

PROBLEMS OF INFORMATION SOCIETY

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Copyright and information market today: European initiatives and library privileges

Abstract. Copyright transformation in the digital world is going ahead. The paper describes new European initiatives in copyright regulation, particularly those that exert influence on information market and the work of libraries and other cultural heritage institutions as well as educational establishments. New European directive on copyright officially called The Directive on Copyright in the Digital Single Market allows for broader use of in-copyright material online and across borders within the European Union for the purpose of education, research and cultural heritage preservation. The Directive simplifies digitization and distribution of out-of-commerce works and gives legal certainty to online use of copies of works of art that are in the public domain. One of the Directive articles gives libraries, archives and museums the right to make digital copies of copyright-protected works in their collections but exclusively for preservation purpose and to the extent necessary for preservation. These important reforms incorporate copyright limitations and exceptions in European legislation and open the way to mass digitization projects in European libraries. The paper also briefly describes LIBER (The Association of European Research Libraries) activities to promote short-term and long-term provisions in international and national copyright legislation to take into account public interests during healthcare, environmental and economic crises.

Keywords: copyright, digital technologies, libraries, The Directive on Copyright in the Digital Single Market, copyright limitations and exceptions, orphan works, mass digitization, cross-border use

Calls to open access to knowledge and information often clash with the need to protect intellectual property. It often happens because of the differences between the parties involved, but also due to the complexity of the topic and difficulty in accounting for all its aspects. That is why we turn to the subject of copyright in the digital world again and again, particularly when planning library activities in serving digital customers.

On one side, the Internet that since the start has been used for information dissemination and exchange, and other rapidly emerging and developing digital technologies created a public demand for immediate, wide and preferably free access to information – and consequently, the open access concept is spreading and the number of copyright exceptions and limitations is growing in the world; on the other hand, right holders express dissatisfaction with these trends as they undermine the economic basis of their business. Traditionally, copyright is the ownership right of the author of the work and of the one who invested in its creation including the right to control duplication of the work. Ecosystem based on respect for copyright supports creation of quality works for the benefit of the whole society.

Copyright legislation in Europe favors right holders, and it is not hard to guess why. Some countries export natural resources, others, agricultural produce, cheap labor, etc, etc. European civilization through millennia has been producing creative works among other things. Due to migration of people and technologies the situation is not as clear-cut now as it used to be but naturally, countries strive to preserve their competitive advantage.

Currently, copyright is undergoing transformation in the digital world, and while it is hard to predict the outcome it is clear that the power struggle of trends continues.

So what has happened recently in the field of copyright regulation on the information market? Let us focus on European initiatives. Experience shows that our modern interconnected world – interconnected mainly thanks to the information technologies that have radically transformed our life, trends and innovations in one region spread to other regions, including Russia.

Just recently, on June 7 2021 new European directive on copyright came into force. Before describing some of its important clauses we would like to mention that in the United Kingdom copyright legislation was reformed quite radically in 2014 and the country went ahead of other European countries in terms of limiting copyright protection in today's digital world. Later some of UK copyright changes were reflected in the above-mentioned European directive.

We previously wrote [1] but would like to repeat in the context of this paper that five important copyright exceptions for libraries were introduced in the British law in 2014:

- making digital copies of audio and cinematographic works for preservation became legal;

- fair dealing principle has been extended to non-commercial and private research and allowed to copy audio and films, including with the assistance of a librarian or a curator;

- library analog collections was permitted on condition that the digitized work will be available only through computer terminals on library premises;

- text and data mining in lawfully acquired electronic resources was allowed in non-commercial and research purposes without the need of a special license;

- libraries and their patrons received the right to enjoy copyright limitations and exceptions available in the UK irrespective of contracts with providers and publishers.

A novel approach to orphan works was also introduced in the United Kingdom: a new licensing scheme gave users the right to ask for a non-exclusive license for the use of an orphan work in commercial and non-commercial purposes.

Next step in transforming European legislation in online digital environment was the European directive on copyright adopted in 2019 and introduced in national laws two years later when, by the way, United

Kingdom had already left the European Union. The full title is as follows: 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 and amending Directives 96/9/EC and 2001/29/EC [2]. The Directive is aimed at updating European Union copyright legislation with account of online and cross-border use of copyright-protected content.

The Directive purpose is formulated as follows: to bring copyright legislation up to date, to protect authors and creators, to establish terms for a prospering European culture. It acknowledges that digital technologies have transformed the way creative works are produced, disseminated and accessed. Web-based services and platforms, aggregators and user-uploaded-content platforms have become the main ways to access creative works in our digital world. The Directive makes an attempt to create a framework, which would benefit a wide range of players acting in the digital environment: internet users, artists, journalists, film music and producers, researchers, online services, libraries, museums and universities.

To achieve this goal, the Copyright Directive focuses on three main objectives:

Wider opportunities to use copyrighted material for education, research and preservation of cultural heritage: relevant copyright exceptions have been modernized and adapted to the technological changes, to allow uses online and across borders within the European Union.

More cross-border and online access for citizens to copyright-protected content: the Directive contributes to increasing the availability of audiovisual works on video-on-demand platforms, it facilitates the digitization and dissemination of out-of-commerce works and ensures that all users are able to circulate online with full legal certainty copies of works of art that are in the public domain.

Fairer rules for the marketplace of in-copyright works, which should enable its better functioning and stimulate the creation of high-quality content: a new right for press publishers in relation to the use of their content by online service providers, a reinforced position of rightholders to be remunerated for the online use of their content by user-uploaded

content platforms, transparency rules and a contract adjustment mechanism to allow authors and performers to obtain fair remuneration in online medium.

The new Directive caused many conflicting opinions and protests at the discussion stage. The loudest were concerned with managing relationships between rightholders and web-platforms with user-uploaded content, for instance, YouTube, as well as with the use of news publications by aggregator sites. What is meant is the problem of media outlets whose product (news) is being widely copied on the web without a proper remuneration. The Directive suggests that web-sites should pay a certain fee to the press, a sort of copyright fee, for the right to publish a snippet of the news with the link to the original news article.

However, we will focus on those Directive provisions that did not feature so prominently during the discussion in the press and on TV but are more obviously relevant to library and information practice.

The Directive implies the strengthening of publishers rights and copyright in general and the easing of the process of content licensing. Difficulties in obtaining licenses for copyright-protected content were often mentioned at international conferences and workshops that we were fortunate to attend, including the London Book Fair, as one of the reasons, along with the price, why users tend to resort to pirate content available on the web.

Simultaneously, wider possibilities of resource use for libraries, museums and archives have been introduced in the European legislation, and the British library exception appeared, that is, text and data mining. The Association of European Research Libraries LIBER (Ligue des Bibliothèques Européennes de Recherche) and other library groups and unions believe that the new Directive holds important developments for universities, libraries and archives.

The Directive states that all European universities and research organizations can perform text and data mining with the use of automated technologies in large sets of in-copyright works to which they have lawful access, including when they engage in public-private partnerships. What is meant here is Big Data, a buzzword nowadays, and the benefit that can be derived from analyzing them with the help of software analytical tools.

This exception will help develop research initiatives and new projects, for instance, in seeking cure for diseases or new approaches to solving climate problem. The Directive does not allow contracts to prevent text and data mining in resources. However, publishers are allowed to use technical protection measure to protect the security and integrity of the networks and databases where the in-copyright works are hosted.

The Directive provides an additional exception for text and data mining with the aim to improve the development of data analytics and artificial intelligence in the EU.

The new teaching exception for educational establishments (Article 5 of the Directive) covers digital cross-border use of copyright-protected content for the purposes of illustration for teaching, including online teaching, within the European Union and in a secure digital environment, for instance, a university intranet or a school virtual learning environment, and with the mandatory citation of a source including author's name.

Previous Copyright Directive also included an exception for "Illustration for Teaching"; what is new in the present Directive is cross-border use and specification of the types of learning environment that include classroom use, digital whiteboards or secure electronic environments which complement a course. New rules cannot be overridden by contracts; the so-called three-step test (a clause that is included in international treaties on intellectual property and allows for free use of works protected by copyright) must be passed; and the use of a part of the work for illustration should not serve as a substitute for the original work or course material [3].

The new cultural heritage preservation exception (Article 6 of the Directive) clearly and soundly allows libraries, archives, and museums to make digital copies of the works in their collections, taking advantage of any appropriate techniques, in any formats and media, but exclusively for preservation purpose in the amount necessary for preservation. The International Federation of Library Associations and Institutions IFLA believes that this provision is a significant step forward because the exception

becomes mandatory for all European Union member countries and frees libraries, archives, and museums from the excessive restrictions on how they carry out this copying.

All European Union member states had provisions allowing cultural heritage institutions to make copies to preserve works but many countries did not allow for digital copies or preservation of born-digital works. Inconsistency and the lack of legally introduced exceptions hindered cooperation between European organizations. Article 6 removes most of these problems, it makes it clear that it is legal to work across borders in order to carry out preservation, for example through computer networks. This is a vital change as not every European library has the capacity to secure preservation on its own and is forced to cooperate with a third party. Detailed analysis of the exception is given by Stephen Wyber in [4].

The new Directive clears the copyright status of works (books, films etc) that are still protected by copyright but cannot be found commercially anymore and introduces a new licensing mechanism for these out-of-commerce works. This makes it easier for libraries and archives to obtain the necessary licenses to disseminate works to the public, notably online and across borders. What is more important, this mechanism opens the way to mass digitization of out-of-commerce works. LIBER that counts among its members major research and national libraries believes this is the European answer to legal problems that marred Google Books, the project of mass digitization and creating a world digital library.

Let us remember that Google Books project employed a “digitization by default” approach when works in library holdings were scanned and OCR’d and then those rightholders who did not wish to see their works available through the digital library collection could “opt out”. This approach was initially called a brilliant business model that opened the way to mass digitization but later was ruled in courts to be a copyright violation.

To date, European approach required obtaining clearances directly with rightholders for any digitization projects: item by item, rightholder by rightholder. Many rightholders could not be found even after a diligent search, hence the adoption of the European Orphan Works Directive. This item by item and element by element approach made mass digitization

virtually impossible. The new Directive implies using Collective Management Organizations to obtain licenses for the purposes of cultural heritage preservation.

LIBER believes that this amendment introduced by the new European Directive is transformative and will help in European large-scale digitization projects such as Europeana [5].

Copyright exceptions and limitations for libraries, archives and other cultural heritage institutions have long been discussed in professional environment. During IFLA Congress in Wroclaw in 2017 the Copyright and Other Legal Matters Committee held a poll for the attendees (we were among them) on library preferences as to the ways of copyright exceptions and limitations implementation. The wide application of fair use concept was one option, legislative exceptions and limitations, another. Most library representatives voted in favor of exceptions and limitations embedded in legislation. We can now conclude that the most important thing that the Directive introduced was to give legal certainty to the said copyright exceptions and limitations that would make it easier for research, education and cultural heritage organizations to work digitally and across borders.

Additional provisions of the Directive are worth mentioning too. They strengthen the rules to ensure fairer remuneration for creators and rightholders when their works are used online, on platforms with user-uploaded content, they increase transparency in their relationships with online platforms, introduce a mechanism for the revocation of rights allowing creators to take back their rights when their works are not being exploited transparently, and a contract adjustment mechanism to allow authors and performers to obtain a fair share when the remuneration originally agreed becomes disproportionately low compared to the online dissemination of their work or performance. According to the new Directive, online platforms with user-uploaded content are considered to be carrying out acts covered by copyright (i. e. performing acts of communication or making available to the public) for which they need to obtain an authorization from the rightholders concerned.

The Directive came into force on June 7 2019 and EU member states had two years to introduce it into their national legislation.

In the US, an ongoing process of revising the Digital Millennium Copyright Act also reflects the trend to strengthen copyright holders' rights and increase the responsibility for content uploaded to online platforms, as the analysis of how current legislation is functioning, completed in 2020, has shown it is tilted in favor of tech companies, and that the rightholders bear disproportionately big load of monitoring possible rights infringement [6].

New European Directive, by the general rule of EU legislation coverage, applies to the whole EU territory and all physical and legal entities that live, work, or do business in the EU. Foreign Internet companies that provide services in the EU will have to abide by the rules. Service providers will have not just to take down copyright infringing content but also prevent it uploading onto platforms. YouTube already has Content ID, an algorithm that can discover and remove cases of copyright infringement. Adaptation to the new rules has just begun, and it would be interesting to follow the development.

We wrote previously about European initiatives related to the new coronavirus infection SARS-CoV-2 [7]. The danger of this infection and ensuing problems did not spare copyright area. On the contrary, as many organizations had closed their doors for in-person visitation and moved to digital environment, remote work, study, and personal communication, new issues arose.

In this context we would like to mention a visit to New Orleans Public Library within the framework of a study tour "Librarianship, Information Systems and Education in the USA" organized by the Russian National Public Library for Science and Technology in October 2011. Earlier, in 2005, New Orleans experienced a major flooding caused by Hurricane Katrina and the city's geographical location – it sits below the level of the Gulf of Mexico. Back then, in 2011, it looked like the problem of library behavior in the face of disasters is not relevant to European libraries, Russian libraries including. However, now, as natural and epidemiological crises have sadly become a feature of everyday life, these problems and search for their solution do not seem remote, and many library associations develop action plans in critical situations.

Under the influence of ongoing pandemic LIBER is advocating for urgent measures to amend copyright legislation in order to support online education and research. It believes that international and national copyright laws should all have public interest defense for the times of medical, environmental or economic crises, and consequently such activities as document supply of whole items to specific individuals, remote access to e-books, use of copyright works in recorded or streamed teaching activities should be allowed. We described LIBER initiatives in more detail in [7]. These proposals have not been accepted yet on the scale of the whole EU but LIBER continues its activities to promote Open Access and believes that the COVID-19 crisis underlines the importance of free and open access to information.

The described European initiatives show that copyright adjustment to changed reality continues and copyright legislation is gradually being transformed on account of online and cross-border nature of digital technologies. The new European copyright directive is a major step in this process.

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