) of Directive 2001/29/EC.

⁴⁶ Article 5(5) of Directive 2001/29/EC.

⁴⁷ Recital 40 of Directive 2001/29/EC.

same goal⁴⁸. In such a case, however, digital copies would make sense to be treated as hard copies and strictly within the scope of preservation target.

The European Library⁴⁹, a network service through which forty eight national libraries can be accessed, as well as European Research Libraries⁵⁰, is a project dating back in 1997 that has provided useful organizational and supporting experience in launching Europeana⁵¹ another European Commission's initiative. This internet portal as well, provides search for metadata records but also for millions of digitized works including books and archival records to which it provides links and from which it assembles various collections. All this material is contributed by institutions across Europe, already digitized in their own local collections. The important aspect in these digitization projects is that material used has been characterized as part of cultural heritage and it certainly belongs to works of public domain. The institutions involved as national libraries are publicly accessible but the crucial factor has been the copyright treatment of works; those that have been digitized are not covered by it anymore. Therefore there is no question of applying the Directive and its exceptions. At the same time, private entities and their undergoing activities, which are not publicly accessible, are excluded from the advantageous provision due to their operation character of direct or indirect commercial benefit, that Article 5(2) (c) leaves out of its scope with clarity⁵².

Digitizing as a process of scanning, in order for libraries and archives to preserve their collections' content in digital format and ,therefore, to be searchable and accessible, is differentiated from providing links or indexing. Those services are related to material that is already digitized and available online and it has been decided by court that do not constitute reproduction. In the case of Google search, for example, of the most widespread search engine on the internet , that provides links to other websites even with full size images ,court has adjudicated in case "Perfect 10 vs Google and

⁴⁸ Ginsburg, Jane C. "Copyright without walls?": speculations on literary property in the library of the future." *Representations* (1993): 53-73.

⁴⁹ The European Library official site <http://www.theeuropeanlibrary.org/tel4/> .

⁵⁰ LIBER: Association of European research libraries <http://libereurope.eu/> .

⁵¹ Europeana Collections <http://www.europeana.eu/portal/> .

⁵² Green Paper - Copyright in the Knowledge Economy, Commission of the European Communities, Brussels, 16.7.2008 COM (2008) 466 final <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1452386138040&uri=CELEX:52008DC0466> .

Amazon"⁵³ that there is no infringement of reproduction right while providing search results to its users with information framed together. Framing as a term, suggests that in results, content from two sources, from Google and from third party website, appear in the same box, with Google's part of information to frame and annotate the in-link to third party content. Another digitization project ,this time in really large scale , that one of "Google Books" of Google Inc. as a private entity that started with the ambitious goal to become a universal virtual library that would provide accessibility to world's books , has come up to settling with European libraries on digitizing works of public domain , not covered by copyright⁵⁴. At the same time, after a long legal battle, the decision of the United States court over the great mass of copyrighted works that has been digitized by the project, seems to justify the corporation, but only in terms of providing snippets and quotes, non-infringing under the fair use doctrine⁵⁵.

Ultimately, digitizing as an act of reproduction of material can be benefited from Directive's exceptions, or from its equivalent in common law countries, like the fair use doctrine and be performed under the same preconditions. Things differentiated when digitization is perceived as a full-termed and comprehensive deed, including the "making available" act.

II. The right of communication to the public or making available

The digital environment of online connection has already taken over fields of everyday life such as communication, information and entertainment. Following that

⁵³Perfect 10, Inc. v. Amazon. com, Inc., Case 06-55405 , 508 F.3d 1146 (9th Cir. 2007) , United States Courts for the Ninth Circuit <http://cdn.ca9.uscourts.gov/datastore/opinions/2007/05/15/0655405.pdf> .

⁵⁴ Green Paper, supra note 52.

⁵⁵ Authors Guild v. Google Inc. No. 13-4829-cv (2d Cir. Oct. 16, 2015) , United States Court of Appeals 2nd Circuit http://www.ca2.uscourts.gov/decisions/isysquery/72ce82ab-e565-4ee8-867b-be7173782a48/2/doc/13-4829_opn.pdf .

mainstream, libraries and other establishments that maintain collections and archival material, consider and attempt in increasing pace , to offer access to their audience through digital formats and channels. That way, the physical presence at each establishment would become unnecessary and resources could be available independently of time and place. But since the communication to the public still is an exclusive right of the authors, one should examine the gap between making available through hard copies and what making available in digital form means, as well as the provided exceptions, and if there could assert an equal, proportionate application.

Among Copyright Directive's provisions, there is an exception to article's 2 right of communication to the public and right of making available. In article 5(3)(n) is defined the provided narrow scope of this exception , "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)"⁵⁶. The choice of the wording "establishments" is indicative of the intention of the legal text.

On works of printed material, communication or making available, in fact, indicates the reading of material by each user. Since the copyright protects the expression of the original ideas and creations of each author and not the means in which those are embodied, reading causes no issues of copyright. On the contrary, reading a text in digital format creates copyright implications. "Looking" in this case means viewing on screen, a process in reality, which requires sorting on computer's memory, parts of or the whole work in reference. Even after erasing this work from the temporary memory, the temporary storage retains the character of reproduction, as copyright law has determined⁵⁷ as a restricted act "the permanent or temporary reproduction of a computer program by any means and in any form, in part or in whole; in so far as loading, displaying, running, transmission or storage of the computer program necessitate such reproduction, such acts shall be subject to authorization by the right holder". An

⁵⁶ Article 5(3)(n)) of Directive 2001/29/EC .

⁵⁷ Article 4 (a) Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs OJ L 111, 5.5.2009, p. 16–22 <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32009L0024> .

exception in this case might be justified with the following reasoning. Since a permission is not required when a user is physically looking at books or other material, a sole access without creating permanent copies, could be considered as the same service provided, that of simply making available. Therefore, it would be justified under the same conditions without requiring author's permission. But the true discussion over the matter is, how this digital copy would be treated by the library, or other institution, itself.

The difference in format is reflected into its inherent availability. If any library would aim in treating digital copies as hard copies in order to be benefited by the exceptions, that automatically would mean that a copy should be available only to one user at a time, just as a hard copy would be. In reality, a digital copy can be simultaneously available to an unlimited number of users depending on the built of the network service provided by each institution. This, in turn, means that from a single digital copy multiple user copies can be produced. Under those circumstances, it would be more than expected for the authors to demand control over those reproductions whether that would be printouts or downloading, leading the institutions, under the existing legal framework, in long negotiations with copyright owners over their permission, compensation and other possible conditions on their works' digitization and any further reproductions that users could make from them. In other words, while planning a digitization project, institutions should take into account that availability to multiple users would lead to claims by the copyright owners and that availability to one user at a time could avoid any further demands unless the provided exemptions are exceeded. Making available in digital environment needs the transposing, the "translation" of those exemptions and the evaluation of their consistency to their goals.

III. Private Copying and technological measures

The exception of private copying, that is incorporated in Article 5(2)(b) of the Directive, is, in fact, an exception with different reasoning than those provided in the rest of the paragraphs. The legislator, in this case, does not exclude this type of

reproduction due to public interest so as to be potentially served this way, but, in reality, tend to see it as a technical matter that is difficult to control⁵⁸. In practice, the enforceability of the reproduction's prohibition is impossible because the end users that would commit such an infringement, would use works in a private manner. Private use, as that would be, do not interfere with commercial life and therefore cannot be detected. All these are true to the extent of using conventional material, like printed collections, whose reproduction would be more difficult with deteriorated value of the copy. The establishment of "fair compensation" in form of copyright levies, is supposed to compensate adequately for the harm that copyright owners would suffer from private copying on analogue material and equipment. Those levies do not constitute a real right to use and it would be unsound, from a legal point of view, to consider it as a right in absolute terms⁵⁹. In judicial decisions such as the one from the French Cour de Cassation in the case "Mulholland Drive" (2006)⁶⁰ has been stated that the exception for private copying "is not a right to make a private copy" and that it could not be an obstacle in the "application of technical measures intended to prevent copying" when this would affect the normal exploitation of the work by the rightful copyright owners. This leads the attention in the digital forms used already.

Through digitization, material has become more easily accessible and copied while still preserving its initial quality. At the same time, technology has come up with new ways of controlling this access and use. New technologies have made it possible for digital works to have a built-in protection system, which can monitor the access, meter the uses and demand authorization. In such way, any type of reproduction can be prevented. Article 5(2)(b) ,providing for private use exception, refers to those technological measures that may possibly be applied and are thoroughly analyzed in article 6, in which it is defined that the subject of protection is all those measures "that are designed to prevent or restrict acts... that are not authorized by the rightholders"⁶¹.

⁵⁸ Gervais, Daniel J, supra note 4.

⁵⁹ DIGITAL EUROPE - Q&A on private copying levies
http://www.digitaleurope.org/DesktopModules/Bring2mind/DMX/Download.aspx?Command=Core_Download&EntryId=815&PortalId=0&TabId=353 .

⁶⁰ Studio Canal, Universal Pictures Video France and SEV v. S. Perquin and UFC Que Choisir , Court of Cassation (1st chamber, civil section), 28 February 2006, European Audiovisual Observatory , IRIS Merlin - Audiovisual Law Information Wizard <http://merlin.obs.coe.int/iris/2006/4/article20.en.html> .

⁶¹ Article 6 (3) of Directive 2001/29/EC.

The protection, therefore, is shifted from cases of infringing acts, that require former access to a work, to cases of non-authorization that clearly benefit the copyright owners against the users and fair use. Paragraph 6(4) might stipulates that the exceptions of article 5 should be respected, but it also specifies that these provisions would not be applied in case of making available under contractual relation. The dissemination of knowledge, the fundamental reason for establishing exceptions, is obviously restricted since it is eliminated the ability to access on the outset. Types of private use possible in analogue environment are now routinely limited due to their digital form. A digital work, even if copied for solely private use, is considered potentially easily reproduced and therefore that the medium is enhancing the temptation to further reproduction.

From a policy point of view the private use, that would justify the private copy exception, does not maintain its private character. Every end user is viewed as a potential intermediate for further unauthorized dissemination. Since private copying exception is established so as the right to information to be served, the protection of copyright owners should not lead to unbalanced and excessive restriction of it. In principle, the copyright is aiming to balance different interests. The anti-circumvention measures should be used to eliminate non-legitimate uses but on the other hand, it would be sound to avoid such a strict application that would impede the knowledge society.

IV. Orphan works

The dream born under the possibilities provided by the power of digitization, the creation of digital online libraries, was what revealed and brought to the fore the special case of orphan works. Large-scale projects, such as Google Books, attempting to create a comprehensive catalogue of digitized works came up with works of unknown authorship that would not belong to the public domain⁶² and most often are not commercially exploited. They would still be protected by copyright but the details of

⁶² Afori, Orit Fischman. "The Battle Over Public E-Libraries—Taking Stock and Moving Ahead." IIC-International Review of Intellectual Property and Competition Law 44.4 (2013): 392-417.

authorship identification would be could not be detected. However such projects has been held up due to various reasons, among of which, of legal claims of groups alleging violations of copyright law. In the core of allegations would be the orphan works treatment.

The digitization of such works in order to be legitimate and reliable should handle in priority the issue of right clearance. Avoiding future implications , in case the author or right holder emerges after the use has commenced and seeks substantial infringement damages, demanding the application of copyright, would mean a great amount of time and effort for the projects as well as great cost. The struggle to locate and identify all those rights holders would become even more complex and intractable in cases of audiovisual works, sound recordings and in general collective works and works of joint authorship. Such works were of significant demand due to their value, cultural, historical or educational but they have been kept, along with books and photograph collections, underutilized in various archives, libraries and museums.

The issue emerged and had been considered both at European Union level, at national legislation level as well as in the United States. The Us copyright Office has published a report in 2006 and bills have been introduced suggesting the amendment of US code with "limitations on remedies in cases involving orphan works" but they did not advance further and any legislation has not yet be passed by the Congress. In June 2015 the Copyright Office released report entitled "Orphan Works and Mass Digitization"⁶³, examining and recommending potential solutions for the issues of orphan works and mass digitization (like Google Books project involving vast amounts of copyrighted works), implying that maybe a new bill is being planned although not yet materialized, on the steps of the failed Shawn Bentley Orphan Works Act of 2008⁶⁴. The core principle in all these initiatives is the performing of diligent search.

⁶³ Orphan Works and Mass Digitization: A Report of the Register of Copyrights, U.S. Copyright Office (2015)

<http://copyright.gov/orphan/reports/orphan-works2015.pdf> .

⁶⁴ Shawn Bentley Orphan Works Act of 2008 , THOMAS ,the Library of Congress, Bill Text Versions 110th, S.2913 <http://www.thomas.gov/cgi-bin/query/z?c110:S.2913> .

At European level, the European Commission adopted a recommendation “on the digitization and online accessibility of cultural content and digital preservation”⁶⁵ in 2006, trying to create and promote mechanisms to detect and record and create lists of orphan works. Following this initiative, a Memorandum of Understanding (MoU) on sector-specific guidelines for diligent search for rightholders to orphan works ⁶⁶ was signed on the fifth meeting of High Level Expert Group on Digital Libraries, by interested parties, libraries, archives and rightholders. A list of resources available for a search of information and other practical guidelines, for example for partnerships between libraries, archives and museums are among the solutions tried to be developed.

In 2011, the proposal for a new Directive was announced and it was aiming to the further structuring of Europeana digitizing material of from libraries, museums, archives of the public domain, to digitizing handling, and to encourage the schemes of collective licensing. Finally in 2012, the Directive 2012/28/EU "on certain permitted uses of orphan works"⁶⁷ was adopted, trying to set European rules about the digitization of orphan works and about their use on the internet. It is clarified that those exceptional uses of works, still being protected by copyright, can be made by "publicly accessible", not strictly public, institutions of affiliated interests (such as libraries, museums, archives, educational establishments and broadcasting organizations.) clearly underlining the "public interest mission" incentive.

Diligent search emerges as a decisive factor for designating which works can be included in the exceptional use and which cannot. Essentially, any institution should proceed to search for the right holders prior to any kind of use, turning to sources that considered reasonable and appropriate for each case. The relevance of sources and, therefore, the effectiveness of search as diligent is determined by each one of the

⁶⁵ European Commission Recommendation 2006/585/EC on the digitisation and online accessibility of cultural material and digital preservation, Official Journal L 236, 31 August 2006 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3A129018> .

⁶⁶ Memorandum of Understanding on Diligent search Guidelines for Orphan Works (2008) i2010 Digital Libraries, International Federation of Reproduction Rights Organisations (IFRRO), <http://www.ifrro.org/upload/documents/Memorandum%20of%20Understanding%20orphan%20works.pdf> .

⁶⁷ Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L 299, 27.10.2012, p. 5–12 <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012L0028> .

Member States, which should include at least what is described as such in the Annex of the Directive. Aiming to avoid multiple efforts, article 3⁶⁸, refers to several rules about in which Member State, a single and sufficient search should be performed. European Observatory on infringements of intellectual property rights already supports a single publicly accessible database that provides information related to orphan works contained in the collections of publicly accessible institutions that and a searchable registry⁶⁹.

Another major point to highlight, is the mutual recognition, a concept that not only supplement the "diligent search" but, in fact, essential for the proper functioning of it. In article 4 is clarified, that such identification of a work as orphan work in one Member State, should be valid and considered as recognition in all Member States. This way the avoidance of multiple searches will not cause any gaps of legal character⁷⁰.

Lastly, in article 6, the permitted uses of such works are clarified, as permitted acts of reproduction and making available to the public with direct reference to the articles of Directive 2001/29/E. The reference and the proportionate treatment of exceptions are also found in the recitals of the directive where it is underlined that "in order to promote learning and the dissemination of culture, Member States should provide for an exception or limitation in addition to those provided for in Article 5 of Directive 2001/29/EC"⁷¹.

Eventually, works that are part of collections in several European institutions, that could not be digitized and legally displayed due to lack of authorization from unknown or impossible to locate the author ,are now possible to be part of digitization projects. Pursuant to this the Greek Law 2121/1993⁷² concerning Copyright, Related Rights and Cultural Matters has been accordingly amended, introducing article 27A for Certain permitted uses of orphan works.

⁶⁸ Article 3 of Directive 2012/28/EU.

⁶⁹ Orphan Works Database EU Observatory <https://oami.europa.eu/orphanworks/>.

⁷⁰ Article 4 of Directive 2012/28/EU.

⁷¹ Recital 20 of Directive 2012/28/EU.

⁷² Law 2121/1993 Copyright, Related Rights and Cultural Matters, Official Journal A 25 1993 , O.P.I <http://www.opi.gr/index.php/en/library/law-2121-1993> .

V. European Commission Initiative for Copyright in digital era - press release December 2015

European Commission has unveiled in 2015 its vision and strategy for a Single Digital Market as one of its priorities. Trying to tear down online barriers in accordance with the "offline borders" abolishment, Commission was set out its vision about EU Copyright rules in the digital age. In a recent press release of December 2015⁷³, a proposal for Regulation was presented "on the cross-border portability of online content services", as a new type of right for EU consumers. In addition, Commission put forward copyright-related initiatives, in four major categories. Among widening the access and enhancing content portability while traveling across EU, balancing and shaping a fairer online marketplace with transparency and certainty, as well as fighting piracy, the plan also provides for regulations on exceptions to copyright rules.

The intentions described include the provision of the use of protected works without prior authorization by the rightholders on an exceptional basis, in certain circumstances. The aim will be the enhance of innovation and inclusivity, allowing researchers to use large amounts of data with advanced technological methods, educational establishments to embrace e-education and cultural institutions to engage into digitization projects. In compliance and complementary to Marrakesh Treaty, changes would allow wider access to more sources of works for people with physical disabilities. Inside this context, libraries and their activities can be directly or indirectly benefited by broadening relating exceptions' spectrum or by revising and clarifying legal norms in text, under the new "digital light".

Since the aforementioned proposals are included in a plan for a Regulation, not a Directive, in case it will be eventually adopted as such, then it will be directly applicable. The Commission's action is going to be formulated into legislative proposals "..in the next six months" while 16 initiatives overall are going to be introduced. The long-term goal seems to be clear for EU, full alignment of copyright legislation, with uniform application, with rules that "fit for purpose".

⁷³ European Commission- Commission takes first steps to broaden access to online content and outlines its vision to modernize EU copyright rules ,press release , 9 December 2015
http://europa.eu/rapid/press-release_IP-15-6261_en.htm .

The Infosoc Directive and interpretations by CJEU

The effectiveness of legislation in regulating and balancing interests as well as to what extent it reaches its objectives, are usually observed and examined in practice. Great indications of what might cause misconceptions and implications and which provisions need clarification of their true notion, are most commonly and safely found on courts' decisions, as judges are called upon to apply the law. The undermentioned cases of Court of Justice of the European Union could shed some light on the application scope of exceptions provided in the Directive 2001/29/EC for libraries and archives, and likewise, on aspects ensued from digitization.

I. Technische Universität Darmstadt v Eugen Ulmer KG (C-117 13)⁷⁴

The library of the technical university of Darmstadt owned a book in its collection by Winfried Schulze, "Einführung in die neuere Geschichte" (Introduction to Modern History), published by the publishing house of Eugen Ulmer KG. The library decided to include it in a digitization project and make it available to the public on its electronic reading posts, where users could consult, print out on paper or download it on USB stick, in parts or even in complete form. Nevertheless the number of copies provided in electronic form through these reading posts were not, at any one given time, more than the physical copies that library owned in its collection.

The publishing house, that already provided the textbook on the electronic form of e-book, made an offer to the university's library in 2009, to purchase this e-book, trying to prevent it from digitizing. The University that already was including the aforementioned textbook in its project, rejected the offer and the publisher brought an action to the Regional court of Main, asking for the interpretation of Article 5(3) (n) of

⁷⁴ C- 117/13 Technische Universität Darmstadt v. Eugen Ulmer KG ECLI:EU:C:2014:2196 [2014].

Directive 2001/29/EC and the relevant provision, paragraph 52b of German law on copyright (UrchG), arguing that digitization was not covered by the Directive's provided exception, claiming that an agreement between parts should have been reached prior of the digital use and also asking to prohibit University from digitizing the textbook at issue.

The court's judgment in 2011, held that the provision of German law should not apply nor the university should be prevented from its digitizing goal respecting the textbook at issue. Nevertheless it was decided as justifiable, to prohibit the further types of textbook's reproduction by means of printing or digital storing in USB sticks.

An appeal followed, on behalf of the university before the German Federal Court. The Court after the hearing and while considering the facts and the cited articles of Directive and German national law, formed three questions addressed to the Court of Justice of European Union and stayed the proceedings until the preliminary ruling. Firstly it asked for clarification about whether article 5(3)(n) finds application in the specific case. If an offer on behalf of rightholder towards an establishment of those mentioned in Directive's article, was enough as a condition for the work to be considered as a "subject to purchase or licensing terms". Secondly, if based on the same provision, does a Member State have the discretion to permit to those establishments to digitize their collections in order to provide them publicly through specific terminals. Lastly, it requested an answer about whether the rights entitled to the establishments by Member States could be extended to the point that would enable users of digitized works to print part or whole of them or even make a digital copy on a USB stick.

The considerations of the CJEU relating to the first question were justifying the right of university's library to benefit from the Directive exception. The plaintiff publishing house as well as other interested parties claimed that since an offer of appropriate character has been made, that was sufficient for the work to be considered as subject of "purchase or licensing" and be excluded from the application of exception of Article 5(3)(n) that states that "for purpose of research or private study...works and other subject matter not subject to purchase or licensing terms" can be made available. On the contrary the Court supported its view countering the comparison of the Directive's text wording in different languages that showed that legislation was using

the word “term”, revealing its intention to exclude works bound by contractual terms and not by offers for contracts. But its main argument was based on the rationale behind the exceptions. Invoking the recitals of the Directive, the opinion also supported by the Advocate General, was that core goal of the Directive is the dissemination of knowledge and that a different interpretation of the provisions wording, would allow any rightholder by a sole offer to prevent realizing this goal by means of digitization. Same would stand if a single offer would be sufficient to prevent establishments from communication to the public of relevant works. In such a case, a fair balance both of rightholder’s and of public's interests, could not be served and that had been the reasoning behind the restrictions contained in the provision. Demanding for contractual terms, an agreement of both interested parties, serves the fulfilling of the establishments’ mission of "knowledge dissemination". Only in case of concluded and existing licensing agreements, can a rightholder ask for ruling out of the application of the beneficial exception.

According to the second question, the Court responded again affirmatively. Understanding the act of digitization as an act of reproduction, a conversion from analogue to digital form, Court stressed that the Article 5(3)(n) is an exception of communication or making available to the public. Taking note that to be an act of communication according to Article 3(1) of Directive 2001/29 "is sufficient that those works are made available in such way that the persons forming the public may access them, irrespective of whether they avail themselves of the opportunity"⁷⁵ , the circumstances of the case described above were justifying of the act as act of communication. Then the Court made the deduction that the right of communication at issue would be left with no meaning in case the publicly accessible establishments were not allowed to digitize the works of their collections, a condition that allow persons to access them. Such right as a "specific act of reproduction" is established in Article 5(2)(c). Nevertheless the "specificity" of the acts that is required is clarified by the court. It concerns digitization of some works, not the entire collection, when this is necessary "for the purpose of making available to the users, for the purpose of research or private

⁷⁵ C-466/12 Nils Svensson and Others v Retriever Sverige AB , ECLI:EU:C:2014:76 [2014].

study by means of dedicated terminals within the establishments" and those cases may a Member State grant to publicly accessible establishments the right of digitization.

The third question of the referring court presents the greatest interest. Asking about the attributed right to the Member States to grant to the publicly accessible libraries the right to "making available", the matter rising is whether this granting covers the acts of printing or digital storing on behalf of the users of the dedicated terminals. The CJEU ruled out with clarity such a possibility. Since the act of printing on paper or digital storing on a USB stick of a work, can only be considered as a "reproduction" as described in Article 2 of the Directive and not as a "communication" of Article 3, it was considered as undisputed that such extension of the right under Article 5(3)(n) is not permitted. The scope of "necessity" embodied in the Article cannot be extended and include printing or downloading partly because these "reproductions" are not necessary during the process of making available and partially because those actions are performed by users and not by the establishments that the exception concerns. However, those acts may be still authorized. The CJEU is referring to a different type of exception that is not related to the establishments themselves but to the type of use of their works made by individuals of the public. Article 5(2) provides for cases of private use that under certain conditions can be considered as justified and permitted by national legislation. Depending on the circumstances, if the conditions of private use exception are met, especially in regard of fair compensation of the right holder, as well as the conditions of the Article 5(5) to "not unreasonable prejudice the legitimate interest of the rightholder" or to "not conflict with the normal exploitation of the work", those can be authorized. The obligation although to not conflict with legitimate interests, would possibly mean that there would be limitations to the size of the whole work allowed to be printed or downloaded.

Importance: The CJEU clarified in this case, firstly the boundaries of what would constitute a subject of a licensing agreement, crucial to exclude works of the beneficial exceptions of Directive, secondly justified the need of modern establishments to proceed to digitization projects when this is considered necessary to their mission and lastly, it connected libraries' right to offer digitized material with users' need for private use, through private copying, when those two, serve different needs.

II .Nils Svensson and Others v Retriever Sverige AB (C-466/12)⁷⁶

The applicants in the main proceedings, journalists Svensson and others had been working and publishing their articles in a Göteborg based newspaper and on its relevant website. The defendant Retriever Sverige was an operator of a website that was monitoring its clients' preferences and needs, and was providing them in accordance to those, lists of links, clickable and directing to other websites where the relevant articles were published. Among those, there were applicants' articles from newspaper's website which were published and freely accessible. Journalists claimed that it was not clear to the clients through that process that they were being redirected to another website, while on the contrary the defendant claimed that clients were aware of the fact. The applicants on their application before District Court asked for compensation, based on the use of their articles by the defendant company without authorization.

The District Court rejected their application, and on their appeal, applicants claimed that their exclusive right of "making available to the public" was infringed by Retriever Sverige website's operation and its link offering. In his defense, Retriever Sverige contended that none such action was committed, that the services provided were only indications of articles and no transmission of actual, protected work. The Court of Appeal asked for a preliminary ruling of the Court of Justice, posing four questions. Firstly, if supplying with clickable links on other's works is an act of "communication to the public" as described in Article 3(1) of Directive 2001/29. Secondly, if the existence of imposed restrictions on the works in some way or the free access to anyone, have any effect for the answer and thirdly, if the impression that is created to the users whether they directed to a different website or not, could play any role in the decision. Lastly, the Court of Appeal asked for clarification about the possibility for Member State to provide for the protection of an exclusive right like

⁷⁶ Ibid.

communication to the public, with a wider scope than what is stipulated in Article 3(1), by including more type of acts.

The CJEU considered the first three questions in combination and expressed its opinion accordingly. It elaborated on the "act of communication" and distinguished the two cumulative criteria under which an act can fall under Article 3(1) and its definition. On one hand, an "act of communication" requires an actual act of "making available" to the public in a way that makes possible to the persons to access the work, irrespectively if the opportunity is used. Under the circumstances, the court decided that providing links, clickable and redirecting to works protected by copyright, is sufficient to be regarded as "act of communication". On the other hand, this communication act has to be aiming to the public. The amount of users-clients of the website offering the link service, is considered to be indeterminate and, therefore, adequate as "public". Furthermore, case law⁷⁷ has determined that an act of "communication to the public" concerns same work, with the same technical means of the initial communication but it requires new public. The reasoning is that the authorization by the authors is given every time concerning the specific audience that can have access to them. Since the articles, in this case, were freely accessible by anyone, providing links to them was not creating any new public. Therefore, there is no communication act in the meaning of Article 3(1) and no authorization was required.

Under the certain circumstances, being freely accessible, whether it was obvious to users that the work was appearing on the same website or on a different one, was considered as irrelevant and not having any effect to the previous conclusion. . On the contrary, in case authors have restricted the public access to their works to specific audiences of subscribers, then linking to articles that otherwise would be unavailable, creates new public by circumventing those restrictions. The authorization of authors would not cover such audience and they could claim for compensation.

As for the fourth and last question, the court invoking the recitals of the Directive underlined the objectives set by it. Those would clearly be the harmonization of legislation among the Member States and along with this, the elimination of legal

⁷⁷ C-136/09 *Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireai*, ECLI:EU:C:2010:151[2010].

uncertainty for third parties. As the court pointed out, if Member States would be allowed to provide for a wider range of acts referring to Article 3 (1), the internal market would be definitely affected and the objectives of Directive would be undermined. Any bilateral agreement allowing granting wider exclusive rights does not, in fact, require so and Member States should avoid such a distortion on European level.

Importance: In conclusion the court expressed a clear view on what constitutes a "communication to the public" act when "linking" interferes, what the criteria of "new public" are and how a decisive factor in the decision could be the possible circumvention of technical means. It also clarified that the Member States are precluded from granting more extensive rights to copyright holders adopting as "communication to the public" more activities than those provided in the Directive's article.

Other dimensions of digitizing issue .IFLA proposals

I. Social and economic aspects

Within the core role of institutions, universities and other establishments that are retaining libraries and archives, we can equivalently identify the concepts of storing and preserving knowledge along with that of furnishing access to knowledge. The on growing use of digital technology has been enhancing the accessibility of all kinds of material and this phenomenon is detectable in various applications of digitization. The catalog systems of libraries are being digitized and searchable, online databases are being developed like Westlaw and LexisNexis, newspapers and magazines are already being available online under subscription system and online search engines companies are being constantly expanding and providing the widest possible range of knowledge.⁷⁸ While the means of dissemination of knowledge go through drastic changes, other dimensions besides strictly legal are worth to be taken into consideration.

Social Dimension. The internet and digital means have built communication channels all over the world, covering the widest diversity of audiences. Regardless their nationality, religion, social or financial status, people are able to communicate and express themselves. Expanding their access universally, to sources authoritative, accurate and efficient, could promote and benefit comprehension, equality, public education and political discourse. All those factors are crucial to enhancing democratic structures to societies.

While spreading the limits of audience diversity, digitization also overcomes boundaries concerning the treatment of historical and cultural heritage and accomplishments. The conversion to digital form gives the opportunity to libraries and archives to preserve effectively their valuable collections and to communicate them to

⁷⁸ Menell, Peter S. "Knowledge Accessibility and Preservation Policy for the Digital Age." *Houston Law Review* 44.4 (2007).

potentially limitless users. That way knowledge is shared about cultures and societies that are no longer bound to be local and restricted. Besides the cultural exchange itself that benefits creation, cultural expression is repeatedly shared and archived, a process that helps the vulnerable elements to escape extinction and oblivion.

Special mention ought to be done to the perspectives that digitization gives to special categories of individuals that are facing limitations to their physical abilities. Since the physical presence is no longer required in order to get information, to study or to make research, persons with mobility issues have the same opportunities in respect to the rest of the public. Same stands of course on accessing material for entertainment or other reasons. Individuals with vision issues can also be benefited as the digital form is easily and highly transformative, adjustable to their needs. That helps, not eliminating but definitely diminishing the inequality for those social groups, helping them to integrate into academic, scientific, or financial life.

Economic Dimension. The economic effects of digitization are quite complex to calculate but nevertheless, they can be traced. Starting with the relatively low cost of reproduction and storage of works, the potential supply for such a case is almost continuous and unlimited. On the contrary to analogue physical markets with finite space and money shortage, digital markets know only one boundary. That would be the amount of demand. But digitization increases also the market size since everything is available in a broader spectrum. Therefore, demand is increased too. The availability of information, that saves time and effort, leads also to highly productive research that is characterized by quality, precision and efficiency. The welfare of society is being served and enhanced.

The digitization has also another interesting economic aspect. That kind of projects do have costs of realization and more often than not, non-restricted access does not necessarily mean free of charge. While at the beginning, works might get available with a "pay-per-view" revenue model, which requires subscribers to purchase each view of the work they use, this eventually changed. The model made the process unaffordable for many users, it started to evolve and after a period of experimentation different models created more viable and sustainable. Services could be offered either free or supported by advertisement and sponsors. This is how major digitization projects have

been working, among them the Google digitization project. We should also note, that this type of economic model is harder to be implemented for books' digitization projects because users are more reluctant to purchase (in comparison to how they reacted in cases of other digital material, like music)⁷⁹.

II. The International Federation of Library Associations and Institutions (IFLA). The Treaty Proposal

As an international body, that has been founded nearly 90 years ago, IFLA has a long history of expressing the needs and representing the interests of libraries worldwide, as well as those of their users. Besides representing its members, IFLA is trying to promote high standards in services provided by libraries and also has been undertaking the briefing about what constitutes a good library and what is the importance and worth of it.

The structure and function of the organization are infused with certain common assumptions about the values that should govern the pursuing of its goals. Among others, the belief in "freedom of access to information", as declared in Universal Declaration of Human Rights, and also the belief that people need this access to be universal and unprejudiced in order to have social, economic, educational and cultural benefits. What provides assurance for this access according to IFLA is exactly the provision of services of high level and standards⁸⁰.

Concerning the limitations and exceptions for libraries and the need for adapting to the digital age, IFLA has declared its views. They are considered as fundamental as other legal norms in copyright and crucial means that help libraries to preserve and to

⁷⁹ US National Commission on Libraries and Information Science (NCLIS) - Mass Digitization: Implication for Information Policy ,Report on "Scholarship and Libraries in Transition: A Dialogue about the Impacts of Mass Digitization Projects" Symposium, , May 2006
<http://www.lib.umich.edu/mdp/symposium/NCLIS-report.pdf> .

⁸⁰ The International Federation of Library Associations and Institutions (IFLA) <http://www.ifla.org/about> .

communicate to the public, give access, to knowledge and heritage, cultural and scientific. In other words, libraries need and use exceptions and limitations as instruments to fulfill their missions.

Overviewing relevant issues, and how libraries could embrace changes and take advantage of them, IFLA has been involved and co-organized workshops. Firstly, along with Electronic Information for Libraries initiative (EIFL), to define and crystallize principles in order to facilitate libraries universally to their mission. In April 2009, a statement was released (Statement of Principles on Copyright Exceptions and Limitations for Libraries and Archives⁸¹), asserting that libraries should be allowed to make copies of copyright works to all media or formats, no matter if they are published or not, for purposes of preservation and proactively when there is danger of deterioration, damage or loss. It was also asserted that there should be a free use exception to be generally applied to libraries, allowing private copying for private purposes such as studying and researching, and when such an exception doesn't exist, the fair use and fair dealing should be extended to libraries' activities. Additionally, there were two more principles noted, related to the libraries: the demand for consistency of the copyright term to the Berne Convention, so as the time limit for the works to enter the public domain not to be extended and also, the permission for libraries to not be bound by restrictions such as technological protection measures or licensing that in reality restrict that use of copyright exceptions and prevent other lawful uses.

Later in 2009, during its World Library and Information Congress in Milan, those principles were approved, and a working group was summoned appointed to create an instrument, a proposal based on those principles. Following consultation with various parties, librarians, specialized and knowledgeable individuals and representatives of Member States, the working group drafted a treaty proposal⁸², which was offered for consideration to the Member States of WIPO.

⁸¹ Statement of Principles on Copyright Exceptions and Limitations for Libraries and Archives , IFLA (2009) <http://www.ifla.org/files/assets/clm/statements/statement-of-principles-sccr20.pdf> .

⁸² Treaty Proposal on Copyright Limitations and Exceptions for Libraries and Archives, Version 4.4 6(Last update December 2013) http://www.ifla.org/files/assets/hq/topics/exceptions-limitations/tlib_v4_4.pdf

The treaty proposal on "Copyright limitations and exceptions for libraries and archives" (known as TLIB) while being developed by a variety of scientific societies, copyright specialists, representatives of NGOs and of World Blind Union, it was deliberate to be used as a constructive and creative tool during the works of WIPO Standing Committee on Copyright and Related Rights (SCCR) that would work on a relevant program for exceptions and limitations between 2011 and 2012⁸³. The aim has been to inform, discuss and get support by WIPO Member States in order for all those important issues to constitute material for a binding treaty, in complementary terms with the Marrakesh Treaty⁸⁴, that would allow libraries meet their goals referring to preservation, support education and research and interlibrary material loans.

Some of the treaty proposals are pointed out in undermentioned suggestions.

- Unless otherwise provided, the treaty provides for an unencumbered application of exceptions and limitations, without remuneration provision for any type of rightholder, including authors [article 4(1)], although it leaves such treatment in the discretion of each contracting party at the ratification [article 4(2)].
- By setting "fair use" as a criterion, it provides for permission for acts of reproduction of copyrighted material, by libraries' or archives' users or by the establishments themselves under request, when those requests are related to education, research or private use purposes [article 8(1)]. In parallel, it provides for the same permission for libraries and archives for providing copies to each other under the same conditions as for users [article 8(2)].
- Under the same conditions of fair use, libraries and archives are allowed to reproduce material from their collection for preservation purposes [article 9(1)].
- A special kind of reproduction exception is also provided, for creating copies of accessible format for the benefit of peoples with disabilities [article 10] supposing there is not a profit-related basis, there is lawful access to the material

⁸³ Ibid.

⁸⁴ Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, World Intellectual Property Organization (WIPO), June 27, 2013 http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=301019 .

at issue, and works are converted in order to be accessible to the beneficiary persons, by whom can only be used, and not to create any changes to them.

- Always in the limits of preservation, research and legal uses ,an exception is provided for libraries and archives to reproduce and make available, works that have been withdrawn from public access or been retracted, under the condition that they had been communicated to the public in the past by their author.[article 11]
- An exception for producing and making available of orphan works, after a reasonable search for their rights holders and insofar they remain orphan, is also included [article 12] stating, nevertheless, that contracting parties can provide for equitable remuneration.
- Lastly, we would mention a special exception provided that allows libraries and archives to carry out translations of lawfully acquired or accessed works, in case such request is made by users, in absence of work in the requested language [article 14].

Under the prism of all issues covered by the proposals, it becomes clear that while respecting obligations against authors and rightholders, the major concern has been the role of libraries and archives, the functioning of them and their adaptation to a world more "open", fast and digital. Through the provisions is reflected the priority given to the utility for the users and the realization of this goal with exceptions and limitations as tools and legal foundation.

Conclusions

"The Three-Step Test has already established an effective means of preventing the excessive application of limitations and exceptions. However, there is no complementary mechanism prohibiting an unduly narrow or restrictive approach. For this reason, the Three-Step Test should be interpreted so as to ensure a proper and balanced application of limitations and exceptions. This is essential if an effective balance of interests is to be achieved.⁸⁵"

The above extract from the Max Planck Institute's declaration that dealt with the interpretation of the three step test seems to sum up and delineate the overall impression which is created by the study of exceptions and limitations for libraries and archives. Copyright has always been a means of protection and balance of interests. True balance and functionality are a natural consequence of providing incentives. Protecting the interests of authors and creators is vital for creation itself in the same way that protecting the public interest is vital for the emerging and the thriving of creators. The structure eventually is unveiled more complementary than a dichotomy among sides. Limitations and exceptions are the legal tools enforcing the individual and collective interests of the public. In particular, those concerning libraries and archives, found in various copyright legislations, express the importance of libraries, archives, museums and all equivalent entities to the communication and dissemination of knowledge worldwide. As the technology progress, new challenges and opportunities arise. Legislators, judges and libraries themselves seem to realize the need to readjust and update to the new standards. If the balance of interests has been challenging and somewhat leaning towards the rightholders side, in the name of protecting the creator with a step-by-step application of requirements, things get more perplexed when

⁸⁵ A Balanced Interpretation of the "Three-Step Test" in Copyright Law, Max Planck Institute for Innovation and Competition, September 1, 2008
http://www.ip.mpg.de/fileadmin/user_upload/declaration_three_step_test_final_english1.pdf.

digitization changes not only the form of material but also the meaning of its various uses. A more comprehensive, overall assessment should be made in order for libraries and archives to retain and clarify in the digital environment, the privileges that allow them to serve their mission. Technological means and controls should not diminish the existing privileges those entities and subsequently their users, the public, enjoy. While the authors' rights and ability to exploit their work should not be compromised, they should neither be technology-centric. Technological measures are used to preclude unauthorized uses but they should not end up to discriminate and deprive libraries and users of their privileges established in an analogue era. Eventually, limitations and exceptions should not remain technologically neutral. On the contrary, they should "incorporate" digitization in a way that will preserve the balance and restate, what constitutes an act of reproduction or an act of communication to the public, what can be considered as a private use in a digital library. Case law is providing clarifications about the functionality, adequacy and friction points of the existing legislation while initiatives and proposal of organizations like IFLA and WIPO exhibit the universal interest on the subject. The level of decisiveness to comprehend the situation and adjust the legal framework accordingly will determine the future form and role of libraries, along with the way knowledge is going to be perceived and disseminated.

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