The Future of Copyright in Europe: Striking a Fair Balance between Protection and Access to Information

**Report for the Committee on Culture, Science and Education –
Parliamentary Assembly, Council of Europe**

by

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Strasbourg, July 2009
(Revised and updated in October 2009)

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REPORT

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This report, which was drafted for the Committee on Culture, Science and Education of the Parliamentary Assembly of the Council of Europe, endeavours to propose guidance to the Council in preparing a recommendation on the future of copyright in Europe[1]*. It is based on previous work of the Parliamentary Assembly on the articulation of two rights presented as competing with each other, copyright and the right of access to information, and emphasises the need to take them equally into account in the new digital environment*[2]*. This clearly shows the Council of Europe's desire to analyse the issues from a broader angle, therefore rejecting the prioritisation of different rights, which is very much in line with an approach based on striking a balance between fundamental rights.*

Challenged by new technology, copyright is currently in turmoil. Increasingly regarded by the general public as a curb to the universal dissemination of knowledge, it seems to have no alternative but to include access to information in order to meet the challenges

[1] An outline of this report was presented and discussed at the meeting of the Committee on Culture, Science and Education at the Council of Europe, Strasbourg, on 28 April 2009. The final version was submitted in July 2009 and revised and updated in October 2009.

[2] *See* the Council of Europe Parliamentary Assembly motion for a resolution on copyright in Europe of 24 April 2007 (Doc. 11272).

posed by the knowledge society. It might even be its ability to bring together opposing but complementary views that will guaranty its durability in the future and whether it can adapt to a new economic, technological and social environment. Copyright law has shown a remarkable ability to adapt to new developments in the past and has the necessary tools to ensure that this continues to be the case in the future, although the massive technological changes will probably require rethinking the mechanisms for its implementation. It is therefore necessary not to think in terms of opposing rights but of the complementary nature of copyright and the right of access to information so as to reconcile the two, which is both necessary and desirable.

Accordingly, it will be necessary, first of all, to reiterate a number of basic principles of copyright law and carry out a brief historical survey. A study will then need to be carried out of how the advent of the information society has changed the existing balances. This will be followed by a brief discussion of recent developments in the legal provisions currently in force. This in turn would lead us to consider both the changes necessary to those provisions to ensure better access to information as well as certain initiatives that are either under way or planned, with the aim of striking a balance between the interests involved.

1. Introduction: copyright law as the result of a reconciliation between diverging interests

First of all, it should be pointed out that copyright law relates not only to the rights of authors but refers to a much more complex legal situation. Since its inception, copyright law has attempted to reconcile the claims of the various players, who are the author/creator, the public and commercial operators (exploiters such as producers and distributers). It is essential for copyright legislation to balance these different interests. Although it is true that the position of these players may vary according to the national legislation concerned, there can be no doubt about the need to strike a fair balance between the various claims. However, it is not an easy task, especially as the interests of the different players vary considerably and, depending on the situation, may even clash.

For example, authors will have an interest in benefiting from the fruits of their labours by receiving payment for the exploitation of their work. However, at the creative stage they will also have an interest in accessing existing works in order to build on them and use them as inspiration for their own work. This is particularly obvious when the author aims to produce a scientific work, since access to existing works will provide a guarantee of the quality and seriousness of his research. At the same time, exploiters will want to recoup their investment in the production of a work. Nonetheless, when they produce a work that incorporates elements already protected by copyright, it will be in their interest not to be excessively obstructed by existing monopolies. Finally, the public will want to have easy and affordable access to works for information and entertainment purposes. However, it will also be in its interest for payment to be made to creators so that new works continue to be created and produced. These examples illustrate the complexity of the interests involved and the need for a balanced approach that takes account of needs and requirements with regard to both protection and access.

2. Initial convergence between the rationale and principles of both copyright and the right to access information

It is worth reiterating that access to information and copyright initially fully converged regarding both the rationale and the principles involved. Accordingly, there was no incompatibility but, on the contrary, genuine complementarity.

Copyright has its roots in the Enlightenment. The philosophers of the 18th century called for the recognition of an author's intellectual property rights in order to guarantee the fruits of their labour, with the higher aim of ensuring cultural and social development. As society needed to regenerate itself, question its values and to be entertained, creators needed to be guaranteed a free space in which they could create works without having to compromise themselves vis-à-vis the authorities. The idea of giving the authors the right to allow the reproduction and representation of their work against the payment of a remuneration was intended to guarantee their financial and intellectual independence.

Instead of having to flatter men of power to receive payment, they could "free themselves" from their patrons for the greater benefit of the community, which in this way was enriched by the abundance of independent works created. Far from being a selfish right, copyright was clearly conceived as one imbued with an important social function that was to a large extent its *raison d'être*. Since its inception, therefore, it has maintained close links to freedom of expression and to its corollary the right of access to information. It is even possible to see its aim as, at least partially, guaranteeing that access.

This principle of striking a balance between the different interests involved is reflected in the very essence of copyright. In principle, copyright does not prevent access to information. The exclusive right is in fact subject to a number of limitations, the main or subsidiary aim of which is to ensure free access to information. There is first the distinction between expression and idea: copyright covers the expression, not the substance of a work, so that different authors can write a book on the same subject and use the same information. Only the way they shape that information will be protected, not the content. Moreover, the expression will be protected only if it contains a certain amount of creativity, when it is original. For example, the enumeration of historical events in a table will certainly be an expression but will probably not possess the necessary originality to be protected. Next, the expression is protected only for a specific period, after which it falls into the public domain. Lastly, the various copyright laws set out a number of cases where the expression can be used to grant access to information (these cases involve exceptions and limitations, especially for teaching or research purposes, for libraries, for quotations, for press reviews, for news reports, for certain cases of private copying, when the aim is to obtain information, etc).

However, this balance was disturbed by technological developments and their legal and technical consequences.

3. New technologies upsetting the copyright balance: the need to redefine the rules to ensure that the various interests involved are taken into account

New information technologies have fundamentally affected copyright law: the Internet have made it very difficult to control the way works are used. Technological progress has facilitated the reproduction and mass distribution of creative works, thus permitting the establishment in some cases of genuine parallel economies based on counterfeiting (a phenomenon sometimes improperly and legally incorrectly referred to as "piracy"). On the other hand, some non-commercial uses, such as "peer-to-peer" exchanges of digital files, have grown to such an extent that they are competing with the normal exploitation of works and challenging established commercial models.

At the same time, this development has been accompanied by the penetration of these new technologies into society. The importance of the Internet in the daily life of citizens is constantly growing, and members of the public nowadays use it for entertainment as well as for information or education purposes (in particular, the issue of distance learning and access to knowledge through digital libraries is taking on a whole new dimension thanks to the possibilities offered by the web). Alongside recognition of the dangers that new technologies may pose for the protection of copyright, there is also a general increasing awareness that these technologies offer the possibility of broad and simple access to information and that they could play a leading role in the fields of education, research and culture in general. The Council of Europe is particularly sensitive to this, and the political declaration by the Ministers of the States participating in the first Council of Europe Conference of Ministers responsible for Media and New Communication Services, held in Reykjavik on 28 and 29 May 2009, stated that "growing numbers of people rely on the Internet as an essential tool for everyday activities (communication, information, knowledge, commercial transactions, leisure), ultimately improving their quality of life and well-being. People therefore expect Internet services to be accessible and affordable, secure, reliable and ongoing. Access to these services also concerns the enjoyment of human rights and fundamental freedoms, as well as the exercise of democratic citizenship"[3]. In the same spirit, the French Constitutional

[3] 1st Council of Europe Conference of Ministers Responsible for Media and New Communication Services (Reykjavik, Iceland, 29 May 2009), MCM (2009) 011, Political Declaration, para. 5.

Council recently recognised a genuine "right to access the Internet" based on freedom of expression as set out in Article 11 of the French Declaration of Human Rights (hereafter "Declaration HR"), underlining that "in the current state of on-line public media and in view of the importance of these services for participation in democratic life and the expression of ideas and opinions, this right presupposes the freedom to accede to these services"[4]. This shows that the delicate balance between protection and access has clearly been called into question and that the "digital revolution" has made it necessary to reassess and adapt the underlying balances[5].

Many initiatives have been taken to this end. First of all, at international level the first step was to strengthen the right-holders' rights, adapt copyrights prerogatives to the digital environment and provide legal protection for technical measures (see the WIPO treaties of 20 December 1996). Given the difficulty in ensuring compliance with copyright rules on the internet, right-holders have pinned great hopes on technical measures, which have in turn been protected against circumvention. This solution was adopted at Community level with Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society[6].

However, these efforts to strengthen exclusive rights were not accompanied by any real reflection on the exceptions and limitations to copyright. Community harmonisation in the field of limitations and exceptions has in fact been a failure, with the aforementioned directive of 22 May 2001 merely providing an exhaustive and (with one exception)

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[4] Decision No. 2009-580 DC of 10 June 2009, Official Gazette of 13 June 2009, p. 9675 (para. 12). The Council specifies, however, that this right is not absolute and must be reconciled with other rights and freedoms of the same status such as copyright as protected by the right of property, which is governed by Articles 2 and 17 of the Declaration HR (para. 13).

[5] *See* also the European Parliament Resolution of 10 April 2008 on cultural industries in Europe (2007/2153(INI)) inviting "the Commission to recognise that, as a result of the Internet, traditional ways of using cultural products and services have completely changed and that it is essential to ensure unimpeded access to online cultural content and to the diversity of cultural expressions, over and above that which is driven by industrial and commercial logic, ensuring moreover, fair remuneration for all categories of right holders" (para. 20).

[6] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167 of 22.6.2001, p. 10.

optional list, from which national legislators could pick the ones that suited them, with the additional possibility of adopting a more restrictive wording[7]. The systems introduced to guarantee the effectiveness of the limits to copyright in the light of technical means have often been very complicated, poorly harmonised and difficult to implement. Finally, the directive provided for the possibility of derogating from the exceptions and limitations by contract in an "access on demand" context, thus enabling doubt to be cast on their actual benefit in the digital environment.

The fact is that the exceptions and limitations are one of the best tools available to national and Community legislators to ensure the so-called "balance of interests" and, in particular, to guarantee that collective needs are taken into account. Some of these exceptions and limitations incorporate the right of access to information into copyright legislations. Accordingly, their lack of effectiveness, the absence of harmonisation and the fact that they have been called into question as a result of recent developments in copyright law may be seen as establishing "one-way" legislation, that is to say legislation shifting towards a strengthening of the rights of the exploiters of works without sufficiently reflecting the interests of their creators and the community. Therefore, increasing number of scholars have stressed that the recent copyright amendments do not take enough account of freedom of expression and the public's right to information.

In response, the European Commission adopted on 16 July 2008 a Green Paper on Copyright in the Knowledge Economy, in order to "foster a debate on how knowledge for research, science and education can best be disseminated in the online environment. The Green Paper aims to set out a number of issues connected with the role of copyright in

[7] The Commission itself agrees, in a reflection paper adopted on 22 October 2009, that this situation is unsatisfactory ("Creative content in a European digital single market: challenges for the future", a reflection document of DG INFSO and DG MARKT, October 2009, p. 15, available at http://ec.europa.eu/avpolicy/docs/other_actions/col_2009/reflection_paper.pdf): "Community rules on copyright have harmonised the scope and tenor of the exclusive rights without, however, providing clear boundaries for these rights by means of uniform exceptions. This is indeed a state of affairs that should not persist in a truly integrated market. The unclear contours of strong "exclusive rights" are neither beneficial for the internal market in knowledge products nor for the development in internet services. Further harmonisation of copyright laws in the EU, in particular relating to the different and optional limitations and exceptions, would create more certainty for consumers about what they can and cannot do with the content they legally acquire".

the 'knowledge economy' and intends to launch a consultation on these issues"[8]. The Commission believes that it is the exceptions and limitations that ensure the dissemination of knowledge within copyright law and which are the key to the balance to be sought by Community legislation. The first conclusions of this consultation were in fact the subject of a communication by the Commission on 19 October 2009, in which it announced the instigation of preparatory work for a possible revision of the EU legislative framework[9].

However, the issue of exceptions and limitations in the digital environment is now also being discussed at the international level, as the World International Property Organisation (WIPO) has at last included this topic on the agenda of its Standing Committee on Copyright and Related Rights (SSCR) and begun discussions to study various proposals for a treaty in this field. Accordingly, this is now a global issue. WIPO points out first of all that "in order to *maintain an appropriate balance between the interests of right-holders and users of protected works*, copyright laws allow certain limitations on economic rights, that is, cases in which protected works may be used without the authorisation of the right-holder and with or without payment of compensation" (emphases added). It goes on to say that "due to the development of new technologies and the ever-increasing worldwide use of the Internet, it has been considered that the above *balance* between various stakeholders' interests *needs to be recalibrated*" (emphases added)[10]. At a meeting at the end of May 2009, discussions centred on a proposed treaty on exceptions to copyright for the visually impaired. However, the discussions are to be pursued in a broader context. The Conclusions of the Chair of the Standing Committee state that "the Committee reconfirmed its commitment

[8] Green Paper of the Commission of the European Communities on "Copyright in the Knowledge Economy", Brussels, COM (2008) 466/3. For a comment, *see* Ch. Geiger, F. Macrez, A. Bouvel, S. Carre, T. Hassler and J. Schmidt, What Limitations to Copyright in the Information Society? A Comment on the European Commissions Green Paper 'Copyright in the Knowledge Economy', International Review of Intellectual Property and Competition Law (IIC) 2009, p. 412.

[9] Communication from the Commission, 19 October 2009, "Copyright in the Knowledge Economy", COM (2009) 532 final, p. 10. The Commission considers that the interests involved have to be carefully balanced and care taken to "ensure that the ground is properly laid for appropriate follow-up actions as a core element of the future comprehensive strategy for intellectual property rights". It adds that it "will continue to be actively engaged with all stakeholders, including the science community, libraries and the internet-literate public at large".

[10] http://www.wipo.int/copyright/en/limitations/index.html.

to work on the outstanding issues of the limitations and exceptions (…), taking into account development-related concerns and the need to establish timely and practical result-oriented solutions. Likewise, the Committee reaffirmed its commitment to continue without delay its work in a global and inclusive approach, including the multifaceted issues affecting access of the blind, visually impaired and other reading-disabled persons to protected works"[11]. The Standing Committee also intended to draw up a questionnaire on "limitations and exceptions for educational activities, activities of libraries and archives, provisions for disabled persons, as well as the implications of digital technology in the field of copyright, including as they relate to social, cultural and religious limitations and exceptions"[12] and to maintain the issue on the agenda of its forthcoming meetings.

4. Assessing and adapting the existing legal framework: the crucial role of the limitations and exceptions to copyright and the possibilities of mandatory collective management

It is essential to guarantee in copyright law a fair balance between the different interests involved. This is clearly not the place for a detailed description of what the architecture of tomorrow's copyright law might look like since that would go well beyond the scope of this report. The issues to be resolved are highly complicated and the responses to them are still being studied. Moreover, they will depend to a large extent on future technical and social developments and on the ability of right-holders and the various players concerned to establish systems allowing for effective and proportionate access to information and to the knowledge contained in works. However, an attempt will be made to outline below a number of elements that could serve as a basis for adapting legislation at both national and supra-national level.

In this regard, the Green Paper on Copyright in the Knowledge Economy identifies a number of exceptions and limitations that have a particular impact on knowledge

[11] Conclusions of the 18th session of the Standing Committee on Copyright and Related Rights, SCCR/18/CONCLUSIONS, 29 May 2009, para. 1.
[12] Ibid., para. 6.

dissemination and proposes launching a discussion on the desirability of developing them in the digital era. Moreover, it is necessary to discuss ways of guaranteeing the adaptability of exceptions and limitations to new technical and social circumstances and to consider the case for introducing more flexibility in the present system. Ways should then be examined of guaranteeing the practical benefit of these limitations in the light of contractual arrangements and technical measures. Finally, it is crucial to ensure that right-holders receive fair and equitable remuneration. Granting access to information on does not mean that the access should be free of charge.

In order to analyse the development of exceptions and limitations to copyright, it is clearly necessary to distinguish between those that allow access to information and those that do not[13]. Not all the exceptions and limitations have the same justification and importance for the development of the information society. The limitations that necessitate particular attention include exceptions for libraries and archives, for teaching and research purposes, for news reports, for press reviews, for quotations and, more incidentally, exception for people with disabilities, as well as private copying when it allows access to information and is not covered by one of the exceptions already mentioned. The Green Paper also proposes studying the possibility of introducing an exception for creative uses[14].

These legitimate uses in relation to effective access to information must be clearly separated from other uses of works that are mainly for consumption purposes. A user who downloads Britney Spears' latest hit from the Internet is not seeking to obtain information but simply wants to listen to the music free of charge without having to buy the CD. Assuming the contrary, as has been sometimes maintained, would clearly be an

[13] The Commission also recently prioritised this differentiated approach in its reflection document of 22 October 2009 (*supra* note 7, p. 15): "In general, a rather more nuanced approach to exceptions and limitations might be in order in the medium term. There are 'public interest' exceptions for research and teaching or for access to works in favour of persons with a disability on the one hand, and there are the 'consumer' exceptions, such as private copying, on the other hand (…). Future policy should make a clear distinction and proposals should clearly state which exceptions should be harmonised and made mandatory in scope as a matter of priority and the precise goals pursued in doing so".

[14] *See* also the aforementioned Commission reflection document (*supra* note 7, p. 15, fn. 46): "Serious consideration should be given to measures facilitating non-commercial re-use of copyrighted content for artistic purposes".

abuse of the right to information and discredit the argument. This dimension needs to be included in the discussions on the future of the private copy exception (downloading a work from an illicit source could be excluded from such an exception)[15] and a harmonised legal framework needs to be put forward to deal with the issue of file sharing on the Internet. This does not necessarily involve a criminal law-based solution[16]. The idea of a "graduated response" in terms of sanctions, as was initially envisaged in France by the Bill preceding the adoption of the Law of 1 August 2006[17], was, in principle, fairly interesting, although it probably required further thought in terms of its mode implementation and its consistency with the rest of the legislative mechanism[18]. On the other hand, the legitimate wish to avoid "criminalising" Internet users should not lead to an excessive restriction of fundamental rights such as the freedoms of expression and communication or the right to private life and protection of personal data[19]. This has been clearly asserted by the French Constitutional Council in its recent decision on the Law

[15] At all events, in order to offset the economic prejudice suffered by right-holders because of digital private copying, it would appear necessary to revise, standardise and increase the amounts awarded in respect of 'private copying' exceptions, including such media as computer hard disks and other digital data storage hardware facilitating copying.

[16] In this connection, *see* the very severe decision taken by the Stockholm district court on 17 April 2009 (Stockholms Tingsrätt, 17 April 2009 Case No. B 13301-06) concerning the Swedish file-sharing platform *The Pirate Bay*, four representatives of which were handed down one-year prison sentences and fined € 2.7 million in damages for complicity of copyright infringement, having provided the means for committing the main offence (illegal downloading). However, an appeal was filed against this decision, so that it is necessary to see whether the outcome is confirmed at appeal level.

[17] Law No. 2006-961 of 1 August 2006 on copyright and related rights in the information society, Official Gazette of 3 August 2006, p. 11529.

[18] The unauthorised reproduction and public communication of a work for personal purposes by means of "peer-to-peer" software was made a minor offence rather than a criminal one (as it is the case with copyright infringement), thus requiring a lighter criminal sanction. This provision does not appear in the final text of the Law because its was censured by the French Constitutional Council (Cons. Const. No. 2006-540 DC, 27 July 2006, Official Gazette of 3 August 2006, p. 11541), considering that *the specificities of peer-to-peer exchange networks do not justify the differentiated treatment laid down in the provision in question* with regard to infringement of copyright and related rights by other means, and that it was therefore *contrary to the principle of equality before criminal law* (para. 65).

[19] *See* also the European Parliament Resolution of 10 April 2008 (*supra* note 5) calling on "the Commission and the Member States to recognise that the Internet is a vast platform for cultural expression, access to knowledge, and democratic participation in European creativity, bringing generations together through the information society; calls on the Commission and the Member States, to avoid adopting measures conflicting with civil liberties and human rights and with the principles of proportionality, effectiveness and dissuasiveness, *such as the interruption of Internet access*", as well as amendment 138 to the "Telecom Package" (Motion for a Directive amending Directives 2002/21/EC on a common statutory framework for electronic communications networks and services, 2002/20/EC on the authorisation of electronic communications networks and services, COM (2007) 697 adopted by the Council of Europe Parliament on 6 May 2009 requiring Member States to obtain a prior court order before suspending access to Internet.

promoting dissemination and creation via Internet[20], which allowed an administrative authority (the High Authority for the Dissemination of Works and Protection of Rights on Internet – HADOPI) to interrupt Internet access in the event of illegal downloading from the internet. The Council considers that such a restriction of the freedom of communication must be strictly regulated and that it is abusive if undertaken by an administrative authority rather than by the courts[21]. The option explored by French legislation therefore lay outside the field of copyright exceptions and limitations. However, if this approach is to be prioritised in future, a clear distinction must be drawn between those exceptions and limitations that are crucially important for the development of the knowledge society and those that are not.

The other possibility which should also be explored with a view to facilitate access to certain works is less radical than that of limitations and exceptions to copyright, because it only concerns the exercise rather than the existence of the exclusive right: mandatory collective management. In this case, access can be guaranteed by the fact that the users know that they can secure the requisite authorisation from one single interlocutor, namely a collecting society. Certain Community directives authorise, or indeed impose, the use of mandatory collective management. This is the case of the Directive of 27 September 1993 on cable retransmission[22], and also the Directive of 19 November 1992, which facilitates collective management of rental rights[23]; the Directive of 27 September 2001 makes the same provisions in respect of resale right[24]. In France, the right of reproduction by reprography is also the subject of mandatory collective management (Article L 122-10

[20] This Law was published on 12 June 2009 after the Council censured some of its provisions (Law No. 2009-669 of 12 June 2009 encouraging dissemination and creation via Internet, Official Gazette of 13 June 2009, p. 9666).
[21] Following this decision, a second law on criminal-law protection of literary and artistic property on Internet (the so-called HADOPI 2) was adopted and published after virtual unanimous validation by the French Constitutional Council (Cons. Const. No. 2009-590 DC, 22 Oct. 2009, Official Gazette of 29 October 2009, p 18292) on 28 October 2009 (Law No. 2009-1311, Official Gazette of 29 Oct. 2009, p. 18290). This Law provides for a simplified court procedure for obtaining an interruption of Internet access (via a court order).
[22] Council Directive 93/83/EEC of 27 September 1993 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6 Oct. 1993, p. 15; Article 9.1.
[23] Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 346 of 27 Nov. 1992, p. 61; Article 4.
[24] Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ L 272, 13 Oct. 2001, p. 32; Article 6.2.

of the Intellectual Property Code). In this case, exclusive rights come into play, giving the collecting society greater negotiating power. This means that this possibility would be worth studying in greater detail. This option was expressly envisaged in France for the case of orphan works in a report to the Higher Council for Literary and Artistic Property (CSPLA) on this matter[25], and has also been studied as a means of "legalising" peer-to-peer exchanges via Internet by submitting the upload of a file (which is subject to authorisation of the right-holder) to a mandatory collective management system[26].

5. Contractual initiatives and the other access possibilities under discussion

Any initiative aimed at reviewing the existing legal framework to guarantee better access to works and to the information they contain, especially for teaching and research purposes, must obviously take account of any present contractual arrangements between the stakeholders concerned. Since regulation makes no sense if the parties manage to agree on establishing satisfactory means of access, it is necessary to be aware of initiatives in progress and model licences drawn up by means of consultation among the relevant protagonists, enabling citizens to access information on acceptable terms and conditions. However, the effectiveness of such agreements must also be examined closely since the existence of arrangements that permit "on-demand" access does not necessarily mean that that access is possible on satisfactory terms and conditions. It will accordingly be necessary to verify that the cost of the service offered is not unreasonable or that the conditions of access are not too restrictive. Apart from considering the arrangements between the stakeholders concerned, it is also important to look at practices that are becoming established in the scientific community, especially the online availability of so-called "open content" works that use open licence mechanisms, such as the "creative commons" model.

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[25] *See* the CSPLA report of 19 March 2008 on orphan works, http://www.csple.culture.gouv.fr/CONTENU/rapoeurvor08.pdf. In 2008, Denmark adopted a kind of extended collective management system (Art. 50(2) of the Danish Copyright Act).

[26] *See* C. Bernault and A. Lebois, *Peer-to-peer et propriété littéraire et artistique*, Study under the direction of A. Lucas, Nantes, June 2005.

It is therefore necessary to take note in this context of a number of initiatives. It is not a question of producing an inventory here but simply of mentioning a few examples. With regard to the digitisation of orphan works (works still covered by copyright but whose owners cannot be identified or located), the European "ARROW" project (Accessible Registry of Rights and Information on Orphan Works for the European Digital Library) has been set up to develop a database that makes it easier to search for right-holders[27]. A European legal initiative to authorise the digitisation of orphan works may therefore seem premature[28]. In addition, the European Commission has set up a High Level Expert Group on Digital Libraries (whose terms of reference were renewed by a Commission decision of 25 March 2009[29]). This group brings together the main players concerned and aims to promote mechanisms drawn up on a voluntary basis. Thus, the effectiveness of the solutions that have been (or will be) developed in this context need to be closely examined. In Europe, there is also the "Europeana" digital library project to digitise a large number of public domain and copyright protected works in agreement with right-holders[30].

Finally, mention needs to be made of the agreement signed by Google in October 2008 with a number of publishers belonging to the Association of American Publishers to allow the full digitisation by Google of numerous works (especially orphan works and books that are out of print) in order to make them accessible online, in whole or in part[31]. However, this very complicated agreement relates only to the United States and its legality should have been considered by an American court (the United States District Court for the Southern District of New York) on 7 October 2009, but the date was postponed in agreement between the parties after the American Department of Justice

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[27] http://www.arrow-net.eu/

[28] The European Commission recently decided that orphan works would be the subject of an impact assessment, which "will explore a variety of approaches to facilitate the digitisation and dissemination of orphan works. Possible approaches include, inter alia, a legally binding stand-alone instrument on the clearance and mutual recognition of orphan works, an exception to the 2001 Directive, or guidance on cross-border mutual recognition of orphan works" (Communication from the Commission, 19 October 2009, *supra* note 9, p. 7).

[29] Commission Decision of 25 March 2009 setting up a High-Level Expert Group on Digital Libraries (2009/301/EC), OJEU L 82, 28/3/2009, p. 9.

[30] http://www.europeana.eu/

[31] http:www.googlebooksettlement.com/

expressed a number of reservations about the legal validity of the agreement[32]. Moreover, it would not appear to be applicable in Europe, given that many points in the agreement contravene current legislation in many European countries, in particular provisions relating to copyright contract law[33]. The agreement also allows a number of authors in the United States to withdraw from the agreement retroactively if they so wish (via an "opt-out" - clause).

A close watch will therefore have to be kept on these developments. While users can no doubt look forward to better access and research opportunities as a result of this digitisation initiative and the fact that library archives are made available online, such an agreement does pose a number of problems, especially in the context of competition law, since a single provider (a private player) will possess all the digital sources of libraries and archives (most of which are public institutions). As it has been rightly pointed out by Prof. Annette Kur, former President of ATRIP, at a hearing organised by the Council of Europe Committee on Culture, Science and Education, "if certain search engines become sole source-databases for library stocks and/or other sources of information and knowledge, this may lead to serious distortions on the market for informational products and services, potentially resulting in misuse of dominant positions, most notably in excess pricing. For this reason, the developments in this field must be subject to adequate control, in particular by the competition authorities"[34]. Such a dominant position could entail risks of abuse, and continued vigilance will be required[35].

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[32] *See* the Statement of interest of the United States of America regarding the proposed class settlement, US Department of Justice, 18 September. 2009, Case 1:05-cv-08136-DC, Document 720. *See* also the statement by Marybeth Paters, Register of Copyrights, "Competition and Commerce in Digital Books: the Proposed Google Book Settlement", Committee on the Judiciary, United States House of Representatives, 111th Congress, 1st Session, September 10, 2009 (http://www.copyright.gov).

[33] This does not mean that there will be no impact in Europe since European right-holders are concerned if they hold copyright over works digitalised by Google to be accessed in the US.

[34] Presentation by A. Kur, Former President of ATRIP (International Association for the Advancement of Teaching and Research in Intellectual Property), Hearing on copyright in Europe, Parliamentary Assembly of the Council of Europe, Committee on Culture, Science and Education, Paris, 9 December 2009 (AS/Cult (2009) 05, 15 January 2009 (also available at www.atrip.org).

[35] *See* in this connection the background information memorandum on the "Google Books" agreement, submitted to the Council of the European Union by the German delegation on 20 May 2009, 10221/09 AUDIO 23 CULT 44 PI 47: "The German delegation would like to raise Member States' awareness of the risks associated with this activity and draw their attention to the fact that Google's actions (…)could have an impact on the concentration of media ownership and on cultural diversity in general, and especially in the European Union (…) The Commission is requested to take the matter up and examine the Google

6. Conclusions and recommendations

In discussing the future of copyright in Europe, therefore, it is crucial to stress the need to strike a fair balance between protection and access to information. At the 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services in Reykjavik, Iceland, on 28 and 29 May 2009, the government representatives clearly acknowledged this objective, since, after reasserting "the importance of copyright protection", they underlined "the need to explore further, in close co-operation with relevant stakeholders, issues deriving from the use of copyrighted material or the exploitation of user-generated content by media-like services to protect and promote the freedom of expression and information"[36].

In order to ensure this balance, a number of recommendations can be proposed:

- Assist and encourage contractual initiatives to provide improved access to works and the information they contain, particularly in the fields of education and research. Verify their effectiveness and implementation by means of empirical studies.

- Facilitate and encourage the provision of a genuine offer of information operating via an "open-content" model.

- Guarantee right-holders fair and equitable remuneration for access to protected works. Granting access to information on no account means that the access should be free of charge. There are production costs in the case of work and quality-control costs in the case of information which have to be covered.

Books project as well as the impact of the settlement sought in the USA from the point of view of copyright law, law on restrictive practices and cultural policy and, where appropriate, to introduce new measures to protect right holders."

[36] 1st Council of Europe Conference of Ministers responsible for Media and New Communication Services (Reykjavik, Iceland, 29 May 2009), MCM (2009)011, Resolutions.

- Propose a harmonised legal framework for remuneration payable in the context of certain exceptions to copyright, particularly the private copy exception. Increase the amount of such remuneration, including in its scope such media as computer hard disks and other digital data storage hardware facilitating copying.

- Initiate substantive reflection on the system of exceptions and limitations by means of a transparent public debate, enabling each interested group to express its point of view.

- Identify the exceptions and limitations essential for freedom of expression and information in a democratic society and ensure that these are fully effective. In contrast, identify the exceptions and limitations which are merely incidental to this objective and propose a differentiated approach.

- Consider establishing an appropriate legal framework for regulating the issue of Internet file sharing, ensuring that the solutions adopted do not restrict such fundamental rights as freedom of expression and communication and the right to private life and protection of personal data.

- Explore the possibility of introducing mandatory collective management systems, especially where exclusive rights would be very difficult to implement and could have negative effects on access to information (for example, in the case of orphan or out of print works).

- Initiate a major future-oriented study on copyright in the digital environment and reflection on the changes required to guarantee flexible legal provisions, enabling copyright law to adapt more easily to technical, economic and social developments.

- Facilitate inter-disciplinary work on copyright, and propose a framework in which such work can be carried out. Copyright law, which is a real societal issue, is not solely a legal question, but needs to be studied from the economic, philosophical, sociological,

historical and psychological point of view. Questions relating to fundamental rights warrant particular attention.

Clearly, these proposals are merely indicative, and many other avenues should still be explored. This is the only way in which copyright can overcome the crisis of legitimacy which it is currently facing.