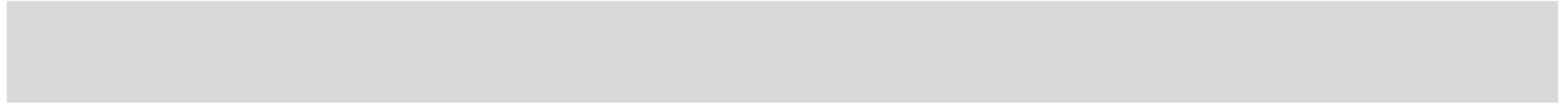
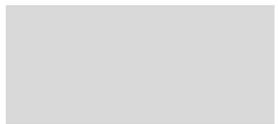


The new Copyright Directive: what opportunities for cultural heritage institutions?

Workshop – Friday 20 September 2019

Bournemouth University

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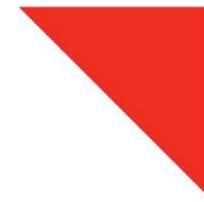


Jean Monnet Centre of Excellence



Erasmus+

Friday 20 September 2019



Making friends with copyright

Maurizio Borghi

Professor of Law

Centre for Intellectual Property Policy & Management Bournemouth

University

Scanning for the
Digital Books Project is
in progress in this Library

M
Lib

Thank you for your patience

Google™

MBoo

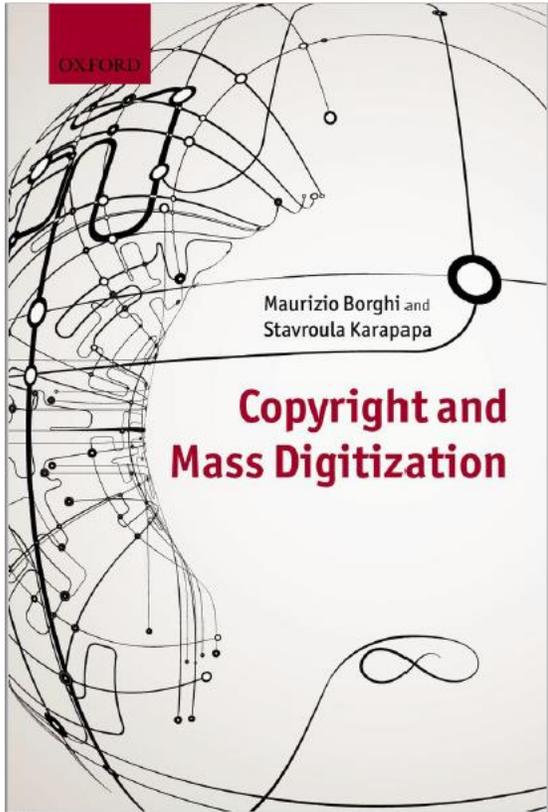
Digitising out-of-commerce works in the EU

2012: LOI n° 2012-287 du 1er mars 2012 relative à l'exploitation numérique des livres indisponibles du XXe siècle



2016: CJEU *Soulier and Doke*, C-301/15





Maurizio Borghi and Stavroula Karapapa

Copyright and Mass Digitization

As digitization is commonly conceived of as the conversion of copyright-protected works into digital format on an industrial scale. It has recently become prominent in the public sphere by which books, journals, photographs, sound recordings, and films have been digitized in bulk to feature in the collections of online archives, repositories, digital libraries, search engines, and data aggregators. Examples include commercial programmes like Google Books;¹ not-for-profit ventures, such as the Internet Archive and its affiliate, the Open Library;² large-scale cultural heritage projects, such as the HathiTrust;³ publicly funded projects like Europeana; as well as a number of initiatives launched by archives, libraries, publishers, and media companies for both commercial and non-commercial goals.⁴ What is the effect of all these endeavours promises to enhance access to culture and knowledge, the lawfulness of the activities underlying mass digitization remains largely uncertain. Envisioned as the gateway to Europe's cultural heritage, the Europeana project has so far progressed conservatively, most notably for its limited copyright clearance. Google Books has been challenged by lawsuits in Europe and the United States, where a class action has been pending since 2005.⁵ Although Google has concluded agreements with publishers to settle lawsuits, the ambiguity of the digitization of their catalogues, legal uncertainty over the lawfulness of the activities underlying Google Books remains. The ambiguity of the lawfulness of mass digital activities has attracted a wide scholarly discussion and judicial attention. In its decision of 10 October 2012, the District Court

¹ <<http://books.google.com>>.

² <<http://www.archive.org>>.

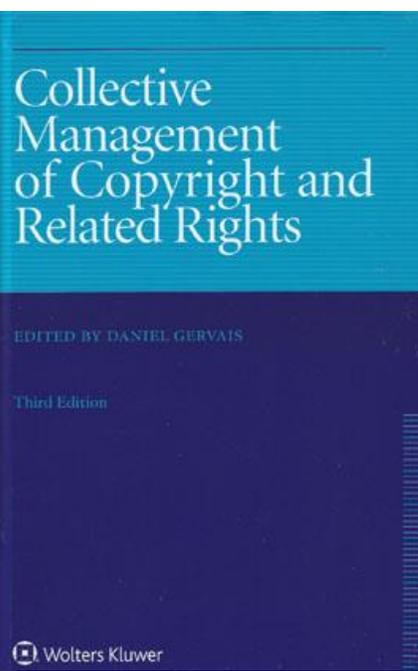
³ <<http://www.hathitrust.org>>.

⁴ <<http://www.europeana.eu>>.

⁵ For a comprehensive account of small-scale digitization projects, cf Kwong Bor Ng, *Digitization in the Real World* (New York, NY: Metropolitan New York Library Council, 2010).

⁶ Commission Recommendation of 24 August 2006 on the Digitization and Online Access of Cultural Material and Digital Preservation, OJ L 236, 31 August 2006, 28–30; Commission Decision of 19 October 2009, COM(2009) 532 final, 4–6.

⁷ *Authors Guild Inc v Google Inc*, 05 Civ 8136 (DC), 37. See also *American Society of Photographers Inc v Google Inc*, No 10 Civ 2977, filed 7 April 2010, and *Editions du Seuil et autres v Google Inc et France*, Paris District Court, 3rd Chamber, 2nd Section, 79 PTCJ 226, 18 December 2009 (decision appealed; the case was dismissed in June 2012 based on an agreement between the French Publishers Association (SNE) and Google; see <<http://googlepressfr.blogspot.it/2012/06/le-syndicat-national-de-ledition-sno-et.html>>).



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Extended Collective Licensing for the Use of Out-of-Commerce Works in Europe: A Matter of Legitimacy Vis-à-Vis Rights Holders

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CROSS-BORDER EXTENDED COLLECTIVE LICENSING: A SOLUTION TO ONLINE DISSEMINATION OF EUROPE'S CULTURAL HERITAGE?

Johan Axhamn

Lucie Guibault

CIPPM

ECL of Archives and Libraries in a Cross Border Context

Lucie Guibault

2019: Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market

To be transposed by by 7 June 2021



Article 8 – overview

Out-of-commerce works other subject matter permanently in a CHI collection

- Extended collective licensing
 - Backstop copyright exception
- 
- subject to opt-out provision

- 
- Works first published in EEA (with some derogations)

1. Extended collective licensing

1. Member States shall provide that a **collective management organisation**, in accordance with its mandates from rightholders, may conclude a non-exclusive licence for non-commercial purposes with a **cultural heritage institution** for the reproduction, distribution, communication to the public or making available to the public of **out-of-commerce works or other subject matter that are permanently in the collection of the institution**, irrespective of whether all rightholders covered by the licence have mandated the collective management organisation, on condition that:

- (a) the collective management organisation is, on the basis of its mandates, sufficiently representative of rightholders in the relevant type of works or other subject matter and of the rights that are the subject of the licence; and
- (b) all rightholders are guaranteed equal treatment in relation to the terms of the licence.

2. Backstop copyright exception

2. Member States shall provide for an **exception or limitation** to the rights provided for in Article 5(a), (b), (d) and (e) and Article 7(1) of Directive 96/9/EC, Articles 2 and 3 of Directive 2001/29/EC, Article 4(1) of Directive 2009/24/EC, and Article 15(1) of this Directive, in order to allow cultural heritage institutions to make available, for non-commercial purposes, out-of-commerce works or other subject matter that are permanently in their collections, on condition that:

- (a) the name of the author or any other identifiable rightholder is indicated, unless this turns out to be impossible; and
- (b) such works or other subject matter are made available on non-commercial websites.

3. Member States shall provide that the exception or limitation provided for in paragraph 2 only applies to types of works or other subject matter for which no collective management organisation that fulfils the condition set out in point (a) of paragraph 1 exists.

1 & 2: Opt-out provision

4. Member States shall provide that all rightholders may, at any time, easily and effectively, exclude their works or other subject matter from the licensing mechanism set out in paragraph 1 or from the application of the exception or limitation provided for in paragraph 2, either in general or in specific cases, including after the conclusion of a licence or after the beginning of the use concerned.

‘Out-of-commerce’ status

5. A work or other subject matter shall be deemed to be **out of commerce** when it can be presumed in good faith that the whole work or other subject matter is not available to the public through customary channels of commerce, after a reasonable effort has been made to determine whether it is available to the public.

Member States may provide for specific requirements, such as a cut-off date, to determine whether works and other subject matter can be licensed in accordance with paragraph 1 or used under the exception or limitation provided for in paragraph 2. Such requirements shall not extend beyond what is necessary and reasonable, and shall not preclude being able to determine that a set of works or other subject matter as a whole is out of commerce, when it is reasonable to presume that all works or other subject matter are out of commerce.

CMO representativeness

6. Member States shall provide that the licences referred to in paragraph 1 are to be sought from a collective management organisation that is representative for the Member State where the cultural heritage institution is established.

Exclusions

7. This Article **shall not apply** to sets of out-of-commerce works or other subject matter if, on the basis of the reasonable effort referred to in paragraph 5, there is evidence that such sets predominantly consist of:

- (a) works or other subject matter, other than cinematographic or audiovisual works, first published or, in the absence of publication, first broadcast in a third country;
- (b) cinematographic or audiovisual works, of which the producers have their headquarters or habitual residence in a third country; or
- (c) works or other subject matter of third country nationals, where after a reasonable effort no Member State or third country could be determined pursuant to points (a) and (b).

By way of derogation from the first subparagraph, this Article shall apply where the collective management organisation is sufficiently representative, within the meaning of point (a) of paragraph 1, of rightholders of the relevant third country.