European Review of Private Law 2-2014 [321–338] © Kluwer Law International BV. Printed in Great Britain.

Digital Libraries: Reconciling Copyright Law and Cultural Heritage Policy.

Reviewing Estelle Derclaye (ed.), Copyright and Cultural Heritage: Preservation and Access to Works in a Digital World*

1. Libraries Old and New

Copyright law and cultural heritage policy are an odd couple. Although they have the same aims – or, more accurately, should have the same aims – they are often in conflict. Cultural heritage policy aims to preserve and make accessible works that are deemed to be part of our shared culture – books, articles, pictures, paintings, photographs, music, recordings, films, statues, architecture, and the like. However, copyright grants an exclusive right to the rightsholder to reproduce or disseminate such works. Therefore, to achieve cultural heritage policy goals in respect of recent copyrighted material often requires the consent of the copyright owner.

Preserving copyrighted cultural heritage and making it publicly available used to be legally easy. Take the example of books. Public libraries are quite successful in collecting and disclosing books. Copyright law does not create any obstacles to libraries making their collection freely available for on-site consultation or even to lending books. In copyright terms, public libraries work along the following general lines (though there are differences between jurisdictions). If a library (or anyone else) buys a physical copy of a book, then the distribution right in that copy is exhausted. That is to say, the copyright owner cannot invoke his copyright to prevent the further circulation of that copy. Therefore, a library can display the copies in its collection and allow users to consult them. The act of lending books to users is not exhausted, but it can be covered by a copyright exception so that the copyright owner cannot prohibit lending and is entitled to remuneration only.[1] Therefore, copyright is no obstacle to traditional 'paper libraries', and the same applies, *mutatis mutandis*, to archives and museums.

This legal scheme is not applicable when libraries and other cultural heritage institutions go digital. The biggest problems arise if such institutions wish to make their existing collections available online. From the perspective of

* ISBN 978-1-84980-004-4, Edward Elgar, Cheltenham 2010.

1 The lending right is covered by Directive 2006/115/EC. Collecting the remunerations can be dealt with by mandatory collective management, so that libraries need not negotiate with or pay to individual rightsholders.

cultural heritage policy, online distribution would be a significant improvement over analogue: the material would become much more easily available and to a much larger group of people. As the material would be available integrally (full text), it could be much more easily and thoroughly searched. The material would also be preserved: Digital books do not tear, break, stain, or get lost. However, copyright law works differently for digital material, and it creates significant obstacles for online libraries. While the distribution of physical copies is exhausted through sales, the distribution of digital copies is not,[2] and for good reasons. Whereas a book in a physical library is available to only one person at any given time, a book in a digital library would be available infinitely many times. If that were possible, one might fear that copyright would be reduced to very little and that creators and copyright owners would lose a major source of revenue. Copyright law therefore provides that digital dissemination is an act of making available to the public, which requires the consent of the copyright owner regardless of the sale of analogue or digital copies. The consequence is significant: cultural heritage institutions cannot make copyrighted content available online unless they strike a deal with each individual copyright owner.

Another copyright problem for cultural heritage institutions is the digitization of analogue material. If material is digitized – e.g., by making a scan or a photograph or typing a text into a word processor – a new copy is made. Reproduction, too, is an exclusive right of the copyright owner and thus requires permission. Copyright laws sometimes provide for exemptions from copyright protection for preservation purposes, and this may include the making of digital reproductions of vulnerable or lost works. However, under European Union (EU) law, digitized content may only be made available to library members via dedicated on-site terminals; online dissemination is not allowed.[3]

It is quite clear that whereas cultural heritage institutions had little to do with copyright law in the past, making use of the possibilities of the Internet requires much more active involvement in copyright matters. Estelle Derclaye's edited volume *Copyright and Cultural Heritage: Preservation and Access to Works in a Digital World* explores how the legal landscape has changed. It takes cultural heritage policy seriously and seeks to take it further by exploring the possibilities to create comprehensive online libraries of digital or digitized works. Creating a European-wide online library, called Europeana, is the main aim of the EU's *i2020 Digital Libraries* policy. The book explores the legal obstacles and challenges for creating such a library and, in particular, issues of copyright law. The volume contains ten contributions divided into five parts. There is a European perspective, a US perspective, a perspective from the cultural sector, another from a cultural heritage specialist, and one on levies for cultural

2 Article 3(3) of Directive 2001/29/EC (hereinafter 'Information Society Directive').

3 Article 5(3)(n) of the Information Society Directive.

purposes. The European perspective is a bit of a misnomer, since there is no single European copyright law; there are, in fact, strong traditional divergences between common and civil law copyright and, to a lesser extent, between the various copyright systems of the civil law countries.

The contributions centre around three themes: orphan works, the copyright protection of digitized or restored works, and copyright exceptions that seek to enhance access to cultural heritage. I shall not discuss all contributions severally but instead highlight some of the main arguments and points of interest of each of the themes. I end with some general thoughts on the book and its topic.

2. Orphan Works

The so-called orphan works are a notorious problem in copyright law today. If one needs to obtain permission from a copyright owner to use a particular work, it sometimes turns out to be very difficult to determine who the copyright owner is or, if his identity is known, to locate him. This problem is not new, but it is particularly urgent in the project of creating online libraries. An online library should be as complete as possible, for one does not know which works will later turn out to be of interest. This means that for all potentially copyright-protected works (say, e.g., all works published after 1880) the library, museum, or archive would have to identify the copyright owner or owners (who may be the heirs of the author or original copyright owner), find out their whereabouts, and contact them. This obviously involves a lot of work. It is also likely to be without result in quite some cases, as the copyright owner cannot be identified or found despite reasonable efforts. The estimates of the number of orphan works are impressive: the British Library estimates that between 10% and 40% of the books in its collection is orphaned. The Bodleian Library puts the number for its collection at 13%, which would amount to three million books. An English project involving the digitization of newspaper material (articles, photographs) published before 1912 found that 95% of the material was orphaned.[4] The precise number of orphan works depends on the thoroughness of the search efforts required before a work can be designated as orphaned, but it is clear that the problem is large.

Various legal solutions to the problem have been proposed, and they had already been discussed extensively in the literature before the book under review was published.[5] Tanya Aplin summarizes the solutions in her contribution: a

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4 ANNA VUOPALA, *Assessment of the Orphan Works Issue and Costs for Rights Clearance* (European Commission, DG Information Society and Media, Unit E4 – Access to Information), May 2010, pp. 5 and 19.

5 See, e.g., D.W.K. KHONG, 'Orphan Works, Abandonware and the Missing Market for Copyrighted Goods', 15. *International Journal of Law and Information Technology* 2007, pp. 54–89; S. VAN GOMPEL, 'Unlocking the Potential of Pre-existing Content: How to Address

defence against infringement if reasonable search efforts were made, an exception to copyright protection for orphan works, and system of prior licensing by a designated body. As these legal solutions all come down to the question of whether the user has made reasonable efforts to search for the copyright owner, it is also important that search guidelines are drafted to clarify the legal requirement. There have recently been important developments in legislation on the orphan works issue, but I will return to those in my conclusions.

There are also more practical solutions for the orphan works problem that can be used instead of or in combination with a legal scheme. If the problem of orphan works is essentially one of copyright owner and user not being able to find one another, then improvements in contact information might contribute to decreasing the problem. There are two ways of doing that. First, and most obviously, the law could somehow require that copyright owners register their works with up-to-date contact information. Second, users could register works that they have found to be orphaned, thereby assisting other users (if a legal solution that allows the use of orphan works is available) and also enabling copyright owners reclaiming works that have been marked as orphaned. The first type is preventive; the latter is a retroactive remedy. It should be noted that registries of either kind offer registration of copyrighted works only, not the full versions of those works. As Steven Hetcher puts it in his essay: a registry is like the catalogue to a library collection, not the collection itself. A digital registry of works is not the online library we desire, but it could help to establish one.

The book contains a contribution by Caroline Colin in which both types of registries – preventive and retroactive – are discussed extensively. Registries are important tools in ensuring and improving the accessibility of copyrighted material, in particular with a view to the future. However, I find some of the observations in Colin's contribution unsatisfactory, and I doubt how helpful registries would really be in creating online libraries. As to the first type of registries, Colin states that the Berne Convention forbids any formalities as condition for the existence or exercise of copyright protection. Therefore, a registry for copyright owners can only be voluntary and could not provide guaranteed full coverage – making it much less useful. That is certainly *communis opinio*, but various copyright scholars have suggested that the prohibition on formalities should be interpreted more narrowly (*de lege lata*), or that there are

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the Issue of Orphan Works in Europe?', *International Review of Intellectual Property and Competition Law* 2007, pp. 669–702; G. SPINDLER & J. HECKMANN, 'Retrodigitaliserung verwaister Printpublikationen. Die Nutzungsmöglichkeiten von "orphan works" de lege lata und ferenda', 57. *GRUR Int (Gewerblicher Rechtsschutz und Urheberrecht: Internationaler Teil)* 2008, p. 271; F.-M. PIRIOU, 'Les "oeuvres orphelines": en quête de solutions juridiques', 218. *Revue Internationale du Droit d'Auteur (RIDA)* 2008, p. 3.

good reasons to reform that prohibition (*de lege ferenda*).[6] A more fundamental appreciation of the reasons for and against mandatory registration would have been appropriate and timely, though I admit that that would not sit well with the practical aims of the book: a revision of the international copyright law framework may not be politically feasible and could certainly not be achieved in the near future.

Turning to Colin's discussion of the second type of registry – one for known orphan works, such as the European ARROW database[7] – I am somewhat puzzled to read that such a system of reversed registration is like a compulsory licensing mechanism while it is said in the same sentence that users relying on such registration are not shielded from copyright infringement (p. 33). I also fail to understand why, if one has such a database of known orphan works, it should still be required that every user conduct his own reasonable search to ensure that the work is indeed orphaned (p. 34). That hardly solves the problem, I think, because the database would do little to decrease the search costs for users. Under the regime of the new EU Orphan Works directive, which was published after the book came out, registries are intended to play an important role in avoiding double searches and decreasing search costs.[8]

There are also a number of obvious practical difficulties in using registries to trace copyright owners for specific works. Searching a database on the title of a book is easy enough, but what about, say, photographs? The percentage of orphan works is thought to be highest among photographs because they rarely contain the name of the maker or a title.[9] I should imagine that it is very difficult and time-consuming to search a database for a photograph that has neither title nor author mentioned on it. There might be technical ways around such problems, and I would have liked to read about them, for the chances of success of registration systems seem to depend on it.

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6 S. VAN GOMPEL, *Formalities in Copyright Law: An Analysis of Their History, Rationales and Possible Future*, Kluwer Law International, Alphen a/d Rijn 2011; D. GERVAIS, 'The Changing Role of Copyright Collectives', in D. Gervais (ed.), *Collective Management of Copyright and Related Right*s, Kluwer Law International, The Hague 2006, pp. 3–36.

7 www.arrow-net.eu.

8 The directive requires that a reasonable search is conducted in the country of first publication only ('in order to avoid duplication of search efforts', Recital 15). The orphan works status, once established, should then be legally acknowledged in all Member States. As to the use of databases, Recital 16 states: 'Considering in particular the pan-European dimension, and in order to avoid duplication of efforts, it is appropriate to make provision for the creation of a single online database for the Union containing such information and for making it available to the public at large in a transparent manner. This can enable both the organisations which are carrying out diligent searches and the rightsholders easily to access such information.'

9 According to the *Gowers Review of Intellectual Property*, December 2006, British museums estimate that approximately 90% of the photographs in their collections are orphaned.

The United States have a long history of copyright registration, and registration with the Copyright Office is still required as a condition for suing for infringement for works originating in the United States.[10] Registration for foreign works is not mandatory but encouraged by awarding it with a number of procedural advantages in case of an infringement claim. Steven Hetcher's essay looks into what the online library project could learn from the American experience. He is not very hopeful. If registration is to be voluntary, the registry will always be incomplete or partly out of date. Tim Padfield, writing about the English experience with voluntary registration, has the same expectations. Another problem of the American registration system is that the Copyright Office does not check the accuracy of the copyright owner's claim. Limited coverage and outdated copyright information will mean more orphan works. Especially, I should think, because the registration data are most likely to be up-to-date for works that are commercially exploited and whose copyright owners would therefore be easy to find anyway – a point also stressed by Padfield (p. 203). And although US law requires the deposition of works in the Library of Congress, those works are not digitally available and it is unlikely that this will change in the foreseeable future. Hetcher concludes that the most pragmatically viable approach would be to cooperate with existing digital repositories, mainly Google Books, to create an online library-and-registration system that aims to provide as much coverage as possible, and if possible also includes digitized works or parts thereof.

Legal deposit schemes are related to but analytically and legally distinct from registration systems. Some jurisdictions (such as the United States) require that a copy of all published material must be deposited in one or more designated libraries. Currently, as Aplin points out in her essay, deposit libraries function as repositories that ensure that all published books are available to the public. As such, they are indeed the perfection of the analogue library. Aplin shows that some deposit libraries even move into the digital sphere by requiring the deposition of works that are published only digitally. Nevertheless, they have little to offer to the project of digital libraries. Deposited works, whether digital or analogue, will only be available for on-site consultation and for lending. They will not be made available online. Moreover, deposit libraries do nothing in the way of copyright information management. They are not responsible for keeping track of

10 The Berne Convention, which forbids formalities such as registration, regulates the recognition and protection of foreign copyright only. The American copyright tradition is based on an economic rationale of copyright protection and therefore does not preclude formalities as conditions for protection or enforceability. By contrast, in the European (especially continental) traditions, copyright protection is based on the idea that the author's creativity gives him a moral claim to exclusivity and protection, which cannot be made conditional on formalities. See, on moral rights, F.W. GROSHEIDE, 'Moral Rights', in E. Derclaye (ed.), *A Research Handbook on the Future of EU Copyright Law*, Edward Elgar, Cheltenham 2009, p. 242.

copyright owners and cannot help to retrieve the owners of orphaned works, even if those works are held in their collections.

3. The Protection of Digitized Material

A second issue in ensuring access to cultural heritage concerns the legal protection granted to digitized, preserved, or restored versions of works that are in the public domain. This may seem a bit unlikely at first. After all, copyright protects original, creative efforts (at least, traditionally, in continental European systems), whereas digitization, preservation, and restoration are aimed at keeping the work in its original form without adding anything new to it. However, as Andreas Rahmatian argues in his chapter, the ordinary and legal concepts of originality differ. The originality requirement in copyright law generally means that a work is not a direct copy of an already existing work. However, if an existing work is modified or added to in a way that meets the threshold for copyright protection, those additions or modifications might attract new copyright protection. That leads to the situation – undesirable from the perspective of cultural heritage policy – that restored or digitized versions of works that in their original form are no longer protected by copyright are again protected by a copyright on the newly added aspects. The digitized or restored versions cannot, then, be reproduced or disseminated without permission of the new copyright owner. That new copyright might be limited in the sense that it protects only the new, added aspects of the work, but that is of little practical significance since these are often intertwined with and cannot be separated from the old, unprotected elements of the work. Even a 'small' or 'thin' copyright protection forms an obstacle.

For restoration, it is clear that there can be situations that attract new copyright protection: The more freedom the restorer has in shaping the restored work, the greater the likelihood of copyright. Rahmatian concludes as much after distinguishing a number of abstract types of restorative activity. These range from (technical) preservation, which adds nothing to the work and therefore does not attract copyright protection, via the reconstruction of missing parts, which is a grey area where copyright protection depends on the amount of independent or creative input, to the creation or recreation of lost works, which is no longer a matter of restoration (as there is no known original) and which will always be copyright protected. The matter is somewhat complicated by divergent criteria for copyright protection in Europe. In the United Kingdom, a work can be protected on the basis of skill, labour, and judgment, whereas in continental systems a degree of creativity irrespective of the amount of expertise or effort is required.[11]

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11 It should be noted that since the book was published, the ECJ has handed down various decisions that hint at the harmonization of the threshold for copyright protection along the lines of originality. See M. VAN EECHOUD, 'Along the Road to Uniformity – Diverse Readings of the

It would thus seem that UK law grants copyright protection more easily to restored works. However, continental systems are by no means reluctant to do so, and creativity is in practice often assumed if the restorer had some freedom of choice in shaping the restoration.

Restoration is a rather specific matter that is unrelated to digitization *per se* and plays a role in a small number of cultural heritage works only. Far more common, indeed necessary if an online library is to include analogue works, is digitization. As Laura Gasaway states in her contribution (to which I shall return later): 'The preferred preservation method today […] is digitization' (p. 131). A scan or photograph of the original work then needs to be obtained. The question is whether such a scan or photograph could attract a new copyright. Rahmatian concludes that it cannot because it is a mere reproduction of a work and therefore includes no creative and original elements (p. 73). I think the matter might be more complicated. There are two ways in which digitization could invoke a new copyright on certain aspects of the digitized work. First, though the pure act of scanning or photographing a work (for instance, scanning the pages of a book) would indeed be too mechanical for copyright, the digitized version may subsequently be edited. A visual image could be retouched to improve its quality or even digitally restored, and this may invoke copyright protection. Scanned text images might be reformatted to make them more legible, or data (such as metadata, comments, cross-references) might be added. These formats and additions could be copyright protected.

Second, the pure act of digitization could attach copyright if it amounts to something more than a mere mechanical reproduction. This is particularly likely if the original work – for instance, a painting or statue – is photographed. The photograph might then be considered to constitute a new, copyrighted work. Ronan Deazley addresses this issue in his historical essay on a nineteenth century experiment in the V&A (then the South Kensington Museum). In the 1860s, the museum started to photograph works in its collection and sell the reproductions to the public at cost price and without any copyright claims or restrictions, with huge success. At about the same time, when a new copyright act was drafted, the question arose whether photographs generally could be copyright protected. That was not so clear at the time, because photography was considered by many to be a mere mechanical reproduction of reality, and not an original, artistic work. The

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Court of Justice Judgments on Copyright Work', *JIPITEC* (*Journal of Intellectual Property, Information Technology and E-Commerce Law*) 2012, pp. 60–80; C. HANDIG, 'Durch "freie kreative Entscheidung" zum europäischen urheberrechtlichen Werkbegriff', *GRUR Int* 2012, pp. 973–979; E. DERCLAYE, 'Football Dataco: Skill and Labour Is Dead', 1 Mar. 2012, Kluwer Law Blog (http://kluwercopyrightblog.com/2012/03/01/football-dataco-skill-and-labour-is-dead/). Not all agree that the ECJ case law would mean the end for the English 'skill and labour' to the extent that the criterion grants copyright protection to non-creative works. See, e.g., *Meltwater* [2011] EWCA Civ 890.

question was eventually settled in favour of copyright for photographs. It was later held by the English courts in the case of *Graves* that photographs of artworks were themselves original works and could be copyright protected if they met the threshold of skill, labour, judgment, etc. That remains the legal position in the United Kingdom today, and in practice British museums claim copyright on photographs of works in their collection. They use their photographs and copyrights to generate revenue. In her essay on the role of cultural heritage institutions, Lucky Belder also explains that such institutions often claim copyright protection for reproductions of artworks from their collection and that the Europeana project allows this (pp. 221 and 228).

The criteria for copyright protection of photographs are now harmonized in the EU,[12] and the threshold is quite low: there are so many choices that a photographer can make – perspective, framing, light, depth, shutter speed and diaphragm, colours, contrast – that the denial of copyright protection is rather unlikely.[13] Though copyright is certainly unavoidable for photographs of three-dimensional objects, it is not impossible for photographs of 'flat' objects either, even if the degree of choice is considerably less. (However, Belder and Rahmatian do not consider copyright on 2D reproductions very likely.) If a painting is photographed, there might still be a choice of perspective, framing, light, and colour adjustment. Rightly or wrongly, it seems to be general practice among museums to claim copyright on photographic reproductions of artworks. Deazley mentions the drawbacks of the practice (at p. 109): '[…] the opportunity for museums and galleries to effectively extend the exclusive control and exploitation of the work in perpetuity should give us pause for thought.' The issue becomes even more pressing, I think, in the context of an online library in which artworks can only be perceived through the medium of a digital reproduction. Moreover, the digital distribution of content allows distributors to use contracts to restrict further use even if there is no copyright: to access the content, a user would be required to accept terms and conditions that forbid further distribution and use.[14]

4. Exceptions and Limitations

One effective way to avoid copyright obstacles for a digital library, including the problems of orphan works and of new copyrights for digitized or restored works, is to limit the scope of copyright protection altogether. This can be done by including a provision in the copyright law to the effect that certain uses by

12 Article 6 of Directive 93/98/EEC.

13 CoJ EU 1 Dec. 2011, Case C-145/10 *Painer*.

14 See L. GUIBAULT, 'Wrapping Information in Contract: How Does It Affect the Public Domain?', in L. Guibault, B.P. Hugenholtz (eds), *The Future of the Public Domain*, Kluwer 2006, pp. 87-104.

cultural heritage institutions require no permission from the copyright owner (i.e., an exception to copyright protection) or that the copyright owner's exclusive right is reduced to one of remuneration (i.e., a limitation on copyright protection). Exceptions and limitations allow public and private interests to be balanced, and they are frequently used to ensure public access to works at reasonable costs. Libraries, for instance, could be allowed to lend books to subscribers without the permission of the copyright owner and against a fee set by law. Cultural heritage institutions could also be allowed to make copies of vulnerable works for preservation purposes without either permission or payment.

Within the EU, exceptions and limitations are governed by the Information Society Directive of 2001. However, they are hardly harmonized. The directive provides a more or less closed list of exceptions and limitations from which the Member States can choose, but only one of them is mandatory. All possible exceptions and limitations that are relevant for cultural heritage are optional. Consequently, the laws of the Member States differ significantly. As Paul Torremans points out in his contribution, this is not the best starting position for working on a European-wide digital library.[15]

Ideally, libraries, museums, and archives would be allowed by law to digitize works (i.e., make a reproduction of them) and to make such digitized copies available to the public via the Internet. Neither is expressly provided for by the Information Society Directive. The directive does allow for an exception or limitation that enables cultural heritage institutions to conduct 'specific acts of reproduction', but it is not clear whether this provides a sound legal basis for general digitization of all works in a collection.[16] A 2007 evaluation study of the directive showed that in many Member States the provision is limited to preservation or replacement purposes, whereas in others it has a wider scope; moreover, some Member States did not allow for digital reproduction at all.[17]

The second step, making digitized works available online, is not permitted under the Information Society Directive. The directive only allows for an exception or limitation that enables cultural heritage institutions to make digital content available to individual members on on-site terminals and only for the purposes of private study and research.[18] According to the 2007 evaluation, not

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15 I have explored that issue in A. RINGNALDA, 'National and International Dimensions of Copyright Law in the Internet Age. Harmonizing Exemptions: The Case of Orphan Works', 17. *European Review of Private Law* 2009, pp. 895–923. In his essay in the volume under review, Tim Padfield also discusses the limits of the UK exceptions regime for cultural heritage institutions.

16 Article 5(2)(c) Information Society Directive; see Torremans' essay at p. 117.

17 GUIDO WESTKAMP, *The Implementation of Directive 2001/29/EC in the Member States*, 2007, pp. 22–27 (available at www.ivir.nl).

18 Article 5(3)(n) Information Society Directive.

all Member States have implemented that exception.[19] Any exception or limitation that goes beyond on-site accessibility would violate the directive.

The question for the future is whether new exceptions and limitations could be developed to allow libraries, museums, and archives to digitize all copyrighted works in their collection and copy digitally created works for preservation purposes and to make those digital collections available to the public. In other words, would it be possible to devise a legal scheme that allows libraries and the like to transpose their current analogue activities to the Internet without copyright obstacles? National law and the EU *acquis* would have to be changed. However, national and EU legislatures are not entirely free to limit copyright protection. New exceptions and limitations have to comply with the internationally recognized three-step test. This test, which seeks to ensure a balance between the protection of copyrights and the public interest, demands that an exception or limitation (1) should apply in certain special cases only, (2) that those cases should not conflict with the normal exploitation of the work, and (3) that the legitimate interests of the rightsholder should not be unreasonably prejudiced. In his essay, Paul Torremans points out that the European Court of Justice (ECJ) has not yet given an interpretation of these clauses (the three-step test is included in the Information Society Directive). In 2009, Advocate-General (A-G) Trstenjak has proposed a restrictive interpretation that, moreover, should be applied cumulatively to each case in which an exception or limitation is applied. According to Torremans, this interpretation would make any further limitations on the reproduction and communication rights to the benefit of online libraries impossible. Under the approach of the A-G, there could be no wider archiving exception, let alone a provision to enable digitized content to be distributed online, because that would enable consumers to obtain a work from an online library rather than buy a copy – which conflicts with the normal exploitation of the work. (The ECJ did not, on this occasion, deal with the interpretation of the three-step test.)

Torremans is right, I think, to argue that this interpretation cannot be correct, for any exception or limitation is bound to have some impact on the sale of works (p. 120). This is why there is a separate third step to the test, i.e., to determine whether any prejudice is also unreasonable towards the rightsholder (p. 123). Torremans proposes an alternative approach to the three-step test as both a legal ground for and a limit on judicial flexibility in interpreting exceptions and limitations. Under this approach, courts could adapt old exceptions and limitations to new technological requirements and opportunities so that the public interest is adequately served and interests of copyright owners are

19 WESTKAMP, *supra* n. 17, pp. 45–47.

protected.[20] Such a flexible, technology-adapting approach to exceptions had been taken by German courts at various occasions (see p. 126–127 of Torremans' essay). Nevertheless, I would think that even under a flexible approach the courts could not interpret exceptions and limitations in a wider sense than the clauses of the Information Society Directive permit. For instance, a court could not allow a library to make digitized collections available online as long as the directive permits on-site access on dedicated terminals only.[21]

Could the legislature introduce new exceptions and limitations to allow libraries to make their digitized and digital collections available online? From the perspective of cultural heritage policy, that would obviously be desirable. Whether it is legally possible comes down to the three-step test, more in particular whether general digital availability does not conflict with the normal exploitation (in particular, sale) of works in a manner that unreasonably prejudices the legitimate interests of rightsholders. Torremans is hopeful because he thinks that digital libraries and archives, with their comprehensiveness, search functions, and metadata, offer a very different service than the sale of individual works. Likewise, he suggests, consumers would still buy the books in hard copy they would otherwise have bought even if they were available in an online archive (see pp. 122 and 124). That may be true in some cases more than others. I should think that I should be buying far less novels (either in hard copy or as e-books) if I could download them from an online library freely or against a small subscription fee and read them on my e-reader.

The political difficulties in extending archiving exceptions along the lines proposed by Torremans are made very clear in Laura Gasaway's essay on the US archiving exception.[22] That essay offers an interesting insight into the deliberations of a study group that explored the possibilities to extend the archiving exception to enable libraries, museums, and archives to disseminate their collections online. These deliberations make it very clear that publishers and producers are reluctant to allow such institutions to digitize the material and that they are outright opposed to any form of digital dissemination. They fear that they

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20 See, e.g., P.B. HUGENHOLTZ & M.R.F. SENFTLEBEN, *Fair Use in Europe: In Search of Flexibilities*, Amsterdam 2011 (available from www.ivir.nl).

21 The problem of conflict with the Information Society Directive did not emerge in the most recent German case that Torremans cites (BGH 11 Jul. 2002, I-ZR 255/00) for that case involved electronic and scanned news clippings (a *Pressespiegel*) being distributed in a company by e-mail. That was not expressly permitted under para. 49 of the German Copyright Act (hence the need for judicial flexibility), but it is permissible under Art. 5(3)(c) of the Information Society Directive, which refers not only to 'press' but also to communication to the public and making available, which comprises e-mail and intranet distribution. See T. DREIER, 'Anmerkung', 58(9). *Juristenzeitung* 2003, p. 477 at p. 478. HUGENHOLTZ & SENFTLEBEN, *supra* n. 20, argue that the European system of exceptions and limitations is, in fact, quite flexible.

22 Section 108 of the US Copyright Act.

would lose control over digitally available material. They also think that the digital availability would interfere with sales. These fears are understandable. Traditional, 'brick and mortar' libraries impose natural barriers on the use of the available works. The number of available copies is limited; consumers usually need to go to the library in person; material can be loaned for a short term only; most libraries have small, well-defined user communities; and although library material may be copied for research or private study, copying is not a true alternative to buying the original: photocopies or scans are always of lower quality than the original, and they take time and effort to make. Because of these natural barriers, traditional libraries are likely to affect the commercial demand for original content to a limited extent only. However, if libraries go digital, many of those natural barriers would disappear: Collections would become more widely and easily accessible, and content could be downloaded and reproduced without loss of quality. Those changes could decrease the demand for original content, especially if publishers and producers themselves move to digital distribution (e.g., e-books). It need not follow that publishers' and producers' objections to digital libraries are legitimate, but we may need to accept the potentially fundamental effect of online libraries for existing markets and business models.

A number of other questions and problems concerning cultural heritage exceptions are raised by Tim Padfield, who writes about the experiences of English cultural heritage institutions in dealing with copyright. One issue is that of unpublished material. Archives in particular contain loads of material that has never been published and was probably never intended for publication – such as diaries, personal notes, and letters. By digitizing such works and including them in an online collection, they would, in effect, be published. This is a problem because the choice whether a work can be published is often viewed as the prerogative of the author. Whether this should be allowed is a sensitive question of policy.

5. Conclusions

The question emerges what the relationship between cultural heritage protection and copyright law is or should be. In the final essay of the book, Lucky Belder sets out two discourses: one in which they are adversaries seeking to further opposing interests, and the other in which they are complementary and based on the same rationale. She suggests that the second is the proper one, as both cultural heritage policy and copyright law are about protecting and rewarding creativity and stimulating new contributions. However, that is normative theory, not legal reality. To realign the two, changes to the existing copyright system are necessary.

The book contains many ideas and discussions on such changes. It has a laudable objective – the creation of a digital library of Alexandria for European cultural heritage. However, it ignores some of the practical but real obstacles that stem from the current system of copyright law. One of those practical hurdles is the principle of territoriality, which is touched upon briefly by some of the

authors but not discussed extensively. That is regrettable. The territoriality principle creates grave problems for an internationally available digital library, and their solution is, in my view, an absolute *sine qua non*. The problem, in a nutshell, is that when material is put on the Internet, it is made available in every country of reception. To judge whether that act of making available is permissible, those countries of reception will generally apply their own copyright law. That is not usually a problem if permission from the copyright owner has been obtained (though there may be divergent approaches as to who is the owner). However, it is a significant problem if the material is uploaded under some sort of exception or limitation, which would probably be the case for a comprehensive online library. The legal regime in all countries of reception would have to be identical, but the EU, let alone the world, is nowhere near the required level of harmonization.[23] Whatever be the legal details of an online library, the issue of territoriality has to be sorted out first. After all, the entire point of the modern library of Alexandria is that it is international in its composition and availability.

Another shortcoming of some of the contributions in the book is their treatment of the orphan works problem. I think that the 'orphans' metaphor is quite inadequate. Metaphors can, of course, be helpful. Legal sociologist David Nelken writes (in relation to a very different metaphor): 'the value of metaphors can only lie in their heuristic possibilities – the way they lead us to think in new and imaginative ways'. So we are used to conceptualizing the problem of unknown or unlocatable copyright owners in terms of 'parentless works' and the need for a legal mechanism to 'save the orphans', 'finding homes for orphans', or 'building orphanages'.[24] However, as Nelken warns, metaphors 'can sometimes also lead us in the wrong direction'.[25] They may force preconceptions upon us, leading us to construct reality in a way that does not necessarily correspond to the actual problem at hand. They can structure our interpretation of that problem and determine our solutions. The orphan works metaphor makes us think of individual works that are without a 'parent'. The natural solution then is to look very carefully for the parents of each work and, if they can indeed be proven to be absent, to introduce some sort of legal guardian. This is what we see in solutions

23 B. HUGENHOLTZ, 'Copyright without Frontiers: Territoriality in European Copyright Law', in E. Derclaye (ed.), *Research Handbook on the Future of EU Copyright*, Edward Elgar, Cheltenham 2009, pp. 12–26; RINGNALDA, *supra* n. 15.

24 See the terminology used, e.g., in K. DE LA DURANTAYE, 'How to Build an Orphanage, and Why', 2. *JIPITEC* 2011, p. 226; O. HUANG, 'U.S. Copyright Office Orphan Works Inquiry: Finding Homes for the Orphans', 21(1). *Berkeley Tech. L.J.* (*Berkeley Technology Law Journal*) 2006, pp. 265–288.

25 DAVID NELKEN, 'Legal Transplants and beyond: Of Disciplines and Metaphors', in Andrew Harding, Esin Örücü (eds), *Comparative Law in the 21st Centruy*, Kluwer, London 2002.

that require a reasonable search and some sort of proof or approval procedure for each individual work.

However, the problem currently faced by libraries, museums, and archives is a different one. It is how to clear the rights for digitizing and disseminating the entire collection at once. The time and costs involved in clearing the rights for individual works or conducting reasonably diligent searches to establish their orphaned status are prohibitive. Some examples give an impression of the impossibility of such a work-by-work approach: An American university library spent EUR 36,000 in labour costs to search for the copyright owners for 343 monographs;[26] the Dutch Royal Library employs one full-time employee, who manages to clear the rights for up to ten school history books a month (clearing the rights for the entire collection of such books would take eight years);[27] the BBC would have to employ 800 staff for three years to clear the online dissemination rights for its archives of 400,000 hours of material, at the cost of 72 million pounds.[28]

Clearly, a different approach is needed to facilitate rights clearance for online libraries, one that does not operate on an individual works basis but allows mass rights clearance for the entire collection of works. This could be in the form of an exception or limitation, as is discussed in several contributions to the volume. However, there are other, perhaps more viable, approaches to mass digitization, especially in the form of collectively granted licenses. Licenses granted by collective management organizations (CMOs) cannot usually cover all possible works in a collection because not all copyright owners are members of such organizations. However, the legal technique of extended collective licensing (ECL), popular in the Nordic countries, allows for the legal extension of the repertoire of CMOs so that they cover all works worldwide (with an opt-out possibility for non-represented rights owners). That mechanism is intended specifically to enable mass rights clearance at low transaction costs to the benefit of users and copyright owners alike.[29] Another approach could be the 'cultural flat

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26 VUOPALA, *supra* n. 4, p. 36. See also the US Copyright Office's *Orphan Works Report*, 2006, pp. 37–38.

27 A. BEUNEN, 'De Google Book Settlement nader beschouwd en bekeken vanuit bibliotheken', *Auteurs-, Media- en Informatierecht* 2010, pp. 38–49.

28 VUOPALA, *supra* n. 4, p. 41.

29 T. KOSKINEN-OLSSON, 'Digital Libraries: Collective Administration for Online Libraries – a Rightsholders' Dream or an Outdated Illusion?', in L. Bently, U. Suthersanen, P. Torremans (eds), *Global Copyright*, Edward Elgar, Cheltenham 2010, pp. 252–264; J. AXHAMN & L. GUIBAULT, *Cross-Border Extended Collective Licensing: A Solution to Online Dissemination of Europe's Cultural Heritage?* (Final report prepared for EuropeanaConnect), IViR, Amsterdam August 2011; A. RINGNALDA, 'Orphan Works, Mass Rights Clearance and Online Libraries: The Flaws of the Draft Orphan Works Directive and Extended Collective Licensing as a Solution', 8(1). *Medien und Recht International* 2011, pp. 3–11.

rate', a monthly fee that is levied on Internet users to remunerate the copyright owners for the free online sharing of their works.[30] Unfortunately, such options are not discussed. The book under review does, however, contain an explanation of the Argentinian system of the *dominio público pagante*. Under this system, a small tax is payable on the sale of works that are in the public domain and no longer copyrighted. The proceeds are collected in a fund and used for the promotion and preservation of cultural heritage. Such a tax could be used to fund digital libraries. However, it is not a copyright measure and does nothing to facilitate the digital preservation and online dissemination of copyrighted matter. It would have been more relevant for the purposes of the book to read about ways to facilitate mass rights clearance. Presently, the attention seems to move away from orphan works and towards mass digitization.[31]

Things move fast in the modern world of digital copyrighted goods. There have been important developments since the book was published in 2010. The Google Books Search Settlement Agreement, which is discussed in several contributions, was famously rejected in 2011. The orphan works problem, one of the core topics of the volume, has also evolved. In the United States, the House did not pass the 2008 orphan works bill.[32] No new legislative initiatives have been introduced since. In the EU, things look a bit brighter. A Directive on Orphan Works has been adopted in 2012, which requires Member States to take legal measures to allow publicly accessible libraries, educational institutions, museums, and archives to copy and distribute certain types of orphan works (to be determined as such upon a reasonably diligent search) for public interest

30 There is some discussion on such a system in Germany. See for a discussion G. SPINDLER, *Rechtliche und Ökonomische Machbarkeit einer Kulturflatrate: Gutachten erstellt im Auftrag der Bundestagsfraktion "Bündnis 90/DIE GRÜNEN"*, March 2013 (available from www.gruene-bundestag.de).

31 The US Copyright Office has launched a new enquiry into orphan works and the issue of mass digitization; Orphan Works and Mass Digitization Notice of Inquiry, 77 Fed. Reg. 64,555; the British *Hargreaves Review of Intellectual Property and Growth*, or *Digital Opportunity –A Review of Intellectual Property and Growth,* 2011, also recommended ECL. See also S. VAN GOMPEL, 'The Orphan Works Chimera and How to Defeat It: A View from across the Atlantic', 27. *Berkeley Tech. L.J.* 2012, p. 1347, who suggests that there should be different legal approaches tailored to the type of use, with ECL as most appropriate for mass digitization projects. Whether measures like ECL are politically viable is doubtful, in particular now that there is the Orphan Works directive of 2012 that is believed to address the problem. See Reto M. HILTY *et al.*, 'Comments of the Max Planck Institute for Intellectual Property and Competition Law on the Commission Proposal for a Directive on Certain Permitted Uses of Orphan Works', 60. *GRUR Int* 2011, p. 818.

32 Shawn Bentley Orphan Works Act of 2008, S. 2913 and H.R. 5889 (110th Congress). Information on the status of these bills was obtained from www.govtrack.us on 23 Sep. 2013.

purposes.[33] Many of the thoughts in the contributions in the volume under review continue to be germane. However, some of the discussions no longer reflect the current state of affairs. That is certainly due to the somewhat belated timing of this review, but it also shows the almost ephemeral nature of some of the debates, questions, and observations in the field of copyright and digitization.

This brings me to a related point of notice. Some contributions address practical issues, others are more normative or theoretic, and others still take a historical perspective. That has its advantages, because the reader is supplied with a great variety of interesting insights and perspectives. Nevertheless, one might say that the volume addresses predominantly the practical aspects of the digitization of cultural heritage. That is a conscious choice, and a legitimate one. However, it does have consequences. Potential solutions that are more innovative to the problems discussed in the book are not dealt with – for instance, ECL, cultural flat rates, or perhaps even a more fundamental reform of the principles of copyright protection. Such solutions – if they are indeed solutions – are obviously not readily applicable since they would require that laws and international treaties be changed. Nevertheless, a more fundamental and innovative approach would have extended the 'shelf life' of the book.

All in all, the contributions in Derclaye's volume offer many noteworthy perspectives on the copyright issues involved in ensuring that our cultural heritage will be adequately preserved and made available in digital times. It also offers a wide range of possible solutions, some viable and plausible, others less so. It is unlikely that there can be one approach to solving all copyright obstacles involved in creating online libraries. A combination of pragmatic and legal solutions will be needed. It can only be hoped that the issues addressed in this book are picked up and developed further in the fields of theory, legal practice, and policy.

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33 Directive 2012/28/EU. The Directive should be transposed by 29 Oct. 2014. See for comments on the directive: RINGNALDA, *supra* n. 29; HILTY *et al.*, *supra* n. 31; R. KERREMANS, 'A Critical View on the European Draft Directive for Orphan Works', 2. *Queen Mary Journal of Intellectual Property* 2012, p. 38.