

Copyright Policy for digital libraries in the context of the i2010 strategy*

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§ 1. *The EU Digital Libraries Initiative: “a future for the past (and for the present)”*. – My presentation concerns the EU digital libraries initiative and the copyright issues related to it. Both the Communication by the Commission of September 2005¹ and the Commission Staff Working Document annexed to it² quite clearly illustrate what the i2010 strategy is about. Libraries, archives, museums were set up a long time ago in order to preserve text, music, images, audiovisual works and other materials. All this content was originally accumulated and made available in analogue format; in the last decade, however, it turned out that digitisation is appropriate and, to a large extent, indispensable in order to pass this content to the next generations.³

The difficulty in achieving this task lies in the fact that, while digitisation of text and even more so of images and audiovisual material is immensely costly, its outcome, digital preservation, entails vast external benefits. This characterization of the structure of costs and benefits suggests that market forces, by themselves, may not be up to the task. That here we are dealing with a case of provision of a public good and specifically of the kind which often is referred to as a global public good⁴ is specially clear in a European context. Just to give an example: market forces could be expected to give priority to text written in English; on the contrary, in the perspective of EU institutions the goal of preserving linguistic and cultural diversity has a clear priority.

So far we mentioned the issue of preserving past content for the future. But it would appear that the same analysis applies to giving a future to the present: to preserving digital born content in view of making it accessible in the future. Also in this regard, market forces may be unlikely to

1* While I am a member of the High Level Group set up by the EU Commission on the Digital Libraries Initiative and Chairman of the Subgroup formed within the HLG, in this presentation I express my opinions only as an independent academic writer. I am deeply indebted to my colleagues in the Subgroup for their insights and dedication; however I am the only one to blame for whatever error of fact or judgement which may be found in this writing. This paper is published under a Creative Commons Attribution 3.0 unported license (<http://creativecommons.org/licenses/by/3.0/>)

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions i2010: Digital Libraries Brussels 30.9.05 COM(2005) 465 final.

2 Commission Staff Working Document, *Annex* to the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions i2010: Digital Libraries, Brussels, 30.9.2005, SEC (2005) 1194.

3 For a balanced view of the respective roles of analogue and digital copies in the libraries of the future see R. DARNTON, *The Library in the New Age*, *The New York Review of Books* 12 June 2008, 72 ff.

4 In accordance with the terminology adopted by K.E. MASKUS-J.E. REICHMAN, *The Globalization of Private Knowledge Goods and the Privatization of Global Public Goods*, in *Journal of International Economic Law* 2004, 279-320

come up with the appropriate rate of preservation and accessibility.

How does copyright come into all this? As it can be easily expected, both digital preservation and accessibility raise a number of copyright issues.⁵ Before dealing with them in some detail below in §§ 2-8, we might begin by questioning what is the relevance of the i2010 strategy and of its copyright angle for the present purposes, that is in connection with public domain policies in the digital age which are the object of this conference and of the entire “Communia” project. There is a number of ways to look at this question. The simplest reply is to say that, before asking whether a given set of materials should belong to the public domain or be privately appropriated, the stuff should be somewhere out there in the first place. In this perspective, we might say that digitisation is about a very preliminary issue: to make sure that in 10 or 100 hundred years from now this set of materials will still be around.

We might as well add that copyright comes into the equation, because its rules do affect quite decisively the rate of digital preservation and accessibility of content. So that we might venture that, if we were to shift from the current form of copyright, as we know it today (Copyright 1.0, we might say), to a new copyright (Copyright 2.0, we might say), or, possibly, to some sort of flexible combination of Copyright 1.0 and Copyright 2.0, the curve of the transaction costs involved in digital preservation and accessibility might experience a marked downwards shift. But we will get back to that later (in § 10). For the moment let us look at the nuts and bolts of matter in the light of the current legal context, as it is to be expected from hard-nosed positivistic continental European lawyers.

§ 2. *The copyright issues taken up in the context of the initiative.* – To deal with the economic, legal and technological issues raised by the i2010 strategy, the EU Commission set up a High Level Expert Group (HLG) on the European Digital Libraries initiative. At the first meeting of the HLG, held in Brussels 27 March 2006, the HLG took the decision to appoint some members to work together as “the Copyright Subgroup” to analyse the relevant IPR issues and options.⁶ The mandate entrusted to the Subgroup was summarized in the following terms: “What are the key IPR challenges? What different actions and arrangements could be undertaken jointly by stakeholders to reduce tensions surrounding copyrights? Is there a need to harmonise at Community level exceptions and limitations that relate to libraries, archives, museums? What are possible ways for facilitating the clearance of rights for cultural institutions?”

The Copyright Subgroup presented its Final Report on Digital Preservation, Orphan Works, and Out-of-Print Works at the meeting of the HLG of 4 June 2008.

The approach adopted by the Copyright Subgroup to deal with the mandate was in a number of ways selective rather than expansive. Even though digitisation and accessibility raise a vast

⁵ Legal analysis of digitisation of works is to be found in O. NIIRANEN, *Online Access to the World Libraries*, in *Computer und Recht international* 2006, 65 ff.

⁶ The following persons were appointed as members of the Copyright Subgroup: Dr. Arne J. Bach (President of FEP – Federation of European Publishers), Ms Lynne Brindley (Chief Executive of the British Library), Ms Claudia Dillman (Director of Deutsches Filminstitut and President of ACE – Association de Cinémathèques Européennes), Ms Tarja Koskinen-Olsson (Honorary President of IFRRO – International Federation of Reproduction Rights Organisations), Mr Emmanuel Hoog (President of INA – Institut National de l’Audiovisuel). I was asked to act as the Chair of the group. To the drafting of the Final Report contributed, besides Lynne Brindley, Claudia Dillman, Tarja Koskinen-Olsson, also Toby Bainton, Secretary of the Society of College, National and University Libraries, and Chair of the Copyright Expert Group of EBLIDA – European Bureau of Library, Information and Documentation Associations, Anne Bergman-Tahon, Director of FEP - Federation of European Publishers, Jean-François Debarnot, Directeur Juridique of INA - Institut National de l’Audiovisuel, Myriam Diocaretz, Secretary General - The European Writers’ Congress and Olav Stokkmo, Secretary General – IFRRO. Two representatives of Google, Ms Patricia Moll first and from the second half of 2007 Antoine Aubert, took part in the Subgroup’s meetings; Google’s reservations on the Report are acknowledged at § 2 of the same.

number of IP issues, four key challenges were given priority: digital preservation, web harvesting, orphan works and out-of-print works. In this regard, the Subgroup followed quite literally the Commission Recommendation of August 24, 2006.⁷ The Subgroup also preferred to see what could be done in these specific areas on the basis of existing EU legislation. Therefore, rather than investigating the possibility of amending the current Directives, it concentrated on two sets of tools at hand: Member States' implementing legislation and voluntary arrangements between rightholders and other stakeholders, be they collective and individual. In a similar vein, we could add that the approach selected was vertical rather than horizontal: it was preferred to look at the fine detail of implementation and deployment of each single selected issue, rather than to cover all the possible ground.

This selective approach may be appreciated in different ways. One may apply to it old Goethe's maxim, whereby *in der Beschränkung steht die Kraft*, the force resides in the limitation; or one may criticize the excess of cautiousness it may entail. Surely it is not for me to decide which of the two assessments is the most appropriate.

Let us look briefly at each of the selected key issues and at the recommendations the Copyright Subgroup has come up in connection with them.

§ 3. a) *Digital Preservation*. – Digital technology evolves quickly; therefore obsolescence is built-in in any given format and platform. Those of us who are no longer in their thirties already experienced that the first digital files we created are now irretrievable; even the medium where they originally were stored (the floppy disk first, the diskette later) has already become – or is quickly becoming – useless, as the platforms to which it was connected already disappeared or are about to disappear. Now, if copyright law allowed only a predefined number of digital copies, this would mean that all the digitisation efforts would probably turn out to be in vain in a quite short time. After a decade or so, these copies would become obsolete; and the initial investment would be altogether lost. This is not a theoretical scenario: we all know that the digital copy of the Book of Doomsday, a beautiful Middle-Ages manuscript, no longer is accessible, while the original still is alive and well.

However, nothing prevents copyright law to take into account this quite obvious technological background and steer clear of posing unnecessary obstacles to digital preservation. All what is required in this regard from a legal viewpoint is that copyright law allows for the creation of an open-ended number of digital copies. Indeed, if the original creation of multiple copies and the subsequent creation of additional copies are permitted to the extent required to evolve (or “shift”) the original copies into the formats which from time to time appear on the technological horizon, then a modicum of technological foresight is required to enable progressive migration at the same pace as formats and platforms evolve.

The Copyright Subgroup noted that EU copyright law does not stand in the way of this possibility. On the contrary, Art. 5(2)(c) of the Directive 2001/29/EC of the European Parliament and the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society⁸ states that “Member States may provide for exceptions to the reproduction right provided for in Article 2 in the following cases: ... (c) 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 commercial advantage”. This wording does not set a ceiling to the number of digital copies and therefore enables migration, subject to the stipulation that the copies from time to time created are linked to preservation only and are not used

⁷ European Commission Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation (2006/585/EC), in *Official Journal* 236 of 31 August, 2006, 28 ff.

⁸ In *Official Journal* L 167 of 22 June 2001, 10 ff.

for other purposes. Migration is nevertheless prevented by Member States implementing legislation, which currently provides only for a limited and fixed number of copies.⁹ Therefore, all what is required to take care of this obstacle to the ongoing adaptation of digital files to technological development is that Member States amend their own domestic rules to enable an open-ended number of copies.

This is indeed the solution recommended by the Report,¹⁰ which goes on to note that the same digital copies can also be made available at all relevant times on the premises of the same establishment to the public by means of dedicated terminals within the limits provided for by Art. 5(3)(n) of the Directive to the extent provided, again, by Member States' implementing legislation.

The resulting solution quite nicely dovetails the corresponding US provision, Sec. 108 of Copyright Law as amended by the 1998 Digital Millennium Copyright Act (DMCA), which also provides for an exemption on behalf of non profit libraries and archives.

What has a characteristically European flavour, both in the Directive and in all the documents referring to it, all the way down to the Report, is the kind of institutions, or "establishments", as Art. 5(3)(n) puts it, we Europeans do have in mind when we talk about the task of digital preservation. What we have in mind are public institutions, like the Bibliotheque Nationale de France or the British Library, much more than private, not-for-profit institutions, such as the Internet Archive founded by Brewster Kahle. For sure private digitising entities, such as private for profit corporations, are out of the European picture, except in the case they operate as partners in some public-private partnership (PPP), along with the responsible "public" institution. We will come back to this feature later on (in § 9).

§ 4. b) *Web Harvesting*. – The Commission Recommendation of 24 August 2006 describes web-harvesting¹¹ as follows: "*Web-harvesting is a new technique for collecting material from the Internet for preservation purposes. It involves mandated institutions actively collecting material instead of waiting for it to be deposited, thus minimizing the administrative burden on producers of digital material, and national legislation should therefore make provision for it.*" The reasons why the Copyright Subgroup felt there was an urgent need to address web-harvesting in addition to digital preservation of analogue materials are quite obvious. Indeed, as earlier remarked, we must ensure a future not only for the past, but even more so for the present. Not only analogue material, but also digital born material, requires preservation and deserves it; and this is even more so for the simple reason that digital material is even less stable than analogue material.

In this connection, rather than going into the details of the Report,¹² I shall confine myself to two remarks.

First, it should be noted that also in this connection the EU legislative framework does not require any innovation. Indeed, on top of Art. 5(2)(c), the text of which was quoted in the previous paragraph, the provision of Art. 9 of the Directive 29/2001 provides that "This Directive shall be without prejudice to provisions concerning in particular... legal deposit requirements". Now, in EU parlance, deposit means legislation mandating public institutions to store away new works as these are from time to time being created and made available to the public. Now, web-harvesting by mandated institutions clearly is a tool to implement deposit legislation, which in this specific case may be described as operating in pull mode (by the institution) rather than in push mode (by the content creator).

Therefore, once again, what is required – and was recommended by the Report – is action at

9 If it provides for them at all: Italy is a sad exception to this, providing only for analogue xerocopies. But then Italy has deliberately chosen to be the sick man of Europe in all possible regards.

10 Report, § 3.

11 Recital 14 of the Recommendation.

12 Report, § 4.

the Member State level only, to implement through national legislation what EU law already permits. This task should now have become much easier, as the Copyright Subgroup noted, once two Member States, France and Finland, set an example with far reaching web harvesting legislation, which also deals with the most crucial issues in the sector (such as the retroactive effect, the connecting factors, etc.).

Second, the institutions to be entrusted with the task of web harvesting once again are ideally public bodies, even though the leeway granted by Art. 9 of the Directive would appear to be greater than the reference to Art. 5 only might be deemed to imply.

§ 5. c) *Orphan Works*. – Digital preservation and web harvesting may appear the easy part of the job, if compared to the much discussed issue of orphan works, that is of works whose rightholders cannot be identified or, if they can be identified, cannot be located. This may be very important content, as in the case of a great part of movies, silent or otherwise, created until the half of last century; sometimes the inclusion of the orphan content may be indispensable for the creation of a multi-component, derivative work. How is it possible to obtain a clearance when the creator is unknown? Here the Copyright Subgroup could not confine itself to noting, as it did in the two other areas we earlier mentioned, that the enabling provision is already available in the *acquis communautaire* and all what is required is Member States' implementing action, for the simple reason that such an enabling provision unfortunately is not to be found anywhere in the relevant EU Directives.

Of course, one could have envisaged specific new EU legislation concerning orphan works, to the effect that, under given conditions, the reproduction, distribution, communication to the public and the other acts concerning orphan works could be considered either altogether admissible or at least subject to what the current US bills call "a limitation on remedies".¹³ I do not know whether this solution might have turned out to be questionable under the 1886 Berne Convention and under the incorporation of Berne by reference to it in Art. 9 TRIPs. For sure, the Copyright Subgroup also in this connection preferred to remain within the limits of the current EU framework and to confine its recommendation to the two sets of tools it had in principle selected, i.e. contractual arrangements and Member States' domestic legislation.

This approach has an obvious difficulty: that it has to deal with a missing link. Indeed, it is quite problematic to stick to a contractual approach in a situation where by definition the correct party to the contract cannot be located or even identified in the first place.

The way I see it, the Report deals with this difficulty, which quite closely resembles the difficulty which the Baron of Munchhausen had to face when trying to raise himself by pulling his bootstraps, by combining three steps.

First, it was assumed that a minimum of harmonisation is required between the rules concerning clearance of orphan works applicable in the 27 different Member States. This harmonisation should particularly concern the issue of establishing what are the relevant diligent search criteria for each sector.¹⁴

Second, it was noted that under EU law minimum harmonisation usually leads to mutual recognition. The essential principle which sees mutual recognition as a consequence of minimum harmonisation at the EU level¹⁵ may have far reaching consequence also in our field. Indeed, once the basic rules to determine what is due diligence in the search of rightholders of orphan works are established, what is deemed acceptable in one Member State should be held to be correspondingly

¹³ Thereby meaning that reappearing rightholders may claim compensation but not damages and/or injunctions. Report § 5.2.

¹⁴ Report § 5.3 and 4.

¹⁵ Enshrined in the European Court of Justice decision of 20 February 1979, case 120/78, *Rewe Zentrale v. Bundesmonopolverwaltung für Branntwein*, in *European Court Reports* 1979, 649 ff., case "Cassis de Dijon".

acceptable in all the other Member States, or, in other words, should have cross-border effect. Therefore a search which is held diligent in one Member State should not be duplicated for the purpose of using the same orphan work in the other Member States but should be considered diligent also in the latter. Thus the solutions set in place in the various Member States could be in part different, but still interoperable, to the extent they are based on comparable due diligence guidelines.

Third, the consequences of compliance with due diligence guidelines should be established at Member States' level. The mechanisms may again vary from one Member State to the other. One Member State may consider resorting to extended collective licenses (ECL).¹⁶ In accordance with this mechanism, which is widespread in Nordic countries, rightholders' and users' collective bodies establish in advance by means of collective agreements what are the pre-requisites and the terms under which works originating from the rightholders who are members of the collective rights management organisations (CRMOs) which signed in the collective agreement, which happen to have orphan status at the time of planned use, may be exploited. This collective licensing feature would in principle be confined to works created by members of the signing CRMO; except that in Nordic countries State legislation steps in at this junction and adds a second, "extension" feature, by extending the effects of the collective agreement also to third parties who are not members of a CRMO, unless these do not chose to opt out. This mechanism automatically takes care of orphan works, because these are in principle included in the collective bargaining enlarged by extension legislation; to exclude them, the rightholder has to raise her hand and object, whereby the work instantly ceases to be orphan. Of course, other Member States might adopt different mechanisms, e.g. providing for a clearance centre checking that due diligence is complied with, granting licenses for orphan works, receiving fees at the applicable rate and paying out of the pool fund thus established the remuneration to the rightholders who may from time to time reappear and stake a claim to compensation. In either case, what is important is that an orphan work which gets the green light under any of these mechanisms in any Member State should also be considered cleared in all the other 26 Member States.

I am aware that all this may sound a bit difficult and technical; and I am afraid that there may be a few hidden snags still to be taken care of here and there,¹⁷ as one would expect considering that, as usual, the devil is in the details. Nevertheless I would like to underline that the approach seems able to attain its stated purpose: to provide a solution for orphans by once again combining contractual arrangements (at the collective, rather than individual level) with Member States' domestic legislation. EU law does indeed come into the picture; but only to the extent it resorts to the time honoured "minimum harmonisation-mutual recognition" principle to give EU-wide interoperability to solutions in all other respects based only on a combination of contractual arrangements and Member States legislation.

Before moving on to the next – and last – issue dealt with by the Report, I would like to add a few words on two noteworthy aspects of the proposals concerning orphan works.

The first remark has to do with the proposed data bases and clearance centres. As I earlier said, the approach of the Copyright Subgroup has been rather selective in identifying the key issues and thus has not been specially "horizontal" in covering the ground of digitisation related topics. I

¹⁶ Report § 5.2. For a comprehensive treatment of ECL see T. KOSKINEN-OLSSON, *Collective Management in the Nordic Countries*, in Daniel Gervais (ed.), *Collective Management of Copyright and Related Rights*, Wolters-Kluwer, 2006, 257 ff.

¹⁷ *Quaere*: should the rate set by the clearance centre in Member State A consider also use in the other Member States B, C etc.? In the event the rightholders eventually appears, should she obtain compensation from Member State A clearance centre also for uses in the other Member States? Should the cross-border effect be established in Member States' legislation and, if so, in which Member States' legislation? Of course, I do have my tentative replies to these questions; but I am fully aware that they are open to debate.

added at the same time that the approach of the Subgroup has been rather “vertical”. Now I can elaborate on this point, noting that the Report has sketched in great detail ways to collect, integrate and seamlessly disseminate information for orphan works, by the creation of EU-wide data bases, suggesting that they are so linked as to work under the one-stop-shop principle.¹⁸ The same applies to clearance centres. We seem to be approaching the era of EU registries for orphan works and of interlinked portals; and this is bound to be a way of reducing the number of orphan works, on top of helping to deal with those works which after all remain orphan. A test bed for implementation both of data bases and clearance centres seems to be under way, in the form of an e-Content Plus Programme, ARROW.

The second remark has to do with the nature of EU law-making. Which certainly is not based on the classical division of powers as envisaged a long time ago by Montesquieu. Here we are dealing with a characteristically inclusive law-making process, which, in turn, is enabled by the fact that the “rules” are not the traditional top-down “command by the sovereign” which one associates with the concept of law but bottom-up best practices, which derive their normative value by being referred to as “guidelines” and incorporated in the process through which rules are fashioned.

This aspect is particularly conspicuous in this connection. At the recommendation of the Copyright Subgroup, the Commission organised a meeting called “Stakeholders’ Perspectives” on 14 September 2007, to include representatives of different cultural sectors in deliberations on due diligence guidelines for their respective sectors. As a follow-up, the Commission set out a plan for facilitating the creation of sector specific diligent search criteria. Such criteria were understood as voluntary measures in the form of Industry Guidelines or Best Practices that European representatives of relevant industries and cultural institutions were expected to endorse. The main creative sectors working in accordance with the plan were: text, audiovisual, visual/photography and music/sound. Consequently, four different Working Groups were nominated to decide on the guidelines for their sector. The work on diligent search guidelines took place from October 2007 onwards. Endorsement by 22 organisations involved in the process took place on 4 June 2008, immediately before the HLG meeting scheduled for the same day. This process, I submit, speaks volumes about the new form of legitimacy which EU legislation is seeking and, in my opinion, also attaining.

§ 6. d) *Out-of-Print Works*. – We earlier saw that under current EU legislation libraries may make digital copies of the texts they own and are even allowed to make them accessible on their premises through dedicated terminals. The investment which digitisation entails is huge; and this is bound to raise the next question. Once the investment is made, why not make the digitised work as widely available as possible? In this connection the formula “to digitise once, to disseminate widely” has frequently surfaced in the debate.

The Copyright Subgroup did not fail to dutifully note that the precept to “disseminate widely” does not by itself entail the liberty to disseminate *freely* under all circumstances, lest the opportunity for uncontrolled *secondary* dissemination destroy the incentives to create in the first place and to invest in what is described as *primary* exploitation of works, often undertaken by businesses risking their own capital in the venture. Indeed, in many contexts creators and publishers may not be expected to engage in the difficult and risky task of creating and marketing a new work, if the initial digital copy were to be available without limits immediately after it is first made.

There are cases, however, in which dissemination of already digitised material would appear to be a win-win solution for all the interested parties. Once an old, rare book is digitised by an institution, there is no reason for a sister institution to duplicate the cost. If the digitised copy is made available to the sister institution, this fact should normally not have a material adverse impact

¹⁸ Report §§ 5.5. and 9.

on commercial exploitation, as also the additional use would be restricted to on the premises consultation. Moreover, every time a book is out of print, it may be that the rightholders are not interested in its further commercial exploitation; therefore they may well be prepared to consent to an even wider dissemination, beyond the restricted networks of public institutions.

The main hurdle to the adoption of these win-win solutions would appear to consist of transaction costs. It would appear that transaction costs can be mitigated by standardisation of contractual arrangements; if they are subject to the scrutiny of the different stakeholders' associations, members may well assume that a balanced solution has been worked out. Therefore, the Copyright Subgroup engaged in an exercise of drafting two model contracts, one intended for use in secure networks (for users who are members of the digitising institution or of an institution linked to it), the other intended for on line use over open networks. The idea was to provide an incentive to wider dissemination of digitised material, by facilitating the consensual arrangements between the two main players: rightholders and institutions who invested in digitisation of out-of-print works.

At a personal level, I was surprised that the second model contract, intended for on line use over open networks, could be adopted at all. I was even more surprised to find that the publishers themselves foresee that there will be a quite large number of works for which adoption of this second model is likely. Which certainly is good news: if the Digital Libraries initiative is about preservation of European heritage and accessibility of the same, then it does make a lot of sense that this accessibility is not reserved to the few EU citizens living in the neighbourhood of the physical location where the digitised resource is available in analogue format. Access from any interested person in any part of the globe is indeed most welcome.¹⁹

Of course, only the future may tell us whether these opportunities will in fact be exploited; and to which extent. What I can add, however, is that the Copyright Subgroup once again tried to be "vertical" in going into the details of deployment. Again data bases and clearance centres for out-of-print works should reduce transaction costs; test beds and "champions" interested in having the projects up and running should provide the necessary critical mass; coordination with the EU and national initiatives already in place and, last but not least, endorsement by European institutions should contribute to this. Therefore let us wait and see, hoping that this quite promising tool is widely resorted to.

§ 7. *Where do we go from here?* – Whatever the assessment of the contribution made by the Report, surely it may prompt us to ask several groups of questions which, to a varying extent, go beyond it. What are the other crucial copyright issues which digital libraries have to face which the Report chose not to address? What are the assumptions on which EU i2010 strategy is based, which have an impact on digitisation by libraries, archives and museums? Are they sound? Finally, is copyright as we know it still an appropriate tool in the current digital context; or should we move on to another mechanism? If so, what would be the impact of the move on the costs and benefits of digital libraries? A few words on these issues may as well be in place here.

§ 8. *A "Second Basket" of open issues.* – In this way, we really have moved on to discuss an agenda for the future. What are then the missing components which have to be addressed in the perspective of a comprehensive digital libraries strategy? I would list at least four.

8.1. *Other Rights.* The Report deals with copyright only. This may be a good approximation,

¹⁹ To this extent the Report has paid heed to the – quite sweeping – remarks made by F. STASSE, *Rapport au ministre de la culture et de la communication su l'accès aux œuvres numériques conservées par les bibliothèques publiques*, April 2005.

at least to begin with. Still, we have to consider that works to be digitised and stored by libraries, archives and museum will quite often, or, even, most of the times, be covered by other rights. Here I will mention neighbouring rights (music entails performances and therefore performers' rights as to the performance itself, phonogram producers' rights as to their fixation; the same applies, *mutatis mutandis*, for moving images, TV-programmes; etc.); data bases (including publisher's data base right on the titles in their series and in the tables of contents of their magazines). Most of the times, these "other rights" may be dealt by what could be described as a simple "extension clause", e.g. by having a provision saying that whatever rule is fashioned in connection with digital preservation, web-harvesting, orphan and out-of-print works applies *mutatis mutandis* to other rights which may cover the work or material from time to time considered.²⁰

The situation gets more complicated when we deal with other rights which are not just an accretion to copyright but a distinct strand, e.g. the right of privacy or the right of publicity. To make an example: we do need to store away TV news. Now, the real time communication to the public of images of actual people included in the news, be it on purpose or incidentally, is as a rule legitimate, as it is covered by the various rules flowing by the broad principles of freedom of information and speech. However, newsworthiness is like fish: it spoils in a few days. If we consider including TV and similar genres within digital archives, then exceptions or other mechanisms tailored after copyright law may not be sufficient. If we pause to think about ECL, we realise that also this otherwise most flexible of tools may fail in this specific connection, as it is extremely difficult to conceive of a trade body whose "members" are apt to show up in TV news. If we stick to the idea that these images have to be preserved and possibly re-used, then it is most likely that we need to have fresh thoughts about ways to balance the interest of the public and of users to store away and re-use these images with the (not negligible) interest of the persons involved to be "let alone", as, indeed, their privacy rights require.²¹

8.2. *National Heritage Legislation.* As old Goethe put it, *es erben sich Gesetze und Rechte, wie eine ewige Narrheit fort*. Old laws from the past still govern us, taking the shape of an eternal madness. This applies also to various Member States' national heritage laws, which were conceived in the analogue past and which give unpredictable and often absurd results if applied to the digital age. You can bet that Italy would be at the forefront of this, as it has both rich cultural minefields and an entrenched penchant for petty bureaucratic legislation. If I still get it right from my past professional experience, if any archive were to make available in digital format works in the public domain to teachers for their class activity, either the archive or the teacher or both would have to obtain written authorisation from some public agency or other and provide a copy (a "photocolor") for documentation to the latter body. May be this was right, when a University professor would take occasional photographs at the Uffizi; it does not sound right any more when the digital file does not derive from the real thing and is a mere duplication of another file stored on the museum's website. At some point we should get rid of all this old wood; or, may be, discriminate between rules which make sense in bricks-and-mortar contexts but fail to do so in connection with virtual reality and those which have a continued rationale in the current situation.

8.3. *Public Procurement Rules.* Here is also another feature which I have been bringing up for several years now, after mentioning it first at a meeting of the Max Planck Institute for history in Berlin back in June 2004. The argument I keep making (to no avail, though) is the following. There is an enormous amount of works which is created with taxpayers' money and is created specifically for institutions the purpose of which is to create and disseminate culture, information and data on

20 Here I use a distinction between "work" and "material", as I mean that the former term applies to items which simultaneously are protected by copyright, while the latter refers to items which are not, as it may be in a quite large number of situations: folklore, works in the public domain, non eligible works as court decisions, documentaries, photos and the like.

21 See in this connection V. MAYER-SCHÖNBERGER, *Useful Void: the Art of Forgetting in the Age of Ubiquitous Computing*, available at ksgnotes1.harvard.edu/Research/wpaper.nsf/rwp/RWP07-022.

behalf of the wider public, including, of course, the same taxpayers. Now, I do not see why the rule of *Zweckübertragung* (or, as the Anglo-Saxons put it, of divisibility of copyright), whereby the creator transfers only the rights expressly contemplated in the contractual agreement, should apply also in these situations. The purpose of the *Zweckübertragung* rule is to protect the individual artist or creator from the dominance of the businesses which contract with her. This rationale does not apply when the public service TV or a local body commissions, say, the creation of a TV programme or an inquiry on tourism in the region. In this situation the law should be amended by saying that the public body does acquire all the rights, both incidental to the initial purpose and to the further, free dissemination to the public in any way and form, be it contemplated by the original parties or not. This default rule should include the storing away in archives and the making available to the public, at a minimum for non commercial purposes. This seems to me to be a rather fundamental issue; so I take the liberty of bringing it up once again in this context.

8.4. *Technical Protection Measures*. This last issue is one which is at the same time quite big and quite obvious. So I can refer to all the available literature and particularly to the discussion concerning the interface between technical protection measures and access by archiving institutions, confining myself to a couple of remarks. First, as in the digital age human behaviour tends to be more influenced by technological rules and less by legal rules than it was in the past,²² we had better to conceptualize obstacles to digital preservation and accessibility also in technological terms, as, indeed, it does happen more and more. Second, we should note that in this context private ordering, i.e. the response to societal needs through negotiation and bargaining, is once again proving quite fruitful. As the Report noted,²³ while born-digital works often have an embedded protection device, European publishers and national librarians have several years ago agreed that this device should be disabled in the deposit copy (i.e. for the purposes of the national library, but not for access by the end-users) so as to allow permanent and unhindered access to the document. This is heartening; but does not detract from the fact that we must still deal with the issue in all these occasions in which voluntary agreements are not by themselves sufficient to make sure that preservation and access is guaranteed to the extent required by our knowledge-based societies.

§ 9. *Dirigism and Laissez-faire in digital preservation*. – So far, I did not question the basic assumptions on which the i2010 strategy and EU copyright law are based. However, I should confess that I have misgivings on one important feature which we Europeans tend to take for granted, in spite of the fact that it always puzzles and disquiets our brethren living on the other side of the Atlantic.

I refer to the dominant role played by public institutions in the preservation and dissemination of protected content. This may make sense, to a certain extent. After all, we seem to be talking here about the provision of global public goods, and it would therefore seem that a crucial role for public institutions within the i2010 strategy may well be warranted.

It should be questioned, however, whether there is a strand of this choice which could come under the heading of “the European reply to the Google challenge” and, if this is the case, whether this would be the right approach.²⁴ We can take for granted that the goal of the European project goes beyond the market-based approach of Google and other private players.²⁵ These entities seem to work on an advertising-led model; in this perspective, digitisation and access to digitisation is

22 As shown, in a wider context, by L. LESSIG, *Code and Other Laws of Cyberspace*, Basic Books, New York, 1999, 122 ff.

23 Report, § 3.

24 In this context it should be remarked that a representative of Google was present in the HLG and that Ms Moll and Mr Aubert took part to the Subgroup on behalf of Google.

25 For a characteristically European view of the issue see J.N. JEANNENEY, *Google and the Myth of Universal Knowledge. A View From Europe*, The University of Chicago Press, 2007.

seen not a goal in itself, but as a means to attract the widest possible audience (“billions of eyeballs”) to platforms simultaneously offering goods and services for a charge.

In the vision of European institutions, the goal of digitisation, to the extent it may be seen as a case of provision of global public goods, should be quite different and consist in maximising access to European cultural heritage and fostering long term societal goals, such as the preservation of linguistic diversity. Thereby, market objectives are not ignored; rather, they should be incidental to the broader objectives of the European polity. This is the context in which also public-private partnership are to be considered. Indeed, the deployment of market-based business models should be promoted rather than discouraged, but only to the extent they are compatible with the broader goals underlying the initiative.

Still, I do have misgivings about the paramount role of public institutions. A factor to consider is that public institutions may distort markets. This is not a moot issue. Once digitisation has taken place, there is a strong reason to favour all kinds of secondary dissemination of digitised materials, including through commercialisation.²⁶ If this is the case, then there are reasons to say that commercialisation of (digital) works by cultural, not-for-profit institutions may in some circumstances turn out to be risky. Indeed, in a competitive environment, it may also be dangerous to have new markets entered by public institutions, because these enjoy public funding and can cross-subsidize one sector with moneys derived from others. Initiatives adding value to digitized text, images and audiovisual content require a level playing field.

In a broader perspective, I would like to point out that we in Europe, and specially so in continental Europe, do have a *dirigiste* streak and an interventionist tradition which is hard to accept in the present days, considering all the bad, bad things which went along with it, from the economic inefficiency caused by corporatism all the way down to active contribution to two word wars.

Maybe I should elaborate a bit on these misgivings.

A few years ago, Roger Shattuck remarked that “most Americans believe that their culture should grow out of the free marketplace of ideas, fashions, and institutions, not out of a state command system”.²⁷ We Europeans have a rather different attitude: we are very quick in spotting market inadequacies and market failures; and possibly we are right in doing so, particularly in the field of culture. After all, this was the starting point of this very presentation.²⁸ However, this is not the end of the story: we should be at least as cautious in handling regulatory tools.

May be this is particularly so at this point in time. The alternative between markets and regulation originates from the Nineteenth century and dominated the so called short century which just came to an end. I do not think that this same dilemma is going to remain crucial for next century. The future, particularly in the sector of culture and media, would appear likely to be dominated neither by neo-proprietary market approaches nor by neo-regulatory revivals, but by the emergence of a new mode of production and distribution based on decentralized, non-market choices or, as Jochai Benkler puts it, by “social sharing”.²⁹

Of course, one might ask whether the landscape is really changing so fast; and whether this demands a fundamental change in the copyright mechanism. I will try to say a few words on both issues.³⁰

²⁶ To the extent, of course, this does not destroy creators’ and business’s incentives to primary exploitation: see above, § 6.

²⁷ Roger SHATTUCK, *In the Thick of Things*, *New York Review of Books* 26 May 2005, 19.

²⁸ See above, § 1.

²⁹ Y. BENKLER, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, in 114 *Yale L.J.*, 2004,

³⁰ For a more analytical treatment see my *Individual and collective management of copyright in a digital environment*, in Paul Torremans (ed.), *Copyright Law. A Handbook of Contemporary Research*, Edward Elgar, 2008, 282 ff.

§ 10. *A look at the future: Digital Preservation in a Copyright 2.0 World.* – To introduce this final point I am trying to make, I could begin by noting that, even if we had a combination of optimal contractual arrangements between all the parties involved and prompt and appropriate legislation by Member States, as discussed in §§ 3-6, and the European institutions were to take care in the best of the ways of all the “complementary” issues I just listed in § 8, which is, I suspect, a quite tall order, still digital preservation and accessibility would be caught in a paradox of sorts. On the one side, the transaction costs would still be enormous, as even streamlined clearances for orphan works would still cost tens or (for audiovisual works) hundreds of euros apiece. On the other side, copyright as we know it would still put a brake on most forms of access, as any mode of access beyond the making available by mandated institutions on their premises through dedicated terminals would again need tailor-made contracting between all the – often quite many – parties involved.

Where is the paradox, then? Well, the paradox lies that in the last decade a new “class” of creators has in the meantime emerged who would appear to be interested in maximizing, rather than restricting, access to their works and favour their widest possible dissemination.³¹

The fact is that, in the meantime, the social and technological basis of creation has been radically transformed. The time has come for us to finally become aware that in our post-post-industrial age, the long route which used to lead the work from its creator to the public by passing through different categories of businesses is gradually being replaced by a short route, which puts in direct contact creators and the public. This development may be sketched as follows.³²

10.1. In the analogue world, direct access to the market by creators was confined to a very limited number of very special cases.³³ Otherwise, it could be taken for granted that business was necessary to bring works from creators to markets. In particular, books and records needed to be printed. For this purpose some kind of “factory” was required, to manufacture what in effect were fixed, stable, material or – as the expression now goes – “hard” copies of the work. In turn these hard copies needed to be stored, transported, distributed, before reaching the shelves where the public would finally find them. It was difficult for creators to engage in all these steps; and this is why, as a rule, they preferred to resort to businesses to set up the characteristic trilateral relationship between creator, business and the public, which is typical of primary exploitation of copyrighted works.³⁴ The kind of business which appeared indispensable had features which in the last two centuries came to be familiar to us. First it had to make substantial outlays to figure out whether there was a market for the work; then again it had to invest and take large risks for the mass production of material copies of works and for their distribution; and this on a scale which increased in step with the extension of the markets. Hollywood and the record labels are appropriate cases in point. Radio and TV came in to take care of so called “secondary” utilization of work, which in some way may equate to the tail of the comet. In all these regards, it certainly can be said that this was a quite long route to institute a contact between the creator and the public.

10.2. In the digital environment all this changes dramatically. On the production side, perfect digital copies make “factories” of physical, material copies of works redundant, at least in principle.³⁵ What is specially remarkable is that this same development is now reaching the movie

31 See in this connection F. MORANDO, *Creative Menus: applying some considerations about default rules and contractual menus to the case of Creative Commons Licenses*, in Anne Flanagan & Maria Lilla Montagnani (eds.), *Intellectual Property and Social Justice: a Law and Economics Approach*, Edward Elgar Publishing, 2009 (forthcoming).

32 See *Individual and collective management of copyright in a digital environment*, above at note ##, at 285 ff. and 308 ff.

33 Such as the bohemian painter personally seeking out patrons to sell his paintings or the wandering gypsy carrying around his violin.

34 See in this connection W.R. CORNISH, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, London, Sweet & Maxwell, 1996, 401.

35 It may be argued that this is true only for additional copies, the ones which can be costlessly multiplied after what we

industry. Until recently this sector of the entertainment business appeared to be the last bulwark in which capital intensive business could be considered really indispensable. But this is becoming less and less true as each day passes. Jean Cocteau predicted that the tools required for the creation of a movie would at some point in time become as cheap as paper and pencil; and digital technology is proving his vision right.

On the distribution side a similar – possibly less visible, but certainly even more striking – process is taking place. This is so because digital goods which are distributed through the net are light rather than heavy, and use up a limited amount of storage space. But even more so because the technological endowment held by the public at the receiving end has in the meantime deeply changed. Even in the past the end user had to make an investment of sorts in technology, by purchasing a radio or a TV set, a record player or a tape recorder. The novel feature is that since the beginning of the digital age the scale of a minimum unit of the technological endowment at the receiving end – e.g. the memory of a PC – has started to be largely in excess of the average needs of the consumer;³⁶ and as a rule each unit is interoperable with all the others. A similar analysis can be reiterated in connection with file-sharing. Whatever legal assessment we may pass of this practice, its ultimate technological ramifications cannot be revoked in doubt. Here we have enormous excess capacity residing with the public at large at the receiving end; and this excess capacity can be mobilized to create distributive networks of extraordinary scale, scope and effectiveness.³⁷

In this novel context, it would seem that the setting up of a relationship between creator and business no longer has the same compelling rationale it used to have in the past. Digital copies are (nearly) perfect; and can be duplicated at no cost at the receiving end. Therefore, in a number of situations both the “factory” and the physical distribution chain are no longer indispensable.³⁸ It appears therefore that creators can more and more often access markets without engaging in the trilateral relationship which used to be characteristic of dealings in copyright. Indeed, these technological determinants enable creators to make works directly available to the public. It is even more remarkable that an increasingly large number of members of the public itself are in turn grabbing the opportunity offered by the technology available at the receiving end and transform themselves into producers and distributors of works.

To make a long story short: both the production and distribution functions migrate from business to the public and there they can rely on excess resources available at each consumption unit. These, if individually of small scale, may be multiplied by very large numbers to provide almost infinite manufacturing and distribution capacity in a way that dwarfs past industry investments and makes them to a large extent redundant.

The stage scenario is indeed changing. Social sharing enters; business recedes. As a result, the long route from creators to the public may at some point become much shorter; and this is happening more and more all the time. Today creators set up their own sites and make books and

could call the initial embodiment, the prototype or the “master” has been first created; and to this it may added that for the latter the required investment still is huge. This objection has indeed been raised a number of times [e.g. by P. AUTERI, *Diritti d'autore, nuove tecnologie e Digital Rights Management*, in (M.L. Montagnani, M. Borghi eds.) *Proprietà digitale: diritti d'autore, nuove tecnologie e Digital Rights Management*, Egea, Milano, 2006, 23 ff.] but it becomes less and less defensible as the time passes. The role of software and of digital technology in the creation and fixation of music is increasing all the time; and their cost is decreasing in parallel.

36 As noted by Y. BENKLER, *Sharing Nicely*, above at note ##, 277.

37 As indeed aptly described by the decision of the US Supreme Court of 27 June 2005, *Metro-Goldwin-Mayer Studios Inc. et al. v. Grockster, Ltd. et al.*, 125 S. Ct. 2764 (2005). On the potential for distribution offered by open spectrum access see L. LESSIG, *The Future of Ideas. The Fate of Commons in a Connected World*, New York, Vintage Books, Random House, 78 ff., 218 ss., 240.

38 Both developments had been anticipated a number of years ago: see E. VOLOKH, *Cheap Speech and What it Will Do* 104 *Yale L.J.* 1995, 1805 ff. and I. DE SOLA POOL, *Technologies of Freedom*, Cambridge and London, The Belknap Press of Harvard University Press, 1983, 249-251.

music directly accessible to the public therefrom.³⁹ Currently, social networking and user generated content are all the rage.⁴⁰ creators and public are finally merging into each other.

10.3. Of course, we do not know much about the future. So much is changing all the time and so quickly, that it is impossible to make predictions. Nevertheless we can anticipate with some confidence that in the future production and distribution of works will originate from two different sectors, the one based on business and markets, the other on the production and distribution mode which is based on decentralized non-market decisions, to which we earlier referred as “social sharing”; and that the two sectors will not be mutually exclusive but will be likely to interact.

This is why any agenda for lawmaking for the digital environment should meet at least three requirements. First, the agenda should incorporate rules which are appropriate not only for the long route but also for the short route. Second, it should allow for the “peaceful coexistence” of the two sets of rules, making them interoperable, in such a way that the continued existence and specific contribution of the two sectors is maximized. Third, obstacles inherited by the past which unduly inhibit the emergence of the short route should be gradually phased out in ways which should minimize the disruption of the workings of the old route.

10.4. Against this background, let us think for a moment about the set of rules which would appear to be appropriate to meet the demands of creators operating along the short route. In the market based model it was essential for creators and even more so for businesses to control and restrict access to works, as the monopoly granted by expansive exclusive rights enabled them to charge the market whatever price the market would bear. However, this would not appear to be the goal of creators currently operating along the short route. Most of them do not make a living out of “sales” of “copies” of their works; even if they are professionally engaged in the creation of works, which is not always the case, their business model is often based on income sources different from the sale of copies as such. It would appear that there is a shift whereby even singers and songwriters increasingly rely on performances, tours, endorsements and their likes rather than sales of albums and tracks. This is the business model which the Grateful Dead pioneered, possibly taking a clue from open source software and IBM, and is currently expanding to an increasing number of business. So that the eminent economist Paul Krugmann recently quipped that in the long run we will all be the Grateful Dead.⁴¹ What is important for creators engaged along the short route is, it would appear, that their work can be disseminated as widely as possible, on two conditions: first, that the works is correctly attributed to them, and second, that no unauthorized third party is allowed to make a commercial profit out of their work unless this is agreed to by the creator or artist herself.

10.5. If this is so, it would appear that copyright, as we have known it for three centuries, which after all is a brief parenthesis in the *longue durée* of information technology the history of which spans over six thousand years, may no longer be an appropriate tool for the needs of creators operating along the short route.

What may currently be needed is a new kind of copyright, which we may, if you wish, label Copyright 2.0. I submit that the new system would have four basic features. Old copyright, or Copyright 1.0, would still be available; but it would have to be claimed for by the creator at the onset, e.g. by inserting the old copyright notice, ©, as the US did in the past, before accessing the

39 On the early beginnings of the phenomenon, when Stephen King set up a site to allow readers to download his latest short story, ‘Riding the bullet’, at \$ 2.50 per download, see J. EPSTEIN, *The Rattle of Pebbles*, in *The New York Review of Books*, 27 April 2000, 55 ff., at 57-58.

40 For an early appraisal see Pew/Internet Home Broadband Adoption 2006, 28 May 2006.

41 P. KRUGMAN, *Bits, Band and Books*, New York Times 6 June 2008. This trend seems confirmed by the current behavior of “traditional” businesses, which are indeed seeking to obtain a share of these novel income streams: see J. GAPPER, *The music labels can take a punch*, Financial Times 3 July 2008, noting that labels have started “to get a slice of the action from the artists’ other earnings, including live performances and merchandising”. Accordingly, “Universal is taking a share of touring and merchandise revenue in 90 per cent of contracts it signs with new artistist”.

Berne Convention. If no notice was given, Copyright 2.0 would apply; and this would give creators just one right, the right to attribution. The notice could also be added after creation, but then it would only have the effect of giving exclusivity against specified non authorized uses (in particular: commercial uses). The Copyright 1.0 protection given by the original notice could be withdrawn, and may be it should be deemed withdrawn after a specified period of time (e.g. the 14 years of the original copyright protection), unless and extension period (of another 14 years) is specifically requested.

What is the purpose of the exercise I just sketched out? Well, I confess that I am not so totally sure after all that the four features I just described are really what is appropriate for the needs of our societies. The point I am making, however, is that thinking along these lines at least allows us to conceptualize how the different sets of rules correspond to the specific needs of the creators who create works along the long and short route. We assumed that Copyright 1.0 should survive; and we may anticipate that this is likely to be resorted to by creators (and businesses) choosing to operate along the long route. Indeed, the ultimate goal is not to displace old copyright, which seems to be alive and well in many situations, but to add to the menu a second possibility, Copyright 2.0, which should be better tailored to the characters of production and distribution of works prevailing in the current digital environment.

This line of reasoning might also help us in asking the next question. Which set of rules would then operate in each given situation? Well, in some way I already replied to this question: creators should opt-in for Copyright 1.0 at the time of the original release of their work; otherwise the new and more flexible Copyright 2.0 would operate as a default set of provisions.

But, you may ask, what is the relevance of all this to digital libraries? The reply to this question may help clarifying one strong point of the proposal: the transaction costs of inclusion of works protected under Copyright 2.0 into a digital library would amount to zero. The notice requirement for works protected under Copyright 1.0 would in turn decrease enormously the costs of inclusion. Further dissemination of works protected under Copyright 2.0 would be automatically enabled, subject to a duty of taking down for commercial uses if and to the extent the corresponding notice is given. The enormous investment in digitisation and digital preservation would be balanced by countervailing benefits; or, to sum up, the paradox we referred earlier would be solved.

Of course, to go this way, one would have to change hundreds of laws and a few international conventions. I do not know that this is an impossibility. I am among those who, at the beginning of the digital age, insisted that it was too early to legislate. In my opinion, however, the time has now come. It is for you to decide whether this is an impossibility, a dream or, may be, a vision. What I know is that the present time – and the present place – are the best to discuss this.

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Abstract

The paper describes in §§ 1-2 the EU policy on digital libraries and the role played within it by the High Level Expert Group (HLG), with special reference to the findings in the Final Report by the Copyright Subgroup of the HLG. In §§ 3-6 it summarizes the analysis and recommendations by the Subgroup in four areas, digital preservation, web harvesting, orphan works and out-of-print works. It further discusses in § 8 four other crucial copyright issues which digital libraries have to face, which, while not addressed by the Report, might belong to a “Second Basket” of policy-making open questions. After examining in § 9 some assumptions of the EU policies in connection with libraries, archives and museums, the paper addresses in § 10 the question whether copyright as we know it still is an appropriate tool in the current digital context or should be displaced by another mechanism. Finally it analyzes the impact of the move towards a new regime (Copyright 2.0) on the costs and benefits of digital libraries