WORKING DOCUMENT

COPYRIGHT

AND DIGITISATION OF BOOKS

TO BESubmitted

TO THE COMMITTEE ON LEGAL AFFAIRS

BY THE WORKING GROUP ON COPYRIGHT

"Imagine yourself at your computer, and in less than a second, searching the full text of every book ever written"
Eric Schmidt, CEO of Google, 2004

"A serious problem with any version of the public interest theory is that the theory contains no linkage or mechanism by which a perception of the public interest is translated into legislative action"
Richard Posner, Theories of Economic Regulation
New York, 1974
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INTRODUCTORY PART:
WORKING GROUP ON COPYRIGHT

1. Make-up and aim

The Committee on Legal Affairs decided, at its meeting on 5-6 October 2009, to set up a Working Group on Copyright made up of members of the committee, with the participation of members of the Committee on Industry, Research and Energy, the Committee on the Internal Market and Consumer Protection and the Committee on Culture and Education. The Working Group is coordinated by Marielle Gallo (JURI, PPE). It is a continuation of a similar body established by the Legal Affairs Committee in the previous legislature.

The Working Group on Copyright is made up of the following members:

Marielle GALLO (JURI, PPE)
Luigi BERLINGUER (JURI, S&D)
Cecilia WIKSTRÖM (JURI, ALDE)
Eva LICHTENBERGER (JURI, Greens)
Francesco Enrico SPERONI (JURI, EDF)
Jiří MAŠTÁLKA (JURI, GUE)
Saj KARIM (JURI, ECR)
Catherine TRAUTMANN (ITRE, S&D)
Pablo ARIAS ECHEVERRIA (IMCO, PPE)
Morten LØKKEGAARD (CULT, ALDE)

The aim of the Working Group on Copyright is to review copyright policies within the EU legislative framework in order to examine the challenges and prospects for the future of copyright in the European Union – particularly in relation to technological advances and the information society. The result of the work undertaken by the Group could serve as a starting point for the Legal Affairs Committee’s and European Parliament’s future legislative activities in the field of copyright.

2. Working method and debates to date

The Working Group on Copyright is assisted in its work by a project team, coordinated by the secretariat of the Committee on Legal Affairs. The project team meets on average once a month before each Working Group meeting in order to prepare the information notes and questionnaires for the exchanges with experts. These notes have dealt so far with Google Book Search and Europeana projects, digitisation projects and libraries and the publishing sector in the digital era.

These information notes - amended as a result of the discussions and the suggestions of members of the Working Group - contributed, under the direction of the coordinator, Marielle Gallo, to the drafting of this working document, which is to be submitted to the Committee on Legal Affairs at its meeting on 22-23 March 2010.
In the course of the two meetings held by the Working Group since its constituent meeting on 19 November 2009, when the Group had an exchange of views on "Copyright: state of play" with Margot Fröhlinger, Director of Directorate "Knowledge-based economy", Internal Market and Services Directorate-General, European Commission, the Group considered the following questions:

**Meeting on 13 January 2010**

The first part of the meeting focused on the debate on the Google books and Europeana projects and on the situation of libraries in the era of projects aiming to digitise books, with an exchange of views with the following experts:

- Antoine Aubert, European Copyright Policy Counsel - Google,
- Yvo Volman, Deputy Head of Unit, Co-ordinator of the Digital Libraries Initiative, "Access to Information" Unit of DG INFSO, European Commission, and
- Ben White, British Library.

At this meeting the Working Group was also presented with a paper "How to tackle copyright issues raised by mass-scale digitization?" prepared by Ben White of the British Library.

During the second part of the meeting, Gregory Paulger, Director of Directorate “Audiovisual, Media, Internet”, Directorate-General “Information Society and Media”, European Commission presented to the Working Group the Reflection document of DG INFSO and DG MARKT of 22 October 2009 "Creative Content in a European Digital Single Market: Challenges for the Future".

**Meeting on 3 February 2010**

Debate on the situation of publishers and bookshops in the era of projects aiming to digitise books, such as Google Books and Europeana, and an exchange of views with the following experts:

- Françoise Dubruille, Director of the European Booksellers Federation International Booksellers Federation,
- Arnaud Nourry, Président Directeur Général of Hachette Livre SA, and
- Anne Bergman-Tahon, Director of the Federation of European Publishers.
PART ONE
COPYRIGHT AND DIGITISATION OF BOOKS:
LEGAL FRAMEWORK

1. Introduction

Digitisation encompasses a wide range of cultural creations. This document focuses however on literary creations as the most visible and, recently, the most hotly debated example of efforts towards putting cultural heritage online.

This Part of the Working Document provides an overview of the legal framework applying to copyright and focuses on aspects which seem most relevant to the question of the digitisation of books, although many of them would be applicable to broader range of works than books only.

It is useful to bear in mind that copyright, a branch of intellectual property, protects literary and artistic works. The term ‘copyright’ refers to all the rights enjoyed by creators in respect of their works.1

2. Legal framework

2.1 International copyright protection

Copyright protection is managed at international level in particular by the World Intellectual Property Organization (WIPO). The main legal instrument, adopted by WIPO, is the Berne Convention for the Protection of Literary and Artistic Works, of 9 September 18862, to which all the EU Member States are contracting parties. The WIPO Copyright Treaty of 20 December 1996 added to it by bringing up to date the international protection of copyright and related rights in the Internet era. The European Community acceded to the Treaty by means of a Council Decision of 16 March 20003 and implemented the resulting obligations through Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society4. The Treaties serve to secure the protection of foreign works on the territory of a contracting party.

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1 Alongside copyright there are rights related to copyright (or neighbouring rights) which however are not relevant in the context of books and the publishing sector and therefore not discussed here.
2 The Berne Convention has been the subject of several revisions, completions and amendments, the last one in 1979.
2.2 EU law

There is no EU-wide copyright. Indeed, each of the Member States has its own copyright law based on the national principle of territoriality. Nonetheless, copyright is not foreign to the European Union's legal system. Thus many aspects of copyright have been harmonised by Community directives, in the context of the internal market.

It is claimed that the existence of 27 different copyright systems in EU, with various legal traditions and approaches to certain concepts in copyright, is a real challenge. It may even be argued that this undermines the internal market. However, it would be equally challenging to harmonise copyright in EU. One of the reasons is the difference in Member States systems and traditions marked by the use of terms copyright and author's rights (droit d'auteur) describing two systems of protection (the common-law and continental European) rooted in different philosophies, cultures and identities. The differences between the two systems led to problems in the past when harmonisation of copyright was undertaken at international or regional level.5

It should also be noted that copyright was not specifically referred to as such by the Treaties. On this point, it should not be overlooked that until recently the problem with going beyond mere harmonisation in EU stemmed from the assumption that in accordance with Article 295 TEC (now Article 345 of TFEU)6 the Community had no direct competence to legislate in the field of copyright, as part of the system governing property ownership. On that basis it was concluded that EU did not have direct competence in the field of copyright and that copyright was in principle a matter of national law.

The legislative activity of the EU in the field of copyright has therefore been based so far on the Treaty provisions relating to the establishment and functioning of the internal market (Article 95 TEC, now 114 of TFEU). EU copyright law was therefore shaped as internal market legislation, which implied that the adoption of harmonisation measures in this field was intended mainly to help remove disparities between national provisions that hindered the free movement of goods, or to help remove disparities that caused distorted conditions of competition.7 The impetus might now be given by the new Article 118 of TFEU.8 This provision requires, still in the context of the establishment and functioning of the internal market, measures to be established for the creation of European intellectual property rights to provide uniform protection of IPR throughout the EU.

It should also be recalled that the Court of Justice is not a copyright court. Most of the decisions on copyrights in EU are taken by national courts. Compared with other

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6 Ex-Article 295 of the EC Treaty (now Article 345 of TFEU) states: ‘[The] Treaty[ies] shall in no way prejudice the rules in Member States governing the system of property ownership’.
forms of intellectual property, such as trademarks, there is no vast case-law of the Court of Justice dealing specifically with copyright. Nevertheless, there are some areas where questions related to copyright have come under the Court of Justice’s jurisdiction:

- copyright and the internal market,
- the interpretation of *acquis communautaire* on copyright,
- the conflict between copyright and other fundamental rights,
- copyright and competition law.

### 2.3 National law of EU Member States

Each of the 27 EU Member States has its own copyright law, partly harmonised by Community directives.

### 3. The subject matter of copyright

Copyright protects intellectual works, i.e. ‘every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression...’ The work must be expressed in a form that makes it physically perceptible, ideas and concepts being excluded from copyright protection. This principle has been confirmed by the WIPO Copyright Treaty (Article 2).

It is important to note that copyright does not relate to the physical object in which the creation is contained but to the *creation itself*. It follows that copyright is independent of physical property rights over the physical object, and thus the sale of the physical object containing the work does not entail the transfer of copyright, which must take place in a specific manner.

**Protected works**

The Berne Convention sets out a list of works protected by copyright, which includes amongst others:

- books, pamphlets and other writings;
- lectures, addresses, sermons and other works of the same nature.

Translations, adaptations and other alterations of a literary work are also protected as original works without prejudice to the copyright in the original work.

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9 For more details see the Memorandum of the Working Group on Copyright (April 2009). Interestingly, Article 262 TFEU (ex Article 229A TEC) provides for the possibility for the Council acting unanimously in accordance with a special legislative procedure and after consulting the Parliament to adopt provisions to confer jurisdiction on the Court of Justice in disputes relating to the application of acts adopted on the basis of the Treaties which create European intellectual property rights. Such provisions require however for their entry into force their approval by the Member States in accordance with their respective constitutional requirements.

10 Article 2(1) of the Berne Convention.
Collections of literary works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of the contents, constitute intellectual creations are protected as such, without prejudice to the copyright in each of the works forming part of such collections.

This list of protected works is not exhaustive, thus making it possible to take into account new intellectual creations.

4. Copyright holders

The original copyright holder is always the author himself. The Berne Convention does not define the concept of ‘author’. However, it creates a presumption of authorship based solely on the fact of the name appearing on the work in the usual manner (Article 15(1)). At EU level this presumption of authorship has been harmonised by Article 5 of Directive 2004/48/EC.

Article 5 of the Berne Convention makes it clear that copyright protection does not depend on a fulfilment of any formality, such as registration or deposit of the work (principle of "no formalities").

Identifying the copyright holder may become more complicated if the works are created by an author who is employed, or when they are created by several persons working together (collaborative work), or under the direction of a principal (collective work).

Identification of copyright holders proves to be particularly difficult in case of so-called orphan works. Although there is no legal definition of orphan works, they are currently referred to as "works that are in copyright but whose right holders cannot be identified or located". It follows that orphan works might constitute an obstacle for complete digitisation, such as digitisation of library collections. Indeed in-copyright works can be exploited only after obtaining prior permission from the right holder. Since in the case of orphan works the grant of such authorisation is not possible, this leads to a situation where a number of works cannot be copied or otherwise used e.g. a photograph cannot be used to illustrate an article in the press, a book cannot be digitised or a film restored for public viewing.


12 This was not the case everywhere. For the evolution of the copyright protection in the US as a result of its accession to the Berne Convention, see T. Dreier, B. Hugenholtz "Concise European Copyright Law", Kluwer Law International, 2006, p. 28: "Therefore, when adhering to the Berne Convention in 1989, the US had to abolish the registration requirement as a condition for a published work not to fall into the public domain. Also, the previous requirement of copyright registration prior to the bringing of an infringement action had to be abolished. However, the US legislature maintained the requirement to deposit works for works first published in the US, though this is no longer a condition for copyright protection."

13 See Communication from the Commission "Copyright in the Knowledge Economy" of 19 October 2009.

14 The exact number of orphan works is unknown.
Other questions - in particular with respect to digitisation of books - are posed by out-of-print works, which can generally be defined as works in copyright but not commercially available, as declared by the appropriate rightholders, regardless of the existence of tangible copies of the work as normally understood.\(^\text{15}\)

There exist also the category of anonymous or pseudoanonymous works and unpublished works of unknown authorship. These are covered by Article 15(3) and (4) of the Berne Convention. However, at present no harmonisation exists within the EU regarding the representation of authors and exercise of rights in those cases.\(^\text{16}\)

### 5. The content of copyright

Copyright covers two types of prerogatives: (i) moral rights, the aim of which is to protect the figure of the author as expressed through his work, and (ii) economic rights, which enable the author to authorise various methods of use of his work and to receive remuneration in exchange.

#### 5.1 Moral rights

Pursuant to Article 6bis of the Berne Convention, ‘*Independently of the author’s economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.*’ It follows from this that moral rights include a right of authorship and a right to respect for the work.

These are rights relating to personality which are inalienable and inextinguishable. They therefore belong to the author from the time when the work is created, and cannot under any circumstances be transferred to a third party, in contrast to economic rights, and are not lost if they are not used.

More specifically, the right of authorship consists of the right to respect for the name of the author and the status of the author. The author has the right to require his name to be placed on the work. The right to respect prevents a third party, even if it owns the economic rights, to modify, cut or add elements which the author has not expressly authorised.

#### 5.2 Economic rights

Economic rights give the author an exclusive right with regard to the exploitation of his work. Any exploitation of a work thus requires the *written authorisation* of the author. The author must have systematically granted an exploitation licence or must have transferred the economic rights, whether in full or in part, exclusively or non-exclusively, with or without charge.


The rights concerned are, more specifically with respect to books, as follows:

- the right of performance or communication to the public of the work (Article 11 and following of the Berne Convention),

- the right of reproduction of the work (Article 9 of the Berne Convention),

- the right to make available to the public the original and copies of the work in the form of sale (Article 6 of the WIPO Copyright Treaty)\(^{17}\).

It should be borne in mind that many provisions of the Berne Convention and the WIPO Copyright Treaty were reproduced in Directive 2001/29/EC, which lays down matters including the right of reproduction, communication and distribution. Rental and loan of originals and reproductions of works protected by copyright are covered by Directive 2006/115/EC\(^{18}\).

In particular Directive 2001/29/EC harmonises the exclusive right of reproduction (Article 2), the rights of communication and of making available to the public (Article 3) and the distribution right (Article 4). From the point of view of digitisation of books, Articles 2 and 3 of Directive 2001/29/EC are the most relevant.\(^{19}\) It should also be noted that Article 5 of the Directive provides for a number of exceptions and limitations to the above-mentioned rights\(^{20}\).

The right of reproduction amounts to the author's exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part, of their works. The right of reproduction includes analogue and digital form. Creating a digital version from an analogue original constitutes a reproduction of the work. Likewise the subsequent digital copying of the digital version is a reproduction. Examples of reproductions include photographs, photocopies, copying by hand, CD or DVD burning, as well as copies in the RAM memory (internal memory) of a computer.

The right of communication to the public is authors' "exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them". The right of communication to the public encompasses a wide variety of non-tangible dissemination of the work, including wired and wireless

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\(^{17}\) The original and copies are understood as referring exclusively to fixed copies that can be put into circulation as tangible objects.


\(^{20}\) See point 8 below.
transmissions. The work has to be communicated to the public located in a different place that the place from which the communication originates. The right of the making available to the public is a form of the right of communication. It applies for example to the offer to download a work from a public website. The condition is that the member of the public has individual control over when and from where to access the work. It is worth noting that the principle of exhaustion of rights does not apply to the rights of communication and of making available to the public.

Finally, the right of distribution is authors' exclusive right, in respect of the original of their works or of copies thereof, to authorise or prohibit any form of distribution to the public by sale or otherwise. This right covers only dissemination on tangible objects, which is the most important difference between that right and the right of communication to the public. It is also concerned by the principle of exhaustion.

6. **Principle of territoriality of copyright**

The copyright system currently in force is based on the principle of territoriality, which is a key concept in intellectual property law. It should be emphasised that it is also a concept of long-standing ambiguity, both with regard to its foundation and its consequences. Two specific principles may be distinguished: the principle of limitation of territoriality, under which a subjective right only exists and has effect in the geographical territory covered by the legal system which created it, and the principle of territoriality of conflict of laws, under which the international law of intellectual property is governed by the law of the country for the territory of which the existence and effect of a subjective intellectual property right are claimed.

These principles are included in and may be deduced from Article 5 of the Berne Convention.

7. **The term of copyright protection**

The term of the rights differs according to whether they are moral rights or economic rights. Whereas moral rights continue to exist, without any time restriction, even after the work has entered the public domain (they are passed on to the beneficiaries after the author’s death), economic rights granted to authors are subject to a time restriction.

With regard to these rights, the Berne Convention makes provision only for minimum protection terms, namely the life of the author and 50 years after his death, thus leaving to the contracting parties to the Convention the option to grant longer terms.

A longer term of protection is laid down by Community law. Directive 2006/116/EC – codifying Directive 93/98/EEC – on the term of protection of copyright and certain related rights thus sets the term of protection of copyright in a literary or artistic

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21 The concept of "public" is not clear and is left to interpretation by legislatures and courts in the Member States.

work at 70 years after the death of the author, irrespective of the date when the work was lawfully made available to the public.\footnote{In the context of digitisation of older works, there is a striking and highly relevant difference with the US in terms of copyright legislation. The term of copyright protection has been harmonised in EU and US to 70 years after the death of the author, but US legislation includes a cut-off date of 1923 (works published before 1923 are in the public domain). Therefore much material of European origin from before 1923 can be digitised and made available in the US without a licence agreement, while it may not be available to European citizens through services such as Europeana (footnote omitted). The practical consequence is wider access to digital books in the US than in Europe, and solutions involving rightholders and cultural institutions should be considered in order to redress this situation. See Commission Communication of 28 August 2009 "Europeana - next steps" (COM (2009) 440 final), p. 6.}

The date of expiry of the term of protection marks entry of the work into the public domain.

8. **Exceptions to copyright**

The Berne Convention leaves to the contracting parties the responsibility for establishing exceptions to economic rights, except for short quotations and illustrations for teaching purposes, which are permitted under certain conditions (see Articles 9 and 10). In addition, exceptions to the right of reproduction must meet the following three conditions (the three-step test): they must be limited to ‘special cases’, they must not conflict with the normal exploitation of the work and they must not unreasonably prejudice the legitimate interests of the rightholder. All three conditions must be satisfied.

With regard to EU law, Directive 2001/29/EC sets out a long, exhaustive list of exceptions, the majority of which are optional for Member States. As an example, optional exceptions to copyright exist in relation to the dissemination of knowledge. These are, firstly, the exception for the benefit of libraries and archives and, secondly, the exception authorising dissemination of works for the purposes of teaching and research. There is also an exception for reproductions made by a natural person for private use and for ends that are neither directly nor indirectly commercial on a condition that the rightholders receive fair compensation. Only one exception to the right of reproduction is compulsory. It concerns certain *"temporary acts of reproduction, which are transient or incidental, which are an integral and essential part of a technological process and whose sole aim is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which has no independent economic significance"* (Article 5(1)). Copyright exceptions provided for in Directive 2001/29/EC have to pass the three-step test.

9. Liability for copyright infringement

This Working Document does not set out to discuss the complex issue of liability for copyright infringements. Suffice it to say that at the EU level in the context of digitisation of books the most relevant provisions are those of Directive 2001/29/EC referring to technological measures and more generally Directive 2004/48/EC on the enforcement of IPR.

10. Other aspects

A number of other aspects, such as conflict of laws, competition law issues, questions on privacy and protection of fundamental rights might have a certain degree of relevance in the context of the distribution of books online and their digitisation.
PART TWO:
DIGITISATION OF BOOKS - STATE OF PLAY AND PERSPECTIVES

1. Introduction

As a powerful global corporation blessed with both financial resources and technical expertise, Google was well placed to take advantage of the extremely high cost and the technological complexity involved in both the process of the digitisation of works and in making them accessible online. It also benefited from the strong desire to conserve and distribute Europe's cultural heritage in the digital era. With its advanced technological capacity and its privileged position as an Internet search engine, since 2004 Google has undertaken mass digitisation efforts and made accessible online millions of works in the public domain as well as works still under copyright without the prior authorisation of right holders. The legal implications of such a precedent are complex and are not bound solely to questions concerning copyright but also regard broader questions such as those related to competition.

During the Education, Youth and Culture Council on 27 November 2009, European ministers discussed the issue of the digitisation of cultural content in Europe. They considered that the involvement of the private sector in the digitisation process should be possible, albeit subject to certain conditions. Legal certainty and enforcement of competition rules were referred to as pre-conditions for such public-private partnerships. Ministers also highlighted the licensing of orphan works as well as the issue of standards for digitisation as being among the crucial questions that needed to be resolved.

2. The site EUROPEANA: online library, museum and archives in Europe

Inaugurated in November 2008, the Europeana site is the outcome of an unprecedented collaboration between several hundred cultural institutions of European Union's Member States whose objective is to digitise the European cultural heritage and make it accessible online.

Europeana is more than a simple database; it is a connection point for the digitised collections of more than a thousand European cultural institutions, granting access to their digitised content. Europeana constitutes a multilingual, free-of-charge access portal to 4.6 million works, of which more than 47% come from collections already digitised by France.

The strategic objective foreseen by the European Commission is to make 10 million works accessible via the website in 2010, in particular to consumer in the Member States.

Most of the works accessible via Europeana are public domain works. Nevertheless, it is possible to have access to some copyrighted works. Those works have been
provided by the INA (French Institut National de l'Audiovisuel) with the authorisation of the rights holders.

At present, Europeana includes neither out-of-print nor orphan works. Europeana aims ultimately to make more and more content under copyright available to the public thanks to collaboration between cultural institutions and right holders, while respecting copyright legislation. The legal obstacles to the digitisation and online publication of such works are huge and the European Commission is currently looking at several approaches which might bring a more suitable legal solution.

To this end, the European Commission could envisage agreements between national cultural institutions and the right holders, or establishing links between Europeana and websites exploited by the right holders, as is the case of the library Gallica 2 website. The latter grants free-of-charge access to public domain content digitised by the National Library of France and provides links to works still under copyright on the websites of French publishers. It has to be noted that the works under copyright are not accessible via Europeana, whereas Gallica 2 public domain works are accessible.

3. Public-private partnerships

For financial and technical reasons, certain public cultural institutions have decided to enter into partnership agreements with private operators in order to guarantee the digitisation of their collections with the aim of their preservation and online dissemination.

3.1 Exclusivity clauses

Certain public cultural institutions grant to private operators exclusivity clauses (digital exclusivity, commercial exploitation exclusivity, etc.) in return for their carrying out and financing the digitisation of the works in their collections.

3.2 Territorial limitation on access to works

Other partnership agreements foresee clauses limiting territorially the access to digital content (for works both in the public and private domains) to the IP addresses of their national territory, either because of the high cost of obtaining a license that would cover the whole territory or on legal grounds. An example is the agreement between the Royal Library of Denmark (RLD) and the private operator Proquest\(^25\). The RLD's works digitised by Proquest are only accessible in the territory of Denmark.

3.3 Partnership agreements between Google and public institutions

In 2004, Google announced its plans to create an online database of all of the world’s books, starting with agreements with major university research libraries in the United States. Since that announcement, Google has entered into agreements with new partners not only in the US but also in the EU.

\(^25\) See: http://www.proquest.co.uk/en-UK/aboutus/pressroom/09/20090820.shtml
Google has entered into partnership\textsuperscript{26} agreements with 21 libraries\textsuperscript{27} and makes part of their collections accessible online for everybody and free of charge. Works in the public domain are fully accessible and users can download these works freely. For works still under copyright, Google displays only basic information about them and in some cases very short excerpts called “snippets”.

3.4 A case study in the European Union: The negotiated public service contract of July 2008 between Google, Scanning solutions and the city of Lyon

Following the opinion of the CADA\textsuperscript{28} of 6 November 2009, the negotiated public service contract between the city of Lyon, Google, and Scanning solutions has been made public. It is now possible to examine in detail the set of provisions relating to digitisation and making available online by Google of part of the collection of the Municipal Library of Lyon (BML).

This agreement of July 2008 aims primarily at the digitisation of part of the printed works published before the 20th century and being in the public domain of the old collection of the BML, one of the most important collections in France. Digitisation is done for conservation as well as online dissemination purposes.

In this chapter, three documents are analysed: the Contract of July 2008 and the list of special technical specifications (CCTP), hereby attached, as well as an explanatory letter of 26 November 2009 from Google to the city of Lyon sent after the Contract was made public.

3.4.1 Digitisation, online accessibility and consultation

In accordance with Article 6.1 of the Contract, Google takes total responsibility for the digitisation and its financing. Rather than receiving any compensation, it takes instead the full ownership of one digital copy of each digitised work. This 'full ownership' includes the right for Google to exploit such digitised works for commercial purposes. The agreement aims also at making the digitised documents accessible online “which can be consulted via Internet immediately, openly, freely and as broadly as possible”. The city of Lyon has also committed to exclude from the agreement the printed works which have not yet fallen in the public domain.

In accordance with Article 2 of the CCTP, Google and Scanning solutions, commit to digitise without any financial compensation between 450 000 and 500 000 works

\textsuperscript{26} For example see: http://www.lib.umich.edu/files/services/mdp/um-google-cooperative-agreement.pdf and the modified version http://www.lib.umich.edu/files/services/mdp/Amendment-to-Cooperative-Agreement.pdf

\textsuperscript{27} Library of the State of Bavaria, University of Columbia, Committee for the Institutional Cooperation (CIC), Cornell University, Harvard University, Ghent University, Keio University, Municipal Library of Lyon, University of Lausanne, Library of Cataluña, New York Public Library, Oxford, Princeton, Stanford, UCLA, University Complutense de Madrid, University of Louisiana, University of Michigan, University of Texas, University of Virginia, University of Wisconsin-Madison.

\textsuperscript{28} Commission dealing with access to administrative documents of the French Republic (Commission d'accès aux documents administratifs de la République française).
within a period of a maximum 10 years from the official date of the notification of the Contract. Moreover, that article states, that in order to avoid duplication, Google should provide a copy of the digital files of works which are in the collection of the BML and which have been already digitised by Google in the framework of another partnership. The digitisation is made in text or image format.

3.4.2 General provisions

As provided for in Article 6.1 of the Contract, Google is the owner, without any time limitation, of the digital files that it produces. The city of Lyon may however freely use copies of the digitised files without financial compensation and without time limit. It can also make back-up copies.

Article 24 of the CCTP provides nonetheless for Google an exclusivity clause on digitisation for the whole duration of the Contract and prohibits the city of Lyon from allowing any third party to digitise printed works falling within the scope of the Contract. The explanatory letter from Google states however that the city of Lyon may ask third parties to digitise works falling outside the scope of the Contract.

On the other hand, Article 6.1 of the Contract states that Google benefits from commercial exclusivity for a period of 25 years over the digitised files from the date when the beginning of the operation is notified. The city of Lyon cannot therefore use the files digitised by Google for commercial purposes or allow third parties to use them for financial or commercial purposes. Nevertheless, where the BML provides an "added value" to the digitised works in the form of, for example, editorial contributions or the production of educational materials which “might lead to an enrichment of the files”, the BML will retain the possibility to receive a payment from the final user for a period of 25 years since this payment is not considered to constitute a commercial exploitation of the actual files themselves.

Article 24 of the CCTP also indicates that Google “accepts that the Municipal Library of Lyon is entitled to conclude partnership agreements with other libraries or non-for-profit cultural, education and research organisations”. The explanatory letter shows explicitly that Google “would be favourable towards the sharing of the digitised works by the BML through Gallica or Europeana”.

Yet, the CCTP does not allow files to be handed over to a third party. Hence, what is authorised is the exchange of data and not of files. Moreover, the BML could conclude broader non-commercial partnership agreements with other organisations only with the prior agreement of Google.

Finally, the Contract imposes various restrictions on the use of digital files. In accordance with Article 24 of the CCTP, the BML undertakes to prevent any third party from downloading a large number of files digitised by Google or from disseminating them on a massive scale (constant and repeated extraction from the data base) on the Internet to anyone, whether or not for commercial purposes. Users keep however the possibility to download data for their individual use.
4. **The Google Book Search case**

4.1 **Google Book Settlement I: Chronology of facts**

At the end of 2004, Google announced the creation of a digital online library by making accessible the set of works available in the collection of several libraries and universities throughout the world on a voluntary basis. At the same time, Google started to digitise and put online short excerpts or “snippets” of millions of out-of-print and orphan works without the prior consent of right holders. In 2005, the Association of American Publishers (AAP) and the Authors Guild initiated a class action against Google and accused it of copyright infringement through digitisation of their works, which took form of an electronic database and of publication of extracts from books without the prior permission of rights holders.

On 28 October 2008, the AAP, the Authors Guild, and Google announced the conclusion of the settlement agreement estimated at 125 million USD. Under the terms of this settlement, Google is to pay, by way of compensation for the digitisation and online publication of works without the copyright holders' consent, 63% of the commercial income obtained from the exploitation of these works. Under the settlement, a Book Rights Registry is to be established to help publishers and authors control how their copyrighted works are accessed.

On 18 September 2009, the American Department of Justice addressed a declaration of interest to the judge in charge of the Google Book Search deeply disapproving the agreement negotiated in 2008, namely on the grounds of the violation of anti-trust laws. This intervention had been preceded at the beginning of September 2009 by the objections presented by the French and German governments in defence of copyright. In this context, the judge agreed, at the request of the parties, to defer the judgment in order to allow them to submit a new version of the agreement. The new version of the agreement was made publicly available on 13 November 2009.

4.2 **Google Book Settlement II: new agreement of 13 November 2009**

The revised version of the new agreement includes a geographical limitation based on similarity of copyright legislation. It henceforth concerns only copyrighted books registered in the US before 5 January 2009 as well as those published before that date in Canada, the United Kingdom and Australia. Only those countries will be represented in the Book Rights Registry, the independent non-profit organisation responsible for the protection of the right holders by the proper implementation of the agreement.

The authors and publishers covered by the new agreement will have, until 31 March 2011, the possibility to claim payment of 60 to 300 USD per digitised book as

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compensation for non-authorised digitisation\textsuperscript{31} of their work by Google. According to the terms of the agreement, by 9 March 2012 they can also request that their work be removed from Google Book Search.

The right holders can also decide not to withdraw their work from that database. If so, they will receive 63\% of the revenue from the commercial exploitation of their work. Google will keep the remaining 37\%. Furthermore, right holders will be able to define the conditions of access to their work.

It has to be noted that the agreement makes no mention of the status of works which have already been digitised but are currently excluded from the agreement. No financial compensation has been mentioned for the prejudiced right holders, who might either negotiate individually with Google or take legal proceedings in order to get compensation. Moreover, the "opt-out" possibility from the provisions of the new agreement concerns only the parties involved.

4.2.1 Orphan works

The Book Rights Registry will include an independent fiduciary, appointed by a judge, who will have the responsibility for supervising the search for the right holders and the management of rights resulting from commercial exploitation of those works. The Amended Settlement provides that the Registry will use settlement funds to attempt to locate rights holders. It will hold unclaimed funds for at least ten years. If after five years the right holder remains unknown, 25\% of the funds will be used to search for the right holder. The remaining unclaimed funds will be transferred after a period of ten years to charity associations fighting against illiteracy in the US, Canada, the UK and Australia.

4.2.2 Out-of-print works

Out-of-print works on Google Books Search may be commercialised by booksellers who are Google's competitors, such as Amazon. The revenues will be divided among right holders, Google and the selling website as follows: 63\% for the right holders and 37\% between Google and the selling website, which should, theoretically, receive a bigger share. Prices are to be fixed freely. For the agreement to be enforced, it has to be validated by the US District Court, Southern District of New York.

On 18 February 2010, a fairness hearing took place. At the beginning of this hearing, the judge Denny Chin in charge of the case said he would not rule immediately on the settlement because of the amount of information to analyse. The judge heard all the objections from the twenty six parties who had expressed their positions on the revised settlement (twenty one against, five in favour).

Google faced criticism about the choice of parties included in the settlement, the reasons for which they were included, the scope of the settlement and the number of

\textsuperscript{31} In accordance with the terms of the agreement, digitisation is considered to be unauthorised if it was done before 5 May 2009.
books covered by the deal. According to its opponents, around 174 million works would be affected by the settlement. For its part Google estimated that the settlement covered only about 10 million works, around half of which were out-of-print. Many critics expressed concern about authors who, although covered by the settlement, did not know about it.

On the one hand, supporters of the settlement such as Sony Electronics and the University of Michigan underlined that the agreement would make millions of hard-to-find books available to a large audience.

For their part opponents to the settlement, including Amazon, Microsoft and representatives of the German government, expressed their concerns regarding competition, privacy and abuse of the class-action process. More particularly, they argued that the agreement should be rejected because it would violate copyright laws. The settlement could give Google an unfair advantage over other online publishers in the market for digital books.

Another crucial issue was why Google and the parties to the settlement did not set up a process that would allow authors to opt-in to the settlement, instead of the system which requires authors to opt-out. Google argued that there could not have been any settlement without an opt-out class because it would be too expensive to find the individual right holders and negotiate with them.

It also pointed out that in the past some operators had tried to adopt an "opt-in system" but had always failed. Microsoft had abandoned its scanning project, finding it not commercially viable. Google argued that the settlement was designed to encourage the production of works and protect the economic interests of rights-holders.

The final decision is expected on 18 December 2010.

5. Examples of case law in France

5.1 Case SAIF v. Google France and Google Inc.: Decision of 20 May 2008, 3rd Chamber of the Tribunal de Grande Instance de Paris (TGI)

In this case, the SAIF brought an action against Google for infringements of copyright through representation and reproduction, in so far as it had made it possible to view through its Google Images search engine, some of the works belonging to SAIF's collection without its consent.

In its defence, Google did not counter the jurisdiction of the French court, but argued that the American law was applicable to this litigation in accordance with the provisions of the Berne Convention. The claimants argued that French law was applicable since the images were made viewable from France through Google Images.
The Court considered “the law applicable in matters of complex offences committed on the Internet is that of the State on whose territory the acts at issue occurred” by way of interpreting Article 5(2) of the Berne Convention\(^{32}\).

According to the Court, since the infringement of copyright consisted in the indexation and the storage of images by host operators based in the territory of the United States of America, it must be considered that the American law on copyright applied, specifically the 1976 Copyright Act. In this respect, the Court did not decline jurisdiction but decided to apply American law, by considering the legitimate implementation of the exception of "fair use"\(^33\), which was claimed by Google. The Court held that Google had not infringed copyright by making thumbnail images of works belonging to SAIF viewable through its Google Images search engine. The Court also considered that the downsizing of the pictures to thumbnails, resulting in reduced resolution, did not lead to the denaturing of these works but was the result of the necessary adaptation of the information to users in the online context.

In its judgment of 20 May 2008, the Court therefore dismissed SAIF's claim in its lawsuit against Google France and Google Inc. to date, this decision has never been confirmed in any court of appeal or court of cassation.

5.2 Case H and K, André R. v. Google: Decision of 9 October 2009 of the 3rd Chamber of the Tribunal de Grande Instance de Paris (TGI)

This case originated with a photograph of a famous singer put online by an Internet user on the website Aufeminin.com. The photographer and the firm H & K, the producers of the picture, informed Aufeminin.com that it contested the dissemination of the picture online. The website therefore withdrew the picture. A few months later, the picture was still available online, as it had been posted by two other Internet users.

In this case Google tried to ask for the application of the SAIF v. Google decision on the ground that, according to the Berne Convention, American law, i.e. the principle of "fair use" and the provisions of the 1976 Copyright Act, applied and that Google had not committed any copyright infringement.

However, the Court decided, contrary to its decision in the SAIF case, to apply strictly the French intellectual property law, rather than the American law. The Court held that as "the damage results from the posting of the aforesaid picture on the website google.fr (...) neither the question of the nationality of the author of the picture, nor the territory in which the first disclosure of the picture took place are disputed by either party (...) the territory of the country in which the act at issue took place is the same country where the damage took place, i.e. France, the claimants could not claim in those circumstances that American law should apply".

\(^{32}\) In stating that the applicable law is the law of the place when the damage occurred, the Court has expressly applied the Lamore judgment of the Cour de Cassation of 30 January 2007. In this decision, the Court also decided to apply the American law on counterfeiting in deciding that "(...) the legislation of the country where the protection is claimed is not that of the country where the damage is suffered but the state on whose territory the offences were committed".

\(^{33}\) Principle of “fair use” enshrined in Article 107 of 1976 Copyright Act.
Accordingly, in its judgment of 9 October 2009, the Court recognised that there had been an infringement of the moral rights of the author. Google Images did not respect the author's rights in so far as it failed to mention his name. Furthermore, it pointed out that the picture had been reframed and that the way it was disseminated only allowed for a poor quality view owing to the size of the image.

The Court therefore found Google guilty of copyright infringement, as a search engine, since it allowed a picture to be displayed Google Images without the photographer's agreement. The Court held that Google Inc. and Google France as well as Aufeminin.com were jointly and severely liable to pay 10 000 EUR as financial compensation to the photographer for the infringement of his moral rights and 10 000 EUR for the infringement of his author's rights and for the damage to the integrity of his work.

Once again, the Court based its decision on SAIF v. Google by considering that the law applicable in matters of complex offences committed on the Internet is that of the state on whose territory the acts at issue occurred. However, the Court considered that French law applied in this case as the infringement resulting from the display of the picture via the google.fr search engine took place on French territory.

Therefore, starting from almost identical principles, the Court has come to completely opposite conclusions.

5.3 Case Google France, Google inc. v. La Martinière: Decision of 18 December 2009 of the 3rd Chamber of the Tribunal de Grande Instance de Paris (TGI)

La Martinière, France’s third largest publishing group and the owner of publishers Editions du Seuil (France), Harry N. Abrams (USA) and Delachaux and Niestlé (Switzerland), brought an action for infringement of copyright against Google. The claimants sought compensation for the damage suffered by La Martinière owing to the digitisation and online distribution of thousands of books on Google Book Search without the permission of the publishing group.

La Martinière sought 18 million EUR in damages from Google for copyright and trademark infringement and freeloading, as well as a daily penalty payment for continuing offences. Two French publishers' associations, Syndicat National de l'Edition (SNE) and Société Des Gens de Lettres (SGDL), joined La Martinière in the suit.

At the hearing of 24 September 2009, the claimants accused Google Inc. and Google France of copyright and trademark infringement in so far as they had reproduced in full and made accessible extracts from works through unauthorised digitisation.

For their part, Google Inc. and Google France invoked once again the application of American law, arguing by reference to Article 5(2) of the Berne Convention, that the law applicable in matters of complex offences committed on the Internet was that of
the state on whose territory the acts at issue occurred. Since the process of digitising the works concerned took place in the United States, only the provisions of the 1976 Copyright Act and the notion of “fair use” had to be taken into account.

The decision of the Court given on 18 December 2009 states three principles: (1) French law applies in the case; (2) the digitisation and the dissemination of a work without the agreement of the author or its rights holders constitute an infringement; (3) presenting truncated extracts of works impairs their integrity.

On the first point (law applicable), the Court stressed that the case concerned works of a French author digitised in order to be accessible to French internet users on French territory. In addition to the fact that it was the French court that had jurisdiction, it has been also taken into account that the plaintiffs were established in France, the intervenents were of French nationality, Google France had its headquarters in France, the domain name giving access to the site had an "fr" extension and the site itself was written in French.

The Court therefore concluded from that that France was the country which maintained the closest links with the litigation. This justified the application of French law and made Google responsible for the infringement.

"By reproducing in full and making accessible extracts from works (...) on the site (...)http://books.google.fr (...) without their authorisation, the company Google Inc. has committed an infringement of copyrights (...)"

Google was ordered to pay over 300 000 EUR damages. SNE and SGDL that joined La Martinière in this case receive symbolic 1 EUR each. Google was also obliged to stop the infringement under the pain of penalty payment of 10 000 EUR a day as of thirtieth day after the Court's decision. Google appealed against this decision on 21 January 2010.

6. Challenges of digitisation and the accessibility of works in the digital era: the perspective of different stakeholders

6.1 Librairies

Digitisation is a crucial issue for libraries in conserving documents and disseminating them online. For libraries, the main concern seems to be the financing of the digitisation process, which is extremely costly. There is not an unanimous view on this issue.

Some libraries such as the Municipal Library of Lyon have decided to cooperate with Google in a public-private partnership. On the other hand, some libraries highlight the fact that financing must come from both national and European sources, as this guarantees that works in the public domain will remain public in the digital era, and will still be accessible without any restriction.
Furthermore, some libraries have called for the revision of the current copyright legislation in order to adapt it to the new challenges of digital technologies.
6.2 Authors

Authors’ positions on the issue differ. Many authors, in particular famous ones, share the concerns expressed by publishers and booksellers. By contrast, a minority of authors, usually less established or well-known, see Google Book Search\(^{34}\) as an opportunity to raise their profile and have their works more visible online. In effect, it is a free marketing opportunity for them.

6.3 Publishers

Copyright is also the cornerstone of the publishing industry.

Considering that the online distribution of eBooks is still a nascent market, publishers argue that the potential barriers arising from fragmented copyright legislation are irrelevant. There is no need in their view to change the current copyright legislation as it does not bar the development of a market which would enable right holders to manage their rights in a fair manner and users to access content easily. Copyright territoriality is therefore not an obstacle to obtaining access to books in any European country because, in general, books in a given language do not have territorial restrictions attached to their licensing.

More particularly with respect to orphan works, publishers argue that any initiative to address orphan works must be based on a due diligent search in the country of publication before making the works available. In the case of out-of-print works, right holders agree to support voluntary licensing after prior authorisation for digitisation and dissemination of their works online.

In this respect, European publishers support such projects like the ARROW (Accessible Registries Rights Information and Orphan Works)\(^{35}\).

Publishers also do not consider that the creation of an EU copyright title would be an appropriate solution on the ground that differences between national copyright laws do not constitute an obstacle to the creation of an online market for digital books. They fear in this respect that an EU copyright title that would take precedence over national copyrights would not be able to take into account the diverse cultural and legal traditions of Member States. Some publishers also argue that it is not clear whether Article 118 of the TFEU gives EU the competence to establish a single EU copyright title, stating that this Article was foreseen for industrial property and therefore there is a risk of legal uncertainty. According to them, it could even lead to annulment before the Court of Justice for lack of a legal basis.

\(^{34}\) *J’aimerais que Google rende mon livre visible sur Internet* (I would like Google to make my book visible on the Internet). \url{http://culturevisuelle.org/totem/324}

\(^{35}\) ARROW facilitates access to rights information available from a predefined set of sources so as to determine the right status of any book, and to redirect libraries to the relevant clearing centres or to individual right holders’ contacts.
Publishers are therefore in favour of maintaining the current legal framework.

6.4 Booksellers

For booksellers, copyright is the cornerstone of the industry. They are convinced that full respect for copyright is essential to ensure Europe’s cultural diversity, creativity and innovation.

In the digital environment, copyright protection appears to be a real challenge. While mass digitisation is to be encouraged, dissemination online on such a scale seems problematic for booksellers, insofar as it could constitute unfair competition with commercial operators offering digital products.

In order to ensure that European bookshops continue to be able to have access to a wide selection of literary productions and knowledge in the future, booksellers emphasise that it is essential to ensure fair remuneration for all stakeholders.

Booksellers point out that the exception granted by Article 5 of Directive 2001/29/EC allows libraries and public institutions to create copies of works and to make these copies available to its users solely for the purpose of research or private study.

Although booksellers believe that digitisation and online dissemination represent a milestone in terms of access to knowledge and culture, they also draw attention to the fact that in the future readers should still be able to choose the format of the book (electronic, paper, digital) and the channel through which they want to access it (bookseller, library, publisher, online, etc.).

Digitisation is a costly process, and alternative sources of income have to be considered. Booksellers are open to becoming part of a public-private business model for works in copyright. The guidelines for such sponsorship should be extremely clear and should ensure that European values and fair competition are respected and that no single commercial organisation is given exclusivity.

7. Challenges relating to digital reading and eBooks

Owing to the development of digital technologies and the mass digitisation of works in recent years, it is necessary to reconsider the question of platforms and devices and raises the broader issue of the future of books in the digital era. Millions of works in the public domain are available today on the Internet via various platforms, such as Europeana or Google Books Search. It is also possible to buy digital files of works under copyright on booksellers' or publishers' websites. The advantages and applications of digital technologies appear to be numerous, including better accessibility for disabled people, educational benefit and environmental gains (savings made in paper, ink, transport and distribution).

Digital technologies have drastically changed the way that the publishing sector operates. This part gives a short overview of the digital books available online today in Europe. It also raises several questions regarding the rapid development of digital books and its effect on the management of copyright in a digital context. In addition,
the document briefly discusses various economic models and issues of accessibility and piracy.

7.1 Digital reading

Digital reading is not limited to reading on a computer screen. Today there are various devices for e-reading, and it is now possible to read a book on a personal assistant (PDA), on a mobile phone, or on e-readers such as “e-books” which are comparable to a physical book with their use of electronic ink. Slowly but surely, digital reading is becoming a reality in Europe. However, the market still remains small compared with the great success of e-reading in America or Japan, where the digital novel “Koizora” had already been read by 25 million Japanese before the print version was even released by publishers. The market for devices for digital reading is virtually non-existent in Europe.

7.2 European publishers in the digital era

Some European publishers have begun to offer digital books online in strict adherence to copyright law, in order to counteract the free access of some digital books and to prevent the potential creation of a monopoly on digital books.

Here are some examples:

Numilog adapts, disseminates, and sells digital books online. It intends to create content for all digital reading devices in partnership with publishers. It aims at adapting paper versions of books, transforming them into digital books and distributing them from its website or from the sites of some of its partners in a secure way that respects copyright.

Libreka, launched by a consortium of publishers, is a website which gives access to the content of the digital books only with the consent of publishers, strictly respecting copyright rules.

I-kiosk is a platform which proposes to publishers and authors to digitise their works, whilst protecting their rights. I-kiosk is one of the ten E-Distributors approved by the BNF and proposes to publishers an exclusive dissemination of digital books on Gallica as well as a contract of non-exclusive digital dissemination on its own platform.

36 Some have even the flexibility and the flexibility of paper. See http://www.plasticlogic.com/
37 There is a real development of digital best-sellers in Japan. Specially designed to be read on small screens, these digital books called “keitai shosetsu”, literally: the “mobile novels”, are becoming a true phenomenon of society.
38 With respect to e-books it is estimated that in the consumer book market in Europe, Middle East and Africa the e-books market will raise from 13 mln USD to 148 mln USD between 2008 and 2013 and will remain a fraction of the general share. However, in the US these figures will be 203 mln in 2008 and 1.26 bln in 2013 and will start to form a more important part of the market. FT.com of 9.2.2010 quoting as a source PwC.
39 http://www.numilog.net/accueil.asp
40 http://www.libreka.de/
41 http://www.i-kiosque.fr/
Other independent publishers are now exclusively working on digital books and have given up the publishing of traditional books. These include Leezam\superscript{42}, which is involved exclusively in the production and the distribution of digital books for all the various e-reading devices.

A few independent publishers believe in the free dissemination of digital books, such as "Les éditions de l'Eclat", which signed a partnership of digitisation with Google, and set up the website LYBER\superscript{43}. On this website, it is possible to access and read digital books, and to buy their paper versions online via booksellers' websites. Such publishers are suggesting that reading a book online free-of-charge does not affect sales of the paper version in bookshops.

7.3 Other commercial offers

7.3.1 Amazon and its Kindle reader\superscript{44}

Introduced in November 2007, Kindle is an e-reader developed by Amazon.com. It allows easy access to a vast library of eBooks which can be downloaded and read on the Kindle device.

In August 2008, 160 000 eBooks\superscript{45} were available and the number is growing by over 25 000 titles per month. eBooks are published in a proprietary format for the Kindle.

Amazon.com decided in January 2010 to provide a new option to publishers on Amazon’s Digital Text Platform. Publishers are now able to choose not to enable digital rights management (DRM), i.e. to publish their eBooks for the Kindle with or without DRM.

Many book publishers are hesitant about offering their works digitally without DRM, fearing a free dissemination of all books available for download via file-sharing networks such P2P

The elimination of DRM may nevertheless increase customers’ comfort level when buying eBooks. Until now, the transfer of eBooks legally purchased from Kindle to another eReader device has been impossible. It is entirely up to publishers to decide how many times their eBooks can be downloaded once purchased on Amazon.com. Once the limit is reached, users must purchase the eBook in question again if they want to download it on their devices. This technically means that although the eBooks purchased will remain in the user's personal Kindle library online, they may not be able to download them if they have upgraded their hardware.

7.3.2 Sony Reader

The Sony Reader is an eBook reader. It uses an interface similar to iTunes to purchase books from Sony Connect eBook stores.
Until now, the digital rights management rules of the Sony Reader allow any purchased eBook to be read on up to six devices, at least one of which must be a personal computer running Windows or Mac OS X. Although the owner cannot share purchased eBooks with others' devices and accounts, the ability to register five Readers to a single account and share books accordingly is a possible workaround.

Sony nevertheless announced in December 2009 that it would make all the titles in its eBook store available in the open source ePub format. This means that users will be able to read any of the eBooks purchased in its store on any eBook reader that supports the ePub format.

7.3.3 The Apple iPad

Announced on 27 January 2010, the iPad is a new device developed by Apple. Its functionalities are similar to the iPhone and iPod touch, running the same operating system and applications.

When Apple launches its eBook store to sell titles for its new iPad device in March 2010, many of its titles are expected to come with digital locks designed to deter piracy.

All iPad applications must be authenticated by Apple. Furthermore, Apple can make updates to the device over its wireless connection, giving itself the possibility to add or remove capabilities at any time. Some critics argued that it may give Apple the possibility to disable features, block competing products, censor news and even delete books, videos, or news stories from users' device without notice. Apple argued in response that it would never abuse its potential power. This situation leads however to some questions about the connection with DRM data protection and privacy of users.

7.3.4 Mobile version of Google Books

Google launched in 2009 a mobile version of its application Google Books, which enables all owners of an iPhone or a Google Phone to access free-of-charge all digitised books in the public domain available in Google Books. Google also signed a partnership with Sony to make its catalogue available on Sony eBook Reader.

7.3.5 Google Editions

In October 2009, Google announced the launch of its digital library Google Editions, which will be accessible from June 2010 in the United States and Europe.

The new commercial platform based on the principle of "buy anywhere, read anywhere" will allow users to purchase DRM free and totally interoperable eBooks that they will be able to read on any eReader device, in contrast to what its competitors currently offer.

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46 http://books.google.com/m
Initially, Google will offer 500,000 works in its digital bookshop. The prices of the eBooks will be fixed by publishers themselves, and Google will share its revenues with both publishers and booksellers.

8. Copyright issues

The current mass digitisation of books as well as the development of digital devices to disseminate them can be perceived as a threat to all stakeholders in the publishing sector. Publishers may fear that works of their authors are being disseminated free-of-charge online.

The current situation of publishers is comparable with the one faced by music companies in the last decade. They initially concentrated their efforts on copy protection (DRM) to apply to the legal downloading rather than seeking to develop new products with added value or finding solutions for the payment of royalties in the digital era, such as setting up new economic models. As a result, they found themselves left behind by other more forward thinking actors such as Apple and its Itunes shop.

Publishers must reflect on the possibility of creating new content as well as its dissemination on various digital devices. Telecommunications and Internet firms are already present on the market in this respect. On the other hand, readers can access more works available online and on their mobile devices. Moreover, financing through advertising appears to be seen more and more as an appropriate solution to remunerating rights holders and it is likely that this will modify the market.

With such a wide public domain, and with some authors, who do not necessarily seek to make benefits from their works, allowing their works to be freely accessible online, the publishing sector may face some difficulties in adapting to a changing market philosophy. It seems that a complete change of mindset is necessary because it is no longer sufficient to think just about the content. One must also consider the versions which will be available on various devices. In this context, some thought needs to be given to the video or audio sequences which will be added to the text. It will be therefore necessary to manage the process of creating these components in parallel with the other more traditional stages. The management of digital rights on the various devices is one of the principal issues in this context. As this was not taken into account in the initial negotiation of the rights, it remains an important outstanding obstacle.
PART THREE:
ANALYSIS

1. Digitisation of books is a relatively new phenomenon, which marks a change from traditional paper support to digital product and online environment. This is an entirely new and difficult change that came much quicker than the book world anticipated and the scale of which has yet to be fully revealed and assessed. It is a time when a page is being turned, but no one knows what this turn is going to bring.

It seems that challenges are different depending on whether works are or not in-copyright, and whether books are in-print and out-of-print or in the public domain.

2. The fundamental difficulty lies in defining the problem faced by the world of books and in determining its scope. Is it about law, economics and business models, cultural and social issues, public versus private? Take book publishers as an example and look at the troubling experience of the music business ten years ago, which changed the lot of the whole music industry and from which publishers know they have to learn in order to avoid the same mistakes. Only by getting the problem right, the right policy choices can be made.

It should be noted that, while this might not yet be the case, digitisation of literary creations can face similar difficulties and challenges as to the protection of copyright as is currently the case for other sectors, such as music or audiovisual. Although voices in the publishing industry point to a fundamental difference between books and music (e.g., unlike in case of music albums, readers want entire novels not just a few chapters of the books), it cannot be excluded that new consumption patterns will emerge if the consumers have the possibility to download only that part of the book that they have a particular interest in (take, for instance, short stories or anthologies of poetry).

3. One of the questions that seem to be relevant today is whether copyright trumps digitisation or whether it is digitisation that trumps copyright. In other words, does copyright challenge digitisation or is it rather digitisation that poses a challenge to copyright? The way this question is answered will influence policy making in the area of copyright in the coming years.

4. However, before and if more substantial reforms are undertaken, it is important to determine whether there are issues that need to be addressed in the more immediate future in order to facilitate and manage digitisation and to avoid the substantial problems that it may create. This is because the choice whether to digitise has already been made - digitisation is already under way, in fact it is here.

5. One of the important factors in digitisation efforts is Transatlantic relations, including relations between the European and the American legal systems, in particular with respect to copyright. Should the EU be inspired by the American way of doing business and law? Or should it work it out differently and, if so, how? Is digitisation of European literary works by an American private company wrong? How can the EU adapt its system in order better to compete with the US? Who should take
the primary responsibility for digitising the cultural heritage of Member States of the EU: the EU? its Member States? the public institutions? the public institutions in cooperation with private sector (e.g. by private-public partnerships)? the business itself? What should be the terms and conditions? What incentives for the private sector would be acceptable so as to ensure that it engages in digitisation projects? Can those incentives be provided? How to ensure that digitisation of cultural heritage by a private economic operator can be linked to and serve the public interest, what guarantees are necessary so as to ensure that such an operator engages in the public service throughout its corporate life span and after its end? Should the task of digitisation be left to each individual Member State or should it be tackled at EU level? Finally, how to open up access to the world knowledge contained in books?

The rapidity and scale of developments outside the EU suggest that the Union could come under serious competitive pressure and find itself on the defensive if European solutions which ensure copyright protection, legal certainty and uniform conditions for development of digital solutions throughout all Member States are not developed fast.

6. It is clear that today the Google Book Search case would not be possible in Europe the same way it is in the US, neither for Google nor for any of its competitors, and it is not because of Europe's particular attachment to copyright, its competition rules or because of the lack of a EU-wide class action. It would not be possible simply because there is no single copyright in EU. Instead, copyright protection is afforded under 27 different copyright laws.

7. The challenge posed by the existence of 27 different copyright systems in the EU should be taken on board, with potential comprehensive harmonisation efforts taking account of the new possibilities given in this field by the Treaty of Lisbon. Any such harmonisation efforts should be preceded by an analysis of the various legal traditions and approaches to certain concepts of copyright in the Member States and internationally.

It should be noted that although Article 118 TFEU continues to be set in the context of the establishment and functioning of the internal market, it now obliges the European Parliament and the Council to establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the EU.

8. Territoriality has usually been praised as a way to preserve Europe's cultural diversity. In today's online world where everything seems to be truly without borders, territoriality within the EU appears to strangle our culture rather than to help it flourish. It appears more and more to be a potential reason for the weakness of EU creative market vis-à-vis the US. Creation of multi-territorial or pan-European licensing systems could be a short-term solution.

9. Internationally recognised copyright principles, which are binding on the EU and its Member States and which form the core of copyright legislation, mark the starting point for any policy considerations. One of the essential principles stresses the compulsory nature of an author's consent to use his or her work. Until this basic
principle is changed, which is unlikely, anyone wanting to use the work has to obtain the agreement of the author. This requires that, as long as the work is in copyright, the author has to be found and has to give the consent to its exploitation. However, as copyright is a property right, an author could have a possibility to cede his or her economic rights free-of-charge or to the public domain.

10. The online distribution of in-prints books is the least controversial issue as the publisher or the author owns the right to make the book available online. Who will give authorisation to publish depends on the publishing contract, which specifies whether rights to this form of exploitation are with the publisher. It should however be noted that the rules on the interpretation of publishing contracts vary from one Member State to the other and it is not clear whether and in which Member States a similar ruling to the 2002 US Random House v. Rosetta Books case would be given.  

11. For out-of-print works a thought could be given to a possibility of a general limit on the non-exploitation of the economic rights transferred by the authors. This could take, for instance, a form of an opt-out clause in the publishing contracts that authors could exercise upon lapse of certain period of time or in case of the publisher's refusal of a certain form of exploitation. It should be noted that the legal situation of out-of-print works has been identified as one of the obstacles to mass digitisation projects.

12. Another category of works has been similarly indicated as being an obstacle to mass scale digitisation. These are copyright protected orphan works where getting author's (or another rightholder's) consent proves to be a particular challenge. Existing instruments on orphan works have been criticised as not giving legal certainty (they are not legally binding, nor solve the fact that using orphan works is a copyright infringement) and as not addressing the issue of mass digitisation.

Discussed solutions to orphan works problem include the introduction of a new exception to Directive 2001/29/EC, a legally binding stand-alone instrument on the clearance and mutual recognition of orphan works, guidance on cross-border mutual recognition of orphan works or solutions on right clearance (through licensing) combined with diligent search. The Parliament supports a legislative action in this field. Whatever the final solution that would allow the problem of orphan works to be tackled, it should ensure legal certainty, be EU-wide and cover commercial and non-commercial aspects of exploitation.

13. The discussions show that in the book sector there is a clear distinction between the needs, interests and offers of libraries and those of publishing industry or

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47 In Random House v. Rosetta Books the US court ruled that the right to "print" an e-book remained with authors.
48 Commission Recommendation 2006/585/EC on the digitisation and online accessibility of cultural material and digital preservation. 2008 Memorandum of Understanding on Orphan Works.
49 Commission Communication of 19 October 2009 “Copyright in the Knowledge Economy”.
50 As above, p. 6.
51 See report on Europeana - next steps (2009/2158(INI)).
booksellers. That should not however necessarily mean that different legal solutions should be developed for each of those sectors.

14. Online distribution of literary works and e-books is a growing market. However, though this part of the market is growing, there is no certainty as to what an e-book is.52

15. Another difficulty faced by the digitisation of books is the variety of the terms of protection accorded to works: whereas this might be of no importance at EU level where the terms of protection are the same across the Member States, the differences at the global level (such as between EU and US) can play a role, in particular with respect to the scope of the public domain and digitisation of older works. One of the solutions suggested by the Commission was to introduce a cut-off date, similar to the one adopted in the US and setting 1923 as the limit date for in-copyright works.

16. The case of the Google Book Search project seems to be the (strange) case of Dr Jekyll and Mr Hyde, of a benefactor and a violator, of a friend and a foe. It offers interesting policy questions from the copyright and competition law perspectives, as well as with respect to fairness, culture, economy, access to knowledge, ideas or culture, creativity, new business models and opportunities, privacy, etc. It also raises the more general political issue of who has the responsibility for the digitisation of cultural heritage.

More specifically, for Europe the Google Books Settlement sets two general problems. The first is the problem of exclusion. The second is the non-ability to provide a project of the same dimension in the same time-span in the EU. It could be argued that one of the reasons for this situation is the lack of a truly internal market when it comes to copyright.

17. It should be considered whether some framework should be set for public-private partnerships that would cover issues such as the duration of those partnerships, the standards for access and digital preservation copy, the period of preferential access, non-competition clauses, post-termination clauses, permitted uses by libraries (both on premises and online), jurisdiction questions, etc.

18. Directive 2001/29/EC was adopted in 2001 with the implementation deadline set at 22 December 2002. The directive was to be reviewed for the first time by 22 December 2004 and then every three years. 2010 should therefore see a new review of its provisions. However to date only a preliminary report on the application of Directive 2001/29/EC has been presented by the Commission with an interesting summary of case law produced by the courts of Member States when dealing with issues covered by the directive, in particular with respect to exceptions and limitations and technological protection measures.

This report shows that, with regard to exceptions and limitations which are likely to have the most impact in the digital environment, their implementation by Member

52 See observations in Report on Digitalisation of Written Heritage of 12 January 2010 by Marc Tessier, point I.2.3.
States did not mark the end of the variety of provisions. This is in particular the case for the private copying exception and the exceptions for the benefit of libraries. It should be noted that implementation and even enforcement of copyright exceptions should be treated as being as important as the enforcement of authors' exclusive rights. To this end, the usefulness of the optional application of exceptions by Member States should be re-assessed.

Finally, the user right and user content debate has so far been limited to the context of music and audiovisual sectors. One may well imagine that similar trends and problems will emerge in the context of books online.
PART FOUR:
CONCLUSION

The digital revolution has changed the cultural world as well as the conditions of production and dissemination of cultural content. The book industry is currently facing similar problems as the music and audiovisual sectors in the recent years.

It has to be understood that, despite the numerous critics, the process of digitisation is already under way. This should not be however a pretext for infringing copyright law.

There are many challenges relating to digitisation, taking into account the fast and permanent development of the digital environment, the future of which, including which business model will prevail, is impossible to predict. In this context, the European Union has to face the legal consequences of digitisation of works.

It is an undeniable fact that Google has not respected the current European legislation on copyright. It is however also true that the EU has had some difficulties in enforcing its own legislation and ensuring that right holders are protected.

It is therefore necessary to consider which solutions could be adopted. Should the EU, as a public authority, take measures to enforce its own copyright legislation?

The current fragmentation of the market resulting from the principle of copyright territoriality as well as the current disparities between national copyright legislations suggest that they are no longer adapted to the new boundaries of the digital market and undermines the EU vis-à-vis its American competitors. In this respect, it is important to examine whether reforming the current copyright legislation would be the solution so as to facilitate the digitisation of books and find a way to “harmonise” copyright in the current digital context.

Article 118 of TFEU states that “in the context of the establishment and functioning of the internal market, the European Parliament and the Council (…) shall establish measures for the creation of European intellectual property rights to provide uniform protection of intellectual property rights throughout the Union and for the setting up of centralised Union-wide authorisation, coordination and supervision arrangements”.

In this context, multi-territory licensing could therefore provide for some specific sectors a possible answer. It would establish a new principle of territoriality of copyright at the EU level, which would be multilingual and multifaceted.

However, behind the threat to copyright, many other issues are at stake. Economic and cultural issues are equally as complex and important.
At this embryonic stage it is impossible to know whether the development of digital reading is sustainable and whether eventually it will replace traditional reading. In addition, it is important to question how consumers will use these reading devices. Will they be simple storage tools, consultation tools or genuine multimedia platforms? Is the most crucial issue a commercial one? The launch of the iPad on the European market shows the reality Europeans live in. Although it can be seen as the latest fashion item to purchase, it appears to be nevertheless an adaptable reference tool with countless applications.