Digital libraries

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Digital Libraries: any step forward?

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Digital libraries are today on the Copyright Agenda. Thanks to new ICTs, traditional libraries, may greatly contribute to preserve the European cultural heritage and to make it easier to use. Private and public entities are investing a considerable amount of effort and money in digitisation projects, which nevertheless may be frustrated because of the Copyright Law. The potential benefits of digitisation (and making available) projects and the barriers posed by the Copyright law have attracted the attention of the policymakers. During the last couple of years, first the European Commission and lately the Member States, have initiated a passionate debate on how to facilitate the running of DL projects without prejudicing the legitimate interest of the rightholders. Main concerns refer to the suitability of existing copyright limitations and to the use of the orphan or out of print works. This article will review the main legal challenges posed by Copyright Law to Digital Libraries and, more importantly, will report on the state-of-the-art in Europe, insisting on the main progress achieved during the last year as a result of the Digital Libraries Initiative.

Introduction

Exactly one year ago I wrote together with my colleague Laura Vilches an article titled "Les bibliothèques numériques et le droit d'auteur en Europe: qu'en est-il?".[1] It dealt with the legal challenges posed by Copyright Law to Digital Libraries, in the light of the Digital Libraries Initiative and the European Copyright legal framework. The following pages may be very well seen as a follow-up of that publication. Their purpose is to recall the main legal questions and, more importantly, to report on the progress achieved during the last year at European and national levels. I will start presenting the two main pieces to be considered when talking about digital libraries and copyright: the Digital Libraries Initiative (I) and the InfoSOC Directive (II). Then, I will focus on the European legal framework for limitations in favour oflibraries (III). In IV I will concentrate on the orphan and out of print words problems. My conclusions will be presented at the end of the paper (V).

I. A European Policy for Digital Libraries: The Digital Libraries Initiative

The Lisbon Agenda, adopted in 2000, aims to make Europe the most dynamic and competitive knowledge-based economy in the world by 2010.[2] A key element for the implementation of the Lisbon goals is the i2010 programme that defines the European Policy for the Information Society. As one of the flagships of the i2010 programme[3] the European Commission (hereafter EC) launches in 2005 the Digital Libraries Initiative[4] (hereinafter the DLI), aiming to make the European cultural heritage easier and more interesting to use online for work, leisure and/or study, and therefore to promote the knowledge society. At the same time, it is not needed to say that the content of the DLI is very linked to the role of traditional archives, libraries or museums: to preserve and to facilitate the access to our cultural patrimony by the general public. In fact, many – but not necessarily all – digital library projects are run by these kinds of entities.

The DLI defines the basis for a European policy on Digital Libraries. It intends to avoid the waste of resources by combining the efforts made by the Member States in this area and, to some extent, by coordinating the possible answers to the very different challenges faced by digital libraries. The first element of the DLI is the "Communication i2010: Digital Libraries" adopted in September 2005.[5] It identifies three key areas for action –

(1) *Cahiers de propriété intellectuelle*, (2007), vol. 19, nº 3, pp. 937-987.

(2) Presidency Conclusions, Lisbon European Council, 23 and 24 March 2000; accessible on http://consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.en0.htm.

(3) http://ec.europa.eu/information_society/eeurope/i2010/index_en.htm.

(4) http://ec.europa.eu/information_society/activities/digital_libraries/index_en.htm.

(5) See the "Communication i2010: Digital Libraries", COM (2005) 0465 final, 30.9.2005 (hereinafter Communication i2010), and its annexes: "Commission Staff Working Document" SEC (2005) 1194 and "Questions for the online consultation" SEC (2005) 1195. The Communication defines digital libraries as "organised col-

digitisation, digital preservation and online accessibility[6] – and highlights the financial, organisational, technical and also legal challenges faced by digital libraries. As far as the legal challenges are concerned the most problematic issue refers to Copyright. Most of the material contained in library collections is under copyright protection. Any action taken in the three areas covered by the DLI poses necessarily copyright questions. The *digitisation* of a copyright work is subjected to the copyrightholders authorisation unless a copyright limitation applies. As we will discuss in detail in III the Copyright Directive foresees the possibility of implementing in national Law limitations in favour of archives, libraries and museums. These limitations may potentially authorise the making of copies for *preservation* purposes of analogue copyrighted work as well as of the still more sensitive digital copyright material.[7] But it is up to the Member States to retain this possibility. On the other hand the on line access to copyright works also requires the copyrightholders' authorisation. The application of limitations in this area is quite limited. As stated by the European Commission, the coverage beyond public domain works by digital libraries would require either a substantial change in the Copyright legislation or agreements with rightholders.[8] Thus, efficient mechanisms for the clearance of rights become an issue for those trying to build digital repositories. A particular problem in this field is posed by the so-called orphan and out of print works. I will go back to them in IV. Finally, not directly connected to copyright, but very relevant for preservation purposes, are the different legal regimes concerning the legal deposit of cultural material.[9] However, the scope of legal deposit schemes, when existing, varies widely from country to country. Sometimes they cover dynamic online material, sometimes do not; sometimes they are built on mandatory basis, sometimes they respond to a voluntary nature.[10]

The Communication is followed by a "Public consultation on digitisation, online accessibility and digital preservation".[11] Not surprising, the most contentious issue is Copyright. Generally speaking, while copyrightholders claim the fully respect to the copyright legal framework, cultural institutions demand legal changes to facilitate their tasks. The reading of the responses to the Communication[12] makes very clear the different interests at stake, as well as the different policy options (from a contractual to a regulatory approach) to face the legal challenges posed by the DLI.[13]

Immediately after the public consultation, the EC set up a High Level Expert Group on Digital Libraries (hereinafter HLG) to advise it on how to best address the identified challenges at European level.[14] In March 2006, a Copyright Subgroup was

lections of digital content made available to the public. They can consist of material that has been digitised, such as digital copies of books and other 'physical' material from libraries and archives. Alternatively, they can be based on information originally produced in digital format."

(6) "Communication i2010", p. 3.

(7) The UNESCO Charter on the Preservation of the Digital Heritage (2003) already warns us about the threat of losing our digital patrimony. Its art. 3 states: "The world's digital heritage is at risk of being lost to posterity. Contributing factors include the rapid obsolescence of the hardware and software which brings it to life, uncertainties about resources, responsibility and methods for maintenance and preservation, and the lack of supportive legislation. Attitudinal change has fallen behind technological change. Digital evolution has been too rapid and costly for governments and institutions to develop timely and informed preservation strategies. The threat to the economic, social, intellectual and cultural potential of the heritage – the building blocks of the future – has not been fully grasped." For more information about UNESCO initiatives on E-heritage visit http://portal.unesco.org/ci/en/ev.php-URL_ID=1539&URL_DO=DO_TOPIC&URL_SECTION=201.html.

(8) "Communication" i2010, p. 6.

(9) *Vid.* also art. 8 I-II UNESCO Charter on the Preservation of the Digital Heritage: "Member States need appropriate legal and institutional frameworks to secure the protection of their digital heritage.

As a key element of national preservation policy, archive legislation and legal or voluntary deposit in libraries, archives, museums and other public repositories should embrace the digital heritage."

(10) For an overview of the digital legal deposit regulation in the European Member States see the "Commission Staff Working Document, Impact Assessment", SEC (2006)1075.

(11) "Commission Staff Working Document Annex to the Communication from the Commission i2010 Digital Libraries – Questions for online consultation", SEC (2005) 1195, Brussels, 30.9.2005.

(12) Accessible on http://ec.europa.eu/information_society/activities/digital_libraries/cultural/actions_on/consultations/online_consultation/index_en.htm.

(13) See also "Results online consultation 'i2010: digital libraries'", on http://ec.europa.eu/information_society/activities/digital_libraries/doc/results_online_consultation/en.pdf.

(14) "Commission Decision of 27 February 2006 setting up a High Level Expert Group on Digital Libraries", *O.J.* L 63, pp. 25 *et seq*, 4.3.2006. More information on the HLG on http://ec.europa.eu/information_society/activities/digital_libraries/cultural/actions_on/consultations/hleg/index_en.htm.

appointed to discuss relevant IPR issues and policy options to address them. This panel of experts groups 20 members representing different stakeholders: libraries, archives, museums, content providers, industry (*e.g.* search engines, technology providers), research organisations and the academia. The group has met several times and published different reports.[15] It terminated its mandate last June 2008 with the presentation of the "Final Report on Digital Preservation, Orphan Works and Out of Print works".[16] Very cautious with any regulatory temptation, its Final Report proposes concrete measures to be implemented by or with the direct involvement of the stakeholders. Special attention should be paid to the opinions of the HLG since they have been fully supported by the European institutions.

In August 2006 the European Commission publishes the "Recommendation on the digitisation and online accessibility of cultural material and digital preservation".[17] The fact that the European Commission has not considered the possibility of any mandatory instrument – a Directive or a Regulation – to implement the DLI might be a clue for the future actions and the policy approach. When drafting the Recommendation the Commission takes into account the responses to the public consultation as well as the first opinions of the High Level Group on Digital Libraries.[18] It refrains from introducing any regulatory action at European level. Even if in relation to some specific points it recommends the Member States to adopt legal measures – especially as regards preservation issues[19] – a preference for a contractual approach is concluded.[20][21] The Recommendation has been very welcomed by other European institutions. In its Conclusions on the Digitisation and Online Accessibility of Cultural Material, and Digital Preservation,[22] the Council invites the Member States to take different steps and defines the priority actions to reach the objectives pursued by the DLI.[23] In addition, it issues a set of recommendations intended to the European Commission.[24] It reinforces the coordination role of the EC and shows its reluctance to any change on the existing European copyright legal framework. Later on, in September 2007, the European Parliament adopts its "Resolution on i2010: towards a European digital library", giving its political support to the Initiative.[25]

II. The InfoSOC Directive

As pointed out in the previous paragraphs, Copyright Law has a significant impact on the activities run by digital libraries. At the European level, the main piece of copyright legislation is the *InfoSOC Directive*.[26] Also conceived as a centrepiece of the Lisbon Agenda,[27] the InfoSOC Directive intends to define a legal framework that promotes the development of a strong European copyright market and faces the challenges and opportunities that new technologies pose to Copyright. It also aims to comply with the duties derived from the

(15) The 16th October 2006 the Copyright Subgroup adopted an "Interim Report on digital preservation, orphan works and out-of-print works". A second report, titled "Report on Digital Preservation, Orphan Works and Out-of-Print Works, Selected Implementation Issues" was adopted the 18th April 2007.

(16) Accessible on http://ec.europa.eu/information_society/activities/digital_libraries/experts/hleg/index_en.htm.

(17) *O.J.* L 236, 31.8.2006, pp. 28-30.

(18) *Vid.* "Summary Minutes of the 1st meeting of the High Level Expert Group on Digital Libraries", 27 March 2006.

(19) See points 9-11, "Recommendation on the digitisation and online accessibility of cultural material and digital preservation".

(20) See point 6, "Recommendation on the digitisation and online accessibility of cultural material and digital preservation".

(21) These action lines are in coherence with the Impact Assessment (see *supra* note 10) accompanying the Recommendation. It evaluates the different policy options ("wait and see", "flexible coordination" and "strong top-down coordination") and states as the preferable one the so-called "flexible coordination". This policy option entails a political strategic coordination at the EU level to stimulate a joint effort by Member States and European organisations towards commonly agreed objectives and prioritise initiatives by tackling challenges of common European concern within EC programmes.

(22) "Council Conclusions on the Digitisation and Online Accessibility of Cultural Material, and Digital Preservation", O.J. C 297, 7.12.2006, pp. 1-5.

(23) See point 6 "Council Conclusions" and its Annex (points A1II, A3III and A5I-II).

(24) See point 7 "Council Conclusions" and its Annex part B.

(25) P6-TA (2007) 0416.

(26) "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", O.J. L 167, 22.6.2001, pp. 10-19.

(27) IViR, "Study on the implementation and effect in Member States' laws of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society", Part I, (2007), pp. vii-viii. Accessible on http://ec.europa.eu/internal_market/copyright/studies/studies_en.htm.

WIPO Internet Treaties.[28] The Directive incorporates three different actions. First of all, to increase the legal security and provide for high protection to the copyrightholders, it adapts the existing legal framework and harmonises the right of reproduction, communication and making available as well as the distribution right. Secondly, to ensure a secure environment for the implementation of technological protection measures and digital rights management, it grants them a legal protection. Finally, to preserve the different interests at stake, the Directive proceeds to the regulation and partial harmonisation of copyright limitations.

A. Copyright Limitations – General Issues

The harmonisation of copyright limitations was one of the most controversial issues during the adoption of the Directive. The Initial Proposal, more ambitious at this point,[29] contained 9 limitations that would become 21 in the final text. Thus, article 5 contains an exhaustive list of limitations that Member State may provide for in their national Law. Member States do not have the obligation to implement all the limitations, with the exception of that related to ephemeral reproductions.[30] With some exceptions, limitations are defined in very vague terms.[31] It not always specified in a clear way the objective and subjective conditions to enjoy limitations[32] although some guidelines may be concluded from the recitals, both in relation to the general framework for limitations[33] and to particular cases[34]. The Directive does not prejudge, as a general rule, the restriction technique to adopt limitations. So, except for the transient copy exception, the Member States may opt for free exceptions or non voluntary licences[35]. Another way of restricting the exclusive rights is the non voluntary collective management. This restriction technique has not been considered by the European Commission when formulating the European notion of limitations and exceptions. Recital 18 explicitly states that the Directive "is without prejudice to the arrangements in the Member States concerning the management of rights such as extended collective licences". The collective management is then considered as a contractual issue – a way of management the rights that does not affect exclusive rights[36] –, point that is not covered by the Direc-

(28) The *WIPO Copyright Treaty* (WCT) adopted in Geneva on 20.12.1996 and the *WIPO Performances and Phonograms Treaty* (WPPT) adopted in Geneva on 20.12.1996. See also Recital 15 InfoSOC Directive.

(29) See the Explanatory Memorandum of the "Proposal for a European Parliament and Council Directive on the harmonization of certain aspects of copyright and related rights in the Information Society" (COM (97) 628 final Brussels, 10.12.1997), Chapter 3.I.B concerning the reproduction right and its exceptions.

(30) Art. 5.1 Directive 2001/29.

(31) EC, "Green Paper on the Copyright in the Knowledge Economy", COM (2008) 466/3, p. 5. This vagueness motivated a general reservation on art. 5.2 and 3 by the French delegation in the Council meetings previous to the adoption of the Common Position. *Vid.* Council Document 5377/00 concerning the Amended proposal for a Directive of the European Parliament and of the Council on the harmonisation of certain aspects of copyright and related rights in the Information Society, p. 1, point 3. Other delegations criticised however the limited flexibility of the list and the potential infringement of the principle of subsidiarity.

(32) IViR, Study on the implementation… (2007), pp. 39 and 63.

(33) See Recitals 35, 36, 44 and 45.

(34) See Recitals 38 and 39 as regards the private copy, Recital 40 concerning the limitation in favour of libraries, Recital 42 for the illustration for teaching or scientific research limitation, etc.

(35) Nevertheless, the Directive foresees that for certain limitations – those contained in art. 5.2 a), b) and e) – the rightholders should receive fair compensation. See also Recital 35.

(36) As it may also be concluded from other European copyright provisions. See for example Recital 28 "Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission" (*O.J.* L 248, 6.10.1993, pp. 15-21), stating that "Whereas, in order to ensure that the smooth operation of contractual arrangements is not called into question by the intervention of outsiders holding rights in individual parts of the programme, provision should be made, through the obligation to have recourse to a collecting society, for the exclusive collective exercise of the authorization right to the extent that this is required by the special features of cable retransmission; *whereas the authorization right as such remains intact and only the exercise of this right is regulated to some extent, so that the right to authorize a cable retransmission can still be assigned*; whereas this Directive does not affect the exercise of moral rights". *Vid* also the Judgment of the European Court of Justice (Third Chamber) of 1 June 2006, Case C-169/05. This approach has been also adopted in the 2003/300 Commission Decision of 8 October 2002 relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement (Case No COMP/C2/38.014, IFPI "Simulcasting") (*O.J.* L 107, 30/04/2003, pp. 58-84), where it is stated that that collective administration of copyright and neighbouring rights clearly corresponds to the exercise of those rights, and not to their existence, (point 66 *in fine*).

tive[37]. On the other hand, the Directive privileges contractual solutions *vis à vis* copyright limitations. Recital 45 states that "the exceptions and limitations [...] should not, however, prevent the definition of contractual relations designed to ensure fair compensation for the rightholders insofar as permitted by national law". From this paragraph it may be concluded that in a very veiled way – on the contrary it would go against the mandatory character of limitations in some national laws – the Directive favours the promotion of contractual solutions internalising the balance of interests. Limitations contained in national laws must not prevent the conclusion of contracts in this sense. This trust on the market is made clear in the regulation of the legal interaction between limitations and technological protection measures[38].

B. The "Green Paper on Copyright in the knowledge economy"

Some of the concerns expressed in the previous paragraphs have aroused in the "Green Paper on Copyright in the knowledge economy"[39] published last July 2008 by the DG Market. The purpose of the Green Paper is to foster a debate on how knowledge for research, science and education can best be disseminated in the knowledge environment by launching a public consultation on a set of issues concerning the role of copyright in the knowledge economy.[40] This set of issues deals with copyright limitations – and specifically with limitations for libraries and archives – as well as with other relevant aspects for our topic, such as the orphan works problem. The first part of the Green Paper is about the general legal framework for copyright limitations. Starting from the contractual approach, the document examines the need of having guidelines or contractual agreements for the implementation of copyright exceptions and/or for dealing with aspects not covered by copyright exceptions. On the other hand, challenging the configuration of art. 5 Directive 2001/29, it questions about the compatibility of a close list of exceptions as regards the evolving of internet technology and about the mandatory character at least of some exceptions (!) The second part of the paper deals with very specific limitations and explicitly refers to limitations for libraries and to orphan works. I will go back to it in the following sections.

III. Limitations in favour of libraries

A. Copyright limitations for libraries

Copyright rules strike a delicate balance between public and private interests. So, while they grant exploitation rights to the authors, they also include the so-called limits – *i.e.* distinction between idea and expression, duration term, rights and subject matter definition, etc. – and limitations to these rights. Limitations in favour of libraries are found both in Copyright and *Droit d'auteur* systems. They intend, as many other copyright limitations, to facilitate the dissemination of copyrighted works and therefore the access to knowledge. The European Directive foresees some limitations explicitly in favour of libraries, archives and museums.

1. Specific limitations in favour of libraries

Art. 5.2.c) states that "Member States may provide for exceptions or limitations to the reproduction right (...) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage". According to art. 5.4, this limitation may also be applied to the right of distribution to the extent justified by the purpose of the reproduction authorised act. The Directive imposes some conditions that the Member States must respect when implementing such a limitation in national laws. It authorises only the reproduction – in analogue and digital form – but not the communication or the making available of the work. The explicit reference to specific acts prevents the Member States from adopting a blanket limitation for any kind of reproduction. National limitations in favour of libraries must be applicable only to publicly accessible libraries, educational establishments, museums or archives. Furthermore, the use must not entail direct or indirect economic or commercial advantage. This

(37) See Working Party on Intellectual Property (Copyright), Council Document 7299/99, Interinstitutional File: 97/0359(COD).

(38) See *infra* section 3 *in fine*.

(39) EC, "Green Paper on the Copyright in the Knowledge Economy", COM (2008) 466/3.

(40) *Idem*, p. 3.

last requirement may also be construed in a way that prohibits the limitation to be applied for for-profit libraries. Those digitisation projects run by private or public entities with commercial purposes are then out of the scope of art. 5.2.c).[41] Finally, the limitation does not specify the purpose of the use. Therefore it may very well serve as a basis to justify the authorisation in national provisions for preservation copies. Very importantly, the Directive neither restricts the number of copies that may be done for preservation purposes nor precludes the format shifting. This is quite significant since, due to technology evolution, preservation copies may become very fast obsolete, being needed to change the format over the time and therefore to make more than a single copy of the work. A bit later article 5.3.n) contains another limitation in favour of libraries. It concerns "the use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections". This limitation authorises the making available of copyright works, but it has been conceived in a very narrow way. It is applied to the same entities mentioned in article 2 but, different from there, it introduces some restrictions in relation to the work or subject matter: it shall deem with works belonging to the collection of the institution and it must not be applicable as regards those works subject to purchase or licence conditions. Once again, the Directive clearly states a preference for contracts. Furthermore, acts authorised by the limitation must pursue research or private study purposes. Another constraint comes from its very spatial notions: the limitation only must serve to have access to the work *on the premises of the establishments by dedicated terminals*. The user must therefore visit the library, something that sounds odd if the purpose is to enhance the Information Society. Recital 40 Directive 2001/29 states that none of these limitations must be used for covering uses made in the context of on-line delivery of protected works or other subject-matter.

2. Other limitations

Other limitations contained in the list of art. 5 may also be of relevance for libraries. This is the case, for example, of the limitation contained in art. 5.3.a) on illustration for teaching.[42] Another limitation that may be relevant for preservation purposes is the one of art. 5.2.d).[43] Nevertheless its limited scope –applicable just to the ephemeral recordings of works made by broadcasting organisations and to be maintained in official archives on the grounds of their exceptional documentary character – makes it not very useful for digital libraries projects.[44]

3. The implementation of the limitations in favour of libraries in national Law

When looking at national laws it is easy to conclude that the transposition of the limitations in favour of libraries has been made in a very different way. In relation to the art. 5.2c) main problems detected by commentators as well as by the European Commission concern the format shifting or the number of copies that may be made under the preservation limitations.[45] Sometimes national limitations are restricted to a certain category of copyrighted work. As far as art. 5.3.n) is concerned, although most of the Member States have followed literally the wording of the Directive, there are still some differences from country to country. On the other hand, the very restrictions of the limitation, the fact that it does not apply to databases and the pre-eminence of contracts make the provision of

(41) Therefore some digitisation projects like Google Book Search – despite of their undeniable social value – may not be entitled to make use of this exception. See also the "Green Paper" (nº 33), pp. 8-9.

(42) According to art. 5.3. a) Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the case of use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved.

(43) Art. 5.2.d) authorises the provision of national limitations in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted.

(44) Other limitations in favour of libraries might be implemented as a result of the Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version), *O.J.* L 376, 27/12/2006 pp. 28 -35. Art. 6 Directive 2006/115 allows the Member States to derogate from the exclusive lending right in respect of public lending, provided that at least authors obtain a remuneration for such lending. Member States may even exempt certain categories of institutions – *i.e.* non profit libraries – from the payment of the remuneration. Nevertheless, it goes without saying that it does not apply to the online environment.

(45) "Green Paper", pp. 7-8. See also the Copyright Subgroup, Final Report, p. 7.

limited utility for on line accessibility.[46] Furthermore, contractual practices in the library sector use to invade the scope of library limitations and to override their application.[47] As accurately concluded by different scholars, the lack of a real harmonisation of copyright limitations and the mosaic of library limitations may cause a legal uncertainty both for users and rightholders.[48]

B. Limitations in favour of libraries and Technological protection measures

1. Introduction

The effective application of limitations in favour of libraries may be frustrated by the use of technological protection measures (hereinafter TPM) impeding the access to, or the making of copies of, copyrighted work. After granting legal protection to TPMs, the European legislator has arbitrated a system regulating their legal intersection with copyright limitations. It is foreseen in art. 6.4 InfoSOC Directive.[49] This not-easy-to-read paragraph introduces a *safeguard clause* reducing the absolutism of the technology in relation to some limitations. It establishes the basis to introduce national mechanisms that make possible the exercise of some limitations if this is impeded by TPMs. These mechanisms shall be in place in relation to the so-called *privileged limitations*,[50] among them that related to the reproductions made by publicly accessible libraries, educational establishments, museums, or archives (art. 5.2.c)). However, art. 5.3.n), concerning the communication or making available by dedicated terminals on the premises of libraries, is not granted with the privileged status regulated by art. 6.4. On the other hand, art. 6.4 requires the beneficiary to have legal access to the work.

Therefore, national laws including limitations to the reproduction and distribution rights in favour of libraries, archives or museums – for dissemination or/and preservation purposes – shall provide for a specific regime concerning the interaction of these limitations and TPMs. Almost all Member States have included into their list of privileged limitations those related to the reproduction acts by libraries.[51] It should be noted that since these limitations must

(46) For an overview of the transposition of limitations for libraries in national Law see G. Westkamp, *The Implementation of Directive 2001/29/EC in the Member States*, (2007) part II of the IViR, *Study on the implementation…* (2007); M. Iglesias and L. Vilches, "Les bibliothèques numériques et le droit d'auteur…", pp. 949 *et seq.* (*supra* note 1); L. Guibault, "Evaluation of the directive 2001/29/EC in the digital information society", paper presented at the International Conference on Public Domain in the Digital Age (COMMUNIA Project), Louvain-la-Neuve, Belgium, June 30th and July 1st 2008, accessible on http://www.communia-project.eu/communiafiles/conf2008p_Evaluation_of_the_directive_2001-29-EC.pdf.

(47) A. Gowers, *The Gowers Review of Intellectual Property*, December 2006, p. 73. Accessible on http://www.hm-treasury.gov.uk/media/6/E/pbr06_gowers_report_755.pdf. *Vid.* also IViR, Study on the implementation… (2007), p. 149.

(48) IViR, *Study on the implementation…* (2007), pp. 39-40 y 63-64. See also L. Guibault, "Evaluation of the directive 2001/29/EC…", (note 46).

(49) "Notwithstanding the legal protection provided for in paragraph 1, in the absence of voluntary measures taken by rightholders, including agreements between rightholders and other parties concerned, Member States shall take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national law in accordance with Article 5(2)(a), (2)(c), (2)(d), (2)(e), (3)(a), (3)(b) or (3)(e) the means of benefiting from that exception or limitation, to the extent necessary to benefit from that exception or limitation and where that beneficiary has legal access to the protected work or subject-matter concerned.
A Member State may also take such measures in respect of a beneficiary of an exception or limitation provided for in accordance with Article 5(2)(b), unless reproduction for private use has already been made possible by rightholders to the extent necessary to benefit from the exception or limitation concerned and in accordance with the provisions of Article 5(2)(b) and (5), without preventing rightholders from adopting adequate measures regarding the number of reproductions in accordance with these provisions.
The technological measures applied voluntarily by rightholders, including those applied in implementation of voluntary agreements, and technological measures applied in implementation of the measures taken by Member States, shall enjoy the legal protection provided for in paragraph 1.
The provisions of the first and second subparagraphs shall not apply to works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them.
When this Article is applied in the context of Directives 92/100/EEC and 96/9/EC, this paragraph shall apply *mutatis mutandis*."

(50) Those referred in art. 5.2 a), c), d) and e); and in art. 5.3 a), b) and e) Directive 2001/29/EC. A specific regime is stated for the private copy in art. 6.4II.

(51) For a complete overview of limitations in favour of library, archives and museums and the national legal framework for TPMs, see G. Westkamp, Part II, *The Implementation of Directive 2001/29/EC…*, (2007).

only concern the reproduction right, they must not be extended to the right of making available. A very interesting question arises then: once the embedded protection has been removed, could the library make a word available according to art. 5.3.n)? The intention of the European legislator points to a negative answer, since it has excluded this provision from the privileged list of art. 6.4 and has given priority to the contractual approach (TPMs may be seen, in fact, as a "contractual" specification). The making available will be possible only if it is according with other limitations already foreseen in the privileged list, *i.e.* a limitation concerning the illustration for teaching or research. Hence, art. 6.4 will not be very useful for digital libraries, at least as far as their dissemination role in the online environment is concerned. On the contrary, the matter becomes crucial when dealing with limitations for preservation purposes. In fact the Recommendation on the digitisation and online accessibility of cultural material and digital preservation advises the Member States to "make provision in their legislation so as to allow multiple copying and migration of digital cultural material by public institutions for preservation purposes, in full respect of Community and international legislation on intellectual property rights". Even if this recommendation is more restrictive than art. 5.2.c) Directive 2001/29/EC –since the former limits the beneficiaries to public institutions– it makes clear that Member States should include in their Law specific provisions for preservation purposes, and then, according to their mandatory status, adopt the corresponding measures in order to facilitate the effective preservation of copyright work or subject matter, even if this is impeded by TPMs.

2. Voluntary agreements

The general framework designed at the European level gives primacy to the will of the rightholders. According to art. 6.4I, only if they do not adopt voluntary measures, the Law must react. Therefore the European legislator is clearly for a subsidiary system. It should be read as an invitation –sometimes in the national Law a real demand– to the market itself to create the proper conditions to exercise copyright limitations. These voluntary measures may be unilateral or derived from agreements between rightholders and other parties concerned. The intended solution seems to advance the conclusion of general agreements with representatives of the beneficiaries, *i.e.* with an association of public libraries, archives or museums. Some agreements have been already concluded in the library sector, as for example the one signed by the German National Library and the German Federation of the Phonographic Industry and the German Booksellers and Publishers Association (52) or that concluded between Dutch Publishers' Association and the Koninklijke Bibliotheek (53). However, it is important to notice that both of them are limited to National Libraries, therefore they are not applicable to other libraries, even if they are public libraries.

3. Appropriate measures in default of voluntary agreements

In the absence of voluntary measures, Directive 2001/29/EC imposes to Member States the adoption of *appropriate measures* to ensure the exercise of the privileged limitations. But the European legislator does not specify what these appropriate measures could be (54). Solutions provided in national regulations, without exhausting those advanced by the doctrine (55), are very diverse. Some states have recognised the beneficiaries a legal action before the courts (56) while others have put in place an administrative procedure (57) or looked at dispute resolution schemes (*i.e. arbitrage*, mediation or other alternative

(52) According to the information provided by IViR, *Study on the implementation…* (2007), p. 107. "The agreement deals with the circumvention of technological protection measures (TPM) such as access and copy controls on CDs, CD-ROMs, and e-books. According to the press release, the German National Library has obtained a 'license to copy' technologically protected digital content for its 'own archiving, for scientific purposes of users, for collections for schools or educational purposes, for instruction and research as well as of works that are out of print.' To avoid abuses, the library 'will check user's interest' for a copy of the technologically protected content. Further, the copies, which are subject to a fee, 'will as far as possible be personalized by a digital watermark.'" [Note: http://blogs.law.harvard.edu/ugasser/2005/01/26/german-national-library-license-to-circumvent-drm/]".

(53) Arrangement for depositing electronic publications at the Deposit of Netherlands Publications in the Koninklijke Bibliotheek (1999), available on http://www.kb.nl/dnp/overeenkomst-nuv-kb-en.pdf. This arrangement is mainly focused on the deposit of electronic publication, but it also includes specific provisions related to TPMs.

(54) IViR, *Study on the implementation…* (2007), p. 109.

(55) The legal doctrine has advanced different proposals: an invitation to negotiate and reach contractual solution, the deposit of password or analogue copies, etc. See S. Dusollier, *Droit d'auteur et protection…,* (2005), p. 172-173 and quoted bibliography.

(56) So in Belgium, Germany, Luxembourg, Spain or Sweden.

(57) Thus in Denmark, France or United Kingdom.

systems).[58] In Portugal, rightholders are obliged to the legal deposit of the means to make possible the limitations in the IGAC (Inspecção-Geral das Actividades Culturais).[59] Norwegian copyright law states that the King may decide that some institutions in the sector of archives, libraries and museums automatically receive the information necessary to ensure that the circumvention of technological protection measures to enable the legal copying is possible[60]. Some countries have even created a kind of circumvention right in favour of users when the rightholders do not comply with the Tribunal order to make available to the beneficiary the means to enjoy copyright limitations.[61]

4. Exclusion of the system

Art. 6.4IV excludes from this complicated system those works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them. It means that works made available on line by virtue of subscription licences will fall out of this safeguard clause. Therefore unless a legal deposit scheme is applied, the responsibility for long-term preservation of the copyrighted material made available online through electronic licences is with the information providers, who on the other hand have likely no interest in doing it.[62]

5. Legal Deposit

The preservation role of libraries and its relationship with technological protection measures is not always covered by traditional copyright laws, but by rules regulating the legal deposit, especially in those countries where the legal deposit is mandatory and applied to works in digital form[63]. During the last years, some countries have modified their rules in order to adjust them to the new technologies and to make possible the deposit of off line as well as on line material. But, as pointed out by the European Commission, legal deposit schemes may fall short of their useful purpose if unprotected copies are not made available by those who produce the information[64]. In order to overcome this problem, some Member States have implemented the obligation to deliver information about TPMs when depositing a work[65]. In other countries, deposit of copyrighted material is based on voluntary schemes, negotiated between national libraries and publishers. Thus in the Netherlands, where an agreement was signed in 1999 between the Dutch Publishers' Association and the Koninklijke Bibliotheek[66]. According to the

(58) In Greece, Hungary, Italy, Latvia, Lithuania and Norway.

(59) Art. 221.1 Código do Direito de Autor e dos Direitos Conexos.

(60) § 53b Act No. 2 of 12 May 1961 Relating to Copyright in Literary, Scientific and Artistic Works., with subsequent amendments, latest of 17 June 2005. In any case, the copies of works delivered for legal deposit shall be equipped with this information.

(61) This is the case in Denmark and Norway.

(62) At this point, a very interesting question to deal with is to what extent mandatory legal deposit regulations related to dynamic on line material and demanding the making available of the technical means to make preservation copies comply with art. 64IV Directive 2001/29/EC. Even if it may be debatable, I think that its art. 9 provides with enough basis to defend the legality of such regulations. According to it: "This Directive shall be without prejudice to provisions concerning in particular patent rights, trade marks, design rights, utility models, topographies of semi-conductor products, type faces, conditional access, access to cable of broadcasting services, protection of national treasures, *legal deposit requirements*, laws on restrictive practices and unfair competition, trade secrets, security, confidentiality, data protection and privacy, access to public documents, the law of contract."

(63) This is the case in Denmark, Norway and United Kingdom – For all digital works – and in Austria, France, Germany and Sweden, in relation to digital work in physical format.

(64) "Communication i2010", p. 8.

(65) For example in Denmark the section 3(2) Act on Legal Deposit of published material, after imposing the mandatory deposit of work in the same form as that in which it has been published, states that "if a work can only be made accessible by the use of technical equipment, the deposited copies must on demand from the legal deposit institution be accompanied by passwords and other information etc. necessary for gaining access to the work, producing copies of the work and making the work accessible to the general public. The person under a legal deposit obligation is entitled to demand that passwords etc. not be made available to any third party". In Finland, a bill being discussed contains a similar provision: "According to committee report discussing the revision of the Act there would be an obligation to provide the means for using and copying a work (password, computer program etc.), whenever there is an obligation to hand over a work for deposit. In case this obligation is not fulfilled, the establishment responsible for depositing the work has a statutory right to circumvent the technological measure.", G. Westkamp, Part II, *The Implementation of Directive 2001/29/EC in the Member States*, (2007), p. 202.

(66) *Vid. supra* note 53.

agreement, publishers should deposit the publications including the accompanying retrieval software and manual documentation in printed or electronic form. At the same time, so far as it is necessary for the preservation of the work, the Koninklijke Bibliotheek is allowed to copy publications, save them in another structure and undo technical security measures. Access to the publications is restricted to authorised users and remote access is completely forbidden.

C. Limitations for libraries in the Green Paper

The position of the Green Paper in relation to the limitations in favour of libraries is quite cautious. Question 8 is about the need of clarifying the scope of the exception for publicly accessible libraries, educational establishments, museums and archives with respect to format shifting and the number of copies that can be made under the exception. More importantly the Green Paper even raises the possibility of scanning of entire collections held by libraries, opening in this way some hopes for large scale digitisation projects. On the contrary, the questions related to on line accessibility are formulated in a very restrictive way. They are focused on the contractual approach without proposing any option for widening the scope of limitations for libraries. Unfortunately, this "forward-looking package" does not deal with the interaction between copyright limitations and TPMs. The status quo of the restrictive and difficult to interpret art. 6.4 and the limited room for online accessibility are then confirmed.

IV. Digital Libraries and Silent Works

If no limitation applies, the digitisation or the making available of a work requires the authorisation of the copyrightholder. Digital libraries must then seek the corresponding permission. However, in some situations permission is almost impossible to get and then copyrighted works are obliged to remain in silence. Difficulties to get permission happen for example in the case of the so-called orphan works. An orphan works situation takes place when it is impossible to identify or locate the rightholder. Such a silence may come out again in relation to out of print works, to those works that are out of the market. Unlike orphan works, the rightholders are known and even locatable, but they don't show any immediate interest in exploiting their works. Since the copyright on these works persists, and it will persist for the life of the author plus 70 years, digital libraries must not digitise or make the works available to the public. Therefore a sterile work from a commercial perspective becomes also a sterile work from a cultural one. Captivity may appear over again in the case of other abandonment situations, for example when rightholders don't reply to the request of the library. According to the current legislation the rightholder has the right not to answer, her silence is equivalent then to a negative response. In the following pages I will focus on the most problematic cases of silent works: the orphan and out of print works.

A. Orphan Works

1. Orphan Works Situations

Orphan works are copyrighted works whose owners cannot be identified or located. Therefore it is impossible to ask for permission in order to make the use. The orphan works are a problem in all creative sectors, although its scope and significance may change a lot from one sector to another. Even if the expression of orphan works has become very used, these situations might be better qualified as orphan rights. Thus, there might be cases where some but not all the rights may be considered orphan (the so-called partially orphan works); for example when dealing with works of multiple authorship: some of the rightholders are known but one or even more are not identifiable or located. Orphan work situations may also refer to unpublished works. The use of personal letters, anonymous manuscripts or unpublished photographs poses additional problems, sometimes raising privacy or moral rights issues. In fact, unpublished works are out of most of the schemes intended to facilitate the use of orphan works.

The Orphan works issue is a very hot topic on the Copyright agenda[(67)]. As it may easily be concluded, the orphan works problem has always existed; nevertheless some phenomena have contributed to make it more acute. One of them is the development of

(67) Orphan works was one of the points raised in the first documents of the DLI and discussed in depth by the HLG. Problems related to orphan works have been also discussed in the US. In January 2006, the Register of Copyrights has published a Report on Orphan Works (http://www.copyright.gov/orphan/orphan-report-full.pdf). The report has been followed by the introduction of two bills addressing the orphan works problem (the Orphan Works Act of 2008, Introduced in House of Representatives the 4th April 2008, [H.R.5889], and the Shawn Bentley Orphan Works Act of 2008, Introduced in Senate the 28th April 2008, [S.2913.IS]).

Information and Communication Technologies that have facilitated new ways of creation and dissemination and even the very existence of DL projects. Other reason is the expansion of copyright protection and terms. Changes to Copyright Law during the last years have had as a result an over-protection of copyright works or subject matter. More and more works are copyright protected, while less and less works are passing to the public domain. The best way to illustrate the relevance of the problem is with some figures: according to the statements contained in the *Gowers Review* the British Library estimates that 40% of all print works are orphan works[68] and a British project has shown that, from a total collection of photographs of 70 institutions, the percentage of photographs where the author was known was only 10%.[69]

2. Orphan Works Solutions

Even if the exact magnitude of the problem remains uncertain[70], it is undeniable that libraries, museums and archives hold in their collections an important number of orphan works. Without a specific mechanism to facilitate their use, libraries should exclude orphan works from their digitisation projects or otherwise face the risk of a lawsuit. The main consequence is not only that digitisation projects will be frustrated but also that, since the works will not be used, rightholders will not get any benefit or remuneration. Any solution to solve the orphan works problem should reverse this lose-lose strategy into a win-win strategy: it should make it easier to find the copyrightholder, facilitate the use of any orphan work and guarantee a way to grant a fair remuneration if the rightholder surfaces. In addition, it must be supported by preventive measures to prevent future orphan works. From a formal perspective policymakers may chose among different options to implement a solution for the orphan works problem. An orphan works scheme may be adopted on regulatory or selfregulatory basis. On the other hand, it may be based on an authorisation model or on a liability or security rule. A myriad of policy options – from regulatory (*i.e.* specific exception/limitations, mandatory collective management, limitation on remedies, collective agreements with or without an extended effect negotiated between representatives of users and rightholders, etc.) to selfregulatory (*i.e.* safe harbour provisions, risk management policies, securities, etc.) – is then opened to the policymaker that should assess their different advantages and disadvantages. Moreover, as it will be explained a bit later, the orphan work problem might be alleviated by means of adopting horizontal solutions instead of vertical or *ad hoc* approaches.

3. The basis for a European solution for orphan works

Before reviewing some of the *ad hoc* systems implemented or being discussed in different countries I would like to introduce the views of the European Commission and, more importantly, the work done by the Copyright Subgroup of the High Level Group on Digital Libraries to face the orphan works problem. The EC "Recommendation on the digitisation and online accessibility of cultural material and digital preservation" advises the Member States to improve the conditions for digitisation of, and online accessibility to, cultural material by creating mechanisms to facilitate the use of orphan works, as well as to promote the availability of lists of known orphan works. It is worth to say that the reaction of the Member States has been quite positive. When reading the national reports[71] concerning the implementation of the Recommendation it may be concluded that some Member States are discussing, through special commissions or working groups, about possible measures to be adopted and in some countries regulatory solutions are already on the table. However, there are still some Member States that seem not to be very active.[72] The main task of the Copyright Subgroup is to advise the EC on how to best address the copyright challenges at European level. The Copyright Subgroup does not declare itself in favour or against any regulatory/selfregulatory option being it a task on the shoulders of the Member States. At this point it only advises that any national solution should work under the principles

(68) A. Gowers, *The Gowers Review of Intellectual Property*, December 2006, p. 69. Accessible on http://www.hm-treasury.gov.uk/media/6/E/pbr06_gowers_report_755.pdf.

(69) *Idem*.

(70) Ivir, *The Recasting of Copyright & Related Rights for the Knowledge Economy*, (2006), p. 166.

(71) Published on http://ec.europa.eu/information_society/activities/digital_libraries/experts/mseg/reports/index_en.htm.

(72) See also the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions: "Europe's cultural heritage at the click of a mouse – Progress on the digitisation and online accessibility of cultural material and digital preservation across the EU". Brussels, 11.8.2008, COM (2008) 513 final, p. 6.

of interoperability and mutual recognition in order to effectively achieve the cross-border effect needed for the European digital libraries. Furthermore, it considers that all national solutions should fulfil certain principles: they should cover all orphan works, they should include guidelines on diligent search as well as provisions for withdrawal and requirements for remuneration if rightholders reappear, and they should offer a special treatment to certain cultural institutions. Thus, this Group of Experts has focused its work on a set of issues that should complement the regulatory or voluntary mechanisms to be adopted by the Member States. According to its Final Report the key elements to be contained in an overall solution for orphan works at European level should consist of a consensus on the diligent search criteria that a user needs to fulfil prior to the use of the work, the running of database(s) of orphan works to help users in their search and a rights clearance procedure and rights clearance centre(s) to grant licences when they can be offered by a mechanism set up by rightholders. (73)

4. Diligent Search Guidelines

A diligent search becomes the very first step to qualify a work as an orphan work. The elaboration of a notion of diligent research was one of the initial priorities of the Copyright Subgroup. It considered that the best way to address the issue was by enhancing a dialogue among different stakeholders. The EC invited then representatives of several rightholders and cultural institutions to sit together in order to reach an agreement on due diligence guidelines or best practices. This initiative led to the formation of 4 sectorial groups that may be seen as spin-offs of the High Level Group. (74) The meetings of these groups have concluded with the adoption in June 2008 of a "Memorandum of Understanding on Diligent Search Guidelines for Orphan Works" (75) and a set of Reports containing "Sector-specific Guidelines on Due Diligence Criteria for Orphan Works" (76). The Joint Report contains a common definition of orphan works: "a work is 'orphan' with respect to rightholders whose permission is required to use it and who can either not be identified or located based on diligent search on the basis of due diligence guidelines. This search must be both in good faith (subjectively) and reasonable in light of the type of rightholder (objectively)". The corresponding annexes contained different definitions of orphan works depending of the sector concerned: text (77), music/sound (78), visual/photography (79) and audiovisual (80). The guidelines contained in the reports have been conceived as a practical tool to assist the parties concerned in identifying and locating rightholders. As regards the procedure, they assume that the search must be performed prior to the use and done title by title. Cultural institutions should establish a proper search procedure in compliance with the applicable guidelines. In any case, the search process should be duly documented and include publicity measures. To facilitate the search, the guidelines include a list of resources available for research. They distinguish between common resources, *i.e.* the European Digital Library, credits and other information appearing on the work or in the institution files, collective management organisations, etc. (81) and resources specific to certain sub-

(73) Final Report, pp. 10 et seq.

(74) Final Report, pp. 15-16.

(75) http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/mou.pdf.

(76) See the Joint Report on Sector-specific guidelines on diligence search criteria for orphan works (http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/guidelines.pdf) and its Appendix containing sector reports and specific guidelines for the audiovisual sector, the visual/photography sector, the music/sound sector and the text sector; (http://ec.europa.eu/information_society/activities/digital_libraries/doc/hleg/orphan/appendix.pdf).

(77) "An orphan work is a work protected by copyright but the current owner is unknown or untraceable by diligent search. The current owner of the copyright might be the author or other creator, some other first owner of the rights (such as the author's employer – when applicable) or a publisher) or any rightholder who is presumed to be the right holder according to the legislation or contractual agreement or any successor of the first owner."

(78) "An orphan work is a protected work or other subject matter whose author and/or rightsholders could not be identified or found, in spite of good faith, reasonable efforts to do so in compliance with due diligence rules, to be defined by the Working Group."

(79) "Neither the Rightholder nor the author/creator nor their respective successors can be traced; unknown authors / creators; anonymous / pseudonymous works are not orphans – often dealt with in national legislation."

(80) "An audiovisual work is defined as 'orphan' only when the copyright owner/rightholder(s) either cannot be identified at all or when his name is known but he cannot be located in order to obtain authorisation. As such, an 'orphan audiovisual work' is defined as a work the copyright owner/rightholders of which cannot be identified after a diligent good faith search using generally accepted search methods and tools. Even if the copyright owner/rightholders can be identified, the work will still qualify as orphan if the identified copyright owner/rightholders cannot be located after a similarly diligent good faith search".

(81) For the complete list of common resources see Joint Report, pp. 2-3.

ject matter.[82] As a general principle, the relevant resources to be taken into account should be those of the country of the work's origin. They should either be publicly available or accessible at no or low cost. Finally, it is recognised that scalable or modified guidelines for diligent search might be appropriate in those sectors where rightholders do not use to be represented by professional organisations, as for example as regards the so-called grey literature.[83] Guidelines have been endorsed by several organisations. A key issue for the future is their dissemination and effective use around Europe.

5. Preventive measures

Last but not least the Copyright Subgroup has issued a set of recommendations to prevent the apparition of more orphan works. These measures include the use of electronic and other identifiers, the creation, use and maintenance of metadata in the digital files and the recognition of the value of standards identifiers.[84]

6. *Ad hoc* orphan works national solutions: the reaction of the Member States

Neither the European Commission nor the HLG gives any recommendation on the regulatory or contractual solutions to make effective the use of orphan works. Nevertheless some countries have already implemented or are discussing different solutions to alleviate the problem. Denmark, Hungary and Germany are preparing legislation to cover the issue.[85] In France, the "Conseil supérieur de la propriété littéraire et artistique" has appointed a special commission to explore the appropriate measures to encourage the digitisation and accessibility of orphan and out of print works.[86] In April 2008 the Commission publishes its Avis about how to deal with the orphan works problem[87]. First, it proposes to incorporate in the "Code de la propriété intellectuelle" an orphan work definition that is limited to published works.[88] Secondly, after having assessed the impact of the orphan work situation in different sectors, the Commission recommends to implement a different system depending on the kind of work. So, for print and visual works it has proposed to modify the "Code de la propriété intellectuelle" to introduce a mandatory collective management system. For music, cinema and other audiovisual works it has preferred not to adopt any modification and to continue with the collective agreements that may be concluded by l'Institut National de l'Audiovisuel and the representatives of rightholders.[89] According to the proposal drafted for print and visual works, an entitled collecting society might grant authorisations to use orphan works. To benefit from the system the user must perform a serious and proven search. The legislation will not establish any specific criteria but, according to the proposal, search guidelines shall be fixed by a Commission bringing together representatives of the rightholders, the users and the public administration.[90] The Opinion also recommends the implementation of a preventive policy for

(82) Specific resources for books, journals, sheet music, audiovisual material and visual material (including photography) are included in the Appendix to the Joint Report – Sector Reports, (*supra* note 76).

(83) Literature published by non-commercial publishers that usually are not members of publishers associations.

(84) Final Report, p. 16.

(85) Communication on Europe's cultural heritage at the click of a mouse (*vid*. *supra* note 72). Unfortunately I do not have more information about the concrete measures to be adopted.

(86) See "Lettre de mission du président du Conseil de la propriété littéraire et artistique du 2 août 2007", accessible on http://www.cspla.culture.gouv.fr/CONTENU/lmœuvres07.pdf.

(87) "Avis de la commission spécialisée du CSPLA sur les œuvres orphelines", (http://www.cspla.culture.gouv.fr/CONTENU/avisoo08.pdf). *Vid.* also the "Rapport de la Commission sur les œuvres orphelines" published in March 2008: http://www.cspla.culture.gouv.fr/CONTENU/rapœuvor08.pdf.

(88) "*L'œuvre est orpheline lorsqu'un ou plusieurs titulaires de droit d'auteur ou de droits voisins sur une œuvre protégée et divulguée ne peuvent être identifiés ou retrouvés malgré des recherches avérées et sérieuses*".

(89) See art. L49, loi n° 86-1067 du 30 septembre 1986 relative à la liberté de communication: "*L'institut (national de l'audiovisuel) exerce les droits d'exploitation mentionnés au présent paragraphe dans le respect des droits moraux et patrimoniaux des titulaires de droits d'auteurs ou de droits voisins du droit d'auteur, et de leurs ayants droit. Toutefois, par dérogation aux articles L. 212-3 et L. 212-4 du code de la propriété intellectuelle, les conditions d'exploitation des prestations des artistes-interprètes des archives mentionnées au présent article et les rémunérations auxquelles cette exploitation donne lieu sont régies par des accords conclus entre les artistes-interprètes eux-mêmes ou les organisations de salariés représentatives des artistes-interprètes et l'Institut. Ces accords doivent notamment préciser le barème des rémunérations et les modalités de versement de ces rémunérations*."

(90) For more details on the proposed system see the "Rapport de la Commission sur les œuvres orphelines". Nevertheless some of them have not been incorporated in the Avis (*supra* note 87). So, for example, according to the Rapport licences must be granted for a limited period of time. The remuneration shall be fixed by negotiation between the collecting society and the users. If the rightholder surfaces, she must be remunerated by the collecting society. Her surfacing will not cause the termination of the licence, therefore the user may continue the exploitation for the limited period of time that it has been granted. See "Rapport de la Commission sur les œuvres orphelines", pp. 19-20.

orphan works in order to improve the identification of rightholders by facilitating the development and access to information. (91)

7. *Ad hoc* solutions outside Europe: special reference to the US proposals

In Canada, according to the Copyright Law, the Copyright Board may issue a non exclusive licence to a user that has not been able to locate the copyrightholder after having made reasonable efforts. The system is applied only as regards published works. The remuneration, if any, is fixed as the other conditions by the Copyright Board. If the rightholder appears, she may collect the royalties not later than five years after the expiration of the licence. (92) A very different example is the one proposed in the US where two bills have been introduced to tackle the problem of orphan works (93). Both proposals are based on a limitation of remedies: the use of an orphan work is still an infringement but if the rightholder brings a legal action against the user monetary and injunctive reliefs may be limited. To benefit from the system the user must prove that before using the work she has performed and documented a reasonably diligent search to locate the copyright owner and that she has provided attribution to the rightholder if known. (94) Additionally, the user must include with the infringing work a symbol, in a manner prescribed by the Register of Copyrights, to give notice that the work has been used under the new orphan works provision. (95) According to the bill entered into the House of Representatives, the user must also file a Notice of Use with the Register of Copyrights. (96) The proposals do not precise the requirements for searches. They only require the infringer to undertake a diligent effort to locate the copyrightholder. Although they give some vague guidelines to assess if a search is diligent: the use of best practices, the time when the search was performed, etc. The bills specifically clarify that the lack of identifying information in a particular copy is not sufficient to meet the conditions mentioned above. Furthermore, both proposals state that the Register of Copyrights shall maintain and make available to the public best practices for conducting search. (97) If all these conditions are fulfilled, the monetary reliefs must be limited to a reasonable compensation. (98) Non profit educational institutions, libraries, archives or public broadcast entities may be exempted of paying a reasonable compensation, if they stop the use after receiving a notice of claim and prove that the infringement was performed without any purpose of direct or indirect commercial advantage and with educational, religious or charitable purposes. (99) The injunctive relief may also be limited in the case of derivate works: it

(91) On the other hand, it is worth to mention that art. 122-9 of the French Law allows the judge to adopt appropriate measures when there is an abuse in the way rightholders representatives are exercising their rights. The Commission has also proposed some modifications in order to apply this article to the orphan works situations.

(92) Art. 77 Copyright Act. More information on http://www.cb-cda.gc.ca/unlocatable/index-e.html.

(93) The Orphan Works Act of 2008 – A bill to provide a limitation on judicial remedies in copyright cases involving orphan works – introduced in House of Representatives the 4th April 2008, [H.R.5889]. And the Shawn Bentley Orphan Works Act of 2008 – A bill to provide a limitation on judicial remedies in copyright cases involving orphan works, introduced in Senate the 28th April 2008, [S.2913.IS]); see also the bill reported to Senate amended, 15th May 2008.

(94) See new §514(b)(1)(A)(iv) as proposed by the Orphan Works Act of 2008 and new §514(b)(1)(A)(i) and (ii) as stated by the Shawn Bentley Orphan Works Act of 2008.

(95) As stated by the new §514(b)(1)(A)(iii) in the Shawn Bentley Orphan Works Act of 2008. Vid. also the new §514(b)(1)(A)(i) and (iii) as proposed by the Orphan Works Act of 2008.

(96) See the Orphan Works act of 2008. As a condition for eligibility the new §514(b)(1)(A)(ii) requires that the infringer (…) before using the work, filed with the Register of Copyrights a Notice of Use under paragraph 3. Paragraph 3 (Notice of use archive) states that

"The Register of Copyrights shall create and maintain an archive to retain the Notice of Use filings under paragraph (1)(A)(i)(III). Such filings shall include – '(A) the type of work being used, as listed in section 102(a) of this title;

(B) a description of the work;

(C) a summary of the search conducted under paragraph (1)(A)(i)(I);

(D) the owner, author, recognized title, and other available identifying element of the work, to the extent the infringer knows such in formation with a reasonable degree of certainty;

(E) a certification that the infringer performed a qualifying search in good faith under this subsection to locate the owner of the infringed copyright; and

(F) the name of the infringer and how the work will be used.

Notices of Use filings retained under the control of the Copyright Office shall be furnished only under the conditions specified by regulations of the Copyright Office."

(97) As stated by the new §514(b)(2) Shawn Bentley Orphan Works Act of 2008 and Orphan Works Act of 2008.

(98) New §514(c)(1)(A) as proposed by the Shawn Bentley Orphan Works Act of 2008 and the Orphan Works Act of 2008.

(99) §514(c)(1)(B) as drafted by the Shawn Bentley Orphan Works Act of 2008 and the Orphan Works Act of 2008.

may not restrain the infringer's continued preparation or use of the work if she pays a negotiated and reasonable compensation and provide attribution of the rightholders.[100] According to the bill introduced in the Senate the court should try to minimise the harm on the user that has invested her efforts and money into making the use.[101] In any case, the application of limitations of remedies is subjected to an important additional requirement: the user could not apply for the limitation if after receiving a notice of claim she fails to negotiate a reasonable compensation with the copyrightholder or fails to render payment of such a reasonable compensation in a reasonable time.[102] The US proposals are applied also to unpublished works. Main arguments for this have been the difficulty to determine if a work is published or unpublished and the fact that many orphan works are unpublished.[103] This option may be quite odd for *Droit d'auteur* systems where moral rights have a fundamental role. However, some continental copyright laws traditionally contain provisions that authorise the *post-mortem* divulgation of a work if rightholders unreasonable oppose to it. Anyhow, beyond the problems faced by moral rights, the digitisation and making available of some unpublished items may also be in conflict with privacy issues.[104]

8. Selfregulatory scenarios

Some private entities or collective societies have developed mechanisms to facilitate the use of orphan works. Thus, a group or scientific publishers have adopted an orphan works policy that allows the uses of orphan works which they may own. According to the safe harbour provision incorporated in their policy, in the event that a copyright owner is identified, the user must pay a reasonable royalty and must ensure that there is no further re-use or re-utilization of work. When the user fulfils these conditions, the publishers agree to waive their rights of bringing an action against her.[105] Another example is the one provided by the Sofam – la "Societé belge d'auteurs dans le domaine des arts visuels". It offers the so-called "convention de porte fort": a user signing this convention must pay a remuneration to the Sofam for the use of orphan works. If the rightholder surfaces she may contact the Sofam in order to collect the remuneration.[106] Last but not least some, not many, cultural institutions operate under a risk management policy. They assess the potential risk and, in some cases, they decide just to face it and make the use.[107]

B. Out of print works

1. Out of print situations

Another situation that may cause the silence of copyrighted works is that related to out of print works, to those works that are no longer commercially available, that have been abandoned. D. Khong identifies three types of abandonment: commercial, strategic and temporarily abandonment. Commercial abandonment occurs when the copyright owner ceases to supply a copyright work because it is no longer commercially viable to do so. A strategic one occurs on the contrary when the copyright owner stops supplying the work because she is selling an upgraded or newer version of the same or similar product. Temporary abandonment takes place when the rightholder temporarily suspends the availability of a work with a view of making available the work again in the future.[108] The identification of different reasons to stop the supply of a specific work leads the Copyright Subgroup to link the out of print work definition to the will of the rightholder. The Copyright Subgroup even introduces some remarks concerning different situations where a work must not be considered to be out-of-print, for example when it has been withdrawn from the market deliberately, either by the publisher or by the author.[109] Since the copyright on these out of print works persists, digital libraries could not digitise or make the works available beyond those cases authorised by copyright

(100) §514(c)(2)(B) as drafted by the Shawn Bentley Orphan Works Act of 2008 and the Orphan Works Act of 2008.

(101) §514(c)(2) as drafted by the Shawn Bentley Orphan Works Act of 2008.

(102) New §514(b)(1)(B) as proposed by the Shawn Bentley Orphan Works Act of 2008 and the Orphan Works Act of 2008.

(103) See Register of Copyrights, Report on Orphan Works, pp. 100-102.

(104) For more information on regulatory mechanisms for orphan works see Final Report, pp. 11 *et seq.*; Ivir, *The Recasting of Copyright …*, pp. 178 *et seq*.

(105) Safe Harbour Provisions for the Use of Orphan Works for Scientific, Technical and Medical Literature, An STM/ALPSP/PSP Position Paper, http://www.alpsp.org/ForceDownload.asp?id=579.

(106) More information on http://www.sofam.be/mainfr.php?ID=104&titel=Conventions+de+porte-fort.

(107) For an example see the National Portrait Gallery case study: "A perspective from the NPG"; HLG stakeholders seminar, 14.09.2007.

(108) "Orphan Works, Abandonware and the Missing Market for Copyright Goods", *International Journal of Law and Information Technology*, vol. 15, issue 1, 2007, pp. 57-58.

(109) Final Report, p. 17.

limitations. Only privileged people having access to the existing copies[110] could enjoy the work. The shadow of "obscurity" (the so-called "20th century black hole") appears once again.[111]

In the first documents related to the DLI there was no reference to the problem of the out of print works. The first mention appears in the Summary Minutes of the First Meeting of the High Level Experts Group where they are considered as one of the problematic issues related to Online accessibility.[112] Out of print works also deserve special attention in the "Recommendation on the digitisation and online accessibility of cultural material and digital preservation". There the EC advises Members States to "improve conditions for digitisation of, and online accessibility to, cultural material by [...] establishing or promoting mechanisms, on a voluntary basis, to facilitate the use of works that are out of print or out of distribution, following consultation of interested parties." Note that, as in the case of orphan works, no intervention or regulatory mechanism is supported.[113] The contractual approach is the starting point for the work done by the High Level Group.

2. Model licences

In its Second Report the Copyright Subgroup presents, as a pragmatic solution to alleviate the out of print problem, a model licence to be used by rightholders – their representatives or authorised intermediaries[114] – and libraries for the digitisation of out-of-print works. This model agreement authorises the making available of out of print works but just through closed networks.[115] This limitation has been very criticised by the library sector. In its Final Report, the Copyright Subgroup goes an step forward and includes a second model licence that, much more ambitious, allows online access to out of print books.[116]

3. Content of the model licences

These two model agreements are contractual templates by virtue of which the rightholder grants the library a non exclusive and non-transferable licence to reproduce and make available the out of print work. The model licences have been designed for the print sector and must be used in relation to the works contained in the collection of the library. They grant – except if given for free – the rightholder a remuneration. She retains the copyright on the work, even on the digitised version, and may, at any time, revoke the licence if she intends to commercialise the work. In this case the library is entitled to a reimbursement of the digitisation costs. In addition to other obligations, the library must inform the rightholder on the use of and access to the work. According to the text of both licences, the end authorised user may search, retrieve and display the digitised version of the copyrighted work. The library and rightholder may also specify on the agreement the possibility of making singles copies of the work or parts of it.

4. Enforcement

The success of this proposal will depend on the effective use of the model agreements. To encourage

(110) *I.e.* in second hand markets.

(111) This risk should not be underestimated. According to H. Travis "Up to ninety-eight percent of books are no longer commercially distributed after a couple of decades; they 'fall into never-never land [,]' as the 'publishers go bust, the authors can no longer be contacted, and it costs hundreds of dollars per book to research who owns the rights.' Only about one percent of the books ever published are still in print; about 100 million book titles were out-of-print in 1999, compared to 1.2 million books available for purchase in the marketplace. More than 100,000 titles have fallen out of print every year since then, or almost as many as are published for the first time in any given year." In "Building Universal Digital Libraries: An agenda for Copyright Reform", (August 2005), accessible on SSRN (SSRN Electronic Paper Collection): http://ssrn.com/abstract=793585, p. 799. In the following pages, the author gives similar figures for motion pictures, music, radio and television (p. 800) as well as for software (pp. 800-801.)

(112) Summary Minutes of the 1st meeting of the HLG on Digital Libraries, 27th March 2006, p. 3.

(113) The Council also refers to the out of print works in its Conclusions on the Digitisation and Online Accessibility of Cultural Material, and Digital Preservation (*supra* note 22). It invites the Member States to foresee "mechanisms to facilitate digitisation and online access of orphan works and out of print and out of distribution works, while fully respecting content owners' interests and rights". A bit later, it recommends the Commission to address framework conditions by "proposing solutions on certain specific rights issues, such as orphan and out-of-print works, while fully respecting content owners' interests and rights, and ensuring their effectiveness in a crossborder context."

(114) Final Report, p. 21.

(115) See Annex to the Report on Digital Preservation, Orphan Works and Out-of-Print Works, Selected Implementation Issues.

(116) For an explanation of the model agreement for the digitisation and making available of out of print works in closed networks see Final Report, p. 22. For the model agreement authorising the use of the works in open networks see p. 23 of the Final Report. The text of the licences is attached as Annex 3 and 4 to the Final Report.

their use and dissemination, they are being translated in several European languages and will be published on the webpage of the DLI.[117] The Copyright Subgroup strongly recommends the dissemination of the model agreements through relevant channels on a national and European level as well as the promotion of their use though the establishment of testbeds, best practices and the exchange of experiences. The Member States Expert Group on Digitisation and Digital Preservation[118] may play a key role on this. The use of the agreements in initiatives as Europeana[119] or other national projects is encouraged.

5. Evaluation of the system

The system proposed has valuable inputs. It intends to eliminate some transaction costs by facilitating, through the standardisation of contractual agreements, the conclusion of contracts between rightholders and libraries.[120] Its main purpose is to bring the out of print works to the light of the day while guaranteeing a payment to rightholders. Even more, model licences may be used by rightholders to check the commercial possibilities of the work in the market.[121] The publication of the second model agreement intended to on line access must be also welcomed. Another positive aspect of the licences is that they have been drafted to be used when contracting on a national, European or multinational level. Last but not least, they foresee that a digitised version must be accessible to visually impaired persons. Having said this, it is worth to note that the position of the library – the one taking the initiative and investing the money – is however weaker. When carefully reading the licences, one can easily conclude that they are not offering a privileged status to libraries. They are just contractual templates for a very specific market: that referring to the exploitation of out of print works. They are not very far from a standardised copyright contract and it is quite questionable if the model licences themselves are going to facilitate the digitisation and making available of the out of print works by (non profit) digital libraries. The fact that the licensor can at any time withdraw the licence could entail a lack of security for libraries. Moreover, since they are based on voluntary basis, rightholders could, without giving any reason, deny the authorisation[122] or even ask for a very costly remuneration. So, many out of print works may still remain silent.

6. Member States Reaction

As in the case of the orphan works, it may be said that the reaction of the Member States has been quite positive.[123] Most of them are working on the translation or dissemination of the model agreement. Some countries are indeed going beyond the recommendations of the EC and the HLG. Denmark, for example, is working on the modification of its Copyright Act to widen the scope of the extended collective licences.[124] Other countries have been however quite critical with the templates. So Luxembourg that is working on more flexible solutions.[125]

(117) Different linguistic versions of the Model agreement for a licence on digitisation of out of print works may be accessed on http://ec.europa.eu/information_society/activities/digital_libraries/experts/hleg/meetings/index_en.htm.

(118) See the Commission Decision of 22 March 2007 setting up the Member States' Expert Group on Digitisation and Digital Preservation, 2007/320/EC, *O.J.* L 119, 9.5.2007, pp. 45-47. For more information on the Member States Expert Group on Digitisation and Digital Preservation see http://ec.europa.eu/information_society/activities/digital_libraries/experts/mseg/index_en.htm.

(119) Europeana – the European digital library, museum and archive – is a European project that will produce a prototype website giving users direct access to some 2 million digital objects, including film material, photos, paintings, sounds, maps, manuscripts, books, newspapers and archival papers, see http://www.europeana.eu/.

(120) M. Ricolfi, "Copyright Policy for digital libraries in the context of the i2010 strategy", paper presented at the International Conference on Public Domain in the Digital Age (COMMUNIA Project), Louvain-la-Neuve, Belgium, June 30th and July 1st 2008, accessible on http://communia-project.eu/communiafiles/conf2008p_Copyright_Policy_for_digital_libraries_in_the_context_of_the_i2010_strategy.pdf, p. 8.

(121) Final Report, pp. 22 and 24.

(122) Final Report, p. 21.

(123) See the Reports by all Member States on the progress they have made since November 2006 on digitisation, online accessibility and digital preservation, published on http://ec.europa.eu/information_society/activities/digital_libraries/experts/mseg/reports/index_en.htm.

(124) Report by Denmark on the Implementation of the Commission Recommendation on Digitisation and Online Accessibility of Cultural Material and Digital Preservation, p. 3; http://ec.europa.eu/information_society/activities/digital_libraries/doc/recommendation/report_implem_submission290208/denmark.pdf.

(125) See Report by Luxembourg on the Implementation of the Commission Recommendation on Digitisation and Online Accessibility of Cultural Material and Digital Preservation, p. 6. Accessible on http://ec.europa.eu/information_society/activities/digital_libraries/doc/recommendation/report_implem_submission290208/luxembourg.pdf. Note however that the national reports were completed before the publication of the second model agreement.

C. National databases and right clearance centres for orphan and out of print works

Two additional elements of the Copyright Subgroup proposals concerning both the orphan and the out of print problem are the creation of national databases of orphan/out of print works as well as the implementation of right clearance centres and clearance procedures. The main aim of databases or registries of orphan and of out of print works is to facilitate the rightholders identification and/or the licensing of the work and to avoid duplication of efforts. To ensure its efficiency, national databases should be based on comprehensive metadata, existing standards and interoperable principles. Ideally, they should be interlinked around Europe, *i.e.* in the European Digital Library. In addition to the databases, the Copyright Subgroup recommends the Member States to set up rights clearance procedure and rights clearance centres to grant licences when they can be offered by a mechanism set up by rightholders. (126) All these elements are more developed in two additional annexes of the Copyright Subgroup Final Report containing a set of key principles for rights clearance centres and databases. (127)

D. Horizontal mechanisms to rescue silent works

As pointed out at the beginning of this section, there are transversal or horizontal mechanisms that even if they are not intentionally designed to solve the silent works problem they may, in practice, reduce its consequences. One example is the extended collective licences used in the Nordic Countries to facilitate the massive utilisation of works for certain uses. According to this system, an organisation representing a substantial number of rightholders may grant a licence to do certain exploitations of the works. Because its extended effect, the licence also covers the works of those rightholders that are not members of the society. It may be said that the system is very similar to mandatory collective management. The big difference is that rightholders can opt out from participating in the system. The European Copyright legal framework seems to be compatible with the introduction of extended collective licences to cover the use of orphan and out of print works in DL projects. As we have seen in II, the EC does not consider the extended collective licences (as well as the mandatory collective management) as "limitations" to the exclusive rights but as a way of management the rights. Other possibility also contained in some Copyright laws is bringing a claim before a court when the rightholder is incurring in abuse or misuse of rights. Nevertheless, for obvious reasons, this system is not very useful for large scale DL projects.

E. Structural Reforms

In addition to the solutions found in positive law, some scholars have presented proposals that are for more fundamental reforms in Copyright Law. These proposals mainly deal with the (*ideal*) copyright term, the re-introduction of formalities in Copyright Law or the reformulation of copyright limitations granting a wider use of copyright work. (128) Even if they are not intended to solve the "silent works" problem, these proposals could actually facilitate the use of orphan and out of print works. Any of these systems would require a structural reform of the Copyright Law, but … is it conceivable in the near term? Less daring are the views expressed by the DG Market in the Green Paper. After briefly analysing the situation concerning the orphan works around Europe, it suggests that the potential cross-border nature of this issue may require a harmonised approach. (129) It also questions if a further Community statutory instrument must be required to deal with the problem of orphan works, considering the possibility of either amending the InfoSOC Directive on Copyright in the information society or implementing a stand-alone instrument. And, it even opens a debate on a possible reform to address

(126) Final Report, points 5.5, 6.4 and 9.

(127) See Annex 6, Recommended Key Principles for rights clearance centres and databases for orphan works, and Annex 7, Recommended Key Principles for rights clearance centres and databases for out-of-print works.

(128) *Vid. i.e.* W. Landes and R. Posner, "Indefinitely Renewable Copyright", (August 1, 2002), *154 U Chicago Law & Economics,* Olin Working Paper, available on http://ssrn.com/abstract=319321"Chapter 8: The Optimal Duration of Copyrights and Trademarks", in The Economic Structure of Intellectual Property Law, (2003), pp. 210-253; L. Lessig, *Free culture*, (2003); D. Khong, "Orphan Works, Abandonware and the Missing Market for Copyright Goods", *International Journal of Law and Information Technology*, vol. 15, issue 1, 2007; C. Sprigman, "Reform(aliz)ing Copyright", *Stanford Law Review*, Nov. 2004; M. Ricolfi, "Copyright Policy for digital libraries in the context of the i2010 strategy", paper presented at the International Conference on Public Domain in the Digital Age (COMMUNIA Project), Louvain-la-Neuve, Belgium, June 30th and July 1st 2008, accessible on http://communia-project.eu/communiafiles/conf2008p_Copyright_Policy_for_digital_libraries_in_the_context_of_the_i2010_strategy.pdf.

(129) Green Paper, p. 11.

the cross-border aspects of the orphan works issue in order to ensure EU-wide recognition of the solutions adopted in different Member States.[130] I do not dare to mean that specific changes in the European Copyright legal framework will be introduced in the near future but, contrary to the expectations we had in 2007,[131] it seems that the EC has not completely ruled out this possibility…

V. Conclusions

The main purpose of this article was to report on the progress of the DLI during the last 12 months. Some advances may be observed at European and national levels. The DLI has been fully supported by the European Parliament ensuring a certain degree of democratic legitimacy. A more fundamental progress may be concluded as a result of the work of the Copyright Subgroup. The agreement on the Memorandum of Understanding on orphan works as well as the different Reports on Sector-specific guidelines on diligence search criteria for orphan works, the drafting of a more progressive Model agreement for the use of orphan works and the adoption of Key principles for the running of databases and right clearance centres mean a good step forward. The practical application of such guidelines is now in the power of the stakeholders.[132] On the other hand the publication of the Green Paper by the DG Market – the one actually in charge of the definition of the European Copyright Policy – might open some doors for the implementation of legal reforms supporting DL projects. However, bearing in mind the past developments of European Copyright Law and the recent proposal on term extension,[133] I look at the Green Paper with certain scepticism… In any case, it opens a public debate concerning a key issue for the access to knowledge. As regards the progress on the implementation of the DLI at the national level, it's worth to say that, in spite of the pessimistic views of the Communication on Europe's cultural heritage at the click of a mouse,[134] most of the Member States have put their shoulders to the wheel and have incorporated this topic into their Copyright agenda. Moreover, in some European countries regulatory reforms (thus in France, Denmark, Germany or Hungary) or contractual private and public initiatives (in Luxembourg or Netherlands) to make easier the work of digital libraries are already on the table. So, as I advanced at the beginning of the paper, it is possible to conclude that some steps have been adopted to eliminate the copyright barriers to the running of DL projects. It has to be seen if these steps will be translated in (desirable and needed) legal reforms or will be reduced to mere intentions.

(130) See questions 10-12, Green Paper.

(131) M. Iglesias and L. Vilches, "Les bibliothèques numériques et le droit d'auteur…", p. 984.

(132) Last but not least the launching of Europeana in November 2008 represents a concrete step to make real the access to an important part of our cultural heritage.

(133) Proposal for a European Parliament and Council Directive amending Directive 2006/116/EC of the European Parliament and of the Council on the term of protection of copyright and related rights, COM(2008) 464 final, 2008/0157 (COD), Brussels, 16.7.2008.

(134) Communication on Europe's cultural heritage at the click of a mouse (*supra* note 72), p. 6.